

KEYWORDS: Waiver of Indebtedness

DIGEST: The shipper must demonstrate 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 the loss or damage was due to an excepted cause. When a carrier loses items not specified on the descriptive inventory, there is sufficient proof of tender when the items are directly related to the inventory description. The last carrier is presumed to be responsible for any loss or damage.

CASENO: 2011-CL-060608.2

DATE: 9/22/2011

DATE: September 22, 2011

In Re:)	
REDACTED)	
)	Claims Case No. 2011-CL-060608.2
Claimant)	

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

The shipper must demonstrate 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 the loss or damage was due to an excepted cause. When a carrier loses items not specified on the descriptive inventory, there is sufficient proof of tender when the items are directly related to the inventory description. The last carrier is presumed to be responsible for any loss or damage.

DECISION

Patriot Forwarders, Inc. (PTFW) requests reconsideration of the July 13, 2011, appeal decision of the Defense Office of Hearings and Appeals (DOHA), in DOHA Claim No. 2011-CL-060608. In that decision, this Office disallowed PTFW's claim for the refund of \$1,484.60 that was collected through offset for the loss/damage to the household goods (HHG) described below.

Background

The record shows that the shipper's HHG were picked up on January 8, 2004, and placed in non-temporary storage (NTS) at Murray Transfer & Storage, Inc., Fayetteville, North Carolina. An inventory was compiled at pick-up, and Item 1 on it was listed as an "O.S. Couch" (overstuffed couch) with a soiled seat and left and right arms. A government bill of lading dated August 17, 2004, was issued to PTFW for transportation of the shipper's HHG from NTS at Murray to Navarre, Florida. The HHG were tendered to PTFW's pick-up agent, Patterson Storage Warehouse Co., Inc., on August 20, 2004, and a rider to the inventory was executed at that time. Item 1 was not among the HHG listed on the inventory.

PTFW's delivery agent, Stevens Van Lines, Inc. delivered the HHG on August 22, 2004. Four items were listed on the DD Form 1840 that was written at that time, and Item 1 was not among them. However, Item 1 was the first item listed on the two-page DD Form 1840R, dispatched October 25, 2004. On page 1, Item 1 was reported as having "Front right bottom-mildew damage to fabric." On page 2, Item 1 was reported as "missing 3 couch pillows (from Penn House collection)." PTFW notified the Air Force (AF) that it would conduct a search for the pillows; however, the search was unsuccessful. The member filed a claim for loss or damage to the shipment on February 28, 2006. Among other things, the member claimed mildew damage to a couch, and loss of the three couch pillows. The AF awarded the member damages for his move to include mildew damage to a couch and three missing couch pillows.

There were numerous correspondences between the AF and PTFW over the next several years, with PTFW initially denying liability for any of the damages in the move. Finally, on September 25, 2008, PTFW revised its request for a refund to \$1,484.60, listing two items of contention, and appealing the matter to DOHA. The remaining items of contention were described in the claim as replacement for mildew damage to a Pennsylvania House couch and three missing special-order pillows for that couch. PTFW contends that it is not liable for the mildew damage to the couch as it only had the couch in its possession for two days, and in that time the shipment did not come into contact with any moisture or water. Additionally, if mildew spores were present but not visible when the driver picked up the shipment, he would not have been able to see any mildew or note it on the rider. PTFW contends it is not liable for the three pillows matching the couch as they are not listed on the inventory. Additionally, PTFW pointed out that inventory #11 and #19 were both cartons containing sofa pillows, and these cartons were not listed as missing.

The adjudicator for DOHA denied the claim by PTFW finding that although the pillows were not specified on the descriptive inventory, it is sufficient proof of tender when the item is directly related to the inventory description. As to mildew damage to the couch, the last carrier is presumed to be responsible for any loss or damage even if it was only in their possession for

two days. In PTFW's reconsideration request, it contends that while people do have throw pillows or accent pillows for their couches, it is standard practice to ship sofas with cushions and not throw pillows, which are usually packed separately. As to the mildew, PTFW argues that they have provided non-speculative evidence that the condition could not be due to their handling of the shipment.

Discussion

Under federal law in an action to recover from a carrier for damage to a shipment, a *prima facie* case is established by showing delivery in a certain condition, failure to deliver or arrival in a damaged condition and the amount of damages. The burden of proof then shifts to the carrier to show that it was free of negligence and that the damage to the goods was due to one of the excepted causes relieving the carrier of liability. See DOHA Claims Case No. 07051605 (June 13, 2007), and *Missouri Pacific R.R. Co. v. Elmore & Stahl*, 377 U.S. 134, 138 (1964). Department of Defense Instruction 1340.21 (hereinafter Instruction) ¶ E5.7 states: "The claimant must prove, by clear and convincing evidence, on the written record that the United States is liable to the claimant for the amount claimed." See DOHA Claims Case No. 98030603 (March 13, 1998).

As to the first *prima facie* element, the adjudicator determined tender of the couch was shown by its listing as Item 1 on the inventory and by it not being reported as missing on the rider. As for the accent pillows, also known as throw pillows, they are a common accessory related to couches. The adjudicator determined that it is the practice of the HHG moving industry to not specifically identify accent or throw pillows on the inventory. Tender of a non-inventoried item can be shown if that item was reasonably related to the inventoried item. See DOHA Claims Case No. 99102711 (February 22, 2000), and DOHA Claims Case No. 97102410 (December 23, 1997).

As to the second *prima facie* element, the DD Form 1840R reported the mildew damage, which was different from the soiled seat and left and right arms reported on the inventory. The pillows were reported missing on the DD Form 1840R. *The Military-Industry Memorandum of Understanding on Loss and Damage Rules* ¶ I(A) states: "The carrier shall accept written documentation on the DD Form 1840R, dispatched within 75 calendar days of delivery to the address listed in block 9 on the DD Form 1840, as overcoming the presumption of correctness of the delivery receipt." In the case at hand, the DD Form 1840R was timely as the HHG had been delivered on August 22, 2004, and the DD Form 1840R was dispatched 64 days later on October 25, 2004, within the 75-day period.

As to the third *prima facie* element, the \$1,484.60 figure was first raised by PTFW in its September 25, 2008, memorandum to the AF, and was used by that agency in its draft administrative report. The AF has adopted the figure, and PTFW has not rebutted it. Therefore, the three elements have been met, and the burden shifts to the carrier. The adjudicator found that the carrier's argument that the pillows were not listed on the inventory was overcome by the rule concerning reasonably related HHG. As to the mildew damage to the couch, the carrier argues that given the brevity of their possession of the couch, the damage is more likely to have begun while the couch was in NTS. The carrier cites the Navy's decision in a Stevens Van Lines case;

however, this case is at the appeal level and, as such, does not constitute precedent and is not dispositive for any purpose. Alternatively, PTFW argues that the mildew damage began during the 64 days between delivery and dispatch of the DD Form 1840R. The adjudicator determined that the carrier had presented no documentary evidence to support either of these assertions. *See* DOHA Claims Case No. 06042742 (June 1, 2006), and DOHA Claims Case No. 97090818 (October 28, 1997). PTFW was the last carrier to have possession of the couch, and as such, is responsible for any loss or damage. *See* 57 Comp. Gen. 415, 418 (1978).

A *prima facie* case has been established, and PTFW has not met its burden of proof to relieve itself of liability. PTFW has not identified error in DOHA's appeal decision in this case.

Conclusion

For the reasons stated, the request for reconsideration is denied, and the appeal decision of July 13, 2011, is sustained. In accordance with the Instruction ¶ E7.15, this is the final administrative action of the Department of Defense in this matter.

Signed: Jean E. Smallin

Jean E. Smallin
Chairman, Claims Appeals Board

Signed: Catherine M. Engstrom

Catherine M. Engstrom
Member, Claims Appeals Board

Signed: Natalie Lewis Bley

Natalie Lewis Bley
Member, Claims Appeals Board