In Re:

American International Moving, Corp.

Claimant

DATE: May 14, 1998

Claims Case No. 98043009

CLAIMS APPEALS BOARD DECISION

DIGEST

A delivering carrier's entry on a rider it created at the nontemporary storage (NTS) facility that a container is "crushed," does not, by itself, insulate the carrier from any liability for the contents of the container. Unless the carrier inspects the contents of such damaged cartons and correctly repacks for onward movement, we have no basis to assume that the carrier did not cause all or part of the damage during its leg of transportation.

DECISION

American International Moving, Corp. (American), appeals the April 17, 1998, Settlement Certificate of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 98020432, which disallowed American's claim for a refund of $704.88, part of the amount set off against American by the Air Force for transit loss and damage to the household goods of a service member.(1)

Background

The record shows that part of the service member's household goods were picked up from his residence in Florida, on November 28, 1994, and were placed into a nontemporary storage (NTS) facility in Fort Walton Beach, Florida. On September 26, 1995, the other part of the service member's household goods were picked up at his residence and placed into a second NTS facility in Fort Walton Beach. American picked up the household goods from the second NTS facility on February 15, 1996, and delivered that portion of the shipment to the service member's new residence in San Antonio, Texas, on February 25, 1996. On or about March 5, 1996, American picked up the other portion of the household goods from the first NTS facility and delivered that portion to the new residence in San Antonio on March 13, 1996.

In relevant part, the record contains a "Notice of Claim" addressed to American dated August 6, 1998, which advises American that the Air Force has a claim for $256.88 against American under the Air Force Claim Number Randolph AFB 96-993. On November 6, 1996, the Air Force sent a follow-up letter concerning this claim. Separately, on July 1, 1996, the Air Force had forwarded to American another claim in the amount of $438 under its Claim Number Randolph AFB 96-992. The $438 claim was amended to $549.24 on August 21, 1996 (although it did not finally affect the outcome). The record also contains a Memorandum For Record by an Air Force official dated December 12, 1996, indicating that the carrier had not responded specifically to Claim 96-993, but that American was contacted regarding its November 11, 1996, correspondence and the confusion which existed was clarified and the carrier intended to address both claim numbers. American's November 11th correspondence was originally typewritten with a reference 96-993, and other carrier correspondence referred to 96-992.

American contends that it did not receive the Air Force's demand letter and an analysis chart for Claim 96-993, and that it was unaware of the damage to the two items on the claim (Descriptive Inventory Nos. 115 and 121) until 1998. American also contends that in Claim 96-992, the Rider it created at the NTS facility reported Item 207, a 3.1 cubic foot carton containing a neon sign which apparently advertised a certain type of beer, to be "crushed." After delivery the service member reported that the neon tubing was broken. Therefore, American argues that it is clear that the NTS

facility damaged the sign, not its agents. American also argues that while the repair cost ($150) for the sign had been established, the Air Force did not also establish the depreciated replacement cost. American contends that the NTS facility or packer used cartons which were too small and not in accordance with the Performance Work Statement For Packing, Containerization and Local Drayage of Personal Property Shipments.[(2)] Generally, American contends that the Air Force committed error concerning those items on which it set off replacement cost because it did not also present to American evidence that each item could not be economically repaired and that they still served the purposes for which they were intended.

Discussion

Initially American may have been confused concerning the existence of two claims, but we cannot conclude from this record that it would not have been aware of the existence of two claims until 1998. On their face, the two claims involved different amounts, claim numbers and times of dispatch. More significantly, the carrier's own correspondence had referred to both claim numbers in 1996. If there was any confusion, American should have clarified it.

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. SeeMissouri 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 asks us to hold that it is not liable with respect to the sign because it had created a rider stating that the carton containing the sign had been crushed. In effect, American urges us to hold that a carrier is blameless for any damages to the contents of containers received from a NTS facility if the carrier merely notes on a rider any imperfections with respect to outside packaging.

The general rule was explained in the Comptroller General's decision Carlyle Van Lines, B-270114, ay 22,1996. In Carlyle, the Comptroller General held that a delivering carrier is responsible for the loss of, or damage to, a service member's household goods that were prepacked by a NTS contractor if the service member otherwise presents a prima facie case of liability against the delivering carrier. The Comptroller General stated that while the carrier is not under a general obligation to open prepacked containers of household goods in apparent good order to examine their contents, the carrier is the last bailee to possess such goods prior to delivery, and, in the absence of evidence that the loss did not occur in its custody, it is presumed that the loss did occur in the carrier's custody. The Comptroller General based his decision on the decision McNamara-Lunz Vans and Warehouses, Inc., 57 Comp. Gen. 415 (1978), and our research indicates that at least two other Comptroller General decisions have followed the same rationale: Eastern Forwarding Company, B-248185, Sept. 2, 1992 and Air Land Forwarders, B-247425, June 26, 1992. We adopted the Comptroller General's practices in this regard. See DOHA Claims Case No. 96070205 (September 5, 1996).

The courts also appear to follow the Comptroller General's analysis. In support of the decision in cNamara-Lunz, the Comptroller General cited and explained two judicial decisions involving successive transportation custodians of prepacked goods: General Electric Co. v. Pennsylvania R.R., 160 F. Supp. 186, 188 (W.D. Pa. 1958) and Julius Klugman's Sons, Inc. v. Ocean Steam Nav. Co., 42 F.2d 461 (S.D. N.Y. 1930).

American's position is less favorable than that of the carrier in Carlyle. Clearly, this carton was not in apparent good order when American found it at the NTS facility. American's Tender of Service states that it had the duty to inspect all prepacked goods and to ascertain the contents and the conditions of the contents. The carrier must repack if necessary

for proper onward movement.[3] If American had opened, inspected, and properly repacked, American would have had proof of the damages caused by the NTS facility. Unless the contents of such damaged cartons are inspected and correctly packed for onward movement, we have no basis to assume that the carrier did not cause all or part of the damage during its leg of transportation.

Previously, we have rejected arguments from American's sister company that it is automatically not liable for damages to household goods where the packer did not use the container specified in its contract with the Department of Defense. See DOHA Claims Case No. 96121605 (May 22, 1997).

There is no indication that American had challenged the replacement costs for the neon sign during the period it had to investigate the claim. American did not produce its own evidence of the replacement cost for the sign, nor did it inspect the damages when it had the opportunity to do so. Similarly, for those items on which the Air Force adjudicated replacement costs, the record is devoid of any evidence from American which would have questioned the use of replacement costs. As we have advised American previously, absent clear and convincing contrary evidence of value, we accept the agency's determination of the amount of damages. See DOHA Claims Case No. 97021808 (June 25, 1997).

Conclusion

We affirm the Settlement Certificate.

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 (PPGBL) XP-076,003 and AF Claim Nos. Randolph AFB 96-992 and 96-993.

2. In prior correspondence, American cited paragraph 5.4.2.4 of Appendix P of Department of Defense *Personal Property Traffic Management Regulation* (October 1991).

3. See Department of Defense *Personal Property Traffic Management Regulation*, Appendix A, paragraph 43a (October 1991).