
In Re:

Lynn Moving & Storage, Inc.

Claimant

)

DATE: June 23, 1999

Claims Case No. 99060720

CLAIMS APPEALS BOARD DECISION

DIGESTS

1. Where no pre-existing damage (PED) is reported, or the PED is clearly different from the damage claimed, we will scrutinize an attempt by a carrier to avoid liability merely by pointing out discrepancies between the description of the damage as reported on the DD Form 1840R and the description of the damage on the applicable estimate. Generally, the member is not estopped from claiming more damage to a specific item than that noted on the DD Form 1840R. The purpose of the DD Form 1840R is to provide notice to the carrier that damage occurred so that the carrier can investigate.

2. Generally, the dispatch date entered on the Notice of Loss or Damage (DD Form 1840R) is controlling for purposes of the 75-day dispatch period required by the Military-Industry Memorandum of Understanding on Loss and Damage Rules. The failure to simultaneously dispatch a copy of the DD Form 1840R to a higher military headquarters does not necessarily demonstrate that the claims office also failed to dispatch the original to the carrier where the certification on the DD Form 1840R clearly indicates dispatch to the carrier within the 75-day period.

DECISION

Lynn Moving & Storage, Inc. (Lynn), has filed this claim with the Defense Office of Hearings and Appeals (DOHA) to recover \$1,052.67 of the \$1,844.65 set off by the Navy for transit loss and damage to the household shipment of a service member.⁽¹⁾

Background

The record indicates that the shipment was picked up in Mayport, Florida, on June 6, 1996, and was delivered to Patuxent River Naval Air Station, Maryland, on June 26, 1996. On the day of delivery, the carrier's representative and the service member reported numerous exceptions in the Joint Statement of Loss and Damage at Delivery (DD Form 1840). A Notice of Loss or Damage (DD Form 1840R), noting additional loss and damage, was dispatched to Lynn and its local agent on July 24, 1996, from the Claims Investigation Officer (CIO) at the Naval Air Warfare Center at Patuxent River. The record also includes a second DD Form 1840R showing a dispatch date of August 30, 1996.

In March 1997, the Navy Claims Investigating Office (NCIO) in Washington, D.C., adjudicated the member's claim, but it denied payment for several items because they were not listed on the DD Form 1840/1840R received from Patuxent River. When the member reviewed the partial denial of his claim against the Navy, he discovered that that the items listed on the second DD Form 1840R were disallowed. The NCIO did not receive a copy of the DD Form 1840R dispatched on August 30, 1996. Meanwhile, the NCIO dispatched a Demand on Carrier (DD Form 1843) and supporting documentation to Lynn in March 1997, for \$1,449.80, and Lynn offered to settle the claim for \$791.98, denying full liability because the member's repair estimates reflected damage not listed on the operative DD Forms 1840/1840R.⁽²⁾ There is no indication that Lynn obtained its own estimates or conducted an inspection. The NCIO accepted the offer on May 1, 1997, but Lynn did not tender payment until September 1998. On October 7, 1997, the CIO at Patuxent River

acknowledged that he failed to forward a copy of the second DD Form 1840R to the NCIO, and forwarded a copy of the second DD Form 1840R at that time. On October 8, 1997, the NCIO revoked his earlier acceptance of Lynn's settlement offer and amended the Demand on Carrier to include the damages noted in the August 30, 1996, DD Form 1840R. The amended claim was \$1,844.65.

Lynn seeks a refund of \$1,052.67. It contends that it never received the August 30, 1996, DD Form 1840R, and that it is not liable for any of the loss and damage associated with the items listed on the August 30, 1996, DD Form 1840R because the notice was not timely.⁽³⁾ Moreover, the record indicates that it proposed a payment of \$791.98, instead of \$1,449.80, because of inconsistencies in the description of the damages between the DD Form 1840, the first DD Form 1840R, and the repair estimates.

The Navy argues that Lynn's proposal for settlement considered the damages to seven items, but only one of them had pre-existing damage (PED), i.e., Descriptive Inventory Item 129, a Seaman's Trunk, and the PED on that item was unrelated to the damage listed on the repair estimate. The Navy also cites the Comptroller General's decision in *Andrews Forwarders, Inc.*, B-257515, Dec. 1, 1994, as a basis for its argument that a service member is not required to precisely describe the nature of the damage to a particular item listed on the DD Form 1840R.

With regard to the August 30, 1996, DD Form 1840R, the Navy cites three decisions for the proposition that the DD Form 1840R is considered dispatched for purposes of the MOU on the date indicated on the form by the installation's claims officer. See DOHA Claims Case No. 96070208 (January 27, 1997); *Senate Forwarding, Inc.*, B-249840, Mar. 1, 1993, 93-1 C.P.D. ¶ 302; *National Forwarding Co., Inc.*, B-238982.4, June 25, 1992, *aff'd.*, B-238982.6, Feb. 11, 1993.

Discussion

The Navy reasonably adjudicated the operative facts and correctly applied the applicable principles of law. Preliminarily, 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. See *Missouri Pacific Railroad Company v. Elmore & Stahl*, 377 U.S. 134, 138 (1964).

The Navy correctly rejected Lynn's offer of settlement of \$791.98 for the items reported as damaged prior to those reported in the August 30, 1996, DD Form 1840R. As the Navy points out, except for Item 129, the Descriptive Inventory did not mention PED for any of the items on which Lynn proposed less than full liability for settlement. On Item 129, the PED involved soil marks and scratches, but the damages claimed involved a broken left front leg. The Comptroller General and this Office have scrutinized attempts by carriers to avoid an otherwise *prima facie* case of liability merely by pointing out discrepancies between the description of the damage as reported on the DD Form 1840R and the description of the damage on the applicable estimate. It is significant that for each item either no PED was reported or the PED reported was clearly different from the damage claimed. The carrier did not offer its own repair estimates, and there is no indication that it inspected the damaged items. For the most part, it appears that the estimates more fully describe the damage to the item, sometimes further explaining the damage and sometimes pointing out other damage to the same item. The member is not estopped from claiming more damage to a specific item than that noted on the DD Form 1840R. The purpose of the DD Form 1840R is to provide notice to the carrier that damage occurred so that the carrier can investigate. See DOHA Claims Case No. 96070212 (November 26, 1996); and *Andrews Forwarders, Inc.*, B-257515, Dec. 1, 1994. The member offered evidence of additional damage between tender and delivery; therefore he has met his burden for presenting a *prima facie* case of liability against Lynn under the *Missouri Pacific Railroad* case.

There is a reasonable basis for the Navy's finding that the August 30, 1996, DD Form 1840R was dispatched on that date. Generally, the dispatch date entered on the Notice of Loss or Damage (DD Form 1840R) is controlling for purposes of the 75-day dispatch period required by the Military-Industry Memorandum of Understanding on Loss and Damage Rules. See *Air Land Forwarders, Inc.*, B-247731, Sept. 21, 1992, citing *National Forwarding Co., Inc.*, *supra*. The Patuxent CIO did not dispatch a copy of the DD Form 1840R to the NCIO, but as the Navy points out, we cannot automatically conclude, therefore, that the CIO also failed to dispatch the original to the carrier at the address and on the

date of dispatch specified in the certification on the DD Form 1840R. As we indicated in DOHA Claims Case No. 96070208, *supra*, if the CIO or his/her clerk certifies that he/she is dispatching the notice to the carrier, this is evidence that it was dispatched. Otherwise, we have to assume that the CIO or his agent is either deliberately misstating the date of dispatch or not doing what he/she is presently certifying that he/she is doing. Lynn remains liable for the items noted as missing or damaged on the second DD Form 1840R.

Conclusion

We affirm the Navy's set off.

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) YP-368,791; Navy Claim No. 7-L6-1789 (Naval Legal Services Office North Central Detachment). DOHA has not issued a Settlement Certificate in this matter, and the Claims Appeals Board is directly settling this matter.
2. The items on which Lynn refused to settle for the full liability as demanded by the Navy were 112, 119, 124, 129, 165, 166, 167, 168 and 177. *See* Lynn's correspondence to NCIO on April 18, 1997, and the NCIO's correspondence of October 8, 1997. In the DD Form 1840, for example, the member and Lynn's agent reported that Item 112, a desk, was scratched, rubbed on the top back edge and rubbed and chipped on the right top side, but the estimate described a top back edge gouged along 60 percent of the surface and a splintered right side bottom. For the various items, Lynn tried to differentiate between damage that was close to that described on the DD Form 1840 or 1840R and that which appeared to be different. Lynn attempted to estimate values for each type of damage, and offered to pay on what it considered to be damage that was close to what was reported.
3. Paragraph I(B) of the Military-Industry Memorandum of Understanding on Loss and Damage Rules (MOU) provides that loss of or damage to household goods discovered and reported by the member to the claims office more than 75 calendar days after delivery will be presumed not to have occurred while the goods were in the possession of the carrier unless good cause for the delay is shown, such as officially recognized absence or hospitalization during at least a part of the period.