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In Re:

Resource Protection

on behalf of

Allied Intermodal Forwarding, Inc.

Claimant

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DATE: March 13, 1998

Claims Case No. 98030603

## CLAIMS APPEALS BOARD DECISION

### DIGEST

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. Where a carrier loses a 1.5 cubic foot carton of professional books in transit, the shipper fails to itemize what books were lost in transit, and the carrier fails to request support for the loss prior to agency adjudication and offset, this Board will deny the carrier's claim unless there is a sufficient basis on the record to support its claim. Settlements are founded on a determination of the legal liability of the United States under the factual situation involved as established by the written record. The burden is on claimants to establish the liability of the United States, and the claimants' right to payment.

### DECISION

Resource Protection, on behalf of Allied Intermodal Forwarding, Inc. (AIMF), appeals the February 18, 1998, Settlement Certificate of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 97111209 which generally affirmed the Army's set off of \$2,199 for recovery of transit loss and damage to the household goods of a service member.<sup>(1)</sup> Resource Protection appeals the Settlement to the extent of the \$125 set off for liability for a lost carton of professional books.

### Background

The record shows that the shipment was picked up at Fort Leavenworth, Kansas, on June 4, 1993, and delivered to Fort Monmouth, New Jersey on August 3, 1993. A Notice of Loss and Damage (DD Form 1840R) was dispatched to AIMF on October 4, 1993, which among other things, noted that Descriptive Inventory Item 81 Red (hereafter Item 81), a 1.5 cubic foot carton of professional books, was missing. The Descriptive Inventory stated that Item 81 was a "Pro book" with a weight of sixty pounds.<sup>(2)</sup> A Demand on Carrier/Contractor (a claim), including a copy of the List of Property and Claims Analysis Chart (DD Form 1844), was dispatched to AIMF on December 16, 1994. The DD Form 1844 indicated that Item 81, a "1.5 carton Professional books" was missing; that the original costs were "unknown various;" that they were purchased between 1985 and 1993; and that the undepreciated replacement cost for the books in the carton was \$500. After applying maximum depreciation (75 percent), the Army found that the depreciated replacement cost was \$125. After receiving no response to the claim, the Army set off for all of the loss and damage involved on August 30, 1995. AIMF did not respond until Resource Protection filed a claim on its behalf through the Army Claims Service in June 1997.

Resource Protection contends that AIMF is not liable for the loss of the professional books because the shipper never offered any evidence of their value. Resource Protection argues that the number and type of books were not indicated: title, author, hardcover or softcover. To support its position, Resource Protection cites Suddath Van Lines, B-247430,

July 1, 1992.

## Discussion

As in most disputes concerning a carrier's liability for loss or damage, we start with the general rule that 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 the extent to which the amount of damages has been established.

Resource Protection is correct to the extent that the shipper should have provided enough detail to facially justify the damages claimed. We do not delineate what level of proof would have been sufficient, but the more detail provided, such as that suggested by Resource Protection, the better the support for the claim. The Army was clearly at fault for not making the claimant substantiate the value of the property before accepting his claim under the Military Personnel and Civilian Employees' Claims Act. See Army Regulation 27-20, *Claims*, para. 11-8b (February 28, 1990).

However, AIMF is also at fault in this matter. It did not inspect any loss or damage during the inspection period, and it did not investigate the loss of the books until long after the 120-day period for the investigation of the claim had expired. See 49 C.F.R. §§ 1005.4 - 1005.5. During the investigation of the claim, AIMF would have had the right to request the type of information that Resource Protection now requests for support of the claim. But, AIMF did not ask for such information when it had the opportunity and duty to do so. Thus, we will not focus on the unanswered questions that AIMF and Resource Protection now have concerning the value of these books; our relevant concern is whether this Board can find enough data to justify the result or to otherwise settle the claim.

The Comptroller General's Suddath Van Lines decision is not dispositive. There is sufficient evidence on the record that the member tendered, and the carrier failed to deliver, one 1.5 cubic foot carton, weighing 60 pounds more or less, of professional books. This carton of books had some value. In Suddath, the Comptroller General was concerned with a claim for a lost and relatively expensive oriental rug where, in the absence of a sales receipt, valuation was distinctive to the item and uncertain in amount. The same is true in other claims where the Comptroller General applied the Suddath line of decisions. See, e.g., OK Transfer & Storage, Inc., B-261577, Mar. 20, 1996 (a mink coat with claimed replacement cost of \$1,500); and All-Ways H & S Forwarders, Inc., B-252197, June 11, 1993 (a lost antique Navajo blanket claimed to be worth \$4,000). Nothing in the record here indicates that these books were anything other than the professional books of average value typically owned by a chaplain.

In Cartwright International Van Lines, B-261980, Jan. 26, 1996, the Comptroller General did not apply the Suddath line of decisions where the lost articles involved an indefinite amount of lost clothing. Clothing generally does not involve a valuation distinctive to the lost item, and in that decision it would have been unreasonable to require sales receipts and dates of purchase for the large number of articles involved. We believe that the situation here is similar to Cartwright. This record contains more than two full pages of cartons of professional books, and the value of each is more similar to the clothing than to the rug or antique blanket. There is no indication that any of the books involved a distinctive valuation issue.

In Catwright, the Comptroller General approved liability after the service member supplied an itemized list of the damaged clothing with estimated replacement costs. The service member was allowed to average the age of the clothing, and the Air Force applied depreciation accordingly. Here, averaging the age was appropriate, but there was no itemized list of what was missing. A list from the shipper was even more critical here because the carton was lost. Thus, in the absence of proper proof from the shipper on his own initiative, or as a result of the carrier's request for supporting documentation, we cannot determine what books were lost or their value.

It appears to us that the Army may have struggled with \$500 replacement cost for this carton of books. Under the Joint Military/Industry Depreciation Guide, the least expensive books are depreciated at a flat rate of 50 percent. The Army depreciated the replacement cost here at 75 percent. Thus, even if the replacement costs of the books in the carton had totaled \$250 instead of \$500, the result of \$125 as the depreciated replacement cost of the carton would have been reasonably justified. A replacement cost of \$250 for a carton of professional books does not appear facially

unreasonable. In any event, settlements are founded on a determination of the legal liability of the United States under the factual situation involved as established by the written record. The burden is on claimants to establish the liability of the United States, and the claimants' right to payment. See 4 C.F.R. § 31.7 and 61 Fed. Reg. 50285 (September 25, 1996). In view of the nature of the missing articles and the amount of liability claimed by the service member, without clear and convincing contrary evidence from Resource Protection justifying a result more favorable for AIMF, we will not disturb the Army's findings.

### **Conclusion**

We affirm the Settlement.

/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 (PPGBL) SP-224,458; Army Claim No. 94-381-0307; and AIMF Claim No. 845697.

2. Resource Protection has tried to argue that there is proof of only one book because "book" is singular, but all cartons of professional books, more than two pages in the Descriptive Inventory, are described in a similar manner. It is unlikely that each carton contained only one book weighing, as AIMF states, 60, 70, 75 pounds, or the other weights indicated. We think it is reasonable to assume that each contained more than one book.