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PR

B-240350

December 18, 1990

DIGEST

Carrier that packed an Army member's household goods is not liable for the loss of a compact disc player that was not listed on the inventory absent a specific statement by the shipper about the loss based on his personal knowledge of the circumstances surrounding tender, or other substantive evidence to support the allegation of tender.

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Aalmode Transportation Corp.

File: B-240350

Date: December 18, 1990

DECISION

The U.S. Army Claims Service appeals a March 28, 1990, settlement by our Claims Group denying setoff of $200 against Aalmode Transportation Corporation. The Claims Group concluded that the carrier was not responsible for the unexplained loss of a small compact disc player that the shipper reported missing after delivery of his household goods. We affirm the Claims Group's settlement.

The Claims Group found that there was insufficient evidence to show that the compact disc player had been tendered by the shipper to Aalmode, which had packed the goods. Proof of tender is the first element of a prima facie case of loss against a carrier, which shifts the burden to the carrier to prove that it was not liable for the loss. The Claims Group said that the indication on the claim form the member submitted that the player was included in inventory item number 37, a 4.5 cubic foot carton labeled by Aalmode as "knickknacks" was not sufficient to show that it had ever been shipped. The Claims Group noted that the carton was delivered intact and still sealed, with no evidence of tampering; the shipper had furnished no information on how or where the item had been packed; and the item was not specified on the inventory despite its value.

The Army, to support its appeal of the Claims Group's determination, cites our decision in Paul Arpin Van Lines, Inc., B-205084, June 2, 1982; our response to the Army's appeal of that decision in B-205084, June 8, 1983; and Trans-American Van Service, Inc. v. Shirzad, 596 S.W. 2d 587 (Tex. Civ. App. 1980), which we cited in the 1983 decision. In our two decisions we held against a shipper claiming non-delivery because the only evidence of tender of lost items was the member's written acknowledgment of the criminal penalties for filing a false claim. The record was devoid of any indication that the shipping cartons had been opened or that most of the items allegedly lost related directly to any category of items listed on the shipper's inventory.

In Trans-American, the court found sufficient evidence of the tender of missing packed items where the shipper had set the items aside in designated areas he showed the carrier; the shipper remembered details concerning the lost items such as how or where they were packed and who packed them; and tapes on the cartons had been tampered with. We cited Trans-American to describe the types of evidence that might establish tender, and concluded that we would not infer details concerning tender merely from the filing of a claim form.

The Army notes that we indicated in our 1982 and 1983 decisions that a shipper does not have to furnish absolute proof of tender. The Army maintains that here, because the compact disc player was small and weighed only 3 pounds, the carrier decided to pack it in a large carton along with other small items (major electronic items were packed in their own cartons) and not to list it separately on the inventory. The Army argues that the statement of loss on the claim form the member submitted establishes proof of tender under the rule of the cited cases, since in it the member states that he checked the house after the carrier packed his goods and nothing had been left behind.

Aalmode comments that an electronic item would never have been packed in a carton labeled as "knickknacks" without so indicating on the inventory for the carton. The firm points out there is no proof in the record that the member even owned a compact disc player even though he allegedly bought it just a month before the move. Aalmode describes the rule of our 1982 and 1983 cases as being that a carrier is not liable for items claimed as missing from a packed carton which, as was the case here, was delivered intact and still sealed.

Neither party correctly describes the view we set out in 1982 and 1983. Our point was that every household good need not be listed on the inventory, and a carrier can be charged with loss where other circumstances are sufficient to establish that the goods were shipped and lost. See Valdez Transfer, Inc., B-197911.8, Nov. 16, 1989. However, to permit a shipper to establish tender only on the strength of an unsupported, self-serving acknowledgement places an unreasonable burden on the carrier with regard to its ability to rebut the claim. See Paul Arpin Van Lines, Inc., B-206117, Sept. 21, 1982. As we explained in the 1983 case:

> "We did not intend by our decision to place an onerous burden on the shipper to require the shipper to offer absolute proof of tender. . . . Rather, our reading of the applicable case law . . . led us to the conclusion that where the issue of whether goods were tendered is raised [by the carrier] the

> shipper must present at least some substantive evidence of tender as an element of his prima facie case . . . .
>
> "[W]e reasoned that the shipper would have personal knowledge of the circumstances surrounding the tender and could supply a specific statement concerning the loss. . . . "

Thus, our decisions do not stand for the proposition suggested by Aalmode that the carrier cannot be held liable for loss simply because the cartons it delivered always were sealed, but rather that such factor may well be an important consideration with respect to establishing tender. Nor do they establish that a simple statement by the member that a particular item was not delivered in itself necessarily shows tender, as the Army seems to suggest in the current appeal.

We do not think that tender of the compact disc player is established here. There is no suggestion, for example, that after tender the tapes on the cartons had been tampered with, which might present reason to conclude that missing items in fact were tendered initially. Nor, as noted by the carrier, did the shipper in this case offer to produce any evidence, like a sales receipt, canceled check or credit card invoice, to prove he had purchased and owned the disc player, although he states that he acquired it shortly before moving.

The only evidence of tender in this case is the statement of loss that the shipper signed, which is preprinted on the standard claim form, with spaces for insertions by the claimant. The statement, apparently created at least in part to respond to our 1982 and 1983 decisions and Trans-American, provides as follows, with the underlined words written by the member:

> "The following paragraph should be completed if it applies to you, and you are claiming MISSING items NOT specifically listed on the inventory;
>
> "The missing items on my claim, #37 compact disc player, N/A, N/A, were items I owned and used prior to the move and were not delivered at destination by the carrier. After my household goods were packed at origin, I checked all rooms in the house to make sure nothing was left behind. All items had been packed by the carrier."

In our view, this statement is little different than the type of evidence--the member's acknowledgement on a claim form of the penalties for filing a false claim--that we rejected in our prior decision for purposes of proof of tender. The shipper's entries on the statement of loss here do not

constitute a personal rendition of facts or understanding concerning the loss, but simply complete the creation of evidence intended by the agency to establish tender in all situations irrespective of what actually might have occurred. We remain of the opinion we expressed in 1982 and 1983 that where the only proof of delivery to the carrier, for purposes of establishing a prima facie against the firm, is a statment by the shipper, that statement must reflect some personal knowledge of the circumstances of tender.

In sum, the record includes neither a description by the shipper of the circumstances surrounding the packing, nor other substantive evidence to support the assertion that the shipper tendered a compact disc player to Aalmode. Accordingly, we find that the shipper has not established a prima facie case of carrier liability, and we affirm the Claims Group's denial of setoff.

James F. Hinchman
General Counsel

PROCUREMENT
Payment/Discharge
Shipment
Carrier liability
Burden of proof