
In Re:

National Claims Services, Inc.

on behalf of

Covan World-Wide Moving, Inc.

Claimant

)

DATE: June 24, 1998

Claims Case No. 98060121

CLAIMS APPEALS BOARD DECISION

DIGEST

The shipper establishes a prima facie case of liability against a carrier, and notice of loss or damage is adequate, when the service member timely dispatches a Notice of Loss or Damage (DD Form 1840R) which identifies the specific Descriptive Inventory items missing and/or damaged even though: (1) the service member incorrectly characterizes at least one of the items as a "loss" when, in fact, it is damaged; and (2) when the carrier fails to demonstrate by clear and convincing evidence that the service member had the duty to specify whether each item was not delivered or delivered in a damaged condition and that the error in not correctly specifying one of these two conditions materially harms the carrier in defending the claim.

DECISION

National Claims Services, Inc., on behalf of Covan World-Wide Moving, Inc. (Covan), appeals the May 18, 1998, Settlement Certificate of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 98032507 which affirmed (except for $34 the Army had offered to refund) the Army's offset of $857.35 for transit loss and damage to the household goods of a service member.[(1)]

Background

The record shows that the shipment was picked up at Fort Drum, New York, on July 29, 1993, and placed into non-temporary storage in Rome, New York. On June 27, 1994, Covan picked up the shipment at Rome, New York, and delivered it to the service member in Texas on July 12, 1994. Two items on the Descriptive Inventory remain in dispute in this appeal: Item 13, a grandfather clock, with a missing pendulum ($145), and Item 60, a microwave oven with a broken glass door ($210). For both items, the service member timely dispatched a Notice of Loss or Damage (DD Form 1840R) to Covan on August 30, 1994, indicating that both items were a "loss." In fact, the clock was delivered with a missing pendulum, and the microwave oven was delivered with a broken door. National Claims Services contends that the notice of damage was inadequate because they were both reported as "missing;" therefore, there was no prima facie case of carrier liability against Covan. In the Settlement Certificate our Office found that there was no evidence on the record that Covan had ever initiated a trace for these items, but on appeal, National Claims Service alleges that it had initiated a trace and that this point is moot because the Army never requested or argued the trace results.

Discussion

The shipper establishes a prima facie case against a carrier for transit loss or damage by showing that he tendered property to the carrier, that the property was not delivered or was delivered in a more damaged condition, and the amount of damages. See Missouri Pacific Railroad Co. v. Elmore & Stahl, 377 U.S. 134, 138(1964); see also DOHA

Claims Case 96070203 (September 5, 1996). The burden of proof then shifts to the carrier to rebut the prima facie liability. However, the Military-Industry Memorandum of Understanding on Loss and Damage Rules (MIMOU) provides, in relevant part, that in order to overcome the presumption of the correctness of the delivery receipt, the service member must dispatch a DD Form 1840R to the carrier within 75 days of delivery. The emorandum is silent concerning the contents of the DD Form 1840R except that "later discovered loss or transit damage . . .shall be listed on the DD Form 1840R."

National Claims Services offered no legal authority, and our research has not developed any authority, holding that a shipper fails to establish a prima facie case of liability against a carrier by mistakenly notifying the carrier that a specific item was lost when he should have advised the carrier that the item was damaged. Without specific precedent, we have to look at several factors to determine whether Covan had adequate notice of loss or damage: the general policy involved in providing notice; the instructions that apply to the DD Form 1840R; the burden of proof; and, if the service member or service is at fault, the degree of harm caused by the error.

The decisions of this Board and the Comptroller General have held that a notice of loss or damage is adequate in content when it alerts the carrier that there may be a claim on the item and that it should investigate the facts surrounding the loss or damage. See DOHA Claims Case No. 97112401 (December 11, 1997); DOHA Claims Case No. 97022406 (June 18, 1997); DOHA Claims Case No. 96121606 (June 6, 1997); 96070212 (November 27, 1996); and American Van Services, Inc., B-249834, Feb. 11, 1993 and the decisions cited therein. The courts have held that the notice is sufficient if it notifies the carrier of an intention to claim damages by reason of loss, damage or delay in respect to a particular shipment so that the carrier may promptly investigate. See Continental Van Lines, Inc., B-215507, Oct. 11, 1984. Here, the shipper advised the carrier that there was a potential claim on the two specific items described as a "loss."

The instructions in the DD Form 1840R advise the carrier that it is "notified that the property owner intends to present a claim for this loss and/or damage," and the carrier is "extended an opportunity to inspect the property." At the top of the list of the property, the instructions state that "tracer action is requested for items listed as missing," and the direction to the shipper next to the column headed with "General Description of Loss and Damage" is "If missing, so indicate." On the completed DD Form 1840R involved here, the service member used three terms to describe the conditions of his missing or damaged property: each was either "Missing," "Damaged," or "Loss," and apparently this member used the term "loss" to indicate something other than the non-delivery of the entire item. The Army could have provided better advice to the member on filling out the DD Form 1840R, but Covan officials were alerted to the fact that the member was using three terms to describe a situation which Covan believed had only two outcomes, non-delivery or delivery with damages. In our view, Covan shares some of the blame for not clarifying the discrepancy. It is not clear from the wording of the instructions on the DD Form 1840R that the member had to specifically alert the carrier on one of two outcomes (non-delivery or delivery with damages) because the wording merely suggests that the member intends to file a claim for "loss and/or damage."

There is no indication that the service member's error was material to Covan's defense. Part of the clock, in fact, involved the "loss" of the pendulum, and the shipper alerted the carrier that he intended to claim damages with respect to two specific items. If Covan had traced these items as National Claims Services alleges, the trace could have resulted in the discovery of the missing pendulum. Moreover, assuming that Covan did trace the shipment as National Claims Services states, the trace of two items which were in fact delivered to the shipper may have resulted in the wasted time, phone calls and correspondence to trace these items. But, it would not have inhibited Covan's defense on the claim for damage to the items. If Covan had exercised its right to inspect the damaged items, it should have discovered the grandfather clock (without the pendulum) and the microwave oven, along with the other damaged items. If it chose not to exercise its inspection rights (which it appears that Covan did here), any discrepancy would have been clarified when the Army filed the claim. At that point, Covan still had a right and duty to investigate the Army's subrogated claim and allow it or disallow it within 120 days provided in the MIMOU and by regulation. In this situation, the service member's error appears harmless.

In totality, National Claims Services did not provide clear and convincing evidence to support a finding by us that the Army and/or service member failed to present a prima facie case of liability against Covan on the basis that Covan was not adequately alerted to a claim on each of the two items. Further, National Claims Services did not provide adequate legal authority to support the conclusion it seeks from us.

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) SP-635,785; Army Claim No. 95-131-3228; and NCSI Claim No. E-0203.