

DATE: January 29, 1997

In Re:

American Van Service, Inc.

Claimant

Claims Case No. 97012102

CLAIMS APPEALS BOARD DECISION

DIGEST

To prevail on reconsideration, the carrier must demonstrate an error in fact or law, and neither disagreement with a decision nor restatement of arguments already made establishes that the decision was based on an error of fact or law.

DECISION

American Van Services, Inc. (American) has requested reconsideration of our decision in DOHA Claims Case No. 96081902 (January 8, 1997). American contends that the Board committed error in not discussing why a fair and reasonable loss of value award was appropriate for damages to Item 40Y, a porcelain Christmas manger cow and donkey purchased in December 1965 for \$75, but not for other items like Item 57W, a large Christmas church figurine. The record indicates that the damages to Item 40Y involved chipping, a broken ear, and a broken horn. The Air Force awarded the service member \$15 as a fair and reasonable settlement for Item 40Y.

American then repeats its argument that it should not have been held liable for the full depreciated replacement cost for the other items. It argues that this Board committed error in not providing data to support our position that a chip destroyed the figurine, that another method, other than retainers, could not have held a piece of cardboard onto the back of a small crystal picture frame (Item 74Y), or how a dent prevents the use of a lamp (Item 119W). The firm contends that our reference to the "bending" of the lamp is not supported by the record. Finally, American contends that it cannot be held liable for any of these damages until the Board explains to it why a chip of unspecified magnitude upon a figurine is not repairable and why it must be replaced; why the cardboard back of a picture frame cannot be held in place with tape; and why a dent of unspecified magnitude in an unspecified location upon a brass lamp is not repairable and is no longer functional.

We deny American's request for reconsideration. To prevail on reconsideration, the carrier must demonstrate an error in fact or law, and neither disagreement with a decision nor restatement of arguments already made establishes that the decision was based on an error of fact or law. See DOHA Claims Case No. 96070201 (September 5, 1996) and Eck Miller Transportation Corporation-Reconsideration, B-245385 & B-245385.2, May 20, 1992. In effect, American reargues its prior position that it was an error of law not to apply a fair and reasonable loss of value as the measure of damages for the three items in issue, but American did not address the Board's concerns about how to apply such a measure. The Board's concerns, among other things, included American's failure to cite judicial or administrative precedent which explain how a loss of value award is calculated and when it must be applied to the exclusion of depreciated replacement cost as a proper measure of a carrier's liability.

More fundamentally, American does not recognize that it, not the Board or the Air Force, has the burden of proving by clear and convincing evidence that the calculation of damages was incorrect. See title 4, Code of Federal Regulations, Subsection 31.7. See also McNamara-Lunz Vans and Warehouses, 57 Comp. Gen. 415, 419 (1978). It speculates that the dent on the lamp⁽¹⁾ and damage to the figurine were repairable, but it did not provide estimates. Thus, American cannot meet its burden of proof where it has nothing except argument to show that it would have been less expensive to repair the lamp than to pay the depreciated replacement value (\$35.29). We cannot assume that it would have been less expensive to repair such a relatively inexpensive item when it could have been purchased new at \$42.95. The same applies to the figurine.

American also contends that there is nothing in the record which demonstrates the magnitude or location of the damages on these items. But the firm is not in a position to offer evidence of the insignificance of the damages when it did not inspect the goods it admittedly damaged.

Also, because American did not send a qualified representative to inspect the damage to the picture frame, it can only speculate that it could have repaired the frame with tape. Even if we accepted that the frame could have been repaired in this manner, we are not convinced that applying plastic tape or duct tape on the back of a \$35 Mikasa crystal picture frame adequately responds to the damages incurred by the service member.

The Air Force's decision to apply a fair and reasonable loss of value for damage to Item 40Y, but not for the three other items, is a matter that is within the reasonable discretion of the Air Force. It appears that the age of Item 40Y may have been a factor. Nevertheless, as we pointed out in our prior decision, the carrier is required to prove that an agency's calculation of the value of the damages to a service member's household goods is unreasonable. For the reasons explained above, we believe the Air Force acted reasonably with respect to Items 57W, 74Y and 119Y.

Conclusion

Accordingly, the petition for reconsideration is denied. The Board will not consider this matter any further. Any additional correspondence forwarded by American will be placed in this file without response.

/s/ Michael D. Hipple

Michael D. Hipple

Chairman, Claims Appeals Board

/s/ Joyce N. Maguire

Joyce N. Maguire

Member, Claims Appeals Board

/s/ William S. Fields

William S. Fields

Member, Claims Appeals Board

1. The DD Form 1840R also indicates that Item 119Y and another lamp were bent, but our opinion here does not change even if we assume that the lamp was only dented.