

DATE: December 20, 1996

In Re:

Resource Protection

on behalf of

Carlyle Van Lines

Claimant

Claims Case No. 96081208

CLAIMS APPEALS BOARD DECISION

DIGEST

A petition for reconsideration is denied where it essentially only restates arguments in the original request for review, and presents no evidence demonstrating an error in fact or law in the prior decision.

DECISION

Resource Protection, on behalf of Carlyle Van Lines, requests reconsideration of the Comptroller General's decision Resource Protection, B-266114, Apr. 12, 1996, disallowing a refund of \$120 set off by the Air Force for loss to a service member's household goods.⁽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 sole question in this request for reconsideration is whether the Comptroller General erred by accepting the Air Force's finding that the proper rate of depreciation for compact discs (CDs) lost in transit is 10 percent for the first year. The record indicates that the carrier lost 19 CDs valued by the member at a total of \$300 which he had purchased at various times during the year of shipment, 1992.⁽²⁾ The Air Force offset \$270 to recover this loss.

The contractual agreement on depreciation between the government and the industry, the Joint Military/Industry Depreciation Guide (JMIDG), does not address depreciation of CDs because such items were not generally used when the JMIDG was last amended in 1976.⁽³⁾

The Air Force found, and the GAO accepted, that unlike records and tapes, CDs are read by a laser beam. Unlike a record, a needle does not touch the record causing wear and scratching, and unlike a tape, the CD does not become unraveled and there are no moving parts.

Resource Protection argues that the Air Force's decision to apply a 10 percent depreciation factor has no foundation and no scientific basis in fact. At one point, Resource Protection indicated that a 25 percent rate of depreciation applied.⁽⁴⁾ More recently, Resource Protection has argued that CDs are like phonograph records and audio tapes, and therefore, they ought to depreciate at the same rate as that provided in the JMIDG for records and tapes, i.e., a flat 50 percent rate. On reconsideration, Resource Protection, for the first time, offers evidence to support its position that CDs are like records because they are subject to some of the same risks of wear and the popularity of the content as records and tapes. This evidence comes in the form of an opinion by an appraiser specializing in liquidations.

The appraiser contends that the only proper basis for valuation of an item is what that item would obtain in the open

market. She states that in commercial liquidations and estate sales of residential property, she disregards book values, original costs, and depreciation allowed for tax purposes. For example, for electronic equipment, the appraiser says that she looks only at what used electronic equipment would sell for in stores regularly selling similar used items, in auctions, in flea markets or in estate sales. From this premise, the appraiser then contends that the only difference between phonograph records and tapes, on one hand, and CDs on the other, is size and shape; that poorly handled CDs may become scratched; and that if not stored properly, CDs sustain irreversible damage. Moreover, the appraiser contends that CDs are subject to the same market pressures as records and tapes; namely, the popularity of the artist and type of music. She

also indicated that it was important that a CD remain in its original container and that it not have visible fingerprints on it. She stated that in liquidations she asks \$5 for CDs by popular artists and \$3 for CDs that do not involve popular artists or are not in the original container. In her experience, a CD generally sells for 50 percent of original price whether it is 6 months old or 4 years old.

Discussion

A petition for reconsideration is denied where it essentially only restates arguments in the original request for review, and presents no evidence demonstrating an error in fact or law in the prior decision. See DOHA Claims Case No. 96070201 (September 5, 1996). Resource Protection has consistently argued that the 10 percent rate is inappropriate but has changed its own position on the proper rate of depreciation, and until this request for reconsideration, had presented little evidence to support any position. For the most part it merely argued that CDs were like tapes and phonograph records. Moreover, Resource Protection did not indicate why it could not have presented the appraiser's statement at a much earlier time when the Air Force or the GAO could have considered it. Historically, the Comptroller General was reluctant to reconsider a claim where a carrier alleges material facts for the first time in a request for reconsideration. See Riss International, B-226006, B-226006.2, Apr. 27, 1990. While these factors are a sufficient basis to deny reconsideration, we recognize the importance of this matter to the industry and believe that some discussion of the appraiser's statement is appropriate.

Some of the appraiser's observations are worthy of consideration. Her remarks about the condition of the CD and importance of maintaining it in its original container are consistent with DeSpirito v. Bristol County Water Co., 102 R.I. 50, 227 A.2d 782, 34 A.L.R. 3d 809 (1967), discussed below. While judicial precedent on valuation of CDs is very limited, one court recently recognized in its discussion that the popularity of the music ought to affect its value. See Zellers v. United States, 682 A. 2d 1118 (D.C. 1996).

On the other hand, the appraiser started her analysis from a faulty legal assumption concerning valuation of used household goods and effects owned and kept for personal use. The courts recognize that actual value to the owner of a lost or damaged item (excluding fanciful or sentimental value) is a significant consideration in assessing damages to household goods and other personal property because the used household goods market, to the extent that it exists at all, may not adequately reflect the value of a household or personal item to its owner. In such a secondhand market, sales are usually at a sacrifice. In determining the actual value to the owner, the fact finder has wide latitude, and he may consider such evidence as the cost of the article when new, the length of time it was in use, its condition at the time of loss or injury, the expense to the owner to replace it with a like item in similar condition, other facts which will assist in determining the worth of the article to the owner. Ownership of property qualifies the owner to give his estimate of what actual loss was, for evaluation in assessing the measure of damages. See DeSpirito v. Bristol County Water Co., supra; see also Annotation, Valuation Of Wearing Apparel Or Household Goods Kept By Owner for Personal Use, In Action For Loss or Conversion Of, Or Injury To, Such Property, 34 A.L.R. 3d 816 (1970). The Comptroller General also recognized the validity of this rule to personal property lost in transit by a carrier. See American Van Services, Inc. -- Reconsideration, B-249834, B-249834.2, Sept. 3, 1993.

In the absence of an agreement between the parties, an immediate 50 percent depreciation of a relatively new item would not appear to be supported by DeSpirito. Moreover, none of the appraiser's remarks was directed at the particular types of albums that were reported missing in this instance.⁽⁵⁾ Also, assuming that a CD is properly preserved and is in good condition, the appraiser did not clearly undermine the Air Force's finding that, in general, a CD is subject to less wear and tear than records and tapes due to the reasons noted above.

We affirm the Air Force's finding that a 10 percent depreciation rate applies, not because it is necessarily the correct rate of depreciation, but because there is some reasonable support for it. For the reasons stated above, we believe that Resource Protection failed to meet the burden of proof in this instance. The administrative office is in a better position to consider and evaluate the facts, and on disputed questions of fact between the claimant and the administrative officers of the government, the Comptroller General has accepted the statement of fact furnished by the administrative officers, in the absence of clear and convincing contrary evidence. See McNamara-Lunz Vans and Warehouses, Inc., 57 Comp. Gen. 415, 419 (1978).

The best solution would be a new military - industry agreement which would specify the rate of depreciation for future claims and settle current disputes. In the absence of such an agreement, we may review this issue in a later claim, and depending on the evidence presented in the particular claim, possibly reach a different result. For now, this Board finds itself in a position similar to the one faced by the Zellers Court: we do not have sufficient information to conclude, as a matter of fact, that a certain rate of depreciation should apply, nor to conclude, with any degree of certainty, what factors ought to be considered in arriving at a rate of depreciation. If we consider this issue in the future, we encourage both the carrier and the government agency involved to present and discuss detailed, objective and widely-recognized authorities as early as possible in the claim process.

Conclusion

We deny the petition for reconsideration.

\s\ Joyce N. Maguire

Joyce N. Maguire

Member, Claims Appeals Board

\s\ Michael D. Hipple

Michael D. Hipple

Chairman, Claims Appeals Board

\s\ Christine M. Kopocis

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Member, Claims Appeals Board

1. This matter involves U.S. General Accounting Office (GAO) Claim File Z-2866671(32), Air Force Legal Services (JACC) File 9304284, Air Force Claims No. 1C/B/LWRC/93/00161/CR, and the carrier reference CLYL 144-109.

2. The average value was \$15.79 each. Under a 10 percent depreciation rate, the total depreciated replacement cost is \$270. Under a 50 percent flat depreciation rate, the total depreciated replacement cost would be \$150. The difference, \$120, is the amount of the claim.

3. The 10 percent per year depreciation rate is the same rate as that provided in the Air Force's Allowance List-Depreciation Guide governing the service's settlements of claims with members pursuant to 31 U.S.C. 3721. It does not directly apply to the carrier's liability.

4. See Resource Protection's November 7, 1993, letter to the Air Force Legal Services Agency.
5. The service member described them in detail on the Notice of Loss or Damage, DD Form 1840R.