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In Re:

American Van Services, Inc.

Claimant

DATE: November 18, 1997

Claims Case No. 97110309

## CLAIMS APPEALS BOARD DECISION

### DIGEST

Under the last handler rule, the last custodian is presumed liable for the loss or damage to an item unless it shows that the loss or damage did not occur while the item was in its custody. Where carrier noted exceptions to missing portions of a lamp on a rider at pick up from a non-temporary storage (NTS) contractor, the carrier is not liable for the missing portions of the lamp.

### DECISION

American Van Services, Inc. (American) appeals the October 15, 1997, Settlement Certificate of the Defense Office of Hearings and Appeals (DOHA) in file 97090213, which disallowed American's claim for a refund of \$115 set off by the United States Army Claims Service to recover transit damages in the shipment of a service member's household goods.<sup>(1)</sup>

### Background

The shipment was picked up and placed into non-temporary storage (NTS) in Sacramento, California, on July 29, 1993. On November 17, 1995, American completed a rider (exceptions to the condition of the shipment), removed the shipment from NTS, and transported it to Mechanicsville, Virginia for storage in transit (SIT). The shipment was delivered out of SIT on April 25, 1996. Loss and damage to various items was noted on the Joint Statement of Loss or Damage at Delivery (DD Form 1840) on the day of delivery.

Two items are in dispute in this appeal: Descriptive Inventory Item 68 or 668, a 4.5 carton stuffed with toys and a clock, in which the clock was reported broken; and Item 88 or 880, a floor lamp missing five large bulb covers.

American contends that the NTS contractor was liable for these damages. To support its position, it contends that under the Performance Work Statement for Packing, Containerization and Local Drayage of Personal Property Shipments,<sup>(2)</sup> the NTS contractor should have packed the clock in a dishpack of not less than 5 cubic feet because it was a fragile item. American also contends that it referred to the missing bulb covers in its rider. American argues that its reference to the missing wire baskets under Item 85, a floor lamp, referred to the five missing bulb covers in Item 88 or 880. Item 85 or 885 was another floor lamp reported at origin in a loose, scratched and chipped condition.

### 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. 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).

American did not rebut its presumption of liability with respect to the clock. American did not demonstrate that the clock was a "fragile" item, and paragraph 5.4.2.4 does not specifically include clocks as examples of fragile items. Moreover, as the Army Claims Service indicated in its administrative report, the cited paragraph does not apply directly to NTS contractors. Such contractors are covered by the Basic Ordering Agreement for Storage of Personal Property and Related Services, Appendix H, to DoD Reg. 4500.34-R. American is liable for damages to the clock.

We agree with American regarding the five bulb covers. More than one floor lamp was included in the shipment, and no bulb cover was reported as missing by the NTS contractor. At delivery, the service member claimed missing bulb covers from only one floor lamp. While "wire baskets" may not have been the best description of the devices here which covered the bulbs, as American indicates, it is reasonable to conclude in this context that these "wire baskets" were the bulb covers. Nothing in the record suggests that they could have been confused with a different missing part which was noted at origin or claimed as transit damage.

### **Conclusion**

We affirm the Settlement Certificate with respect to \$65 for the clock, and reverse it with respect to \$50 for the bulb covers.

Signed: Michael D. Hipple

Michael D. Hipple

Chairman, Claims Appeals Board

Signed: Christine M. Kopocis

Christine M. Kopocis

Member, Claims Appeals Board

Signed: Jean E. Smallin

Jean E. Smallin

Member, Claims Appeals Board

1. This matter relates to Personal Property Government Bill of Lading YP-245,965, and Army Claim 96-311-0486.
2. See *Department of Defense Personal Property Traffic Management Regulation*, DOD Reg. 4500.34-R, Appendix H, para. 5.4.2.4 (page P-14), October 1991.