
In Re:

Stevens Worldwide Van Lines, Inc.

Claimant

)

DATE: September 24, 1999

Claims Case No. 99082410

CLAIMS APPEALS BOARD DECISION

DIGEST

The record supports a *prima facie* case of liability against a carrier for its failure to deliver a refrigerator when the refrigerator is listed on the descriptive inventory and the member dispatches notice to the carrier within 28 days of delivery that the item was missing. The carrier does not overcome the *prima facie* case merely by arguing on appeal that the refrigerator was such a large and essential appliance that the member would have had to advise the carrier of its missing status at delivery.

DECISION

Stevens Worldwide Van Lines, Inc. (Stevens) appeals the March 6, 1998, Settlement Certificate of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 97121902. In the Settlement Certificate, DOHA disallowed, among other things, the portion of Stevens' refund request amounting to \$1,295 that was offset by the Air Force for a lost refrigerator shipped with a service member's household goods.⁽¹⁾ This appeal involves the \$1,295 set off for the refrigerator of the \$1,444 that was offset for loss and damage to the entire shipment.

Background

The record shows that the shipment was picked up in New Mexico, on January 13, 1995, and delivered to the service member in Kansas, on January 19, 1995. The member and carrier's agent did not report loss or damage on the Joint Statement of Loss or Damage at Delivery (DD Form 1840). In a Notice of Loss or Damage (DD Form 1840R) dispatched to Stevens on February 15, 1995, the member notified it of loss or damage to several items, including a missing Kenmore refrigerator at Descriptive Inventory Item 164. The member's claim included \$1,516.69⁽²⁾ for the missing refrigerator, and the Air Force adjudicated Stevens's liability at \$1,295.

In its appeal, Stevens makes several points. The refrigerator was obtained from Sears just four days prior to the carrier's receipt of the shipment. Also, the driver who picked up the shipment also delivered it, and there were no intermediary agents. The shipment was delivered from residence to residence. Stevens contends that the driver placed a check mark in black ink next to each item he delivered as listed in the destination inventory, including Item 164. Stevens believes that a review of the *Military-Industry Memorandum of Understanding on Loss and Damage Rules* (effective January 1, 1992) suggests that a refrigerator is considered an essential part of the household, and the record is devoid of a purchase receipt for the replacement refrigerator even though it is something that would be needed immediately. Under these circumstances, Stevens believes that it is unreasonable to assume that an owner would have waited 28 days before he reported such a new and expensive appliance like this one as missing.

Discussion

There are three elements on which the service member or his military service in subrogation must present to establish a *prima facie* case of liability against the carrier: tender of an item to a carrier, delivery in a damaged or more damaged

condition, and the amount of damages. *See Missouri Pacific Railroad Company v. Elmore & Stahl*, 377 U.S. 134, 138 (1964). In our view, where as here an item is specifically listed on the descriptive inventory (proving tender), the member dispatches notice of loss or damage within 75 days of the shipment's delivery⁽³⁾, and the member offers some evidence of value, he has established a *prima facie* case of liability against the carrier. The question here is whether Stevens has overcome the presumption in favor of the member. This is a question of fact. *See* DOHA Claims Case No. 97123103 (January 28, 1998).

Some of Stevens concerns are noteworthy. The Air Force could have presented a stronger claim if the record included evidence that, on the day of delivery or shortly thereafter, the member had requested the carrier to trace his new refrigerator. Since the refrigerator was an essential, major appliance, it was reasonable to expect the member to purchase a new one if it had not been located quickly.⁽⁴⁾ On the other hand, the Comptroller General indicated that a member has the right to dispatch notice of loss or damage up to 75 days after delivery. *See National Forwarding Company, Inc.*, B-238982, June 22, 1990. Moreover, arguments about the meaning of factual events are not positive evidence that Stevens' agent delivered the refrigerator. As Stevens also realizes, even if Stevens' driver was the person who had placed the check marks next to each of the delivered items to indicate delivery, the Comptroller General's decisions view this as weak evidence of delivery. *Compare National Forwarding Company, Inc.*, B-238982, *supra*. Without clear and convincing evidence from Stevens showing that it delivered the refrigerator, we have no basis for finding that the Air Force's adjudication of liability against Stevens was unreasonable. *See* DOHA Claims Case No. 97123103, *supra*.

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) VP-794,284; Air Force Claim McConnell AFB #95-481; and carrier claim #95-60139.

2. This amount appears to be based on the price in the receipt of purchase dated January 9, 1995.

3. Paragraph I(A) of the MOU provides in part that "the carrier shall accept written documentation on the DD Form 1840R, dispatched within 75 calendar of delivery . . . as overcoming the presumption of correctness of the delivery receipt."

4. We received correspondence from the Air Force Legal Service Agency (AFLSA), dated September 3, 1999, which indicates that AFLSA is attempting to bolster the claim by obtaining a statement from the separated service member. AFLSA asked the member to explain why he did not report the loss on the day of delivery and to explain how he functioned without the refrigerator between the delivery day and the day of dispatch of the DD Form 1840R. Even if AFLSA obtained a response from the member, this type of development should have been accomplished prior to this

point, preferably prior to adjudication. We will not consider it now.