In Re:

Andrews Van Lines, Inc.

Claimant

)

DATE: June 9, 1998

Claims Case No. 98051812

CLAIMS APPEALS BOARD DECISION

DIGEST

Receipt in good condition as an element of a prima facie case of carrier liability is established if the carrier can reasonably observe any existing damage when it receives the article but fails to document the damage. Thereafter, the burden is on the carrier to prove by clear and convincing evidence that it was not in good condition when received.

DECISION

Andrews Van Lines, Inc. (Andrews) appeals the April 15, 1998, Settlement Certificate of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 98020434 in which our Office allowed in part, and denied in part, Andrews' claim for a refund of amounts set off by the Army for transit loss and damage to a service member's household goods.(1)

Background

The record indicates that the carrier picked up the service member's household goods at Fort Leavenworth, Kansas, on July 27, 1995, and delivered them to the service member in Pennsylvania on August 3, 1995. The amount of $1,653 was offset for loss and damage on May 26, 1996, and Andrews reclaimed $552.90. Our adjudicators allowed $261 for Descriptive Inventory Items 145 (washing machine) and 291 (table), but disallowed Andrews' refund claim with respect to damages to Item 120 (a 5.6 cubic foot carrier packed carton containing a cement goose); Item 313 (a dining table); Items 179, 180, 183 and 184 (dining chairs); Item 181 (a trunk); Item 288 an ironing board; and Item 245 (a wood "Deacons" bench). In this appeal, Andrews seeks a total of $264.40 for these disallowed items.

The cement goose, an item apparently used as a garden ornament, was delivered chipped and gouged. Andrews contends that it had some pre-existing damage (PED). Andrews also argues that the proper rate of depreciation should be 20 percent because it was a lawn item. Andrews believes that it should be refunded $14.40 of the $26 offset as depreciated replacement cost. The Army applied a 10 percent rate of depreciation and noted that the Descriptive Inventory did not mention any PED. Andrews responds by stating that its inspector(2) noticed PED (along with transit damage) after delivery and that its driver merely failed to notice the PED at pick up.

The dining table was delivered with the leaves scratched in many places on the top. The reported PED was that the table top was scratched, and the left and right sides were scratched and dented. Andrews denies all liability for repairs ($143) because the claimed transit damage was PED. Andrews' inspector stated that the service member had advised him that the table was just finished, but he observed a worn and damaged top which did not appear to be transit damaged. oreover, Andrews argues that it was not provided adequate and timely notice of the damage, and there was no proof that the leaves were tendered. The Army reduced the recovery by 35 percent to reflect PED, but points out that the damage to the leaves was noted on the Notice of Loss and Damage dispatched to the carrier on September 11, 1995.

When they were delivered, the finish on the dining chairs was damaged. The Notice of Loss or Damage (DD Form

1840R) indicated that the finish was rough and sticky. The Army's inspector noticed furniture pad marks on the finish. Andrews' inspector noted that the condition resulted because the service member "oiled" the chairs just prior to packing. Andrews argues that this was an abnormal condition and that it padded the chairs as required. The Descriptive Inventory notes various pre-existing scratches, rubs, gouges and soil marks on the chairs at origin, but it did not mention anything concerning their "oiled" condition.

Andrews refutes liability for repair of a hole in the bottom right side of an antique trunk ($25); a gouge on the front top of the ironing board ($20); and scratches to the top surface of a wood bench ($35). The trunk had pre-existing damage: top scratched, front/rear scratched and all legs dented and scratched. No PED was noted on either the ironing board or the bench. Andrews explains that its professional inspector examined these items and found that the damage was not transit related; therefore, it contends that the damages were PED which the driver easily missed. The carrier's inspector stated that he was "unable to determine" if the eight-inch gouge on the ironing board was transit damage; that the crack on the Deacon's bench "does not appear to be fresh;" and that the damage to the trunk did not appear to be fresh.

Discussion

Generally, under federal law, in an action to recover from a carrier for loss of or damage to an item in 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. See Missouri Pacific Railroad Company v. Elmore & Stahl, 377 U.S. 134, 138 (1964). Additionally, if the carrier can reasonably observe any existing damage when it receives the article but fails to document damage, receipt in good condition may be established, and there is then a prima facie case against the carrier for damage discovered after delivery. See Interstate Van Lines, Inc., B-197911.5, June 22, 1989; Paul Arpin Van Lines, Inc., B-193182, June 16, 1981; and Chandler Trailer Convoy, Inc., B-193432, Sept. 13, 1979.

The failure of Andrews to except to the service member's delivery to it of the ironing board and bench for damages which were reasonably observable, is sufficient to establish delivery in good condition for both items. The delivery of both items in a damaged condition and amount of damages are not in dispute. Thus, there was a prima facie case of carrier liability. We then considered Andrews inspector's comments, and we weighed those comments against Andrews' failure to note PED on the Descriptive Inventory. The inspector's comment that he was not able to determine whether an obvious eight inch gouge on the ironing board was transit damage, is not clear and convincing evidence of PED. While the inspector's observations with regard to the bench, and more particularly the trunk, were stronger, they likewise fail to rise to the clear and convincing evidence standard. The trunk's PED did not include a hole on the bottom right side. A hole should have been observable and was clearly different than dents and scratches.

In some respects, the four dining chairs were like the trunk. There was PED, but none was the same type as the damages claimed. Unlike the trunk, Andrews admits that the final events which caused the damage to the chairs resulted from the transit, but Andrews contends that the stage was set for such damage by the fault of the service member. The chairs were not tendered to Andrews with the marks on the finish. Thus, there is a prima facie case of carrier liability. By clear and convincing evidence, Andrews then has the burden of proving that the shipper's negligence, rather than its own, caused the damage. In our view, general assertions that the shipper "oiled" the chairs is insufficient to meet such a burden. Andrews remains liable for the damage to the chairs.

The Descriptive Inventory failed to mention any PED for the cement goose, and Andrews inspector did not explain the basis for his belief that part of the damage was not transit related. Accordingly, there is a prima facie case of carrier liability without clear and convincing evidence of any PED. The Joint ilitary/Industry Depreciation Guide does not include a specific listing for cement garden fixtures like this. A review of the annual depreciation rates in the Guide for lawn and patio furniture and garden equipment show that the plurality of rates are at ten percent per year. The more durable items like redwood, steel, and Wrought Iron furniture are at ten percent. Aluminum furniture, a less durable item, is at 15 percent, and fabric patio furniture is at 20 percent. The durability of the cement goose appears to be more like the first three items than the last two. The carrier presented no evidence that the goose should be depreciated at a faster rate. Accordingly, we do not believe that the Army acted unreasonably in finding that a ten percent per year rate of depreciation applied.

Finally, we agree with Andrews that it should not be held liable for scratches to the table leaves. We disagree with Andrews' argument that there was no showing of tender and adequate notice.[(3)] However, the claimed damage was that the leaves were scratched in many places on the top surface, and the reported PED included a scratched table top, which, as we find, included the leaves. In such circumstances, we look to the rest of the record, including the carrier's and the government's inspection reports, to determine whether additional damage resulted from transit. The Army's inspector merely mentioned that the top surface was scratched in many places. The carrier's inspector relayed the statement of the service member that the surface was just refinished; observed that the top seems to be worn and damaged; and commented that the damage did not appear to be fresh. If additional scratches resulted from transit, the Army's inspector should have provided specific detail. While Andrews' inspector could have been more specific, in circumstances like this where the PED and claimed damage are similar, and there is nothing else in the record which specifically indicates that some of the damage resulted from transit, we are inclined to accept the carrier inspector's observation that the damage was not fresh. The inspector's letterhead indicates that it is in the business of furniture restoration. Andrews should be refunded $143.

Conclusion

We modify the Settlement to allow a $143 refund for the dining table; otherwise 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 (PPGBL) VP-764,426; Army Claim No. 95-354-0448 and Andrews Claim No. 95-195.

2. Andrews' inspector/repairer and the Army both inspected this shipment in September 1995, shortly after delivery.

3. The tender of the table tends to prove the tender of matching leaves. Compare DOHA Claims Case 98031913 (May 28, 1998). This is also supported by a record which indicates that the damage to the leaves was similar to the damage to the rest of the table. Even though the Notice of Loss and Damage (DD Form 1840R) did not mention the leaves with the table, it did timely and adequately notify Andrews of damage to the table, and as a result, Andrews' inspector found the leaves along with the rest of the table when he went to inspect the damages shortly after delivery. The final paragraph of the Military-Industry emorandum of Understanding on Loss and Damage Rules indicates that even if an object is not listed on the inventory, but it is delivered in a damaged condition and the carrier is notified, the fact of delivery establishes that the claimant owned and tendered the item.