In Re:

Midwest Moving & Packing, Inc.

Claimant

DATE: November 27, 1996

Claims Case No. 96070212

CLAIMS APPEALS BOARD DECISION

DIGESTS

1. When a service member ships his household goods and notifies the carrier on a DD Form 1840R that it caused transit damage to a particular item of property, the service member is not necessarily limited to the damage described on the notice for the particular item. The purpose of the DD Form 1840R is to provide notice to the carrier to inspect the property involved for transit damage.

2. The fact that some pre-existing damage may be repaired incidental to the repair of transit damage does not diminish a carrier's liability where the carrier has not demonstrated that the additional cost for doing so is ascertainable.

3. Under the Military-Industry Memorandum of Understanding on salvage, a household goods carrier generally must take possession of a salvage item not later than 30 days after receipt of the government's claim.

4. The burden of establishing fraud rests on the party alleging it and must be proven by evidence sufficient to overcome the presumption in favor of honesty and fair dealing.

5. Consistent with the practice of the Comptroller General when he considered claims by household goods carriers for recovery of agency offsets for transit loss/damage, DOHA does not question an agency's calculation of the value of damages to items in a shipment of household goods unless the carrier presents clear and convincing evidence that the agency acted unreasonably.

DECISION

Midwest Moving & Packing, Inc. (Midwest), appeals the U.S. General Accounting Office's (GAO) Settlement Certificate Z-2862445-9, dated November 7, 1995, which denied Midwest's claim for reimbursement of $5,567.75, except for a refund of $89 allowed by the Army, deducted by the Army for transit loss and damage to the household goods shipment of a service member.(1) Pursuant to Public Law No. 104-316, October 19, 1996, title 31 of the United States Code, Section 3702 was amended to provide that the Secretary of Defense shall settle claims by transportation carriers involving amounts collected from them for loss or damage incurred to property incident to shipment at government expense.

Background

The record indicates that Midwest picked up the service member's household goods at Fort Bragg, North Carolina on August 25, 1992. The goods were transported to Hialeah, Florida and delivered on May 18, 1993. The service member claimed damage on a number of items, and on November 21, 1994, the Army offset $7,902 from Midwest. The carrier now appeals $2,278.72 of that offset.

On appeal, Midwest disputes its liability for eight items on the descriptive inventory: the table leaves (item 31), a child's self-propelled toy riding jeep (item 38), a Kirby vacuum cleaner (item 122), two chairs (items 36/37), an oriental carpet (item 125), a queen size mattress (item 129), and a microwave oven (item 5). Generally, Midwest contends it was not accorded its salvage rights, which would apply to each item except the table leaves. In addition, Midwest contests the

measure of damages for a number of items.

Regarding the table leaves, Midwest states that the only damage substantiated is on the Notice of Loss or Damage (DD Form 1840R) which indicated that the damage was a "scratched top," but the damage claimed and repaired also included a deep dent. Midwest argues that the deep dent was not transit related, and that the other damage was pre-existing damage (PED). Therefore, the entire $378 that the Army set off should be refunded. The DD Form 1840R indicates only that the leaves were scratched; nothing on the DD Form 1840R indicates that the leaves were dented. However, the descriptive inventory shows that the leaves were rubbed and scratched on the top and sides, and that a dented condition ("D") was noted as an exception at destination. The carrier's inspector (DiSar Furniture Service, Inc.) also observed the deep dent. The inspector found the cost to repair the leaves at $378, and the Army found that it was not possible to separate the cost of repairing the dent from the cost of repairing the pre-existing damage.

Concerning the jeep, there is no dispute that depreciated replacement cost was the proper measure of damages. However, Midwest requests a $40 refund to receive credit for the salvage value. The firm acknowledges that the service member offered the jeep as salvage, but it did not take custody at that time because the service member disputed the carrier's taking custody of some other items in the shipment to which it was entitled to salvage. Midwest wanted to take custody of all salvage items at one time. The Army contends that Midwest is not due such credit because the service member offered possession but the carrier did not make arrangements to take it; therefore, the carrier waived its salvage right.

Midwest contends that the service member intentionally falsified the value and the extent of damage or repair cost to the vacuum cleaner. It alleges that it investigated the claim and found any Kirby vacuum cleaner can be rebuilt for $158. Therefore, it seeks to recover $814: depreciated replacement cost ($ 972) - $158. The carrier's inspector noted that a 4-year old Kirby Heritage odel 1HD was valued at $1,000. The Army found that the undepreciated replacement cost was $1,800 based on a written estimate by the Kirby Vacuum Center of South Florida which indicated that missing and broken parts had to be special ordered because the model was no longer made.

Midwest contends that it should have been allowed the right to collect the chairs for salvage and, on appeal, requests a refund of $93.72.

The Army reports that the service member made the oriental carpet available to Midwest for salvage as it did with the child's jeep, but that Midwest failed to pick it up. Midwest again suggests that it was awaiting a proper decision on salvage for other items, and it suggests that the Army did not provide sufficient assistance in obtaining possession of all the items to which it was entitled to salvage. Midwest claims $645 for salvage credit. Alternatively, the carrier argues that the service member ought to be limited to a loss of value award ($300) because he continues to use it. The record indicates that the carpet was permanently spotted; attempts at cleaning it were unsuccessful. A professional written appraisal in the record indicates, among other things, that the rug was discolored permanently and contains yellow and brown stains (presumably due to water or dampness). It also has several black, grime, dirt and grease marks which cannot be removed. The appraiser estimated the undepreciated replacement cost of the rug at $3,000.

Similarly, the queen size mattress was water damaged, and Midwest argues that it is still being used by the service member without it having been cleaned. The firm argues that a loss of value damage of $50 is proper and seeks to recover $153, the difference between that and the repair cost.

The damage claimed to the microwave was that a bottom corner was scratched and rubbed; that it works sometimes and not others; and that the door was bent down. Midwest contends that there is no proof that the door damage was transit related, but the inspector noticed the door damage and such damage was not noted at origin in the descriptive inventory. The DD Form 1840R did not note such damage. The depreciated replacement cost was $270.

Discussion

Generally, under federal law, in an action to recover from a carrier for damage to a shipment, the shipper establishes his prima facie case when he shows delivery in good condition, failure to deliver or arrival in damaged condition, and the amount of damages. Thereupon, the burden of proof is upon the carrier to show both that it was free from negligence and that the damage to the cargo was due to one of the excepted causes relieving the carrier of liability. SeeMissouri

Pacific Railroad Company v. Elmore & Stahl, 377 U.S. 134, 138 (1964).

In each instance, the service member showed that there was additional damage to an item between origin and destination, plus the amount of such damages. For example, the inspector observed that there was a deep dent in the table leaves, an observation confirmed by the "D" notation as an exception to delivery in the descriptive inventory. Similarly, the inspector noted door damage to the microwave. The legal issue that Midwest appears to raise with respect to these two items is whether the service member is estopped from claiming more damage to a specific item than that noted on the DD Form 1840R. We do not think so. The purpose of the DD Form 1840R is to provide notice to the carrier that damage occurred to an item so that the carrier may inspect it. Here, the carrier did inspect and its inspector described the dent on the leaves and the damage to the door on the microwave oven. In such situations, the Comptroller General has held that the service member is not required to precisely describe the nature of the damage to a particular item on the DD Form 1840R. See Andrews Forwarders, Inc., B-257515, Dec. 1, 1994. Moreover, the fact that some PED may be repaired incidental to the repair of transit damage does not diminish a carrier's liability where the carrier has not demonstrated that the additional cost for doing so is ascertainable. See American Van Services, Inc., B-256229, Sept. 8, 1994; and Interstate Van Lines, Inc., B-197911.2, Sept. 9, 1988.

Concerning the issue of salvage, Midwest's July 15, 1994, letter to the Commander, U.S. Army Claims Service requested the salvage of the member's damaged goods, and the Army either has already credited or will credit the carrier for salvage value (25%) for each item where salvage is involved, except for the jeep and the oriental carpet. Thus, except for the salvage of these two items, we will not discuss the salvage issue further. The record supports a finding that Midwest waived its salvage rights concerning the toy jeep and oriental carpet. The carrier acknowledges that it did not pick up these items because the service member disputed the carrier's salvage rights on other items, and it wanted to obtain possession of all of the salvage at one time. The Army found that Midwest never finally arranged a pick-up of these two items, and Midwest acknowledged in its July 15, 1994, letter to the Commander, U.S. Army Claims Service, that the service member's wife offered the jeep and the carpet for salvage. Under the Military-Industry Memorandum of Understanding (MOU) pertaining to salvage, generally a carrier must take possession of the salvage items not later than 30 days after receipt of the government's claim. This period is extended, if necessary, so that it does not run prior to the end of the period of time that the carrier has to inspect the property. The MOU also extends time to take possession if the service member and the claims office agree with the carrier to hold salvage for a longer period. The Army dispatched the claim on July 12, 1994, and it appears that the inspection was conducted in August 1993. There is no indication in the record that the carrier, the service member and the claims office agreed that the service member would hold the rug and jeep until the other salvage issues were resolved; therefore, Midwest waived its salvage right.

We find Midwest's allegations that the service member intentionally misrepresented the replacement cost of the vacuum cleaner not to be compelling. While the replacement cost appears to exceed that of the average vacuum cleaner, the carrier's inspector estimated the "value" at $1,000. More significantly, a written estimate from the manufacturer's representative estimated the undepreciated replacement cost at $1,800, with the need to special order parts. The burden of establishing fraud rests on the party alleging it and must be proven by evidence sufficient to overcome the presumption in favor of honesty and fair dealing. See Captain Roger L. Reasonover, Jr., USN, B-213543, Dec. 7, 1983. The unsupported allegation that the vacuum cleaner could have been rebuilt for $158 does not overcome the presumption of honesty and fair dealing in this instance.

Finally, on some items, Midwest suggests that the appropriate measure of damage should be a smaller loss of value award rather than depreciated replacement cost, especially where the service member may continue to use the damaged item. Midwest has not cited to us any judicial or administrative decisions which have held, as a matter of law, that a smaller loss of value award must be applied in such instances. We will not question an agency's calculation of the value of damages to items in a shipment of household goods unless the carrier presented clear and convincing evidence that the agency acted unreasonably. See DOHA Claims Case No. 96070204 (September 5, 1996). Here, for example, the Army relied on a record containing a professional appraiser's written estimate of the replacement cost of the oriental carpet and the carrier's inspector's valuations of the mattress. Such reliances are reasonable.

Conclusion

We affirm GAO's settlement.

\s\ Michael D. Hipple

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Michael D. Hipple

Chairman, Claims Appeals Board

\s\ Joyce N. Maguire

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Joyce N. Maguire

Member, Claims Appeals Board

\s\ Christine M. Kopocis

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Christine M. Kopocis

Member, Claims Appeals Board

1. See Army Claim No. 94-261-1371, and Midwest's File No. M93-019, involving a shipment under Personal Property Government Bill of Lading (PPGBL) GP-790,457.