DATE: March 6, 1997

In Re:

Andrews Van Lines, Inc.

Claimant

Claims Case No. 96080215

CLAIMS APPEALS BOARD DECISION

DIGEST

1. A compromise offer submitted to a carrier by an agency to settle a loss and damage claim does not bind the agency unless accepted by the carrier. Upon carrier rejection, the agency may set off monies otherwise due to the carrier up to the carrier's full contractual liability, whether or not they exceed the amount of the proposed compromise. Where the Service's claims office adjudicates a claim within its delegated settlement authority and states in writing that the carrier is relieved of liability for a particular item, the Service may not reinstate the claim while adjudicating other items in the same shipment.

2. This Office will not question an agency's calculation of the value of the damages to items in the shipment of a service member's household goods unless the carrier presents clear and convincing evidence that the agency acted unreasonably.

3. When an item is delivered in damaged condition and the damage is noted on the DD Form 1840R, the fact that the carrier delivered the item established that the shipper owned and tendered that item.

DECISION

Andrews Van Lines, Inc. (Andrews) appeals the U.S. General Accounting Office's (GAO) Claims Settlement Certificate Z-2729037-140, dated June 21, 1996, denying it a refund of $304 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

On appeal, Andrews disputes its liability for seven items on the descriptive inventory: the typewriter (Item #77), bookcases (Items #7 and #8), dining room chairs (Items #193, #64, and #65), and a figurine (Item #142). Andrews argues that the Robins' AFB claims office relieved it of liability for the typewriter and reduced its liability for the bookcases. In addition, Andrews argues that the damage to the dining room chairs was pre-existing damage (PED) and that the shipper has not proven tender of the figurine.

The Air Force's administrative report states that Andrews remains liable for the amount assessed in the set off for the typewriter and bookcases on the basis that settlement discussions on claims absent a signed release or other agreement are not binding on either party to the discussion. Regarding the typewriter, the Air Force determined that Andrews was liable for the damage after determining that the damage was to an external component of the typewriter as well as internal damage and in reliance on a notation on the repair estimate indicating that the damage was caused by shipment.

The Air Force determined after inspection that the damage to the dining room chairs was new, transit related damage. The Notice of Loss or Damage (DD Form 1840R) states that each chair had "gouges:" one was on the left back, one was on the right back, and one was on the left arm. The government's inspection report indicates that one chair had a transit

related 3-inch "scratch" on the right back support, one had two scratches, each 1-2 inches long, on the left back support, and one had a chip on the top side of the left arm. The repair estimate for all three chairs referred to a "new scratch on the left side, and front right on another."

The Air Force held Andrews liable for the figurine relying on Comptroller General decisions which state that the delivery of an item which is noted on the DD Form 1840/1840R as damaged establishes that the item was tendered.

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). Once the shipper has established a prima facie case of liability, the burden is on the carrier to show either

that the damage did not occur while in its custody, or that the damage occurred as a result of one of a number of causes for which the carrier is not liable.

We note that a compromise offer submitted to a carrier by an agency to settle a loss and damage claim does not bind the agency unless accepted by the carrier. Upon carrier rejection, the agency may set off monies otherwise due to the carrier up to the carrier's full contractual liability, whether or not they exceed the amount of the proposed compromise. See DOHA Claims Case No. 96070214 (January 6, 1997) and American World Forwarders, Inc., B-247770, July 17, 1992. The Air Force's August 24, 1994, letter to Andrews states that the Air Force accepted Andrews denial of liability for the typewriter and reduced the amount set off by $40. The August 24th letter responded to, and accepted, the carrier's argument that the damage to the typewriter switch was internal damage.[(2)] The claim for the typewriter was reinstated by the Air Force in November 1994 and the Air Force Legal Services Agency determined that Andrews should remain liable for the damage. The issue of Andrews' liability for the bookcases remained open when the claim was transferred from the Robins AFB claims office. We accept the Service's calculation of damages to the bookcases, however, we agree with Andrews that the issue of Andrews' liability for the typewriter was settled in August of 1994 when the claims office, within its delegated settlement authority, adjudicated the liability in Andrews' favor. There was no compromise offer involved. Andrews should receive a refund of $40 for the typewriter.

Regarding the dining room chairs, we agree that the reference on the estimate to damage on the "front right" is inconsistent with the language used in both the DD Form 1840R and the inspection report to new, transit-related damage on the "back" of two chairs. This inconsistency without an explanation by the Air Force justifies a refund to the carrier of $15 for one of the chairs.

However, regarding the remaining two chairs, we disagree with the carrier's concern about the shipper's use of the word "gouge," instead of "scratch," on the DD Form 1840R. While we recognize that a "gouge" is deeper than a "scratch," one person may describe a damage as a "scratch," while another may describe the same damage as a "gouge." The Comptroller General recognized that often there is no meaningful distinction between these two terms. See American Van Services, Inc., B-256229, Sept. 8, 1994 and Continental Van Lines, Inc., 63 Comp. Gen. 479 (1984). Additionally, the DD Form 1840R is sufficient if it alerts the carrier that damage occurred for which reparation is expected; it does not have to be very specific. See American Van Services, Inc., B-256229, supra.

Finally, we reject the carrier's suggestion that the damages that were claimed as transit damages were pre-existing and that it did not know about the inspection report. The Air Force's August 25, 1994, letter to Andrews specifically referred to its inspection report. There is no indication that the carrier inspected any of the damaged property, but the Air Force did inspect. The inspector specifically described the transit related damage and differentiated it from the PED. Based on the inspector's report, and in the absence of clear and convincing evidence to the contrary, we accept the Air Force's findings that American caused additional damage to two of the dining room chairs. See McNamara-Lunz Vans and Warehouses, Inc., 57 Com. Gen. 415, 419 (1978.)

Andrews claims that the shipper has not proved tender of the figurine. The administrative report states that Item #142 was a dishpack including a CD. The Service determined that there is no reason to believe that a figurine would be separately listed on the inventory, especially when the inventory for this shipment has one word descriptions of items and in many cases had generic descriptions such as "1.5 carton" with no description of the contents of the carton. Our review of the Descriptive Inventory indicates that the items listed around Item #142 included items perhaps from on or around a bookcase or dresser top such as porcelain, shelf glass, pictures and books. The carrier has not provided evidence to dispute the reasonableness of the Service's determination that Item #142 contained more than a CD and in particular the figurine which was noted on the DD Form 1840R as damaged. In addition, we have held that when an item is delivered in damaged condition and the damage is noted on the DD Form 1840R, the fact that the carrier delivered the item establishes that the shipper owned and tendered that item. See DOHA Claims Case No. 96070220 (September 5, 1996). Andrews remains liable for the amount of set off.

Conclusion

The settlement is modified accordingly.

/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 SP-387,303; Air Force Claim No. Robins 94-571; Carrier Claim #94-018.

2. The Electric Repair Form indicated no external damage.