In Re:

Andrews Van Lines, Inc.

Claimant

DATE: November 21, 1996

Claims Case No. 96080202

CLAIMS APPEALS BOARD DECISION

DIGEST

A service member has demonstrated a prima facie case of liability against a delivering carrier for transit damage when he shows that a certain type of damage to an item was not noted by the nontemporary storage (NTS) facility when the member tendered the item to the facility, such damage was not noted by the carrier on the rider it made when it obtained the item from the NTS facility even though it noted other damage to the item, and the item was delivered with such a damage.

DECISION

Andrews Van Lines, Inc. (Andrews) requests reconsideration of the Comptroller General's decision Andrews Van Lines, Inc., B-270469, May 29, 1996, which, in part, denied the company's claim for reimbursement of $1,037.46 deducted by the Army for transit loss and damage to the household goods shipment of a service member.(1) Pursuant to Public Law No. 104-316, October 19, 1995, title 31 of the United States Code, Section 3702 was amended to provide 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.

Background

The record indicates that Andrews picked up the shipment from nontemporary storage (NTS) in Alpena, Michigan on May 3, 1993, and delivered it to the service member in Colorado Springs, Colorado on May 13, 1993. The service member had tendered his household goods to a nontemporary storage (NTS) contractor on August 21, 1992. Andrews contests its liability on some of the loss and damage involved on the shipment, and it believes that GAO erred in finding that Andrews was liable for the loss and damage to these items. The Descriptive Inventory item numbers and amounts still in dispute are a damaged dining table (Item 32) for $406.50, a damaged child's table (Item 174) for $75, a missing Cuckoo clock (Item 76) for $54.48, and salvage on a ripped and crushed Star Trek video poster (Item 151) for $4.50.

The service member claimed that the dining table was warped, and that the top was split and the leg was cracked on the child's table. When it received the dining table from NTS, Andrews' agent noted on its rider that the dining table was scratched, rubbed and gouged, and that the child's table was scratched, rubbed, chipped, gouged and dented. Andrews' position is that the warping and splitting/cracking claimed by the service member on these two items was caused by climatic conditions (humidity) at the NTS contractor's warehouse and that nothing it did during the short period of transit caused these damages. Andrews bases its position on the summary opinion in its inspector's report.(2) Andrews points out that the shipment was in NTS for nine months but was on its truck for only 10 days; that the delivery paperwork does not indicate that there was water damage; and that the 1993 season was very humid with rainfall and flooding throughout the United States; and that changes in climate from moist to dry were very probable. Andrews contends that GAO incorrectly characterized its position because the company never argued, as GAO suggests it did, that the damage to these items was the result of pre-existing damage (PED). Moreover, Andrews argues that the Army accepted its inspector's report that these climatic conditions produced the warped conditions in a piano (item 10) and in other items for which Andrews was not held liable. GAO did not indicate why the dining table and child's table should be treated differently.

Andrews argues that the service member notified it that a Cuckoo clock was missing, but no item number was noted. It points out that its rider noted that a 1.5 cubic foot carton with no number tag was missing. The Descriptive Inventory indicates that item 76, a Cuckoo clock, was packed in a 1.5 cubic foot carton. Andrews believes that it was more than likely that the clock was in the missing 1.5 cubic foot carton to which it had taken exception on its rider.

Finally, Andrews argues that it was denied its salvage rights to the ripped and crushed video poster.

Discussion

A petition for reconsideration is denied where it essentially only restates arguments in the original appeal and presents no evidence demonstrating an error in fact or law in the prior decision. See DOHA Claims Case No. 96070215 (October 15, 1996). We see no error of law or fact in GAO's decision, but we amplify the discussion in the GAO decision.

Generally, under federal law, in an action to recover from a carrier for damage to a shipment, the shipper establishes his prima facie case when he shows delivery in good condition, failure to deliver or arrival in damaged condition, and the amount of damages. Thereupon, the burden of proof is upon the carrier to show both that it was free from negligence and that the damage to the cargo was due to one of the excepted causes relieving the carrier of liability. SeeMissouri Pacific Railroad Company v. Elmore & Stahl, 377 U.S. 134, 138 (1964). Once the shipper has established a prima facie case of liability, the burden is on the carrier or other bailee to show either that the damage did not occur while in its custody, or that the damage occurred as a result of one of a number of causes for which the carrier is not liable. Additionally, when goods pass through the custody of several bailees, it is a presumption of the common law that the damage occurred in the hands of the last one. See Stevens Transportation Co., B-243750, Aug. 28, 1991; and McNamara-Lunz Vans and Warehouses, Inc., 57 Comp. Gen. 415, 418 (1978).

The last custodian can avoid liability by showing that the damage or loss did not occur while the item was in its custody. For a carrier removing goods from a storage facility for delivery, that showing is made by preparing an exception sheet--a rider--to the inventory; the rider then can serve to rebut the general common law presumption of the last carrier's liability. SeeAble Forwarders, Inc., B-252817, Apr. 19, 1993; and A-1 Ace Moving and Storage, Inc., B-243477, June 6, 1991. Item 54m of the Tender of Service[(3)] describes a proper rider. It requires, among other things, that when the carrier prepares its own descriptive inventory, it is to note differences in the condition of individual items, as compared to the nontemporary storage (NTS) inventory. When the opinions of the carrier's and the warehouse's representatives differ, both opinions are to be reflected on the carrier's exception sheet. Both the carrier's and warehouse's representatives must sign the exception sheet. Item 54n of the Tender of Service requires at least a cross reference to the item numbers used on the NTS inventory, and item 54o requires the use of the same inventory prepared at origin to verify delivery at destination.

Whatever their cause, Andrews' agent should have been able to observe the warped condition of the dining table and the split top and cracked leg of the child's table as these items emerged from NTS. In the rider, the agent specifically described other damage, but he did not mention these damages. By itself, this is a legally sufficient basis for the Army to conclude that the additional damages were transit related. However, we question whether Andrews' arguments, accompanied by its inspector's opinion that something is not transit damage or that it appears to be climatic damage, are sufficient to relieve the carrier of liability.[(4)] There is no evidence of the measures taken by either Andrews or the NTS contractor to avoid humidity or moisture damage. An unsupported allegation that the damages were climatic and occurred at the NTS warehouse is insufficient.

We do not see how the Army's treatment of the piano helps Andrews. Superficially, there is little difference in documentary support between the warped condition of the piano and that of the dining table. Like the dining table, the warping of the piano was not PED, and it was not noted in the rider. Thus, there was a prima facie case of liability. Accordingly, the service member claimed the warping as a new damage on the List of Property and Claims Analysis Chart, DD Form 1844. Damage to the piano became part of the total of $1,415.36, initially offset against Andrews. When Andrews reclaimed $1,037.46 in its December 2, 1994, correspondence to GAO, it did not address the issue of the piano.

We assume that Andrews had performed its responsibilities when it received the shipment at the NTS facility, and if

inventory item 76, a "Koo-coo clock," had been missing, surely Andrews' agent would have noted this. Andrews did not explain how it knew that an unnumbered 1.5 cubic foot carton, allegedly containing the clock, was missing; what it did to try to identify the exact item number and contents of such a carton when it received the shipment at the NTS facility; or what it did to trace the missing carton. Under these circumstances, we cannot conclude that the Army erred in finding that Andrews did not prove by clear and convincing evidence that it did not receive the 1.5 cubic foot carton containing the clock from the NTS facility.

Regarding the poster, the Military-Industry Memorandum of Understanding pertaining to salvage generally provides that the carrier will take possession of salvage items not later than 30 days after receipt of the government's claim against the carrier. The record indicates that the government's claim was dispatched in June 1994, and there is no reference in the record to salvage on the poster until Andrews' August 8, 1994, correspondence to the US Army Claims Service. No further consideration is required.

Conclusion

We affirm GAO's settlement.

Signed: Michael D. Hipple

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Michael D. Hipple

Chairman, Claims Appeals Board

Signed: Joyce N. Maguire

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Joyce N. Maguire

Member, Claims Appeals Board

Signed: Christine M. Kopocis

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Christine M. Kopocis

Member, Claims Appeals Board

1. See Army Claim No. 94-061-0967, and carrier file 93-402, involving a shipment under Personal Property Government Bill of Lading (PPGBL) SP-027,530. In its administrative report, the Army allowed $85 and the Comptroller General allowed an additional $411.98.

2. Andrews inspector confirmed that the sides of the dining table top do not align with each other, then simply concluded that it was "not transit damage." The inspector also confirmed the damage to the child's table then concluded that this damage "appears to be climatic damage."

3. The Tender of Service, effective May 31, 1990, is found at Appendix A of DoD Reg. 4500.34-R.

4. Andrews did not suggest a legal justification for this aspect of its argument, but it is similar to the arguments made by carriers to relieve them of liability when damage is caused by an act of God or the inherent nature of the goods shipped. However, under either of these recognized exceptions to liability, a carrier must demonstrate that it met the exception. A carrier must prove that it was not negligent and that no intervening fault of the carrier contributed to the damage. See, for example, Atlas Van Lines, B-261348, Feb. 16, 1996 and Caisson Forwarding Company, Inc., B-251042, Apr. 21,

1993.