February 8, 2000

In Re:

Air Land Forwarders, Inc.

Claimant

Claims Case No. 99111906

CLAIMS APPEALS BOARD DECISION

DIGEST

When a service member tenders a household item in a certain condition to a non-temporary storage (NTS) facility or packing contractor, and the item is later transferred to a carrier for delivery to the service member, but the carrier delivers it in a more damaged condition, the delivering carrier as the last bailee to exercise possession over the item is deemed to be responsible for the damage. However, the carrier may show that it was not in possession of the item when the damage occurred, and in such circumstances, it will not be liable. A carrier may be able to show that an item was damaged before it assumed possession of it by preparing a valid exception or "rider," noting conditions different than those observed when the member turned his property over to the NTS facility or contractor. When the carrier prepares a rider that does not meet the requirements of the *Tender of Service*, especially material requirements such as the date of execution, a military service is reasonably justified in questioning the authenticity of the rider.

DECISION

Air Land Forwarders, Inc. (ALFY), disputes $667.26 of the Navy's setoff of $962.35 arising from transit damage to the household goods of a service member.[(1)] Due to administrative necessity, the Claims Appeals Board directly settles this matter.

Background

The record shows that the member turned over his household goods to a non-temporary storage (NTS) facility or packing contractor (collectively "contractor") on August 11, 1995, and that ALFY picked up the service member's household goods from the contractor in Silverdale, Washington, under a PPGBL issued on September 7, 1995, and delivered them to the service member in Coronado, California, on September 18, 1995. The member dispatched a *Notice of Loss or Damage* (DD Form 1840R) on October 25, 1995, identifying damage to the three items discussed below, and on June 13, 1997, the Navy dispatched a *Demand on Carrier/Contractor* (DD Form 1843), which included the three items. In letters to the member dated July 9, 1997, with a second request dated July 16, 1997, ALFY acknowledged that it received the *Demand* on June 19, 1997, and it advised the member that while it was still reviewing the claim, it was seeking the salvage.

ALFY claims a refund of $500, the amount set off by the Navy for damage to an antique wooden ice box (Descriptive Inventory Item 81). The carrier contends that it prepared a rider when it obtained the shipment from the contractor in which it noted exceptions for Items 81-82: "ant ice chest R side Br in center." The Navy contends that the rider is not

valid because a valid rider must contain the names of both delivering and receiving companies, the signatures of both company agents, and be dated on the day of pickup from the contractor. The Navy points out that the rider provided by ALFY does not show the name of either company and that it is not dated; therefore, there is no proof of when the rider was prepared or who prepared it.

ALFY claims a refund of $11.25 on Item 26, for the salvage value of a straw hat decorated with dried flowers and a ribbon. The hat was delivered smashed with the ribbons detached. In correspondence to the Navy dated July 29, 1997, ALFY stated that on July 24, 1997, the member telephonically advised its representative that he had disposed of the hat. In its final demand of October 17, 1997, and in the administrative report, the Navy does not dispute that the member had discarded the hat but contends that the hat had no salvage value because it could not be sold at a second-hand market resale-type facility. The Navy also contends that based on ALFY's original salvage letter to the service member it was asking for salvage prior to reviewing the claim.

Finally, Item 234, a Weber gas grill, was delivered with a smashed top and bent wooden handle. ALFY claims a refund of $156.01 because it alleges that the grill was not a gas grill as claimed by the service member but was a "smoker" that was listed elsewhere on the inventory. ALFY notes that the top was removable and that the picture provided by the member did not depict a control panel, which is indicative of a gas grill. The Navy contends that ALFY failed to prove that the item was not a gas grill. The Navy agrees that it was a round grill with an apparently removable lid. But, the picture provided by the service member showed only part of the grill, and any possible control panel (with regulating knobs for the gas) was not depicted in the photograph. The Navy also notes that on older model gas grills, there was no control panel. The Navy found that Weber did make round gas grills, but was advised that round gas grills were discontinued by Weber.

Discussion

Generally, 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).

Additionally, when goods pass through the custody of several bailees, it is a presumption of the common law that the damage occurred in the hands of the last one. *See Stevens Transportation Co.*, B-243750, Aug. 28, 1991; and *McNamara-Lunz Vans and Warehouses, Inc.*, 57 Comp. Gen. 415, 418 (1978). The last custodian can avoid liability by showing that the damage or loss did not occur while the item was in its custody. For a carrier removing goods from a storage facility for delivery, that showing is made by preparing an exception sheet--a rider--to the inventory; the rider then can serve to rebut the general common law presumption of the last carrier's liability. *See* DOHA Claims Case No. 96070231 (February 10, 1997); *DOHA Claims Case No. 96080202 (November 21, 1996); Able Forwarders, Inc.*, B-252817, Apr. 19, 1993; and *A-1 Ace Moving and Storage, Inc.*, B-243477, June 6, 1991. Item 54 of the *Tender of Service*[(2)] includes a description of a proper rider. It requires, among other things, that when the carrier prepares its own descriptive inventory, it is to note differences in the condition of individual items, as compared to the contractor's inventory. When the opinions of the carrier's and the contractor's representatives differ, both opinions are to be reflected on the carrier's exception sheet. Significantly, as the Navy points out, both the carrier's and contractor's representatives must sign and date the exception sheet. The rider in this claim contains signatures of two people, but it is not clear whom each represents. More importantly, the rider is not dated. Accordingly, the Navy reasonably found that the rider, by itself, is not competent evidence to show that the damage to the antique ice box occurred prior to ALFY's possession

of it.

ALFY's salvage claim for the hat should not be allowed. The military services and the industry agreed by contract to procedures for claiming salvage and crediting a carrier with salvage value. This agreement is contained in the *Military/Industry emorandum of Understanding* (MOU) concerning savage, which became effective on April 1, 1989. In relevant part the agreement states:

"c. Notwithstanding the provisions of paragraphs "a" and "b" above, it is agreed that the carrier will not exercise its salvage rights . . . [w]hen the depreciated replacement value of all salvageable items in a shipment totals less than $100.00, or a single item of less than $50.00. If a shipment has more than one salvageable item, one of which has a value of $50.00 or more, yet the total of all salvageable items is $100.00 or less, the carrier may exercise its salvage rights."

"d. In the event that a carrier is unable to exercise its salvage rights due to the disposal of an item(s) by the military member, the carrier's liability shall be reduced based upon the following method of determining the salvage value of the item(s):

(1) For an individual item which has a depreciated replacement value of less than $50.00, the carrier will receive no credit for salvage.

(2) For any claim containing a salvageable item of $50.00 or more, or multiple salvageable items which have a combined total or [sic] $100 or more, the item's (items') salvage value credited to the carrier will be 25 percent of the item's (items') depreciated replacement value based upon the Joint ilitary/Industry Depreciation Guide."

Both the Navy and ALFY apparently overlooked the $50 limitation per item. The List of Property and Claims Analysis Chart (DD Form 1844) indicates that the hat was purchased in March 1992 for $79.95, with a replacement value of $89.95, but the depreciated replacement value was listed as $44.97. Accordingly, no salvage credit is due under paragraph d(1).

Although not determinative of the outcome, we note ALFY should have been more vigorous in enforcing its salvage rights. Paragraph b requires, among other things, that the carrier has 30 days to take possession of salvage after receipt of the government's claim. The 30-day pick up period may be extended by mutual agreement, but if there is any question about the member's cooperation, the problem must be promptly referred to the claims office for resolution. ALFY may have unreasonably relied on a second letter dated July 16th requesting the salvage, which if dispatched at that time was merely three days before the 30th day after it received the Navy's claim.

Similarly while not determinative here, the Navy was incorrect in requiring ALFY to show that the hat continued to have market value. If the member had disposed of the hat prior to the expiration of ALFY's rights, which apparently is what happened here, the formula in paragraph d(2) provides for an automatic 25 percent reduction. There is no reference to the residual value of the hat in a used property market.[(3)]

Finally, we do not see any reasonable basis for ALFY's allegation that Item 234 was not a gas grill. On DD Form 1840R, the member reported that Item 234, a "gas grill" was damaged. The Descriptive Inventory refers to Item 234 as a gas barbecue grill. ALFY's statement that gas grills do not have removable tops but do have control panels, is nothing more than factual speculation that the Navy rebutted. If ALFY had any question concerning the nature of the grill

reported as damaged, it had an opportunity to inspect the damaged item and provide supporting witness statements.

Conclusion

ALFY's claim is disallowed in its entirety.

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 refers to Personal Property Government Bill of Lading YP-036,313; Navy Claim No. PCA 96-1061; and ALF Claim No. 970119.

2. The Tender of Service is part of the contractual relationship between each member of the industry and the Department of Defense. When the shipment moved, it appears that the May 31, 1990, version of the Tender of Service applied. The signing and dating requirement, for example, is in paragraph 54m of the 1990 version. The same language is contained in the succeeding version dated October 31, 1995, at paragraph 55m.

3. In other contexts, we have questioned carrier attempts to valuate personal property by examining what such goods could derive in a used household goods commercial market. See DOHA Claims Case No. 96081208 (December 19, *1996).*