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R. Shipman
Transp.

DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-189597 DATE: April 18, 1978

MATTER OF: McNamara-Lunz Vans and Warehouses, Inc.

DIGEST:

1. Household goods carrier receiving packaged goods from warehouse or another carrier is not required by provisions of Basic Tender of Service, DOD Regs. 4500.34R, to unpack and examine goods to prepare inventory.

2. Loss of or damage to goods which pass through the hands of several custodians is presumed at common law to occur in the custody of the last custodian.

3. Shipper establishes prima facie case of carrier liability for loss or damage in transit by showing failure to deliver the same quantity or quality of goods at destination.

4. Once prima facie case of loss or damage in transit is established burden is on carrier to show by affirmative evidence that loss or damage did not occur in its custody or was sole result of an excepted cause and mere suggestion or allegation is not sufficient.

5. Determination by administrative office that additional damage was caused will be accepted by the General Accounting Office in the absence of clear and convincing contrary evidence.

6. Carriers of household goods have entered into agreement with branches of the military departments to accept liability for damages or loss noted to the carrier within 30 days of delivery.

The Department of the Air Force referred to the General Accounting Office the protest of McNamara-Lunz Vans and Warehouses, Inc. (McNamara), to the recovery by setoff of $550.30, the value of damages to an Air Force member's household effects while in transit from nontemporary storage at Armstrong Moving and Storage Inc. (Armstrong), San Antonio, Texas, to the residence of the Air Force member in Houston, Texas. We will treat McNamara's protest as a claim for refund of the $550.30.

The household effects were picked up at the residence of the member in Schertz, Texas, by Armstrong as agent for United Van Lines, Inc., on March 16, 1976, and transported to nontemporary storage at Armstrong

in San Antonio, Texas. At the time of the pick up the goods were packed by Armstrong and a detailed inventory was prepared. On April 14, 1976, the household effects were picked up from nontemporary storage by McNamara, and transported to Houston, Texas, under Government bill of lading No. K-5833042, dated April 14, 1976. At the time of the pick up by McNamara an inventory rider was prepared by McNamara and Armstrong which listed preexisting damage to certain items included in the shipment. The household effects were delivered at the member's residence at destination on April 16 and on the last page of the Armstrong inventory he noted exceptions to 21 items damaged and that a ring was missing. The inventory was then signed by McNamara's driver and by the member.

Pursuant to the Military Personnel and Civilian Employees' Claims Act, Pub. L. 88-558, as amended, 31 U.S.C. 240-243 (1970), the member filed a claim against the Government; he was allowed $2,127.85. The Government thereby became subrogated to the member's rights, and on April 25, 1976, a claim in an unstated amount was made by the Government against Armstrong and McNamara; on July 26, 1976, a formal demand for $881.30 was addressed to McNamara. After an exchange of correspondence the claim was forwarded to the Headquarters of the Air Force's Tactical Air Command which, after careful and extensive comparison of the Armstrong and McNamara inventories, the delivery exceptions and the Government report of inspection, DD Form 1841, reduced the Government's claim to $550.30, the value of 12 damaged items and two missing items. When McNamara failed to refund, the $550.30 was recovered by setoff.

McNamara protests the setoff denying liability for damage to the items packaged by Armstrong and alleging preexisting damage on other items.

McNamara contends that paragraph 54j of the Tender of Service does not require the carrier to unpack each and every prepackaged container in order to determine whether any of the items are missing or damaged when there is "no visible damage to the external shipping container."

Paragraph 41k (now Paragraph 54j) of the Basic Tender of Service, DOD Regulations 4500.34R, titled "Inventory", provides that the carrier agrees to:

> "Annotate the inventory to show any overage, shortage, and damage found, including visible damage to external shipping containers each time custody of the property changes from a storage contractor (warehouseman) to a carrier or from one carrier to another."

Therefore, when a carrier receives a shipment from a warehouseman or another carrier, it undertakes only to note overages, shortages and damages to unpacked items or "visible damage to external shipping containers." There does not appear to be any undertaking to unpack prepacked items.

However, once a shipper has made a prima facie case of liability for loss or damage in transit by showing a failure to deliver at destination the same quantity or quality of goods as received at origin the burden is placed upon the carrier or other bailee to show either that the damage or loss did not occur while in its custody, or that the loss or damage occurred as a result of one of the causes for which the carrier is not liable. See Missouri Pacific R.R. v. Elmore & Stahl, 377 U.S. 134 (1964). And when the goods pass through the custody of several bailees it is a presumption of the common law that the loss or damage occurred in the hands of the last bailee. See Modern Wholesale Florist v. Braniff International Airways, Inc., 350 S.W.2d 539 (Sup. Ct. Texas 1961). Thus, in General Electric Co. v. Pennsylvania R.R., 160 F. Supp. 186, 188 (WD Pa. 1958), which involved intrastate rail shipments of refrigerators in cartons from Erie, Pennsylvania, to warehouses in Pittsburgh, where after storage damage was noted, the court found that:

> ". . . proof of delivery of the carton-packed refrigerators in good condition to the carrier in Erie and the discovery of the damaged refrigerators in the possession of the warehousemen in Pittsburgh would make out a prima facie case for plaintiff . . .. The burden of going forward with the evidence . . . is thus cast upon the defendant bailees."

And in Julius Klugman's Sons, Inc. v. Oceanic Steam Nav. Co., et al, 42 F.2d 461 (SD NY 1930), in an action brought against (1) an ocean carrier, which transported packaged furs from London to New York, (2) a trucker, which moved the goods to a New York warehouse, and (3) the warehouse, for loss of furs pilfered, the court held that "where goods passed through the hands of successive custodians, in apparent good order, any loss is presumed to have occurred while they were under the control of the last custodian", and plaintiff was held entitled to a verdict against the warehouse.

Of the 14 items constituting the Government's claim, nine were packed by Armstrong and no exceptions were taken by Armstrong on its inventory to either the condition or the number of the items. On delivery at destination, however, exceptions were noted to either the condition or the number of items in the packages, establishing

a failure to deliver the same quantity or quality at destination, and establishing a prima facie case for loss or damage in transit, which, in the absence of evidence to the contrary is presumed to have occurred in the custody of McNamara.

McNamara also has suggested that the damage to the prepackaged items occurred as a result of improper packing on the part of the firm which originally had responsibility for packing and sealing the shipping containers. Assuming, without deciding, that Armstrong acted as an agent of the shipper, and that damage resulting from improper packing would, therefore, result from an act of the shipper, one of the excepted causes to carrier liability, no evidence has been presented or otherwise appears in the record to substantiate this suggestion. The burden is on the carrier to prove that faulty packaging was the sole cause of the damage. A more allegation or suggestion does not satisfy this burden. See 55 Comp. Gen. 611 at 613 (1976).

McNamara also alleges that a number of the items had preexisting damage. However, of the items comprising the Government's claim, McNamara took exceptions on its inventory to only two: inventory item 34, a king headboard from which an item was missing for which the Government claims $24.50, and inventory item 47, a sewing cabinet, for damage to which the Government claims $60. The exceptions noted, however, are not legible on the photo copy in the record. McNamara also alleges preexisting damage to inventory item No. 4, a piano, but an exception was not taken at the time of pick up from the warehouse.

The record shows that an inspection official of the Department of the Air Force personally inspected the goods and prepared a Report of Inspection, DD Form 1841. The record further shows that the Department of the Air Force carefully compared the Armstrong inventory, the exceptions taken in the McNamara inventory, and the Report of Inspection, and determined that additional damages existed to the several items for which claims were made. While some damages apparently did exist prior to receipt of the items by McNamara, the record reasonably supports the administrative determination that additional damage was caused while in the custody of McNamara. Also, because the administrative office is in a better position to consider and evaluate the facts, it is the rule of our Office, on disputed questions of fact between the claimant and the administrative officers of the Government, to accept the statement of fact furnished by the administrative officers, in the absence of clear and convincing contrary evidence. 48 Comp. Gen. 638, 644 (1969).

McNamara has also contested the measure of some of the damages. However, the measure of damages is supported by estimates furnished by the member and contained in the record. No contrary evidence has been presented by McNamara.

Finally, McNamara alleges that the shipper signed for item 126, missing bedrails, for which the Government claims $4.20. While the bedrails were not initially noted by the member on carrier's inventory, the loss was noted shortly thereafter and was reported to the carrier within a 30-day period. The household goods carriers have entered into an agreement to accept liability for items noted within a 30-day period of delivery as though noted on delivery.

Accordingly, McNamara's claim for $550.30 is disallowed.

Deputy Comptroller General
of the United States