_____ DATE: September 5, 1996

In Re: Resource Protection

on behalf of

Allied Freight Forwarders Claims Case No. 96070220

Claimant

_____

CLAIMS APPEALS BOARD DECISION

DIGESTS

1. When an item is delivered in damaged condition and where damage is noted on the DD Form 1840 or 1840R, the fact that the carrier delivered the item establishes that the shipper owned and tendered that item.

2. When an item is not listed on the inventory, the shipper must present at least some substantive evidence of his tender of the item to the carrier beyond his claim and the acknowledgment on it of the penalties for filing a false claim. The service member must provide a statement reflecting personal knowledge of the circumstances surrounding the tender of the items to the carrier or other substantive evidence to support the tender.

3. Statements alone, from a repair person that electronic equipment was damaged during a move is insufficient to establish liability of the carrier. A prima facie case of liability may be established with regard to a video cassette recorder and compact disk player when, absent external damage, the shipper provides evidence that the items in question were in good working order at the time of tender and evidence that the damage was consistent with having been dropped or damaged in transit.

DECISION

This is in response to an appeal of General Accounting Office Claims Settlement No. Z-151685(65), dated February 26, 1996, regarding the shipment of household goods of a service member by Allied Freight Forwarders (Allied) under government bill of lading No. UP- 061,787. Pursuant to Public Law No. 104-53, November 19, 1995, effective June 30, 1996, the authority of the General Accounting Office (GAO) to adjudicate carriers' reclaims of amounts deducted by the Services for loss and or damage was transferred to the Director, Office of Management and Budget, who delegated this authority to the Department of Defense.

Background

Allied, through its representative, Resource Protection, requests a refund of amounts offset by the Navy for items lost or damaged in the move.(1) Items raised in the appeal include a television table, a lamp shade, a waste basket with contents, including several baby items, a compact disk player and a video cassette recorder. The carrier also argues that the damage to several pieces of furniture was pre-existing, and thus the carrier is due a full refund for amounts awarded to the shipper for repairs.

Previous correspondence from the carrier raised the issue of tender and the computation of the unearned freight charge for missing and irreparably damaged items. In the GAO Claims Settlement, GAO found that the Navy had established a prima facie case with regard to the items in question but found that the total weight of the items which had been destroyed or were missing was in error. The settlement directed the Navy to refund $33.42 to the carrier.

Allied again raises the tender issue and argues alternatively that the amount assessed against the carrier was excessive, since proper depreciation was not applied. We find that the Navy established a prima facie case of liability against the carrier for most of the items. Thus, we generally affirm the Claims Settlement. However, with regard to the video

cassette recorder and the compact disk player, a prima facie case was not established and we find errors in the amounts allowed for depreciation. The carrier is due a refund of $327.05, as set forth below.

Discussion

A prima facie case of liability is established by showing that the shipper tendered the property to the carrier, that the property was delivered in a more damaged condition and the amount of the damages. Missouri Pacific Railroad Co. v. Elmore & Stahl, 377 U.S. 134 (1964). The burden of proof then shifts to the carrier to rebut the prima facie liability.

The member wrote on the DD Form 1840R that the lampshade, located in box # 103 was smashed and crushed. The carrier argues that there is no evidence of tender of the lampshade. The ilitary-Industry Memorandum of Understanding for Loss and Damage Rules, effective January 1, 1992, provides that when an item is delivered in a damaged condition, and when the damage is noted on the DD Form 1840/1840R, then the fact that the carrier delivered the item would establish that the shipper owned and tendered the item. Since the item was delivered to the shipper in a damaged condition and duly noted on the 1840R, tender has been established.

The shipper's statement indicates that in addition to the lampshade, items missing from box #103 include a TV table and video tapes. The carrier argues that the TV table was not tendered, and could not have fit into the carton. The inventory describes the contents of box #103 as a radio and clothes. It appears that a number of odds and ends (the TV table, lamp shade, video tapes and presumably a radio and clothes) were put into that box. Given the general description on the inventory and the information reflecting personal knowledge provided by the shipper, we find it reasonable that an 18" x 18" TV table and the video tapes could have been packed in box #103, a box 4.5 cubic feet in size.

The fact that these items were not all listed on the inventory does not relieve the carrier from liability. Since the carrier packed the shipment and was responsible for preparing the inventory, it is not reasonable to conclude simply from the carrier's own labeling and inventorying decisions that the items were never tendered to the carrier. American International Moving, Corp., B-247576.2, Sept. 2, 1992. As noted in the administrative report, the carrier put only the briefest of descriptions on the inventory. In some cases there is no description at all of the contents of the boxes.

When an item is not listed on the inventory, the shipper must present at least some substantive evidence of his tender of the item to the carrier beyond his claim and the acknowledgment on it of the penalties for filing a false claim. The service member must provide a statement reflecting personal knowledge of the circumstances surrounding the tender of the items to the carrier or other substantive evidence to support the tender. Allied Freight Forwarding, Inc., B-260695, Sept. 29, 1995. It is our view that the shipper has provided statements reflecting such knowledge, sufficient to establish tender of these items. In addition, the shipper provided a statement that box #103 was open when delivered.

The shipper noted that a number of baby items were missing. These items, cloth diapers, a baby monitor and baby bottles, are not listed on the inventory. However, the shipper provided a statement indicating that these baby items and another waste basket were packed in the kitchen waste basket, inventory item #19, and were shipped that way. It is our view that the statement provided indicates knowledge of tender of these items and is sufficient to establish tender of the items.

The carrier also argues that the Navy improperly held the carrier liable for damage done to several pieces of furniture. As noted in the administrative report, the shipper had established a prima facie case of damage to the television (#75) , the television stand (#76), chest of drawers (#124), night stand (#128), book case (#122) and speakers (#78, #79). With regard to the television, night stand, book case, chest of drawers, and speakers, although there was a primafacie case that the carrier had done damage different from the preexisting damage listed on the inventory, 50% of the repair cost was deducted from the amount awarded to the carrier because of the pre-existing damage.

We agree that a prima facie case of damages was established. The Navy has already greatly reduced the amount awarded to the shipper for repair of the furniture, since there was preexisting damage. This office will not question an agency's calculation of the amount of damages to items in the shipment of a member's household goods unless the carrier presents clear and convincing evidence that the agency acted unreasonably. A & A Transfer Storage, Inc., B-252974, Oct. 22, 1993. We find nothing in the record which indicates that the damages awarded were unreasonable.

With regard to the compact disc player (CD) and video cassette recorder (VCR), the carrier claims that the damage was not transit related, and thus the carrier is not liable. We find that a prima facie case of liability has not been established, since the record contains no evidence that the items in question were in proper working order at the time of tender. The shipper provided receipts from C-VAC Electronics indicating that these items no longer function because of the moving damage. The repair person told the shipper that the type of damage done was the type of damage that would result when the box the VCR and CD player were shipped in was dropped, but the damage otherwise was not described. Moreover, the shipper provided no statement or evidence of the condition of the items at the time they were tendered to the carrier. Compare Department of the Army - Reconsideration, B-255777.2, May 9, 1994. Thus liability has not been established. The carrier should be refunded $159.75 and $107.00 for the CD player and VCR respectively.

While the Agency acted reasonably in awarding damages to the shipper, we agree that with regard to a number of items, depreciation was not applied in accordance with the Joint Military Industry emorandum of Understanding and Depreciation Guide. We find that the carrier is due a refund of $60.30 as set forth below:

-- Cloth diapers, three years old, should have been depreciated 75%, (30% a year for 3 years, with a maximum of 75%), thus carrier is owed $25.20.

--The nursery monitor, three years old, should have been depreciated 30% (10 % a year for 3 years), the carrier is due $5.00.

-- The baby bottles, three years old, should have been depreciated 30% (10% a year for 3 years) the carrier is due 5.10.

-- The waste basket, 1 year old, should have been depreciated 20%, carrier is due $1.00.

-- The lamp shade, 2 years old, should have been depreciated 40% (20% a year for 2 years), the carrier is due $6.00.

--The TV tray, 9 years old, should have been depreciated 63% (7% a year for 9 years), the carrier is due $18.00.

Conclusion

The GAO claims settlement is modified accordingly.

_____/s/_____

Joyce N. Maguire

Member, Claims Board of Appeals

_____/s/_____

Michael D. Hipple

Chairman, Claims Board of Appeals

_____/s/_____

Christine M. Kopocis

Member, Claims Board of Appeals

1. This matter involves U.S. Navy Claim No. 100-93, and Allied File No. 812106.