DATE: April 14, 1997

In Re:

Park Avenue Storage

Claimant

Claims Case No. 96070223

CLAIMS APPEALS BOARD DECISION

DIGEST

1. A subcontracted carrier who has no privity with the government with regard to a shipment of household goods under a GBL has no standing to request reconsideration of a settlement certificate which addresses the claim of the carrier listed on the GBL.

2. Where the shipper initialed every item on the inventory, but understood that he could later submit the DD Form 1840R if he discovered items missing, the presumption that items reported as missing within 75 days of delivery were lost in the hands of the carrier applies even when the shipper has initialed the inventory to indicate the delivery of individual cartons

3. We accept the statement of facts as presented by the administrative office in the absence of clear and convincing contrary evidence by the claimant.

4. 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.

DECISION

Park Avenue Storage Corporation (Park Avenue) appeals the United States General Accounting Office's (GAO) Claims Settlement Certificate Z-2869901 (Settlement), dated February 1, 1996, denying Stearns' Moving and Storage, Inc. (Stearns'), a refund of $148 for loss and damage to 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 delegated this authority to this Office.

Background

The record shows that Stearn's Moving and Storage picked up the shipment from Oakwood, Ohio, on May 26, 1993. It was delivered to Fort Monmouth, New Jersey, on July 10, 1993, by Park Avenue Storage. After delivery, the shipper submitted a timely Notice of Loss or Damage, DD Form 1840R, which indicated that one of three vacuum cleaners (Item #27) was missing from his household goods.

Stearns' contends that it was not liable for the missing vacuum cleaner because the shipper initialed the inventory sheet at delivery to confirm that the box in which the vacuum was packed had been delivered. The shipper states that at the time the household goods were delivered, four individuals were calling out inventory numbers to him, and that he merely signed off on the inventory sheets with the understanding that he could identify missing items on the DD Form 1840R after he had an opportunity to find out if anything was missing.

The Army filed a claim with Stearns' for the amount of the vacuum cleaner. Stearns' denied liability, and the Army set off $148 against Stearns'. Stearns' appealed to GAO for a refund of the amount set off. The GAO denied the refund in

Settlement Certificate Z-2869901. Stearns' then apparently set off the same amount, $148, against Park Avenue Storage, which delivered the household goods to the service member. Park Avenue argues that the vacuum cleaner was not missing at delivery, and requests that DOHA reconsider the Settlement.

Discussion

Based on the information in the file, Park Avenue is a subcontractor, selected by and paid by Stearns'. Park Avenue is not listed on the GBL as a carrier, and there is no evidence of privity with the government with regard to this move. It is well settled that since privity of contract generally does not exist between the government and subcontractors, such firms have no legally permissible way to bring claims directly against the government. See Trism Specialized Carriers, Inc., B-260604.2, April 18, 1996, 96-1 C.P.D. 202. Thus, while Stearns' could have requested reconsideration of the Settlement, and while Park Avenue could request that Stearns' do so, Park Avenue has no standing to do so. However, in the interest of efficiency and expediency, this Board chooses to review the substantive issue presented.

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.

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. The carrier's argument appears to be that once a shipper has initialed the inventory sheet to indicate that the cartons have been delivered, the shipper loses the benefit of the presumption that items reported as missing within the 75-day period were lost in the hands of the carrier. The Comptroller General has held that the presumption that items reported as missing within 75 days of delivery were lost in the hands of the carrier applies even when the shipper has initialed the inventory to indicate the delivery of individual cartons. Andrews Van Lines, Inc., B-257399, Dec. 8, 1994.

In the present case, although the carrier claims that the vacuum cleaner was not packed, the shipper's statement and the administrative report state that the vacuum cleaner and its parts were packed, and that only the parts were delivered. We accept the statement of facts as presented by the administrative office in the absence of clear and convincing contrary evidence by the claimant. See McNamara - Lunz Vans and Warehouses, Inc., 57 Comp. Gen. 415 (1978).

In addition, the shipper states that due to the circumstances involved at delivery, he was not sure what had been delivered, but initialed the inventory with the understanding that he could later submit a claim for items which he discovered were missing. Thus, his signature does not provide evidence that the missing vacuum cleaner was delivered, and the member's timely reporting of the item overcomes the presumption of correctness of the delivery.

Finally, Park Avenue alleges that the claim for the vacuum cleaner is fraudulent. However, other than the allegation, Park Avenue provides no evidence of such fraud. 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. A carrier's claim is denied where it provides no evidence to substantiate its allegation that the claim was fraudulent. See DOHA Claims Case No. 96070226 (September 5, 1996).

Conclusion

We affirm the settlement.

_____/s/_____

Michael D. Hipple

Chairman, Claims Appeals Board

_____/s/_____

Joyce N. Maguire

Member, Claims Appeals Board

_____/s/_____

Jean E. Smallin

Member, Claims Appeals Board

1. This shipment was made under Government Bill of Lading SP-005,371, Army Claim Number 94-381-0041. The Army set off the claim against Stearns', which charged Park Avenue for the loss, and Park Avenue appeals the Settlement.