DATE: November 14, 1997

In Re:

American Van Services, Inc.

Claimant

Claims Case No. 97102802

CLAIMS APPEALS BOARD DECISION

DIGEST

The last custodian can avoid liability by showing that the damage or loss did not occur while the item was in its custody. Where carrier did not note any exceptions to a particular item on a rider at pick up from a non-temporary storage (NTS) facility, the carrier remains liable for damages. The carrier's argument that the NTS warehouse packed the item in a carton that was too small to contain the described article, does not in the circumstances here overcome the carrier's liability as last handler.

DECISION

American Van Services, Inc. (American) appeals the October 2, 1997, Settlement Certificate issued by our Office in DOHA Claim No. 97082530, in which we disallowed American's claim for a refund of $52.50 that the Air Force had offset to recover for transit damage to a service member's vase.[(1)]

Background

The record shows that on November 27, 1992, Tri City Moving and Storage picked up the shipment in Highland, California, and placed it into their non-temporary storage (NTS) facility in Redlands, California. On March 29, 1993, American picked up the shipment from the NTS facility. American delivered the shipment to Auburn, New Hampshire, on April 6, 1993. The amount of $117.08 was offset in 1996. American reclaimed $52.50 that was offset for the breakage of a vase, inventory item #97, described in claims documents by the service member as being four feet in length. American did not note any exceptions for this item on a rider at pick up, but argued that the fact that the NTS facility had packed this fragile item in a carton that was too small is controlling for liability purposes.[(2)] American did not inspect the item when it was reported as damaged. The Settlement Certificate denied the claim stating that since American did not note any damage to the vase/carton on a rider when it received it from the NTS facility, as the last handler, American is liable for the damage.

After American appealed the setoff, the Air Force obtained a statement from the service member in which the member stated that the vase was waist height and that the carton containing the vase was dropped by the carrier at delivery. American challenges the probative value of the statement because it was made four years after delivery. American also questions the value of the vase as stated by the Air Force, and it contends that our Settlement Certificate was flawed because the legal authorities that the Air Force used to adjudicate the claim and prepare the administrative report are not contained in DOHA's file.

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. See Missouri

Pacific Railroad Company v. Elmore & Stahl, 377 U.S. 134, 138 (1964). In addition, 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 McNamara-Lunz Vans and Warehouses, Inc., 57 Comp. Gen. 415, 418 (1978); and DOHA Claims Case No. 96070205 (September 5, 1996).

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. See DOHA Claims Case No. 96070210 (September 19, 1996).

In our view, American's argument on the comparative sizes of the item and the carton raises a question of whether the item was tendered to the NTS facility. However, Note 1 to the Military-Industry memorandum of Understanding on Loss and Damage Rules states that the fact that a damaged item was delivered is evidence that the claimant owned it and tendered it for shipment. While the probative value of any statement made 4 years after delivery should be questioned, the service member's allegation that the carrier dropped the carton at delivery is very specific. Whatever the supportive value of the shipper's statement may or may not be, the common law presumption of the last handler's liability is determinative. American's supposition that the NTS facility had to break the vase to place it into the carton is not evidence that would overcome this presumption.

Concerning the value of the vase, it is our practice not to question an agency's calculation of the value of damages unless the carrier presented clear and convincing evidence that the agency acted unreasonably. See Andrews Forwarders, Inc., B-255697, Apr. 22, 1994. The record contains conflicting information on the exact size of the vase. For this reason, American questions how the Air Force could find that the cost is the same for either size vase; but, American provides no evidence that the agency's calculation that the particular vase's cost of $75, the claimed purchase price, is unreasonable. American offered no evidence on the value of the damaged vase even though it could have inspected the item. The Air Force deducted for depreciation and charged American for $52.50.

Concerning American's concern with the fact that DOHA does not have copies of some of the legal precedents cited by the Air Force in its administrative report, we note that the Settlement Certificate cites different precedents, which are readily available. DOHA bases its decisions on the written record, so that if a party to a case wishes DOHA to use a particular authority as legal precedent, that party should ensure that the authority is available. In this instance, the legal issue the Air Force was stating in its administrative report, the last handler rule, is well documented and precedents from the courts, the Comptroller General, and our Office are numerous. We find no flaw in the Settlement Certificate concerning legal precedents.

Conclusion

We affirm the Settlement Certificate.

/s/

Michael D. Hipple

Chairman, Claims Appeals Board

/s/

Christine M. Kopocis

Member, Claims Appeals Board

/s/

Jean E. Smallin

Member, Claims Appeals Board

1. This matter involves Personal Property Government Bill of Lading UP-963,790; Air Force Claim No. Hanscom AFB 95-314; and AVAS Ref. No. BL 20291.

2. The Air Force's administrative report notes that the longest item which could have fit into a 4.5 carton was 30 inches. It is undisputed that a 4.5 carton measures 18 inches long, 18 inches wide and 24 inches high. The Air Force questions whether the carton size noted on the Descriptive Inventory was correct or whether the member's claim that the item was four feet long was correct.