In Re:

Resource Protection

on behalf of

Carlyle Van Lines, Inc.

Claimant

DATE: January 28, 1998

Claims Case No. 97123103

CLAIMS APPEALS BOARD DECISION

DIGEST

While a carrier may present factual evidence of actual delivery, a service member is not necessarily precluded from recovery for the loss of an item in transit just because he admits that he initialed his household inventory at destination to acknowledge receipt of the item and even though the item is one that is likely to be separately itemized on the descriptive inventory and not packed in a container or carton. Generally, the service member may challenge the presumption of the correctness of the delivery receipt when it dispatches notice of loss or damage to the carrier within 75 days of delivery. The question of whether the carrier has presented sufficient evidence of delivery (e.g., a document which purports to show the member's acknowledgment of receipt), is a question of fact.

DECISION

Resource Protection, on behalf of Carlyle Van Lines, Inc. (Carlyle), appeals the December 8, 1997, Settlement Certificate of the Defense Office of Hearings and Appeals (DOHA) in Claim No. 97091902. In the Settlement, this Office affirmed the Air Force's set off of $371.07 against Carlyle for the transit loss of a 8' X 12' braided rug in the shipment of a service member's household goods.[(1)]

Background

The record indicates Carlyle picked up the service member's household goods at Kirtland Air Force Base, New Mexico, on November 18, 1994, and delivered them to the service member in Fargo, North Dakota, on December 5, 1994. The service member did not report anything missing or damaged at delivery, but in a Notice of Loss and Damage (DD Form 1840R) dispatched on December 20, 1994, the service member noted that the braided rug was missing from Descriptive Inventory Item 189 which was described as "Rugs (3)." The Air Force's subrogated claim against Carlyle was forwarded on February 2, 1995.

Resource Protection denied the claim because it contends that Carlyle did deliver the rug. As evidence of delivery, Resource Protection notes that the service member initialed for it on the Descriptive Inventory. The Air Force agrees that the service member did initial the Descriptive Inventory, but the member claims that he initialed for all the rugs, even though one was not delivered, because he trusted the driver when the driver told him that all of the rugs were placed in the garage. The member contends that he accepted the driver's word on this because it was too cold to go outside to verify delivery to the garage area.

Resource Protection argues that the member's excuse for not verifying delivery contradicts the plain meaning of his initials. Furthermore, the member was entitled to have the rugs laid and furniture placed by the carrier one time, and it does not appear to be reasonable that the member would have waived this entitlement. Resource Protection then explains how a delivery should occur in the ideal world. Resource Protection also distinguishes this claim from the one in DOHA Claims Case No. 96070223 (April 14, 1997), cited by our adjudicators, where an item was missing from a

sealed carton; the firm says that the rug would have been plainly visible here.

Discussion

The Air Force's admission that the shipper initialed the inventory is some evidence in Carlyle's favor, but Resource Protection has not demonstrated by clear and convincing evidence that it delivered the rug. Resource Protection cited two related Comptroller General decisions in which the Comptroller General indicated that the carrier is not precluded from presenting evidence showing that it delivered an item even though the member is permitted to challenge the presumption of the correctness of the delivery receipt by dispatching notice of loss within 75 days of delivery.[(2)] On the other hand, these decisions also indicate that the service member is not precluded from challenging the presumption of the correctness of the delivery receipt just because the carrier may have evidence that the service member acknowledged receipt of an item. In these decisions, the Comptroller General questioned whether a check mark, allegedly made by the service member to indicate delivery, precluded the member thereafter from claiming that the item, a bicycle, was missing. The bicycle appears to have been a separate line item.[(3)] See National Forwarding Co., B-238982.2, June 3, 1991, which denied reconsideration of National Forwarding Company, Inc., B-238982, Jun. 22, 1990. Citing the original National Forwarding decision, the Comptroller General later found that even though the member may have initialed the inventory acknowledging delivery of certain cartons and acknowledged carrier unpacking, this is no evidence that the goods claimed to be missing from these cartons were delivered because the goods were carried into the house and unpacked by the carrier. The member's prompt reporting of the missing items overcame the presumption of correctness of the delivery receipt. See Andrews Van Lines, Inc., B-257399, Dec. 8, 1994. As in Andrews, the service member in the present claim dispatched prompt notice of loss; here notice was dispatched 15 days after delivery.

We do not suggest that a service member can simply ignore the consequences of acknowledging receipt for an item because the Department of Defense will always come to his rescue if he later decides that he did not receive it. If, for example, Resource Protection had coupled the admission with strong supporting evidence gathered during an investigation made shortly after the member notified it of the loss, the outcome may have been different. The service member was a technical sergeant (E-6) in the United States Air Force, and a noncommissioned officer at that rank generally does not sign a document acknowledging receipt of property unless he knows that he has possession of it. On the other hand, the above cited authorities preclude the broad holding sought by Resource Protection; namely, that a service member is always precluded from claiming the loss of an item whenever the member admits that he initialed his household inventory at destination as having received the item and the item is one that is likely to be separately inventoried and not hidden within a container or carton.

Thus, the question of whether Carlyle provided the Air Force enough evidence to demonstrate that it delivered the rug is a question of fact. The administrative office is in a better position to consider and evaluate such facts. It was the Comptroller General's rule, and the rule of this Office as his successor in deciding this type of matter, that we accept the statement of fact furnished by the administrative office in the absence of clear and convincing contrary evidence. See McNamara-Lunz Vans and Warehouses, Inc., 57 Comp. Gen. 415, 419 (1978). See also, for example, DOHA Claims Cases Nos. 97011407 (June 6, 1997); 96080215 (March 6, 1997); 96081209 (January 31, 1997); and 96070206 (September 5, 1996). The service member's prompt notification suggests that the Air Force had a reasonable basis for its finding.

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 VP-797,474; Air Force Claim Osan AB 95-522; and Carrier Claim CLYL 95-57.

2. See the Military-Industry Memorandum of Understanding on Loss and Damage Rules, effective January 1, 1992.

3. However, the Comptroller General was not convinced that the service member made the check mark.