

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Red Ball Van & Storage of Georgia) ASBCA No. 51809
)
Under Contract No. DAKF11-97-D-0013)

APPEARANCE FOR THE APPELLANT: Melvin E. Abercrombie, Esq.
Abercrombie Law Office
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APPEARANCES FOR THE GOVERNMENT: COL Nicholas P. Retson, JA
Chief Trial Attorney
CPT Ryan M. Zipf, JA
CPT Richard P. Donoghue, JA
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE GRUGGEL

Red Ball Van & Storage of Georgia (Red Ball) timely appeals a contracting officer's final decision asserting a Government set-off for alleged damage to a military member's household goods. Appellant was the destination carrier of these goods. The parties elected to have the appeal decided on the record under Rule 11.

FINDINGS OF FACT

1. The Government awarded a requirements contract to Red Ball in June 1997. Under the terms of the contract, appellant was to perform outbound, inbound (destination) and intra-city area movement of household goods in the northern counties of Georgia. The contract term was through December 1997, with two additional option-years of performance. (R4, tab 1 at F-1)

2. The contract incorporated by reference DFARS clause 252.247-7016, CONTRACTOR LIABILITY FOR LOSS OR DAMAGE (DEC 1991) which states in pertinent part:

(a) Definitions.

As used in this clause—

“Article” means any shipping piece or package and its contents. . . .

(b) For shipments picked up under Schedule I, Outbound Services, or delivered under Schedule II, Inbound Services—

(1) If notified within one year after delivery that the owner has discovered loss or damage to the owner’s property, the Contractor agrees to indemnify the Government for loss or damage to the property which arises from any cause while it is in the Contractor’s possession. The Contractor’s liability is—

(i) Nonnegligent damage. For any cause, other than the Contractor’s negligence, indemnification shall be at a rate not to exceed sixty cents per pound per article.

(ii) Negligent damage. When loss or damage is caused by the negligence of the Contractor, the liability is for the full cost of satisfactory repair or for the current replacement value of the article.

. . . .

(3) In the absence of evidence or supporting documentation which places liability on a carrier or another contractor, the destination contractor shall be presumed to be liable for the loss or damage, if timely notified.

(R4, tab 1)

3. Section C (Performance Work Statement) provides:

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

. . . .

5.9 Delivery, Unpacking, Unloading, and Loss and Damage Reports.

....

5.9.3 Recording Damage or Loss. When unloading or unpacking articles at the destination residence, the contractor shall, in coordination with the owner, check the inventory prepared at origin and inspect each article for loss or damage. the [sic] contractor shall record damage and loss on a DD Form 1840, Joint Statement of Loss or Damage at Delivery (Figure P-9). The DD Form 1840 shall indicate any difference in count and condition from that shown on the inventory prepared at origin and shall be jointly signed by the contractor and the owner.

(*Id.*)

4. The personal goods of Senior Master Sergeant Ronetta Rynning (SMSgt Rynning) were shipped from Bellevue, Nebraska, to Lilburn, Georgia. The shipment was packed by Metro Moving Services Inc., (Metro) in June 1997. The inventory of goods included, among other items, a 26" television, backpack, cassette player, luggage caddy, mixing bowl, glassware, dishes, trash can, coffee mug, bucket and a dish rack. SMSgt Rynning tendered these items to Metro in "good, working condition." The inventory contained no exception symbols indicating preexisting damage to the tendered items. (Gov't br., exs. G-1, G-2)

5. Red Ball accepted SMSgt Rynning's shipment, consisting of 12 boxes, from Roadway Express, the carrier who delivered the shipment from Nebraska to Georgia. The Roadway Express freight bill delivery document read "ALL FREIGHT HAS BEEN RECEIVED IN GOOD ORDER UNLESS NOTED BELOW." Red Ball did not note any damage to the shipment on the freight bill. (R4, tab 10)

6. On 3 July 1997, Red Ball delivered the shipment to SMSgt Rynning in Georgia. SMSgt Rynning did not waive unpacking. Box #3 was battered and gouged. SMSgt Rynning recorded the condition of the box as "dented/gouged" on her copy of the inventory. (R4, tabs 8, 9; Gov't br., exs. G-2, G-3)

7. At the time of unloading, SMSgt Rynning and Red Ball's employee completed a DD Form 1840, Joint Statement of Loss or Damage at Delivery. The parties noted on DD Form 1840 that the backpack was missing and that several items were broken. Red

Ball's employee signed DD Form 1840, but did not note any improper packing. (R4, tab 8)

8. Subsequently, SMSgt Rynning found damage to additional items. All of the damaged items were packed in boxes # 2, 3, 5 and 8, while the missing backpack was listed as packed in box #5. (Gov't br., exs. G-1, G-3)

9. SMSgt Rynning submitted a DD Form 1840R, Notice of Loss or Damage, and a DD Form 1842, Claim for Loss of or Damage to Personal Property Incident to Service, declaring, under penalty of law, entitlement to the total sum of \$1,160.87, for which she was reimbursed \$639.94. In accordance with the Contractor Liability For Loss or Damage clause of the contract, the Government made demand on Red Ball for only \$462.58. (R4, tabs 4, 7, 8, 9)

10. Red Ball denied liability, but later submitted an unsworn statement as to how improper packing by Metro caused damage to particular items in box #3. Specifically, Red Ball cited SMSgt Rynning's statement on her DD Form 1840R that "glasses fm [sic] Kit packed around 26" Sony Triton TV/VCR [sic]" as proof that Metro's improper packing caused the damage.* The Government accepted this explanation for the improperly packed glass items only, reimbursing Red Ball for charges related to the broken glassware and dishes packed with the television. Red Ball has not demonstrated that the improperly packed glassware was the cause of the damage to the Sony television ("case cracked, remote missing"), cassette player ("dented speaker, battery door missing, rattles") or other items in box #3. Red Ball does not adequately establish that the missing backpack and the damages to the luggage caddy, mixing bowl, trash can, coffee mug, bucket and dish rack were caused by either Metro or Roadway Express. (R4, tabs 10, 12; Gov't br. at 7-8, exs. G-1, G-5)

11. The Government also reimbursed Red Ball for the damages related to items packed in box #8, since the inventory revealed that box #8 was packed at Metro's warehouse. None of the remaining damaged items were packed in box #8. (Gov't br. at 8, exs. G-2, G-5)

12. On 20 May 1999, the contracting officer reissued her final decision which determined that Red Ball's remaining liability for the 26" Sony television, backpack, cassette player, luggage caddy, mixing bowl, trash can, coffee mug, bucket and dish rack was \$409.64 (R4, tab 9; Gov't br., ex. G-5).

DECISION

* This statement is found in Red Ball's Notice of Appeal dated 14 October 1998.

The Government, as claimant, has the ultimate burden of proof. However, a rebuttable presumption, shifting the burden of going forward onto the destination carrier, arises when the Government can show delivery of items in good condition to the originating contractor and the arrival of these items at their final destination in damaged condition. *Fairbanks Moving & Storage, Inc.*, ASBCA No. 27398, 84-2 BCA ¶ 17,331. This presumption is rebuttable, but the contractor must go beyond merely raising doubt as to the validity of the presumption. It must “provide evidence demonstrating that liability is properly placed on another carrier or contractor.” *McNamara-Lunz Vans & Warehouses, Inc.*, ASBCA Nos. 43152, 43153, 92-1 BCA ¶ 24,649. The record establishes that the damaged items and the missing backpack were tendered to the originating contractor in an undamaged condition and arrived at its final destination in a damaged condition. The presumption of liability is operative.

Red Ball made no attempt to annotate the condition of the boxes either at the time of delivery to its warehouse by Roadway Express or at SMSgt Rynning’s residence. There was no factual notation made on the DD Form 1840, signed by appellant’s employee, to indicate the condition of packing or that damage was caused by any other contractor. Red Ball failed to avail itself of the opportunity to contemporaneously record observations of actual packing conditions and has produced no other credible evidence sufficient to rebut the presumption of liability. Therefore, the appeal is denied.

Dated: 23 February 2000

J. STUART GRUGGEL, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

I concur

MARK N. STEMLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

RICHARD SHACKLEFORD
Administrative Judge
Acting Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 51809, Appeal of Red Ball Van & Storage of Georgia, rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals