DATE: May 16, 1997

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In Re:

Stevens Forwarders, Inc.

Claimant

Claims Case No. 96080601

**CLAIMS APPEALS BOARD DECISION**

**DIGEST**

1. The long-standing rule is that we will not question a Service's use of a shipper-supplied estimate, rather than the carrier's, in the absence of clear and convincing evidence that the Service acted unreasonably in doing so. Where the shipper's repair estimate was for refinishing water damaged furniture and the carrier's repair estimate, for a lower dollar amount, was for recoating the lacquer on the furniture, the carrier has not provided evidence sufficient to establish that the Service's use of the shipper's estimate is unreasonable.

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.

**DECISION**

Stevens Forwarders, Inc. (Stevens) appeals the U.S. General Accounting Office's (GAO) Claims Settlement Certificate Z-1348910-85, dated May 1, 1995, denying it a refund of $3,233 set off by the Air Force for loss and damage to the household goods 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. The Secretary of Defense has delegated this authority to this Office.

**Background**

The record indicates that the member's household goods were moved from Cannon AFB, New exico in December 1989 and delivered to Alexandria, Virginia on January 17, 1990. The member submitted a claim for loss and damage with a repair estimate to the Air Force and the Air Force settled with the member in February 1990. Stevens inspected the shipment on March 2, 1990, 33 days after dispatch of the Notice of Loss or Damage, DD Form 1840R, and submitted a repair estimate to the Air Force within the same week. The Air Force set off $3,233 based on the shipper's repair estimate, stating that Stevens' estimate was not presented prior to the payment of the shipper. Stevens' appeal of the set off was denied by GAO.

On appeal of the GAO Settlement, Stevens accepts portions of the GAO settlement but argues that a prima facie case of liability was not established with regard to the wall units (Items ## 145,146, 147, 148, and 149) and a desk (Item # 224). Stevens is requesting a refund for these items on the basis that the member's repair estimate was for refinishing the items, which would place the member in better condition than when the items were tendered to the carrier, and that the carrier's estimate was for repair of only the damage noted on the DD Form 1840R.

The DD Form 1840R indicates the wall units and desk received water damage. The shipper's repair estimate was for refinishing the wall units at $350-$500 per unit and the desk at $650. The carrier's estimate was for a recoating of lacquer ($30 per unit) or other repair to the wall units if lacquer does not work, at $50 per unit, and $40 for the desk. Our review of the two estimates indicates that for items that were only chipped and scratched, the two estimates match fairly closely.[(2)] For items that were water damaged, however, the estimates vary greatly, the shipper's repair estimate showing a significantly higher repair cost. For example, for the telephone cabinet which received water damage, the

shipper's estimate is for $90 and the carrier's is for $30. We presume the difference in repair costs has to do with the way the repair of the water damage would be handled by the two companies, the shipper's company refinishing the pieces rather than recoating with lacquer.

Stevens argues that for Items #146 and #147, the Descriptive Inventory notes scratches in various locations and the DD Form 1840R lists minor water damage. The carrier's estimator was prevented from repairing the minor damage to these two units because the member stated he could not alter the damage since a government inspector was coming. Stevens points out that the shipper had already been paid and no government inspection is noted in the record. Additionally, for these two items as well as Items #145, #148, and #149, Stevens states that the shipper's estimate includes repair of pre-existing damages and is not responsive to the damage caused by the carrier.

Item #224, the desk, had water damage on the left side. Stevens argues that the item was purchased a few weeks prior to tender yet repairs were allowed for $100 more than the purchase price and more than the full replacement cost. The administrative report indicates that the repair estimate was $50 lower than full replacement cost. The shipper's estimate of $650 is for complete refinishing on the inside and outside, and Stevens states that no damage was claimed for the inside of this unit. Steven's estimate was for $40.

**Discussion**

The long standing rule is that we will not question a Service's use of a shipper-supplied estimate, rather than the carrier's, in the absence of clear and convincing evidence that the Service acted unreasonably in doing so. See DOHA Claims Case No. 96070204 (September 5, 1996) and Fogarty Van Lines, B-257111, Dec. 29, 1994. This rule was modified by the current ilitary-Industry Memorandum of Understanding on Loss and Damage Rules (MOU) for goods moved on or after January 1, 1992; however, the long-standing rule applies here because this shipment moved in 1989 and 1990.

Stevens argues that the Air Force acted in bad faith in settling with the shipper prior to the exhaustion of the time period allotted for it to conduct an inspection and in using the shipper's estimate in adjudicating the claim with it. The fact that the Air Force settled with the service member in an expeditious manner and in so doing based their settlement on the shipper's estimate supplied with the DD Form 1840R is a separate issue from the Air Force's responsibility to settle loss and damage claims with the carrier. The current MOU specifies how the military services are to evaluate itemized repair estimates submitted by a carrier.[(3)] The MOU in effect at the time of this shipment made no reference to how the Services were to evaluate estimates.

In the present case, Stevens' estimate was received by the claims office 48 days after delivery of the shipment and after adjudication with the member, but prior to the Demand on Carrier. The administrative report indicates that the Air Force considered the estimate during the appeal process, but in any event, the long-standing rule applies. The Air Force states that "Stevens has simply introduced a repair estimate that the damages could be easily repaired (at little cost), they did not demonstrate that the repair cost provided by the shipper were unreasonable for the work performed. Therefore, Stevens has failed to carry their burden of rebutting the presumption of the agency's findings of fact."

Stevens arguments on appeal that its lower estimate should have been accepted are not convincing. Stevens has not shown why the shipper's estimate is unreasonable. A carrier's lower repair estimate does not prove that the shipper's estimates or the agency's calculation of the carrier's liability was unreasonable. See DOHA Claims Case No. 96070233 (February 18, 1997). The mere fact that Stevens' repair company would choose to recoat the lacquer does not explain that the shipper's repair company's choice to refinish the furniture was unreasonable.

Regarding pre-existing damages, we have held that 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. SeeDOHA Claims Case No. 96070212 (November 27, 1996). Stevens presents no evidence that the cost of repairing the scratches and other pre-existing damage was separable from the cost of repair of the water damage.

**Conclusion**

We concur with the Settlement.

/s/

Michael D. Hipple

Chairman, Claims Appeals Board

/s/

Christine M. Kopocis

Member, Claims Appeals Board

/s/

Joyce N. Maguire

Member, Claims Appeals Board

1. Government Bill of Lading TP-216,838; AF Claim No. 2WA/BXUR/90/00720/CR; Carrier Claim # 89-73419. The amount now contested in this appeal is $2,500.

2. For example, the shipper's estimate to repair a curio cabinet is $45 and the carrier's estimate is $40 and to repair an antique cabinet, the shipper's estimate is $55 and the carrier's is $40.

3. If the appropriate claims office receives an estimate within 45 calendar days of delivery, that office will use that estimate if it is the lowest overall. An estimate received more than 45 calendar days after delivery will be used by the claims office if the claim has not already been adjudicated and that estimate is the lowest overall. If the carrier provides the appropriate claims office with a low repair estimate after the Demand on Carrier has been dispatched to the carrier's home office, it will be considered in the carrier's recovery rebuttal or appeal process if lower than the estimate used by the claims office and if it establishes that the estimate submitted by the member was unreasonable in comparison with the market price in the area or that the price was unreasonable in relation to the value of the goods prior to being damaged.