In Re:

Stevens Forwarders, Inc.

Claimant

DATE: March 11, 1997

Claims Case No. 96102805

CLAIMS APPEALS BOARD DECISION

DIGEST

A military service member has not established a prima facie case of liability for transit loss of a handmade silk Turkish prayer rug in a carton labeled "pillow," or in a carton labeled "blanket," when the service member does not offer a written statement detailing the circumstances surrounding the purchase, use and tender of the rug to the carrier and the evidence offered to establish tender is conflicting or otherwise not specific.

DECISION

Stevens Forwarders, Inc. (Stevens) appeals the settlement of the Defense Office of Hearings and Appeals (DOHA), Settlement Certificate on DOHA Claim No. 96070163 (September 27, 1996), which affirmed the Army Claims Service's set off of $1,224 for the loss and damage associated with the shipment of a service member's household goods in connection with Personal Property Government Bill of Lading SP-197,438.[(1)] The Secretary of Defense has authority under 31 U.S.C. 3702 to consider claims by transportation carriers involving amounts collected from them for loss or damage incurred to property incident to shipment at government expense.

Background

The record indicates that Stevens obtained the shipment from a non-temporary storage facility in ontgomery, Alabama on June 23, 1993, and delivered it to the service member at Fort Leavenworth, Kansas, on September 2, 1993. The service member dispatched a Notice of Loss or Damage, DD Form 1840R, on October 18, 1993, and a claim (Demand on Carrier/Contractor, DD Form 1843) was dispatched to Stevens on July 20, 1994. Stevens contests its liability on three items: the loss of a Turkish handmade silk prayer rug, whether in Item 21 or 23 ($1,032); the loss of a six foot wooden step ladder, a laundry pole and a lawn fertilizer spreader among a group of 15 tools in Item 124 ($167); and a broken light socket on a glass lamp in Item 28 ($25).

Referring to the List of Property and Claims Analysis Chart, DD Form 1844, the Army's administrative report describes the rug as very small, .3 X .5 meters. The DD Form 1844 also indicated that it was handmade with 3,000 knots per square centimeter. In its investigation of this matter, the Army found that prayer rugs are very small, no more than 2 feet by 3 feet. The Army acknowledged that rugs are not normally packed, but that a rug this size would fit into a 4.5 cubic feet carton.

The Descriptive Inventory did not specifically list this rug. In the DD Form 1840R, the service member advised Stevens that there was loss or damage to a ".3 X .5M silk Turkish prayer rug" in Item 23, which was described on the Descriptive Inventory as a 4.5 cubic feet carton containing a "blanket." However, later, on the DD Form 1844, the service member indicated that the rug was located in Item 21, a different 4.5 cubic feet carton described as containing a "pillow."

Undoubtedly due to the amount of the claim, Stevens focused most of its attention on the prayer rug. Stevens argues that it is not liable for a loss under Item 21 because the service member did not meet the requirement to dispatch the DD Form 1840R within 75 days of delivery.[(2)] It says that it received the Demand on Carrier, the DD Form 1843, which contained a copy of the DD Form 1844 that referred to Item 21, 330 days after delivery. Stevens also contends that the

service member's notice of loss under Item 23 was deficient because he failed to follow instructions in the DD Form 1840R and indicate that the rug was missing from Item 23. Moreover, Stevens contends that there is no evidence that such an item was tendered to it at all because the article was not reasonably related to either "pillows" or "blankets." Earlier in the adjudication process, Stevens had argued that rugs cannot be packed; therefore, there was no reasonable basis to believe that this one should have been packed in either Item 23 or 21[(3)]. Stevens argues that the DD Form 1840 indicates that it unpacked the shipment at the time of delivery, but no expensive prayer rug was reported missing at that time. The service member's shift from Item 23 to Item 21 as the claimed location of the rug, coupled with the absence of a statement from the service member concerning why he changed his position about the carton containing the rug, raises doubt as to whether it was tendered at all. Stevens points out that the date of purchase noted on the DD Form 1844 was admittedly incorrect[(4)], and that the Army never produced a copy of the video tape that its inspectors viewed or the canceled check used to purchase it.

Stevens also disputes tender of the ladder, pole and spreader because they are relatively large items. Stevens argues that it would be unreasonable for a carrier to include such items with 12 others in some sort of bundle, while it separately listed other items like a fishing pole and a weed eater.

Finally Stevens argues that its rider to the Descriptive Inventory made at pick up at the NTS contractor's facility indicates that the Item 28 carton was crushed. The damage to the lamp inside it, a broken socket, is consistent with the crushing of the carton. Therefore, in Stevens view, this proves that the damage to the lamp existed before it obtained custody of the shipment.

Discussion

Tender of an item to the carrier is the first element in establishing a prima facie case of carrier liability for loss or damaged household goods; the shipper also must show that the item was not delivered or delivered in a more damaged condition, and the amount of damages. SeeMissouri Pacific Railroad Co. v. Elmore & Stahl, 377 U.S. 134, 138 (1964).

Preliminarily, the Board is not persuaded by Stevens' arguments concerning the ineffectiveness of the notice of loss or damage for the prayer rug. The purpose of the DD Form 1840R is to rebut the presumption of a clear delivery receipt by alerting the carrier that a loss or damage occurred so that it can investigate. The Comptroller General and this Office have held that the service member is not required to precisely describe the nature of the damage to a particular item on the DD Form 1840R. See DOHA Claims Case No. 96091701 (February 24, 1997) and Andrews Forwarders, Inc., B-257515, Dec. 1, 1994. Additionally, it is possible to comply with the general requirement for notice under the Military-Industry Memorandum of Understanding: Loss and Damage Rules even if the written notice does not include specific item numbers, article descriptions, or the types of loss or damage as long as the carrier has enough information to initiate a prompt and complete investigation. See Continental Van Lines, Inc., B-215507, Oct. 11, 1984. We recognize that the service member here should have indicated that the rug was lost and should have been more careful in identifying the carton in which it was located. But the fact remains that the notice to Stevens clearly identified that a handmade Turkish prayer rug of a specified size was lost or damaged, and Stevens' inspector commented during its investigation in November 1993, about a month after the DD Form 1840 was dispatched, that the rug was allegedly missing and that the service member claims that he purchased it in 1982 and was looking for the receipt.

Additionally, the Board is not sympathetic to Stevens arguments that the Army did not provide it a copy of the video tape depicting the rug or the check used to purchase it. In its letter to Stevens dated October 17, 1994, a claims examiner at the U.S. Army Claims Service advised Stevens that representatives at installation level had viewed the video tape and obtained a copy of the canceled check used by the member to purchase the rug. Stevens acknowledged receipt of this letter on November 17, 1994, but there is no indication that it requested, but was unable to obtain, a copy of these two items to complete the investigation of the claim that had been filed the previous July 17th. Carriers have an affirmative duty to investigate claims for loss and damage, and Stevens had notice of this evidence within the 120-day period during which it was required to investigate this claim. See 49 C.F.R. 1005.5. A carrier cannot "sit on its rights" until a matter is appealed to this Office.

The matter of tender is a different issue. We recognize that a service member may have forgotten which of two closely related cartons an object like this may have been placed into by the packer, especially when the packing took place years

before the claim. This small and expensive item, in all likelihood, was used in a decorative mode. It could have been used as a bed covering of some sort, and if such facts had been demonstrated, it would not have been unusual to find it packed in a carton full of pillows or blankets. It is unlikely that such an expensive, small, silk cloth object like this would have been treated as a carpet. We also recognize that the facts are somewhat distinguishable from those in Suddath Van Lines, B-247430, July 1, 1992, cited by Stevens, because the service member here, unlike the service member in Suddath, produced a canceled check which allegedly was used to purchase the carpet and which is evidence of the object's value[(5)]. Nevertheless, the record fails to contain a statement from the service member describing the facts and circumstances surrounding the purchase, use and tender of the rug which would establish that it was tendered to the carrier. The Service had the responsibility to obtain a written statement from the member that would explain how the check provided, the videotape viewed by the claim examiners, and Item 21 or 23 relate to tender. The Comptroller General and this Office have stressed the importance of such evidence when an article is not specifically itemized, especially when expensive objects are involved. See DOHA Claims Case No. 96070203 (September 5, 1996); OK Transfer & Storage, Inc., B-261577, Mar. 20, 1996; All-Ways H & S Forwarders, Inc., B-252197, June 11, 1993; and Suddath Van Lines, supra. In considering the weight of the evidence in this case, we cannot ignore the incorrect information initially provided by the service member on the DD Form 1844 concerning the date of purchase and amount. Accordingly, we do not believe that a reasonable person would find that this record demonstrates tender to the carrier of the rug.

For the same reason, we find Stevens' position persuasive on Item 124. We recognize that the NTS facility, not the service member, made the labeling choices when it packed the service member's household goods in April 1989. However, as Stevens points out, the warehouseman specifically identified smaller and similar sized items like a fishing pole, a golf bag, and a garden can on the Descriptive Inventory. When multiple items were packed together (e.g., the golf clubs in the golf bag in Items 126 and 127), this was indicated. Some of these items were located near Item 124 on the inventory. It is not reasonable to assume that the warehouseman would suddenly change its practice for one item group. At a minimum, a statement was required from the service member explaining the circumstances surrounding the tender of these items.

We do not agree with Stevens regarding Item 28. If the carton containing the lamp was crushed, as Stevens contends, it had the duty to open the carton and check the contents for damage. The damaged light socket would have been noticeable.

Conclusion

We reverse the settlement except for Item 28.

/s/ Michael D. Hipple

Michael D. Hipple

Chairman, Claims Appeals Board

/s/ Christine M. Kopocis

Christine M. Kopocis

Member, Claims Appeals Board

/s/ Joyce N. Maguire

Joyce N. Maguire

Member, Claims Appeals Board

1. This matter involves Army Claims Nos. 94-171-0489 and 94-171-0490, Personal Property Government Bill of Lading SP-197438, and carrier # 93-67698.

2. See the Military-Industry Memorandum of Understanding regarding Loss and Damage Rules.

3. This shipment was packed by a non-temporary storage (NTS) contractor. Under the Basic Ordering Agreement for Storage of Household Goods and Related Service, the contractor must roll, not fold, a carpet. See Section C-3,k of Appendix H to the Department of Defense Personal Property Traffic Management Regulation, DoD 4500.34-R.

4. On the DD Form 1844, the member stated that he purchased the rug in June 1984 for $1,000, but the check he offered as proof of purchase was dated June 1982 for $1,200.

5. The check was drawn on a New Hampshire bank and negotiated in Greece for the amount and on the date indicated above. Nothing on the face of the check indicates that it was used to purchase the rug involved here.