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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Caisson Forwarding Company, Inc.

File: B-256686

Date: November 7, 1994

DIGEST

Carrier cannot disclaim responsibility for failure to locate a member's missing lawn mower when carrier delayed effort to find mower until after the Air Force had paid the member's claim for nondelivery of the lawn mower and the member had bought a replacement mower. The member had advised the carrier at the time his household goods were delivered that the lawn mower was missing. The carrier had not properly accounted for the lawn mower at the storage facility when it picked up the shipment, and it not seek to locate the missing mower within a reasonable time after receiving notice that it was missing. Therefore, Air Force properly recovered the value of the lawn mower from the carrier.

DECISION

Caisson Forwarding Company requests review of our Claims Group's settlement denying the company a refund of $1,443.75 set off by the Air Force against funds otherwise due Caisson, for loss of a lawn mower in a shipment of a service member's household goods.[1] We affirm our Claims Group's settlement.

The service member's shipment of household goods was picked up in Homestead, Florida, in January 1987, and placed into storage at the warehouse of Abbot Moving & Storage, Inc. in Miami. Caisson's agent obtained the shipment on August 27, 1990, placed it in storage in transit at Herndon, Virginia, on September 6, 1990, and delivered it to the service member in Montclair, Virginia, on September 24, 1990. At delivery, the service member and Caisson's agent prepared a Joint Statement of Loss or Damage at Delivery (DD Form 1840) reporting, among other things, that the lawn mower (listed as item 1 on the shipment inventory) was

[1]This shipment involves Personal Property Government Bill of Lading TP-293,276 (Major Gary E. Barrentine).

missing. The member filed a claim with the Air Force for the mower and other items on October 18, 1990.

On February 26, 1991, the Air Force paid the member's claim. By letter of the same date, the Air Force informed Caisson of a claim for $1,443.75 against Caisson for loss of the mower. On May 15, 1991, Caisson informed the Air Force that it had found the mower in Abbot's warehouse and was ready to deliver it, but the service member, who had bought a replacement mower in the interim, refused delivery.

Caisson denies responsibility for the late delivery of the mower, pointing out that the mower was never tendered to it. Caisson asserts that Abbot is responsible for any damages because it had mistakenly crated the lawn mower with another shipment and the lawn mower was left in the warehouse when Caisson obtained the goods. Caisson also contends that the copy of the inventory it obtained from Abbot was extremely difficult to read and that parts of the entry for the item were scratched out or obscured.

Here the central issue is whether the Air Force can look to the carrier, Caisson, for recovery of an amount already paid to a member in settlement of a claim. We conclude it can. As detailed below, Caisson breached its contract of carriage with the government and its breach was the proximate cause of a loss. Caisson's assertion that it is not responsible because the item was never tendered to it is not relevant, since Caisson had a duty to seek out the listed item.

Caisson did not perform several of its contractual duties. First, Caisson had a duty to obtain a legible inventory. Paragraph 54 of Caisson's Tender of Service with the Department of Defense[2] required the firm to obtain two "legible" copies of the inventory from Abbot. If Caisson's agent had a concern about the legibility of the first item on the inventory, the time to have raised this concern was at the time of its initial acceptance of the shipment. A procedure, the preparation of an exception sheet, is provided for addressing such concerns. However, no such sheet was prepared. Having failed to raise a question on the legibility then, Caisson is precluded from raising it subsequently. In short, if Caisson had followed the direction in paragraph 54, it would not have accepted the shipment from Abbot until Abbot provided it with legible copies of the inventory.

In any event, we do not agree that the section of the inventory in question is illegible. While an attempt was made at some point to cross out part of what had first been written on the line for item 1 of the inventory, the words "Toro 11-32 ride mower" remain undisturbed and legible on copies provided to us. Item 1, the riding mower, was therefore clearly an active item on the inventory listing, and Caisson

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[2]See Appendix A to Department of Defense Personal Property Traffic Management Regulation, DOD 4500.34-R (May 1986).

had a duty to account for this item before it assumed control of the shipment at the warehouse facility.

Second, Caisson's agent had a duty under paragraph 54, in the presence of Abbot's representative, to check each item of the shipment against the inventory, and if necessary to prepare an exception sheet or rider noting any shortage/overage or difference in condition between the description of an item and what was physically present in the inventory. Any difference in opinion between the warehouseman and Caisson also had to be noted. Both parties should then have signed the exception sheet, and each party should have retained a copy. When Caisson's agent obtained the household goods in Miami, it did not prepare a rider to the inventory to show nonreceipt of any item.

Third, under Section 38 of the Tender of Service agreement, Caisson was required to trace missing inventoried items and to report the results of the search to the Air Force within 30 days. It did not so do so. In the ordinary course, the Air Force, after the 30-day period has elapsed, will pay a member's claim for an undelivered item. If the carrier subsequently finds the item, Section 38 directs the carrier to hold the item on location and await disposition instructions. If, as here, the member no longer wants the item, the Air Force then regards it as the property of the carrier.

We agree with the Air Force's disposition of the matter. It is well settled that a party who breaches his contract cannot insist upon performance by the other party. Nakdimen v. Baker, 111 F.2d 778, 782 (8th Cir. Ct. of App., 1940); Belser v. Mutual Life Ins. Co of New York, 77 F. Supp. 826, 829 (Fed. Dist. Ct., E.D. of South Carolina, 1948); Williston, Law of Contracts, 3rd Ed., Section 1299.

Clearly, Caisson breached its Tender of Service contract by failing to act with reasonable dispatch. Caisson received notice that the mower was missing in September 1990, when it was so informed by the member in the course of delivering the shipment to the member. We find no indication in the record that Caisson sought to locate the missing mower until the Air Force initiated the claim action in February 1991. Caisson did not find the mower until May 1991, by which time the Air Force had paid the service member and the service member had replaced the missing mower.

Accordingly, Caisson is not entitled to recover the amount setoff by the Air Force. The carrier, however, is not left altogether without recourse. It may seek to dispose of the mower on whatever terms are most advantageous to it.

We affirm our prior settlement.

for Robert P. Murphy
Acting General Counsel