
In Re:

Resource Protection

on behalf of

Carlyle Van Lines, Inc.

Claimant

DATE: April 30, 1998

Claims Case No. 98030602

CLAIMS APPEALS BOARD DECISION

DIGEST

Generally, we will not review a claim based on a theory of recovery which was not raised by the claimant until appeal.

DECISION

Resource Protection, on behalf of Carlyle Van Lines, Inc. (Carlyle), appeals the February 18, 1998, Settlement Certificate in Defense Office of Hearings and Appeals (DOHA) Claim No. 97111210, in which DOHA disallowed Carlyle's refund claim for $395, part of the amount set off by the Army to recover transit loss and damage in connection with the shipment of a service member's household goods.(1)

Background

The shipment was picked up at Columbus, Georgia, on December 6, 1995, and it was delivered to Fort Lewis, Washington, on July 26, 1996. The amount of $470 was offset on January 30, 1997, for loss and damage to the shipment, and the carrier's refund claim of $395 involves the amount offset for the repair of the entertainment center, Descriptive Inventory Item No. 179-180.

At origin, the inventory noted scratches, rubs, and dents to many parts of this item. The inventory also indicated that the item was knocked down by the shipper. At destination, the shipper noted that it was "all disassembled." The shipper's repair estimate noted that it was "badly broken apart, all boards broken at connectors." The estimate indicated that the "broken boards" had to be replaced and refinished.

Throughout most of the claim processing, Carlyle's position has been that the shipper knocked down the entertainment center prior to shipment; therefore, he was responsible for any damage at the connectors. In response, the Army's position has been that the entertainment center was badly broken apart with the boards broken at the connectors. The Army noted that the carrier had not noted this type of damage at origin; therefore, it was delivered in a more damaged condition than at origin.(2) DOHA's Settlement Certificate noted that if a carrier can reasonably observe existing damage when it receives an item and fails to note that damage at origin, it may be held liable for delivery in a damaged condition for purposes of a prima facie case of carrier liability.

On appeal, Resource Protection acknowledges that if the connectors had been broken at origin, and if such damage had been visible, then that fact should have been noted on the inventory. But Resource Protection now contends that such damage was not visible. Resource Protection argues that connector points are recessed within the piece of wood itself, and the connectors are not visible. For confirmation of its position, Resource Protection then draws our attention to what it considers ordinary uses of connectors, such as our desks at work.

Discussion

As a general rule, the shipper must demonstrate three things to establish a prima facie case of liability against the carrier: tender of the item to the carrier, delivery in a damaged condition or non-delivery, and the amount of damages. Thereafter, the burden shifts to the carrier to show that it was not negligent and that the loss or damage was due to an excepted cause. See Missouri Pacific Railroad Company v. Elmore & Stahl, 377 U.S. 134, 138 (1964). The issue here is whether the entertainment center was delivered with more damages than the pre-existing damages already noted, and our disposition of this matter is heavily dependent on the factual record in this case.

Resource Protection's argument that the claimed damage was hidden, and not visible by ordinary observation, comes too late in the process. If Resource Protection had evidence to support the fact that the claimed damage was hidden, it should have presented it to the Army during the process of claim adjudication so that the issue could have been fully developed by both sides in the dispute. The Comptroller General and our Office have found that it is inappropriate to raise new theories of recovery on appeal. See, for example, DOHA Claims Case No. 98021008 (February 27, 1998) and American Van Services, Inc., B-252972.2, July 14, 1995. Compare also DOHA Claims Case No. 96081208 (December 20, 1996), a reconsideration request, where we explained to Resource Protection and Carlyle Van Lines the general policy of the Comptroller General and this Office against consideration of a claim at appellate level which is predicated on new material facts. This Board cannot properly adjudicate a claim in the absence of full factual development, and Carlyle and Resource Protection had to be aware no later than receipt of the Army's September 16, 1996, letter that the Army considered the damage to the boards to be visible by reasonable inspection.

Separately, as evidenced by the estimate, the record suggests that the damage was not just to the hidden connectors, but to the visible surface areas around the connectors. The estimate states that "boards [were] broken at connectors." Resource Protection had the opportunity to inspect the damaged item, but it did not take that opportunity to gather empirical data showing that the damage to the boards would have been hidden in this case. Additionally, if the item had been knocked down by the service member, the damage around the connectors should have been more visible than if he had not knocked down the item. Thus, there is no factual basis for us to conclude that the claimed damage was hidden as Resource Protection alleges. The record reasonably supports a prima facie case of liability against Carlyle for the damage.

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

Jean E. Smallin

Member, Claims Appeals Board

1. This matter involves Personal Property Government Bill of Lading YP-108,284; Army Claim No. 96-011-1890; and Carlyle Claim No. 96-0208.

2. See, for example, the installation Office of Staff Judge Advocate's letter dated September 13, 1996, and Carlyle's

September 6, 1996, letter to the Office of the Staff Judge Advocate.