DATE: November 4, 1996

In Re:

Fogarty Van Lines

Claimant

Claims Case No. 96070232

CLAIMS APPEALS BOARD DECISION

DIGEST

Carrier does not meet its burden to overcome the prima facie case for loss or damage to a service member's household goods by merely arguing that the Joint Statement of Loss or Damage at Delivery (DD Form 1840) is suspect. The DD Form 1840 appears to be valid on its face; it indicates that it was signed and dated on the delivery date by the service member and the carrier's representative and that certain items were reported as lost or damaged. The carrier's attempt to impeach the DD Form 1840 with evidence that the government failed to check a "Yes" block on an associated Shipment Evaluation and Inspection Record (DD Form 2223), to indicate that there was recorded loss or damage at delivery, fails because while the government did not check the "Yes" block on the DD Form 2223, neither did it check the "No" block. The DD Form 2223 was not fully completed, and the Army explained that it forwarded a copy of the DD Form 2223 to the carrier before the end of the time period provided for the delivering agent to forward the DD Form 1840 to the Army transportation officer reporting loss or damage at delivery. This is not clear and convincing evidence necessary to overcome an apparently valid DD Form 1840.

DECISION

Fogarty Van Lines (Fogarty) appeals the U. S. General Accounting Office's (GAO) Settlement Certificate Z-2710209-9, dated November 27, 1991, which denied its claim for reimbursement of $592 deducted by the Army for transit loss and damage to the household goods shipment of a service member.(1) Pursuant to Public Law No. 104-53, November 19, 1995, effective June 30, 1996, the authority of the GAO to adjudicate carriers' reclaims of amounts deducted by the Services for transit loss/damage was transferred to the Director, Office of Management and Budget who delegated this authority to the Department of Defense.

Background

Fogarty picked up the household goods of the service member in Louisiana and delivered them to Jamestown, North Dakota on August 8, 1987. The Army set off $934 on December 19, 1989, for loss and damage to the shipment. Fogarty denied all liability claiming lack of timely notice. Upon reconsideration the Army determined that timely notice of damages discovered after delivery was not provided the carrier. In February 1990, Fogarty was issued a refund of $342 covering all items not indicated on the Joint Statement of Loss or Damage at Delivery (hereafter referred to as the DD Form 1840).

Fogarty's claim asserted that the driver stated that there was no damage noted on delivery and that its copy of DD Form 1840 did not list any damage. Fogarty was unable to provide a copy of its blank DD Form 1840, but argued that the Shipment Evaluation and Inspection Record (hereafter referred to as the DD Form 2223), a form prepared by the Army to evaluate the carrier, supported its claim that there was no damage noted on the DD Form 1840. The carrier stated that their first notice of damage to the shipment was the subrogation claim from the Army received over a year after delivery. The Army Claims Service contends that the DD Form 1840 is valid and identifies extensive damage. The administrative report indicates that the Army contacted the member's wife on March 8, 1990 to corroborate the information on the DD Form 1840. She confirmed that extensive exceptions were noted at delivery on DD Form 1840.

Fogarty appealed the set off to GAO. On November 27, 1991, GAO settled this claim against Fogarty finding that the

Army has clearly established a prima facie case of carrier liability for damage. Even though Fogarty states that it appealed GAO's settlement by its letter dated January 2, 1992, there is no indication on the record of an appeal before June 5, 1996.

Fogarty appeals the settlement claiming that there is no documentation to support the Army's position that there was damage to the shipment. Fogarty renews its argument that the DD Form 2223 supports its claim. In particular, Fogarty alleges that the DD Form 1840 is "very suspicious" in light of what Fogarty identifies as the Army's statement that the Notice of Loss or Damage (DD Form 1840R), was fraudulent. Fogarty acknowledges the member's wife's statement that damages were listed on the DD Form 1840, but questions when the damage was noted, stating "it clearly wasn't listed at the time of delivery."

Decision

While this appeal is untimely, we will address the merits of the appeal because there appears to be no prejudice to the government due to the delay.

Section 31.7 of Title 4 of the Code of Federal Regulations states that claim settlements are based on the facts as established by the government agency concerned and by evidence submitted by the claimants, and the burden is on the claimant to establish the liability of the United States for payment. Where there is disagreement as to the facts in a case, the facts are accepted as presented by the agency in the absence of clear and convincing proof to the contrary. See, McNamara-Lunz Vans and Warehouses, Inc., 57 Comp. Gen. 415 (1978). A prima facie case of carrier liability is established by showing that the shipper tendered property to the carrier, that the property was not delivered or was delivered in a more damaged condition, and the amount of damages. See 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 administrative report includes a DD Form 1840 dated on the delivery date and signed by the shipper and Fogarty's agent. It appears to be valid on its face. The Army accepted this form as valid, and this is evidence of notice to the carrier of loss or damage. In arguing that timely notice was not provided, Fogarty contends that the DD Form 1840 was suspect, but it did not provide the Army, when the Army requested it, a copy of a blank DD Form 1840 from this transaction or otherwise provide evidence that the damages noted on the DD Form 1840 were placed on it after delivery. The Army's administrative report indicates that an official talked to the member's spouse in 1990 and she confirmed that she remembered the delivery because her oak table was badly damaged and extensive exceptions were noted on the DD Form 1840.

Fogarty's reliance on the DD Form 2223 is misplaced. The Army's administrative report indicates that it sent a copy of the DD Form 2223 to Fogarty prior to the close of the period of time that Fogarty's agent had to forward the DD Form 1840 to the Army destination transportation officer. In any event, the DD Form 2223 itself was not complete. While the government had not checked the "Yes " block on the DD Form 2223 for loss or damage at delivery, neither did it check the "No" block. This is not clear and convincing evidence necessary to overcome a DD Form 1840 which is facially valid.

The Army acknowledges that the carrier did not receive timely notice of damages noted on the DD Form 1840R. There is no indication that the Army considered the DD Form 1840R to be fraudulent, and 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., U.S.N., B-213543, Dec. 7, 1983. Fogarty has not met the burden of proof establishing fraud. Nor has it overcome the Army's prima facie case establishing liability.

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. See Army File No. 88-091-0082, involving a shipment under Personal Property Government Bill of Lading PP-165,740.