KEYWORD: Transit damage; measure of damages

DIGEST: A carrier must prove by clear and convincing evidence that a military service unreasonably applied a particular measure of damage to calculate the carrier's liability. However, by contract with the industry, the military services agree that the depreciation rates for average care and /or use set forth in the *Joint Military/Industry Depreciation Guide* are reasonable for purposes of recovery against the carrier. When the Army deviates from these rates without a complete explanation, such a deviation is inferentially unreasonable until explained.

CASENO: 02061404

DATE: 07/16/2002

DATE: July 16, 2002

In Re:

National Claims Services

on behalf of

Eagle Van Lines, Inc.

Claimant

Claims Case No. 02061404

CLAIMS APPEALS BOARD DECISION

DIGEST

A carrier must prove by clear and convincing evidence that a military service unreasonably applied a particular measure of damage to calculate the carrier's liability. However, by contract with the industry, the military services agree that the depreciation rates for average care and /or use set forth in the *Joint Military/Industry Depreciation Guide* are reasonable for purposes of recovery against the carrier. When the Army deviates from these rates without a complete explanation, such a deviation is inferentially unreasonable until explained.

DECISION

The U.S. Army Claims Service appeals the January 4, 1999, Settlement Certificate of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 98112014, holding that two porcelain figurines owned by a service member and broken in transit were subject to depreciation.[(1)] Application of depreciation reduces the Army's recovery by $56.80.

Background

The record shows that the shipment moved from Alexandria, Virginia, to Fort Benning, Georgia, in 1994. Two porcelain figurines (a Kaiser painted foal and a Goebel tennis player) were broken in transit. Replacement costs on the retail market were $448 and $165 respectively. In calculating damages, the Army did not apply depreciation to either item because it viewed each as an "object of art," and the Army Claims Service believes that no depreciation applies in such instances per the *Joint Military/Industry Depreciation Guide* (JMIDG). National Claims Services (NCS), Eagle's representative, had argued that the JMIDG specifically provides for a 10 percent flat rate of depreciation for all figurines. NCS points out that the JMIDG did not indicate that, in some circumstances, a figurine may be considered an object of art instead of a figurine and that an object of art or "object d' art" is a vague term. Finally, NCS contends that even if an item is properly classified as an object of art, the measure of damages noted in the JMIDG is the "commercial value," and "commercial value" is not necessarily equal to replacement cost as the Army has assumed.[(2)] The Settlement Certificate applied the depreciation requested by NCS because the Army failed to prove that these figurines, in fact, were objects of art.

In this appeal, forwarded to us about three and a half years after the Settlement Certificate, the Army Claims Service expounds upon its argument that claims office personnel should have the discretion to place a damaged item into whatever category under the JMIDG that is appropriate given the nature and quality of the object. In this case, the Army contends that it is more logical to categorize these items as "fine china" or "objects of art," and when categories (such as bric-a-brac, figurines and objects of art) are vaguely defined, a reasonable decision to classify an object in one category and not in another should be upheld by DOHA. The Army Claims Service cites several Comptroller General and DOHA decisions exemplifying the fact that the JMIDG, as its name indicates, is a guide and that agency claims officials have some discretion in applying the rates listed therein. The Army Claims Service clarifies its prior position, agreeing that a figurine does not become an object of art just because it passes a certain monetary value, but on the other hand, price is a relevant consideration and should be considered along with other factors. In this case, claims office personnel decided not to depreciate these two items based on value, quality and composition. The Settlement Certificate noted that normally, mass produced items are not classified as works or objects of art, but the Army Claims Service contends that it is *possible* to classify a mass-produced item as an object of art. If one item of high artistic quality is created and constitutes an object of art, then many of the same, re-created in the same fashion, using the same level of artistry and skill, are objects of art. The Army Claims Service contends that NCS has not demonstrated that the classification is unreasonable.

Discussion

Preliminarily, we express our concern about the Army Claims Service's unexplained delay in the processing of this appeal. Where a claimant delays his appeal in similar circumstances, generally we will remind him that we have the

authority to reject his appeal to the extent that the government's ability to defend itself would be imperiled by the delay. *See, for example* , DOHA Claims Case No. 97100111 (January 23, 1998). It is well-recognized that the doctrine of laches does not apply against the government, but we still stress the need for government officials to live by the same standards that they seek to impose on members of the public.

The record advises us of the replacement cost of each item. It also advises that one was a Kaiser porcelain foal and the other was a Goebel porcelain tennis player. We reviewed relevant sites on the Worldwide Web,[(3)] and there appears to be enough information to find that each is a collectible and that the products produced by each company are made by experienced craftsmen. From this information, the Army Claims Service invites us to find that each is an object of art.

But, even assuming (without deciding) that the Army Claims Service could properly classify one figurine as a figurine for JMIDG depreciation purposes and another as an object of art for the same purpose, the record still lacks a reasonable factual foundation for classifying these particular items as "objects of art." The Army Claims Service cited no authority indicating how the term "object of art" is used for transportation purposes.[(4)] Both items are mass-produced, not unique, and are available to everyone willing to pay the modest sales prices for each. The replacement cost of the Goebel is $165, only a modest amount above the presumed bric-a-brac threshold.[(5)] There is no evidence, for example, identifying the artist(s) who created the broken porcelain foal or broken tennis player, his/her reputation as an artist, the amount of care in preserving each article for transit, or a description of the artistic skills and skill used in creating each item. The composition and quality of each item is not explained. A claims examiner at the Army Claims Service found that neither item depreciated, but she did not indicate how she reached that conclusion. The Army merely jumps to the conclusion that if a figurine is produced by Goebel, Kaiser, Hummel, or Lladro, especially if the replacement cost is $100 or more, it is *ipso facto* an object of art.[(6)]

In other aspects of carrier recovery, at times we adopted the military services' position on similar depreciation matters arising in settlement of member claims because we believed that the Services' internal business practice reflected whatever existed of the intent of the parties, especially where the JMIDG did not address an issue. *See* DOHA Claims Case No. 01050801 (May 23, 2001); and DOHA Claims Case No. 99060725 (June 24, 1999). Naturally, we must closely scrutinize deviations from the express provisions of the JMIDG. *Compare* DOHA Claims Case No. 02021401 (March 6, 2002). Here, the items in issue are figurines, and there is a specific rate of depreciation in the JMIDG that applies to figurines. If the Army wants to classify them as "objects of art" it must first demonstrate that these items are properly classified in the JMIDG as "objects of art."

Conclusion

We affirm the Settlement Certificate.

Signed: Michael D. Hipple

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Michael D. Hipple

Chairman, Claims Appeals Board

Signed: Christine M. Kopocis

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Christine M. Kopocis

Member, Claims Appeals Board

Signed: Jean E. Smallin

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Jean E. Smallin

Member, Claims Appeals Board

1. This matter involves Personal Property Government Bill of Lading VP-954,047; Army Claim 95-251-0007; and National Claims Services' file E-0337.

2. The concept of "commercial value" is not in issue in this appeal, but it is somewhat unusual language in the context of household goods. We would expect service and industry representatives to provide specific evidence of intent should this concept become involved in any future claim.

3. *See*, *e.g.,* www.equestriandreams.com/porcelain_horse_gifts.htm. At the time of our review, we found imported Kaiser German porcelain horse gifts ranging in price from $90 to $1,495.

4. Our cursory research indicates that some courts have commented on this. In *Olsen v. Railway Express Agency, Inc.*, 295 F. 2d 358 (10th Cir. 1961), the Court accepted as uncontested that a damaged porcelain work (*the Last Supper)* purchased by the plaintiff for $3,500 was a work of art even though: it was of contemporary manufacture; it had no special value from antiquity; it was neither original nor unique in that duplicates existed and were obtainable; and it was not of museum quality.

5. The multi-Service *Allowance List-Depreciation Guide* (ALDG)*,* a publication used by the military services to establish depreciation for claims against the government, states in Rule 31 that a bric-a-brac carries a flat 10 percent depreciation rate and includes inexpensive figurines as distinguished from expensive objects of art (Rule 111). It also states that items that exceed $100 may be considered under Rule 111 (objects of art including sculptures and figurines) if more appropriate.

6. In sum, the Army Claims Service is asking us to adopt the military services' policy on claims against the government (the discussions under Rules 31 and 111 of the ALDG) as the intent of the parties under the JMIDG . Rule 111 mentions Hummel and Kaiser by name as companies that produce quality by definition, even if less than $100.