DATE: March 6, 2002

In Re:

Andrews Van Lines, Inc.

Claimant

Claims Case No. 02021401

CLAIMS APPEALS BOARD DECISION

DIGEST

A carrier must prove by clear and convincing evidence that a military service unreasonably used a particular measure of damage to calculate the carrier's liability. Here, however, the Army deviated without explanation from the depreciation rates for average care and/or use set forth in the *Depreciation Guide*. Such deviations are inferentially unreasonable until explained.

DECISION

Andrews Van Lines, Inc. (Andrews) appeals the November 9, 2001, Settlement Certificate of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 01103016, wherein DOHA disallowed Andrews claim for a refund of amounts set off by the Army for loss or damage to a service member's household goods.[(1)] Andrews appeal issues involve the calculation of damages and the applicable depreciation if proper.

Background

The record shows that Andrews' agent picked up the shipment on July 9, 1997, in Oklahoma, and delivered it to the member in Texas on January 22, 1998. A *Demand on Carrier/Contractor*, DD Form 1843,was dispatched to Andrews on August 18, 1999. In relevant part, by letter dated August 30, 1999, Andrews requested the member to allow it to pick up nine damaged items for salvage.[(2)] Andrews contends that the member's spouse agreed on September 8, 1999, to

release three of the nine items requested (Items 71, 109 and 125). On the same day, Andrews states that its representative contacted a named representative from the Army Claims Service, and advised her of the member's refusal to release the remaining items. Andrews states that the Army Claims Service's representative told Andrews that it was appropriate to deduct 25 percent credit for salvage on the remaining items. Andrews contends that the Army Claims Service otherwise calculated damages incorrectly on four items: 42 (an end table), as well as Items 109, 276, and 323 identified above.

On Item 42, a solid wood end table purchased for $150 in April 1987, the carrier's repairer calculated repair cost at $72, and the Army paid that amount to repair the transit damage (chips and scratches to the front leg and top corner). Prior to this appeal Andrews argued that its repairer also had observed that the damage was "old damage;" therefore, it contended that it was not liable because the damage was pre-existing damage (PED). The Army noted that the repairer stated that the damage "appears" to be old, not that it was old. Also, the PED reported on the descriptive inventory only involved a faded top corner, not chips and scratches to the front leg. Andrews now argues an entirely different basis for relief. It contends that the "ADV," which we understand as adjusted dollar value, is $211.50 ($150 x 1.41) less 70 percent depreciation (10 years old x 7 percent per year), or $63.45. Andrews also contends that it was not allowed to exercise its 25 percent salvage right, and when this is factored into the final calculation, it is owed a refund of $8.55, or $24.41 with depreciation.

On Item 109, a hutch base purchased for $244 in September 1981, Andrews similarly believed that any claimed transit damage was PED. As in Item 42, the Army had rejected Andrews position because the origin inventory referred only to various chips and scratches, mostly to the corners and edges of the base of the hutch, while the damages reported at destination were substantially more extensive. In its alternative position, that it now addresses in this appeal, Andrews contends that Item 109's ADV is $431.88 ($244 x 1.77), less 75 percent maximum depreciation, or $107.97. Andrews asks for the difference between the amount set off, $122, and $107.97, or $14.03.

On Item 276, a plastic clothes basket purchased in September 1993 for $3.00, Andrews argues that the ADV is $3.33 ($3.00 x 1.11), less 80 percent maximum depreciation (the *Depreciation Guide* lists plastic baskets at 20 percent per year), or $0.66. When a 25 percent salvage credit is factored into the calculation, the amount of liability is $0.50, not the $2.40 amount set off. Andrews seeks a refund of $1.90. The Army also used ADV at the same rate (1.11), but used a 28 percent depreciation instead of 80 percent.

On Item 323 a rocking chair purchased in 1980 for $150, Andrews argues that the ADV is $292.50 ($150 x 1.95), less 80 percent maximum depreciation (using 20 percent per year for children's furniture in the Depreciation Guide) or $58.50. When a 25 percent salvage credit is factored into the calculation, for reasons explained above, the amount of liability is $43.88, not the $54.85 set off. Andrews seeks a refund of $10.97. The Army's offset was based on the same TADV rate, minus 75 percent for depreciation and 25 percent for salvage, and the Army noted that 75 percent was the proper percentage, not 80 percent, because this furniture was not infant furniture and does not have a maximum depreciation of 80 percent.

Andrews also notes that on March 1, 2000, the Army Claims Service responded to Andrews' December 10, 1999, refund request by allowing a $41.02 refund. However, Andrews cannot determine which item is related to the $41.02 refund allowance and contends that it never actually received the $41.02 allowance.

Discussion

The military services and the industry agreed by contract to procedures for claiming salvage and crediting a carrier with salvage value. This agreement contained in a *Joint Military-Industry Memorandum of Understanding on Salvage*, became effective on April 1, 1989.[(3)] In relevant part the agreement states where the carrier has paid, or agrees to pay, a claim for the total depreciated replacement value of an item, the carrier that chooses to exercise salvage rights will take possession of salvage items not later than 30 days after receipt of the governments claim. The carrier will not exercise a right to salvage when any single item is less than $50, or when the item is hazardous or dangerous to the health or safety of the members family unless it is an antique, figurine or crystal. For an individual item which has a depreciated replacement value of less than $50, the carrier will receive no credit for salvage. *See* DOHA Claims Case No. 98022313 (March 5, 1998).

On the issue of salvage, Item 42 was not included in Andrews' August 30, 1999, letter, and there is no indication that it had otherwise requested salvage of this item within 30 days after receipt of the government's claim. Accordingly, salvage credit is not applicable to this item. With regard to Items 44, 48, 243 and 323, the Army's administrative report and our Settlement Certificate both noted that the Army had factored salvage into its calculation of Andrews' liability, and our review of the *List of Property and Claims Analysis Chart*, DD Form 1844, Block 20, confirms the 25 percent credit for each item. The Army's administrative report and the Settlement Certificate do not specifically address salvage in Item 215, but our review of the DD Form 1844 indicates that the Army credited 25 percent for salvage in Block 20. We agree with the Settlement Certificate that salvage/salvage credit is not applicable to the replacement of the plastic clothes basket (Item 276) because it is well under the $50 threshold.

Andrews now argues that its liability for Item 42 (aside from the salvage issue) should be $63.45, instead of $72, using "ADV" to measure damages. Our review of the record does not indicate that Andrews had previously presented this alternative claim basis for the Army's consideration, and for that reason alone, we would be justified in rejecting Andrews' revised claim. *Compare* DOHA Claims Case No. 98032303 (April 14, 1998). As stated above, Andrews' position prior to this appeal was that it was not liable for any damage to Item 42 because the damage was pre-existing. Additionally, we see nothing in the record that supports Andrews' use of ADV. In a prior Andrews' claim, we had recognized the reasonableness of applying the Army's Table of Adjusted Dollar Value (TADV) to measure damage when an item cannot be replaced or no suitable replacement is obtainable. *See* DOHA Claims Case No. 97122315 (January 12, 1998). Here, Andrews did not settle the claim on this basis, nor did it otherwise justify the use of this method to the Army when it presented a claim for a refund. On the other hand, a solid wood end table appears to be an ordinary piece of furniture that is replaceable or repairable. Andrews failed to meet its burden of proof: it must prove by clear and convincing evidence that the Army's repair cost was unreasonable. *See* DOHA Claims Case No. 97021808 (June 25, 1997); and DOHA Claims Case No. 97012102 (January 29, 1997).

The $41.02 refund allowance relates to Item 109. Our review of copies of the DD Form 1844 in the record indicates that the Army Claims Service revised Andrews liability on Item 109 from $122 to $80.98, or a refund of $41.02. The available record includes only the first page of the March 1, 2000, letter from the Army Claims Service that advised Andrews of the allowance. Ahead of this letter in our record is a copy of the same letter, apparently returned by Andrews to the Army Claims Service, that contained the following handwritten note dated March 24, 2000: "Thank you for the refund of $41.02. However we feel that this needs to be reviewed further. Please forward to DOHA." A worksheet in back of the copy of page 1 of the Army Claims Service's arch 1, 2000, letter associated $41.02 with Item 109. We cannot determine from the record that Andrews actually received payment of the $41.02 refund for Item 109, but if it did, the point raised in its appeal is moot. We remand this aspect of the appeal to the Army Claims Service to ascertain whether Andrews was paid $41.02.

On Item 276, we have declined salvage for reasons stated above. Both the Army and Andrews applied an adjustment factor of 1.11 to purchase price (rather than replacement cost), resulting in an amount of $3.33 that was subject to depreciation. However, we agree with Andrews on the rate of depreciation. The *Joint Military/Industry Depreciation Guide* (DG) provided a 20 percent per year rate of depreciation (80 percent for four years) for "Baskets & Hampers" "Wicker or Plastic." It is not apparent how the Army arrived at a 28 percent total rate of depreciation for the four years, and we found no explanation for this on record. Our calculations indicate that $3.33 x 20 percent residual value, is $0.666, or $0.67. We allow Andrews $1.73.

As in Item 276, the essential difference between the Army and Andrews on Item 323 involves the rate of depreciation. The DG provided for a 20 percent annual rate of depreciation, with a maximum of 80 percent, for children's furniture. Nothing is specifically mentioned about infant furniture. The *Revised Joint Military/Industry Depreciation Guide*, effective on April 1, 2000, provides for a 10 percent annual rate of depreciation, with a maximum of 75 percent for children and infant furniture (no distinction), and the *Allowance List-Depreciation Guide* (ALDG) (for internal DoD purposes) had a 10 percent annual, maximum 75 percent, depreciation rate for infant furniture. Neither the revised DG nor the ALDG would apply here. Andrews' liability is $43.88, and we allow $10.97 as requested.

Thus, we would allow Andrews a total additional amount of $12.70 (for Items 276 and 323). However, under the prevailing interpretation of the *Joint ilitary-Industry Agreement*, the Army is not obliged to pay amounts of $25 or less in these circumstances. *CompareAmerican Van Services, Inc.,* B-250492, April 21, 1993.

Conclusion

We modify the Settlement Certificate for the reasons indicated. We remand this matter back to the Army Claims Service to determine whether the $41.02 it allowed was actually paid to Andrews. If this amount has not been paid, and the Army confirms the allowance, then the Army should initiate action to pay the $41.02 amount, plus $12.70 for the additional allowances here. *See* B-261770, Feb. 27, 1996. We are closing our file in this matter but will re-open it if there remains a dispute about the $41.02 allowance.

Signed: Michael D. Hipple

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Michael D. Hipple

Chairman, Claims Appeals Board

Signed: Christine M. Kopocis

Christine M. Kopocis

Member, Claims Appeals Board

Signed: Jean E. Smallin

Jean E. Smallin

Member, Claims Appeals Board

1. This matter involves Personal Property Government Bill of Lading (PPGBL) YP-443,649; Army Claim No. 99-131-1510; and Andrews' claim 99-0337.

2. Items 44 (coffee table), 48 (rocker), 71 (three glasses as specified by Andrews), 109 (hutch base), 125 (dining chair), 215 (armoire), 243 (quilt rack), 276 (clothes basket), and 323 (small rocking chair).

3. A copy of this MOU is found at page 401 of Department of the Army Pamphlet 27-162, *Claims Procedures* (April 1, 1998).