

In Re:

American Van Services, Inc.

Claimant

DATE: March 13, 1997

Claims Case No. 96111201

CLAIMS APPEALS BOARD DECISION

DIGEST

Where the carrier's representative marks carrier packed cartons on the Descriptive Inventory as either "dishes," "pots" or "pans," and the service member claims to have shipped pots, kitchen utensils, silverware, baking tins, an electric mixer, and knives in such cartons, there is sufficient evidence of tender of these items for a prima facie case of liability against the carrier.

DECISION

American Van Services, Inc. (American) appeals DOHA's settlement in Claim No. 96070156 (October 28, 1996), which allowed American \$180 of the \$645 refund it claimed in connection with the Army's set off for transit loss/damage arising from the shipment of a service member's household goods.⁽¹⁾ Pursuant to Public Law No. 104-316, October 19, 1996, title 31 of the United States Code, Section 3702 provides that the Secretary of Defense shall settle claims by transportation carriers involving amounts collected from them for loss or damage incurred to property incident to shipment at government expense. The Secretary of Defense delegated this authority to this Office.

Background

The Settlement Certificate describes the background of this claim. American transported the service member's household goods from Alexandria, Virginia, to East Point, Georgia, delivering them on ay 10, 1994. The service member reported various lost and damaged items on the date of delivery and in the Notice of Loss or Damage (DD Form 1840R) dispatched on May 16, 1994. On August 31, 1995, the Army offset \$700 against American for all of the loss and damage, and American reclaimed \$645 on account of Descriptive Inventory Items 13, 28, and 108. Previously, we allowed American \$180 based on insufficient evidence of tender of a vacuum cleaner, which the service member had claimed as an article shipped under Item 28.

American contends that the service member failed to offer adequate evidence to support any of the three elements of a prima facie case of carrier liability with respect to the articles still reported as missing under the two remaining item numbers. American argues that the service member offered no proof to support the fact that he tendered the following articles to American under Item 13: two sets of Regal pots (\$128 for both), five baking tins (\$24), two sets of Oneida silverware (\$68), a crab pot (\$23), assorted knives (\$33), a large crock pot (\$36) and a Westinghouse mixer (\$45). Item 13 was described by the carrier on the Descriptive Inventory as "CP 5.2 and 3.1 ctn" and its condition was described as "ceramics, oriental large vase, pots/pans." Similarly, American argues that there is no evidence of tender of the articles claimed under Item 108: Corningware (\$28), kitchen utensils(\$48) and two large cooking pots (\$32). Item 108 was described as a "CP 3.1 ctn" of "lamps, dishes." On appeal American also argues that these articles were not reported as missing at delivery; that there is no evidence of loss because the two cartons were delivered without discernible evidence of tampering; and that there is no evidence of replacement values of the items.

American is concerned about the untimeliness of the service member's "packed by the movers statement" which was not submitted until May 17, 1996. American argues that the service member "can recall self-serving facts years after delivery," but, shortly after delivery, he did not recall what was delivered in cartons 13 and 108, or their condition. American points out that some of the missing articles are not mentioned by the member in the statement.

Discussion

Generally, to establish a prima facie case of carrier liability, the shipper must show (1) that he tendered the property to the carrier in a certain condition; (2) that the property was not delivered by the carrier or was delivered in a more damaged condition; and (3) the amount of loss or damage. See Missouri Pacific Railroad Co. v. Elmore & Stahl, 377 U.S. 134, 138 (1964). The burden of proof then shifts to the carrier to show that it was not liable for the loss or damage.

Preliminarily, we note that under the Military-Industry Memorandum of Understanding on Loss and Damage Rules, the service member has 75 days to dispatch notice of loss or damage to the carrier. Here, the carrier's representative, not the service member, drafted the general item descriptions in the Descriptive Inventory. The articles in issue are kitchen ware, either "dishes," "pots" or "pans," or articles which are clearly related to them. Moreover, many of the articles from both Items 13 and 108 were delivered. It is unreasonable to expect that every article shipped would be individually listed, and the Comptroller General has stated that the burden on the shipper would be too onerous if he were required to offer absolute proof of tender on everything he ships. We find the circumstances here to be similar to Cartwright Van Lines, B-241850.2, Oct. 21, 1991, where the Comptroller General found sufficient evidence of tender where a quilt was missing from a carton labeled "linen." See also DOHA Claims Case No. 96070203 (September 5, 1996).

In this case, the shipper's "packed by the movers statement" does not add much in the way of evidentiary value, especially because it was prepared two years after delivery and was not very specific except for the size of the lamps. However, the relationship of the missing articles to the description on the inventory is sufficient evidence of tender to meet the requirements of the first element of the prima facie case of liability against the carrier without further clarification in the "packed by the movers statement."

Regarding American's no "discernible evidence of tampering" argument, we note that American was the only carrier involved in this shipment. As the last and only carrier involved, it is prima facie liable because it failed to deliver what it received. Compare McNamara-Lunz Vans and Warehouses, Inc., 57 Comp. Gen. 415, 418 (1978) where the last custodian was held liable, even where multiple custodians were involved, for items missing from a shipping container with no visible external damage.

American contends that the service member did not meet his burden of presenting sufficient evidence on the value of the damages to establish a prima facie case of liability. Some of American's prior correspondence in this matter indicates that it expected the service member to produce receipts for all of the missing items. For common, inexpensive household items like these, that is not necessary. The Comptroller General has advised American in prior claims that ownership of property qualifies the owner to give his estimate of what actual loss was for evaluation in assessing the measure of damages. See American Van Services, Inc.--Reconsideration, B-249834.2, Sept. 3, 1993, citing DeSpirito v. Bristol County Water Co., 102 R.I. 50, 227 A.2d 782, 34 A.L.R. 3d 809 (1967); and Annotation, Valuation Of Wearing Apparel Or Household Goods Kept By Owner for Personal Use, In Action For Loss or Conversion Of, Or Injury To, Such Property, 34 A.L.R. 3d 816 (1970). The service member's claim concerning the amount he paid and replacement cost is sufficient for the articles involved here, especially where American offered no contrary evidence of value based on a proper investigation of the claim. ⁽²⁾

Finally, American's accusations of selective memory suggests that the shipper's motives were dishonest. The burden of establishing fraud rests on the party alleging it and must be proven by evidence sufficient to overcome the presumption in favor of honesty and fair dealing. See Captain Roger L. Reasonover, Jr., USN, B-213543, Dec. 7, 1983. The Army reasonably found that a person could remember what household goods he shipped yet not remember exactly what carton they were contained in.

Conclusion

We affirm the settlement.

/s/ _____

Michael D. Hipple

Chairman, Claims Appeals Board

/s/ _____

Joyce N. Maguire

Member, Claims Appeals Board

/s/ _____

Christine M. Kopocis

Member, Claims Appeals Board

1. This matter involves a shipment under Personal Property Government Bill of Lading (PPGBL) SP-448,195; Army Claim No. 94-271-0493; and Carrier Claim No. 9330010271.

2. Internal guidance for processing claims against the Army at Paragraph 2-41 of Department of the Army Pamphlet 27-162, Claims, provides that, as a rule of thumb, the property owner is expected to present a purchase receipt or similar evidence when the amount claimed for an item exceeds \$100, and repair estimates are expected when claimed repairs exceed that amount. If the depreciated replacement costs of the articles involved here had exceeded that amount, the Board would have expected more substantial evidence of ownership and replacement costs. The average claim per missing article or set of articles described above was \$46.50.