DATE: February 18, 1997

In Re:

Stevens Worldwide Van Lines, Inc.

Claimant

Claims Case No. 96070233

CLAIMS APPEALS BOARD DECISION

DIGEST

1. When a carrier aggressively protects its rights to inspection and the member discards broken articles before the carrier has the opportunity to inspect, the carrier must have a substantial defense involving facts discoverable by inspection to overcome a prima facie case of liability. Where the government inspected the shipment twice before items were discarded or repaired and the carrier does not provide evidence of a substantial defense, the carrier remains liable for the damage.

2. A carrier's lower repair estimate does not prove that the shipper's estimates or the agency's calculation of the carrier's liability was unreasonable.

DECISION

Stevens Worldwide Van Lines, Inc. (Stevens) appeals the U.S. General Accounting Office's (GAO) Claims Settlement Certificate Z-1348910(78), dated December 13, 1994, denying it a refund of $2,471.90, except for $290 allowed by the Army, set off by the Army for loss and damage to the household goods of a service member.[(1)] Pursuant to Public Law No.104-316, October 19, 1996, 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. The Secretary of Defense has delegated this authority to this Office.

Background

The record shows that the carrier picked up the household goods shipment in Richmond, Virginia, in ay 1990 and delivered it to San Francisco, California, on July 9, 1990. The Notice of Loss or Damage, DD Form 1840R, was dispatched on August 20, 1990. The shipment was inspected twice by Army inspectors and the member was paid August 29, 1990. The carrier inspected the shipment on September 11, 1990. The member destroyed the broken articles and repaired the damaged items prior to the carrier's inspection.

The Comptroller General denied Steven's appeal of the Army's set off. On appeal of the settlement, Steven's argues that it was not provided an opportunity to inspect and that the Army failed to use the carrier's lower estimate.

Discussion

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 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.

The Military-Industry Memorandum of Understanding on Loss and Damage Rules (MOU) allows the carrier to exercise its inspection rights within 75 days from the date of delivery or 45 days of dispatch of the DD Form 1840R, whichever is later. The Comptroller General has held that the carrier cannot avoid liability solely on the basis of no opportunity to inspect. The carrier will not be held liable when it aggressively protects its rights to inspection within the time period stated, the member discards broken articles within that time period and before the carrier has the opportunity to inspect, and the carrier has a substantial defense involving facts discoverable by inspection. See National Forwarding Co., Inc., B-260769, Nov. 1, 1995, and Stevens Worldwide Van Lines, Inc., B-251343, Apr. 19, 1993.

In the present case, Stevens conducted the inspection within the time period stated in the MOU. The shipper had destroyed some articles prior to that inspection. The Army's administrative report states that the shipper's actions were more the result of his failure to understand the carrier's rights rather than any deliberate attempt to deny those inspection rights. The Army suggests that most of the damaged items were a hazard, broken glass, which was reasonable for the shipper to discard, especially after he was paid for them. In any case, the Army determined that the carrier suffered no harm and is not due a refund because the damage was verified by the Government's two inspections and the shipper's repair estimates. Stevens merely argues that it was denied the opportunity to inspect and does not discuss specific items in the shipment. Stevens has not demonstrated that it would have a substantial defense which would overcome the prima facie case of liability if certain articles had been retained for inspection.

Stevens argues that its lower estimate should have been used by the Army. The Army used the shipper's estimate as the measure of damages, determining that it was reasonable in comparison with local market repair prices in San Francisco. Additionally, the Army determined that the carrier's estimates are not responsive since they do not cover all of the damage claimed. The differences in costs between the carrier's estimates and the shipper's support the idea that the carrier's estimates do not address all the damage. Stevens argues that its estimate is more responsive in some instances than the shipper's. Stevens does not present evidence that the shipper's estimate is unreasonable in the market place. A carrier's lower repair estimate does not prove that the shipper's estimates or the agency's calculation of the carrier's liability was unreasonable. See Interstate International, Inc., B-197911.6, May 25, 1989. Our Office has ruled that we will not question an agency's calculation of the value of the damages to items in the shipment of a service member's household goods unless the carrier presents clear and convincing evidence that the agency acted unreasonably. See DOHA Claims Case No. 96070206 (September 5, 1996). Steven's has not met this burden of proof.

Conclusion

We affirm the settlement.

See partial dissenting opinion

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

In Re:

Stevens Worldwide Van Lines, Inc.

Claimant

DATE: February 19, 1997

Claims Case No. 96070233

CLAIMS APPEALS BOARD DECISION

Dissenting Opinion of Michael D. Hipple, Chairman, Claims Appeals Board

I respectfully dissent with my colleagues' finding concerning the effect of the denial of the carrier's inspection right; however, I concur with the remainder of the decision. The record indicates that the carrier had requested an inspection within the period required by the MOU, and in fact, conducted the inspection within that period. Nevertheless, certain items were repaired or discarded prior to the carrier's inspection. No issue exists concerning whether the carrier aggressively pursued its right to inspect. While there are some instances in which a carrier cannot demonstrate harm by the government's failure to accord it an inspection, it is difficult to make such a finding here for many items.

In National Forwarding, supra, the decision cited by the majority, the Comptroller General considered a claim involving crystal ware. The Comptroller General was unable to conclude that the carrier would not have had a valid defense with respect to the element of the amount of damages. He held that it was unreasonable to discard relatively expensive broken crystal ware items, ahead of the carrier's inspection, when the carrier vigorously pursued his inspection rights within the time allowed by the MOU. The value of the crystal ware, of course, affected the amount of damages.

In the present claim, we considered damages to items falling into 3 general categories: relatively expensive glass or ceramic ware, wood and/or antique furniture and other items. The Army's administrative report is incorrect in stating that most of the damaged items were dangerous broken glass. Of the items reclaimed by Stevens due to denial of the opportunity to inspect, only Items 7 (stained glass figurine), and 4 (broken glass in a picture frame) were clearly glass. The National Forwarding decision would have required the retention of Item 7 for inspection due to its value (original cost $850). By logical extention, that decision also would have required retention of the $110 Hummel figurine (Item 179) which had an original purchase price of $110.

Most of the damaged items involved wood antiques which would have been available for inspection except for the fact that they had been repaired. Stevens' expressed concern was that the repair denied it the opportunity to verify transit damage, pre-existing damage and tender of the item. It is more difficult to demonstrate harmful error in such instances because the tender of the item at origin, and its condition at tender, were contained in the descriptive inventory. However, as in National Forwarding, the amount of damages is still an issue. Of course, the carrier would have had a much heavier burden in proving harmful error by the government's disposal of the broken glass in the picture frame in Item 4 or by the disposal of the pottery (Item 134).

The Services should be much more vigilant in protecting the carrier's right to inspect damaged property. Even when the disposal or repair of any particular item does not constitute harmful error, the Services have a duty to honor their contractual obligations.

Accordingly, I would grant the carrier's claim with respect to Items 239, 122, 123, 128, 231, 303, 7, 11, and 179.

/s/ Michael D. Hipple

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Michael D. Hipple

Chairman, Claims Appeals Board

1. Government Bill of Lading #RP-709,759; Army Claim #90-022-0150; Carrier Claim

#90-64039.