
In Re:

Resource Protection

on behalf of

Cartwright Van Lines, Inc.

Claimant

)

DATE: June 16, 1998

Claims Case No. 98061502

CLAIMS APPEALS BOARD DECISION

DIGEST

The shipper must show 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. The shipper and the service have established a prima facie case of liability against the carrier for all of the 156 compact disks (CDs) that the carrier failed to deliver when the carrier: inventories 156 CDs in individual cases as one item, delivers 134 of the cases without the CDs included, completely fails to deliver the remaining 22, and then fails to conduct an inspection of the 134 cases upon receipt of the notice of the loss. The Navy's failure to provide an itemization of the 156 CDs at the carrier's request during the investigation of the claim is harmless error with respect to all 156 CDs where the carrier could have obtained the title and artist(s) for 134 of the CDs and average depreciated replacement cost is involved.

DECISION

Resource Protection, on behalf of Cartwright Van Lines, Inc. (Cartwright), appeals the May 28, 1998, Settlement Certificate of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 98033021 which affirmed (except for \$67.50 the Navy had offered to refund) the Navy's offset of \$2,172.20 for transit loss and damage to the household goods of a service member.⁽¹⁾

Background

The record shows that the shipment was picked up in San Leandro, California, on December 16, 1994, and was delivered to the service member's residence in Alexandria, Virginia, on January 12, 1995. At the time of pick up, Cartwright prepared a descriptive inventory showing that Item 98 was a 1.5 cubic foot carton of "CD Tapes" packed by Cartwright. On February 16, 1995, the service member dispatched a Notice of Loss or Damage (DD Form 1840R) which indicated, among other things, that 22 Compact Disks (CD) were completely missing from the carton, and that 134 CDs were removed from their cases (which were still in the carton). The liability of Cartwright for the missing CDs is the only issue in dispute in this appeal. In July 1995, the Navy dispatched a demand on Cartwright for loss and damage to the shipment, including \$2,104.20 for the loss of 156 CDs purchased between 1987 and 1994. The service member claimed an average pre-depreciated replacement cost of \$14.99 for each CD. The Navy then depreciated the total replacement cost of every CD in the carton by a flat 10 percent to arrive at the \$2,104.20 claimed. On August 8, 1995, Cartwright denied all liability for the CDs requesting a list of the CDs to substantiate the claim. The Navy's administrative report indicates that the CDs involved a Jazz collection.

Resource Protection denies all liability. Using much of the same substantiation as in DOHA Claims Case No. 96081208 (December 20, 1996) involving Carlyle Van Lines, Resource Protection contends that the Navy failed to use the proper

depreciation for the CDs. It contends that CDs should be depreciated at a flat 50 percent the first year, and 10 percent per year thereafter until depreciated to 20 percent. Resource Protection also argues that the service member failed to list what CDs were tendered; therefore, the service member was unable to establish replacement cost because each one may be worth a different value depending on its condition, popularity and other factors. Finally, Resource Protection alleges that 156 CDs cannot physically fit into a 1.5 cubic foot carton; therefore, there was no proof that 156 were tendered.

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.

There is sufficient evidence of tender of the 156 CDs. Cartwright labeled Item 98 as "CD Tapes." Thus, we must conclude that the carton contained CDs. Resource Protection's argument that 156 CDs would not fit into a 1.5 cubic foot carton is not based on fact. Resource Protection admits that CD cases are a standard size, and the Navy's administrative report states that it attempted to fit CDs into a 1.5 cubic foot carton and that 156 CDs would easily fit.⁽²⁾

The record indicates that Cartwright had asked for a list of the missing CDs during its investigation of the claim. During the 120-day period in which a Department of Defense domestic personal property carrier has to settle a claim, the carrier may require proof of loss or damage claimed.⁽³⁾ Under 4 C.F.R. § 1005.4(b), the carrier may require the claimant to establish the destination value of the items transported. Here, the Navy should have provided the information requested by Cartwright to the extent that such information was reasonably available.⁽⁴⁾ There is no indication that it did so. However, for the reasons explained in DOHA Claims Case No. 98012618 (February 12, 1998), we do not believe that the government's failure to provide such information results in a failure to establish a prima facie case of liability against the carrier. Moreover, in contrast to Claims Case No. 98012618, the government's failure to provide the supporting documentation here was harmless error with respect to most of the claim, in particular, the 134 CDs missing from their cases.

In Claims Case No. 98012618, we were concerned about the Air Force's failure to provide damage amounts for each of the items on the Descriptive Inventory on which the shipper claimed loss or damage. That information was readily available to the Air Force, the carrier had requested it during the investigation of the Air Force's claim, and the carrier had specifically itemized each item for which an amount was requested. In the present claim, when Cartwright prepared the inventory, it chose to treat Item 98 as one item, not 156 items.⁽⁵⁾ The shipper here provided a total amount of loss for the one item. Accordingly, in the present circumstances, the Navy's use of the average price for CDs sold at the Fort Meyer Army Air Force Main Exchange (\$14.99 each) was not an unreasonable method of determining pre-depreciation replacement cost. Compare DOHA Claims Case No. 98030603 (March 13, 1998) where, in appropriate circumstances, we upheld the Service's application of average value for lost items (a carton of professional books). While Cartwright had the right to obtain more specific information during its investigation of the claim, and had the right to offer differing evidence of replacement costs, it had already waived the opportunity to obtain the exact name and artist(s) of each of the 134 CDs for which an empty case was delivered because it failed to exercise its inspection rights.⁽⁶⁾ The carrier remains liable for the amount offset for these CDs.

The remaining 22 CDs are somewhat different, but because of the specific facts in this case, the result is the same. As we indicated above, there is sufficient evidence of tender of 156 CDs, even though we would not have expected either Cartwright or the service member to itemize the title and artist(s) on each CD. The member was in a better position to describe what he lost, and it was an error for the Navy not to obtain at least a general description of the lost items and to provide this information to the carrier for its investigation. While this type of error may materially prejudice the carrier in many claims, it was immaterial here. Any harm suffered by Cartwright as a result of not obtaining the requested information on the 22 CDs was relevant to the issue of the amount of damages. As explained above, the parties chose to treat the 156 CDs as one item, and the average replacement cost per CD became relevant, not the individual replacement cost of each of the 22 missing CDs. Cartwright may have been able to defend itself on the issue of the amount of

damages by inspecting the 134 delivered cases and obtaining replacement costs based on the information it gathered in that inspection.

We uphold the Navy's application of a 10 percent flat depreciation rate. As Resource Protection states the services apply a 10 percent flat rate of depreciation for CDs in reimbursing a service member for the loss or damage, and in seeking reimbursement from the carrier. Resource Protection contends that because CDs are not listed in the Joint Military-Industry Depreciation Guide, they either must be categorized as one of the items listed under the Guide or the carrier must be held liable only for the actual cash value of the particular CDs. The firm's appraiser also suggested that generally all CDs have a residual value of approximately \$3 or 20 percent of original purchase price.⁽⁷⁾ Resource Protection has offered no support for either of these two contentions. The 10 percent flat rate is not necessarily the correct rate, but in DOHA Claims Case No. 96081208 we found some reasonable support for it. Resource Protection failed to meet its burden of proving that the Navy's application of that rate against Cartwright in this claim was unreasonable. As we indicated in DOHA Claims Case No. 96081208, we may review this issue in a future claim if we are presented a record in which the claimant has introduced detailed, objective and widely-recognized authorities that the service has the opportunity to consider in its adjudication process. Resource Protection offers nothing more here than the same letter by the same appraiser that it presented on behalf of Carlyle Van Lines in 1996. Again we urge the military services and the industry to reach agreement on the proper depreciation for CDs and to amend the Depreciation Guide to reflect that agreement.

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-133,747; Navy Claim No. 1127-95; and CVLC Claim No. 364894.

2. We agree with the Navy. A standard CD case measures approximately 5 1/2 inches wide, 5 inches high, and about 3/8 inches thick. A 1.5 cubic foot carton measures 13 inches wide, 14 inches high, and 19 inches deep. By our estimation, one can stand up 84 CD cases on the bottom of such a box (a double row of at least 42 extending in the 19" depth), stack another double row of 84 on top of them, and still have space remaining for tapes and packing material.

3. See Item 5i of the various editions of the Domestic Personal Property Rate Solicitation issued by the Military Traffic Management Command (MTMC).

4. We recognize that it would be difficult for most shippers to itemize the titles and artists in 156 CDs, and it is not reasonable to expect an exact itemization. The service member can meet the burden of proof by providing as much detail as is available. We decline to delineate the level of proof that would be sufficient, but the more detail provided,

the better the support for the claim. We evaluate the record in each case as to the evidence provided.

5. We would not expect Cartwright to list the exact title and artist(s) of each CD in the Descriptive Inventory, but it was not unreasonable to expect it to obtain a count on the number of CDs and tapes tendered to it.

6. Under Paragraph II(A) of the Military-Industry Memorandum of Understanding on Loss and Damage Rules, the carrier has 45 calendar days from dispatch of the DD Form 1840R to inspect the shipment for loss and/or transit damage. If Cartwright had conducted the inspection, it could have made a complete list of the titles and artists of the 134 CDs with delivered cases.

7. This amount, coincidentally, is also 20 percent of the average replacement cost claimed by the shipper, but common experience suggests that some CDs never sell for as much as \$3 even when new, while others generally sell for amounts substantially greater than \$15 when new.