In Re:

Fogarty Van Lines

Claimant

DATE: January 15, 1998

Claims Case No. 97122318

CLAIMS APPEALS BOARD DECISION

DIGEST

When goods pass through the custody of more than one carrier or other bailee, it is presumed that any loss occurred in the hands of the last bailee. The burden then is on the delivering carrier, as the last bailee, to prove that the prior bailee was responsible for the loss. Mere allegations or suggestions that the prior bailee was responsible does not satisfy that burden.

DECISION

Fogarty Van Lines (Fogarty) appeals the December 9, 1997, Settlement Certificate of the Defense Office of Hearings and Appeals (DOHA) in Claim No. 97090409. In the Settlement, this Office, among other things, affirmed the Army's set off of $503 against Fogarty for the transit loss of a king-size mattress in the shipment of a service member's household goods.(1)

Background

The record indicates the service member's household goods were placed into nontemporary storage (NTS) in Georgia on March 4, 1993. Item 20 of the Descriptive Inventory was a king-size mattress carton. On August 8, 1994, Fogarty obtained the household goods from the NTS facility, and on August 15, 1994, delivered them to the service member in Fort Carson, Colorado. On the day of delivery, the service member notified Fogarty that a Sealey Platinum Plush king-size mattress, which he had tendered to the NTS facility and was contained in Item 20, was missing. The member also advised Fogarty that the mattress that Fogarty had attempted to deliver did not belong to him. In July 1997, the service member and his spouse produced a statement describing events on the day of delivery. In rejecting the mattress on the day of delivery, they pointed out to the driver, and the driver acknowledged, that the mattress contained the wrong color sticker, an incorrect inventory number, and did not match the box spring.

Fogarty contends that it is not liable for the loss because, even if it had opened the carton to examine the contents, it had no way of knowing that the carton contained the wrong mattress. The only parties who would have known about the nature of the mattress tendered was the NTS facility and the service member. Fogarty also contends that it is improper for us to consider the July 1997 statement because it was made three years after the events, and therefore, it is unreliable. Fogarty alleges that the government did not make the carrier aware of the substance of the statement until recently and had the duty to present these facts to the carrier in 1994. Fogarty contends that there was no evidence of tampering with Item 20, thus demonstrating that it delivered the item tendered. Fogarty presents a copy of a February 24, 1995, letter from the NCOIC(2) of Claims Recovery at Fort Carson in which he stated that "we do relieve you of liability on items 20 and 117," and based on this, Fogarty concludes that the claims office must have investigated this matter and concluded that the correct color sticker and inventory number were on the mattress delivered. Finally, Fogarty contends that our adjudicators ignored its September 10, 1997, letter in which: 1) it cites the Comptroller General's decision in Carlyle Van Lines, Inc., B-247442.2, Dec. 14, 1993, as dispositive authority in its favor; and 2) it alleges that even if the inventory number had been different for the mattress delivered, this does not account for the lot number being the same, thus proving that the mattress had been tendered by the shipper.

Discussion

The Carlyle decision, citing McNamara-Lunz Vans and Warehouses, Inc., 57 Comp. Gen. 415, 418-419 (1978), states that when goods pass through the custody of more than one bailee, it is presumed that any loss occurred in the hands of the last bailee. The burden then is on the delivering carrier, as the last bailee, to prove that the prior bailee was responsible for the loss. Mere allegations or suggestions about the prior bailee's actions do not satisfy that burden. In Carlyle, the Comptroller General rejected the carrier's defense, now raised by Fogarty, that it merely delivered the item, which in that claim was a handmade Oriental carpet that was obtained at an NTS facility. He also rejected the suggestion that the carrier would not have been aware of the nature of the item tendered to it, and was not persuaded by the argument that it would have been impossible to switch the sticker from the expensive carpet to a cheap carpet, a sticker containing the shipment's lot number and the carpet's inventory number. Thus, the legal authority cited by Fogarty to support its claim clearly rejects Fogarty's first argument, the argument it used to settle the claim.

The Comptroller General allowed Carlyle's claim for a reason unrelated to the facts here. He believed that neither the service member nor the Air Force had demonstrated that the carpet tendered to the NTS facility was substantially similar to the carpet which provided the basis for the damage estimate. The service member did not prove that he tendered to the NTS facility a 9' X 12' hand knotted Turkish carpet made with wool on a cotton foundation of Turkish weave and Ladik quality. The carpet was not mass-produced, and its value and nature were dependent upon the craftsmanship of the producer. Thus, the Comptroller General reasonably expected more detailed evidence of the nature and value of the item than that expected for a mass-produced item of similar value. The mattress in the present claim was mass-produced, and if the model of mattress was tendered, its value was reasonably ascertainable by Fogarty. For this reason alone, the claims are dissimilar.[(3)]

There are additional difficulties with Fogarty's claim. Fogarty assumes that the mattress that was delivered had the same lot number as the remaining portion of the shipment, but it offered no proof of this.

Fogarty has shown that an NCO at the installation claims office "relieved" it of liability for the mattress, but ordinarily an Army sergeant (pay grade E-5) would not have settlement and approval authority to relieve a carrier of liability for transit loss/damage.[(4)] Fogarty's greater concern appears to be that the Recovery NCOIC at least would have triggered a proper investigation of the loss. While that should have happened, it is not directly related to Fogarty's duties. Whether or not the Army properly investigated the member's claim against it under the Military Personnel and Civilian Employees' Claims Act, 31 U.S.C. §3721, Fogarty had a duty to investigate the loss and settle the claim within 120 days of the demand. See Paragraph IV(A) of the *Military-Industry emorandum of Understanding on Loss and Damage Rules*, and 49 C.F.R. §1005.5(a). If Fogarty had properly investigated the loss, it should have obtained the same information from the service member as that contained in the July 1997 statement. Additionally, assuming the veracity of the service member's statement, as we must, the Army did not withhold proof of loss for 3 years because Fogarty's own agent was advised at delivery, and could verify then and there, that different numbers, a different color tag, and an incompatible box spring were involved. The July 1997 statement merely supports the existing claim, and the service member and his spouse could testify to the same effect if this matter were presented in litigation. The incompatible box spring was indicative of a mismatch between the mattress tendered and the one received.

Conclusion

We affirm the Settlement.

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

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Member, Claims Appeals Board

1. This matter involves Personal Property Government Bill of Lading SP-427,559; Army Claim 95-016-0185; and Carrier Claim 940948.

2. The non-commissioned officer in charge.

3. It appears that Fogarty may have researched the legal issue long after it settled the claim against it on a basis which was not legally sound. Once it discovered that the basis of its settlement was unsupportable under Carlyle, it tried to argue that the facts in this claim are similar to those in Carlyle, and that the same result should follow.

4. See for example paragraphs 1-6 and 11-24 of Army Regulation 27-20, *Claims* (February 28, 1990).