KEYWORDS: carrier freight claim

DIGEST: The DOHA appeal decision disallowing the carrier's claim for recovery of amount claimed against it for a lost shipment by a carrier is affirmed where carrier alleges but offers no evidence that the shipment was not delivered by the shipper to the carrier at origin.

CASENO: 2011-CL-041501.2

DATE: 6/28/2011

DATE: June 28, 2011

In Re:	)	
Estes Express Lines	)	
	)	Claims Case No. 2011-CL-041501.2
	)	
	)	
Claimant	)	

CLAIMS APPEALS BOARD
RECONSIDERATION DECISION

DIGEST

The DOHA appeal decision disallowing the carrier's claim for recovery of amount claimed against it for a lost shipment by a carrier is affirmed where carrier alleges but offers no evidence that the shipment was not delivered by the shipper to the carrier at origin.

DECISION

Estes Express Lines (Estes) requests reconsideration of the May 25, 2011, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2011-CL-041501. The appeal decision disallowed Estes' claim disputing the Government's claim against Estes for $50,000.00 for a missing shipment.

Background

The record shows that on January 19, 2009, Menlo Worldwide Government Services (Menlo) and Estes signed a contract entitled Master Broker/Motor Carrier Agreement Government Services. Under this contract, Menlo, a broker arranging for motor carrier transportation of property for shipments for the Government under the contract, awarded Estes the transportation services for Government freight shipments.

The freight shipment at issue originated at Stockton, California. The transportation officer at Defense Distribution Depot San Joaquin (DDJC), California, issued a bill of lading on September 30, 2010, to transport one 50-cubic foot container weighing 465 pounds from DDJC to Defense Distribution Depot Susquehanna (DDSP), New Cumberland, Pennsylvania. This container was allocated transportation control number (TCN) SW322402730243XXX. The bill of lading reflected that the shipment was classified as a Freight All Kinds (FAK). It also noted the TCN, weight, length, width, height, volume, origin and destination. It also reflected that the driver for Estes signed for the shipment on September 30, 2010, at 2100. Estes applied stickers to the bill of lading reflecting that Estes driver number 547 arrived at 2010 to pick up the 50-cubic foot shipment, assigned an Estes' freight copy number to the shipment and departed at 2117.

Estes' argument is that there is no proof of tender to it, and that the presence of its stickers and signature at the time of receipt of the bill of lading did not certify what Estes received. Estes claims that its driver did not physically count or check the freight at origin. Estes states that its first opportunity to examine the shipment was at "first break," in Modesto, California. Estes claims that this practice of examination at "first break," is consistent with its ordinary course of dealings with Menlo. Estes further suggests that this shipment was a shipper's load and count. Estes cites 49 U.S.C. § 80113(b) and *Ed Miniat, Inc. v. Baltimore and Ohio R.R. Co.*, 587 F.2d 1277 (D.C. Cir. 1978), in support of its argument. Estes states that the mere existence of a signed bill of lading cannot serve to satisfy the first element of *prima facie* case of liability, *i.e.*, tender to the carrier in good condition. Estes contends that more evidence is required. Finally, Estes points out a factual issue in regard to precisely when the claimed shipment was tendered to Estes. Estes finds this issue pertinent as to whether it satisfied its responsibility to notify Menlo of shortage within five days of tender as set forth under its contract with Menlo.

Discussion

Under federal law, in an action to recover from a carrier for loss or damage of an item in transit, a *prima facie* case is established by showing tender to the carrier, failure to deliver or arrival in a damaged condition, and the amount of damages. Thereupon, the burden of proof shifts to the carrier to show that it was not negligent and that the loss or damage was due to one of the excepted causes relieving the carrier of liability. *See Missouri Pacific R.R. v. Elmore & Stahl*, 377 U.S. 134, 138 (1964).

In this case, our adjudicators found sufficient evidence of tender of the missing shipment. The issue raised by Estes is whether there is sufficient evidence that the freight was tendered to it. Estes claims that the presence of its stickers on the bill of lading signifies that it received the bill of lading, which purportedly describes a portion of the contents of a sealed trailer which was tendered to it. Estes contends that its driver did not physically count or check the freight at origin, and had no opportunity to even look inside the trailer at the time it accepted the bill of lading. However, the record reflects that Estes' driver picked up the shipment and that the driver signed the bill of lading without exception. The bill of lading referenced information on the origin, destination, weight, TCN and freight copy number. Estes acknowledges signing the bill of lading on September 20, 2010, at 2100. The bill of lading indicates that the driver for Estes arrived at 2040, and departed at 2117. In totality, all this is evidence that Estes received the property on the bill of lading.

However, Estes characterizes the shipment as a shipper's load and count. Estes thus argues the bill of lading is insufficient to prove that the shipper tendered its goods described on the bill of lading because the shipment was loaded by the shipper. Estes states that the ordinary course of dealings between it and Menlo establishes that its acceptance of the bill of lading is not its certification of a load count or that the items described in the bill of lading were actually loaded inside the sealed trailer tendered to it. In this case, we find no evidence that the shipment was a shipper's load and count. Although Estes cites a section from Menlo's Carrier Training Guide, that purports to state that the carrier proactively identify and resolve any lading or shipment document discrepancies after pick-up, Estes does not submit the full document for our consideration or explain its relevance to whether this shipment was a shipper's load and count. We find nothing on the bill of lading or the contract between Estes and Menlo to indicate that the shipment was a shipper's load and count. The carrier issues the bill of lading, and if there was any question about the nature of the liabilities for the shipment, the carrier must verify the shipper's intentions prior to movement, correcting the bill of lading if the shipper agrees with the carrier. *See* DOHA Claims Case No. 99110207 (November 16, 1999). In this case, the fact that the carrier's driver did not check the freight at origin does not relieve the carrier of liability for the missing shipment. *See* B-191889, May 16, 1979.

Finally, Estes raises a factual issue as to when the shipment was picked up by it and when it arrived at "first break." Estes argues that it met the five-day notification period under its contract with Menlo. We find it unnecessary to analyze the parties' contractual obligations to each other in this decision. This issue is one for resolution between Menlo and Estes.

The Board concludes that the DOHA adjudicators had a reasonable basis to conclude there was evidence of tender to the carrier of a package later claimed as missing. The Board finds no error of fact or law in the appeal decision.

Conclusion

The carrier's request for reconsideration is denied, and we affirm the May 25, 2011, appeal decision in DOHA Claim No. 2011-CL-041501. In accordance with DoD Instruction 1340.21, ¶ E7.15.2, this is the final administrative action of the Department of Defense in this matter.

Signed: Michael D. Hipple

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Michael D. Hipple
Chairman, Claims Appeals Board

Signed: Jean E. Smallin

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Jean E. Smallin
Member, Claims Appeals Board

Signed: Catherine M. Engstrom

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Catherine M. Engstrom
Member, Claims Appeals Board