DATE: May 13, 1998

In Re:

Stevens Transportation Co., Inc.

Claimant

Claims Case No. 98010520

CLAIMS APPEALS BOARD DECISION

DIGEST

1. Under the Joint Military-Industry Memorandum of Understanding on Loss and Damage Rules, Services will use the carrier's estimate when it is received within 45 days of delivery and is from a reputable repair firm which is willing and able to make the repairs. The Army's dismissal without adequate explanation of the carrier's estimate submitted within 45 days was inappropriate.

2. A carrier that chooses to inspect damages to a household goods shipment before the end of the time period for the shipper to file a DD Form 1840R runs the risk of having to conduct a second inspection if additional damage is noted on a timely filed DD Form 1840R.

3. Generally, when settling a claim for loss or damage, a common carrier by motor vehicle of household goods shall use the replacement costs of the lost or damaged item as a base to apply a depreciation factor to arrive at the current actual value of the lost or damaged item.

DECISION

Stevens Transportation Co., Inc. (Stevens), appeals the Defense Office of Hearings and Appeals Settlement Certificate, DOHA Claim No. 97072407, September 9, 1997, which denied Stevens' claim for a refund of $3,746 set off by the Army for loss and damage to the household goods of a service member.[(1)]

Background

The record shows that the household goods shipment was picked up from Copperas Cove, Texas, on June 24, 1992, by Mason Movers of Killeen, Stevens' agent, and was delivered to the shipper in Washington, D.C., on July 20, 1992. The shipper's claim was offset in the amount of $7,748 in 1995. Our Settlement Certificate denied Stevens' reclaim in the amount of $3,746 for all but $135, which the Army agreed to refund for the cost to repair pre-existing damage (PED) that was listed on the inventory for Item #225, a stereo cabinet.

Stevens argues that the Settlement Certificate incorrectly interprets the Joint Military-Industry emorandum of Understanding on Loss and Damage Rules (MOU) concerning how a carrier's estimate is to be used in the adjudication and settlement processes. Thus, for Items #163 and #235 coffee tables, #225 a stereo cabinet, #260 a china cabinet, and #271 a bed, the issue in dispute is the extent to which the government is bound by the carrier's estimate of damages. A second issue involves Stevens' liability for Item #46, a leather loveseat, which had pre-existing damage (PED), and which Stevens' inspector did not estimate.

It is rare that events transpire as in this case. In particular, it is rare that the carrier's estimate, which includes items for which the carrier had not yet received notice of damage, is received prior to submission of the Notice of Loss or Damage (DD Form 1840R) and months before the shipper's estimate and Army inspection. The Joint Statement of Loss or Damage at Delivery (DD Form 1840) identified 12 items that were damaged, including the china cabinet and 2 coffee tables. In August 1992, within 45 days of delivery, Stevens provided an estimate for 8 of these items plus 5 additional items that were damaged or missing. The shipper evidently had provided to Stevens' inspector not only the damaged

items listed on the DD 1840, but additional items which the shipper had not yet documented as damaged or missing in the move. On September 18, the DD Form 1840R was dispatched. The DD Form 1840R identified a number of missing and damaged items, including the stereo cabinet and bed, 2 of the items that were noted on Stevens' estimate. The shipper supplied estimates in January 1993 and the claims office inspected some of the items in arch 1993.

Although Stevens' estimate was the lowest overall, the Army reimbursed the shipper in April 1993 and made a Demand on Carrier based on the shipper's estimates. The Army contends that because Stevens' estimate only covers a portion of the required repairs to Items #225 and #271, it was incomplete and did not have to be considered by the Army. A February 19, 1997, letter to Stevens indicates that the Army considered Stevens' estimate for some of the items, but determined that the estimate did not show that the shipper's estimates were unreasonable.

Discussion

As a general rule, the shipper must demonstrate three things to establish a prima facie case of liability against the carrier: tender of the item to the carrier, delivery in a damaged condition or non-delivery, and the amount of damages. Thereafter, the burden shifts to the carrier to show that it was not negligent and that the loss or damage was due to an excepted cause. See Missouri Pacific Railroad Company v. Elmore & Stahl, 377 U.S. 134, 138 (1964).

We note that the dollar amount the Army reimbursed the shipper for his loss and damage to this shipment is separate from the carrier's contractual liability under the MOU. We look first at the china cabinet and coffee tables, items listed on the DD Form 1840, for which Stevens provided an estimate within 45 days. The Army considered Stevens' estimate for these items but determined that it did not show that the shipper's estimate was unreasonable. When the carrier submits an estimate, Section III(B) of the MOU explains how that estimate will be used. Section III(B)(1) states:

"If the appropriate claims office receives an itemized repair estimate from the carrier within 45 calendar days of delivery, the claims office will use that estimate if it is the lowest overall, and the repair firm selected by the carrier can and will perform the repairs adequately for the price stated, based upon the repair firm's reputation for timely and satisfactory performance. If the carrier's estimate is the lowest overall estimate and is not used, the claims office will advise the carrier in writing of the reason the lowest overall estimate was not used in determining the carrier's liability."

Stevens' estimate for these items was received within 45 days of delivery and was the lowest overall. The Army has not contended that the repair firm selected by Stevens had a poor reputation or was not willing and able to perform the repairs. The Army's Administrative Report states that Stevens' repair firm is a "seemingly reputable firm". Based on the contractual agreement entered into by the transportation industry and the military services, we find that the Army was incorrect in not using Stevens' estimate when calculating Stevens' liability for the items listed on the DD Form 1840. The Army inappropriately used Stevens' estimate as if it had been received after the Demand on Carrier was made and therefore applied the standards of Section III(B)(3)[(2)] of the OU instead of Section III(B)(1). The Army did not adhere to the MOU and, therefore, Stevens is due a refund for the difference between its estimate and the amount offset. The Army should have used Stevens' estimate or put in writing reasons why that estimate was not the amount of liability if such a determination was made. Stevens is due a refund of $582 for the china cabinet and $1,278 for the coffee tables.[(3)]

Next we look at the stereo cabinet and the bed, items listed on the DD Form 1840R for which Stevens' inspector provided an estimate prior to Stevens' receipt of the DD Form 1840R. Stevens' estimate is for replacement of the hinges for the glass door of the stereo cabinet and hardware and 2 wooden braces for the bed. The DD Form 1840R states that the stereo cabinet had a missing door and parts and the bed had missing parts and a broken bed rail. The List of Property and Claims Analysis Chart, DD Form 1844, indicates that missing parts included an end board, middle support and rail, and side pieces. We point out that Section II of the MOU provides a carrier 45 days from dispatch of the DD Form 1840R to inspect loss and damage listed on a DD Form 1840R. The fact that the shipper chose in August to provide to Stevens some of the information about loss and damage to these items does not relieve or excuse Stevens' contractual duties under the MOU. The DD Form 1840R contained statements that were contrary to Stevens' understanding of the situation, and Stevens had a right to investigate these statements. Specifically, Stevens argues that because its inspector only mentioned replacing hinges to the stereo cabinet door, the inspector saw the door itself and that the inspector's estimate covers all the bed parts that were missing in August. Stevens did not conduct a second inspection or question the additional missing portions of the stereo cabinet and bed that were listed on the DD Form 1840R during the

inspection period. A carrier that chooses to inspect damages to a household goods shipment before the end of the time period for the shipper to dispatch a DD Form 1840R runs the risk of having to conduct a second inspection if a timely DD Form 1840R with additional damages is submitted. Stevens remains liable for the amount offset for loss and damage to the stereo cabinet and the bed, minus the $135 the Army agreed to refund for the stereo cabinet.

Regarding Item #46, the leather loveseat, the inventory indicated one tear, in the "rear corners" in addition to various rubs, soils, and stains. The DD Form 1840R indicated that the leather loveseat was torn but did not note a location for the tear. The shipper's repair estimate indicated a rip/tear on the "right side rear." The claims office inspected the loveseat in March 1993 and acknowledged a visible tear, presumably transportation related damage. The DD Form 1844 indicates "torn, left side". Stevens did not know of the shipper's claim on the loveseat when it conducted it's inspection in August and did not inspect after receiving the DD Form 1840R. The Army determined that the damage noted on the 1840R was new and offset $1,839.00, because the replacement cost was less than the repair estimate. Stevens argues that its liability should be $735.60 to account for depreciation and PED.

Generally, when settling a claim for loss or damage, a common carrier by motor vehicle of household goods shall use the replacement costs of the lost or damaged item as a base to apply a depreciation factor to arrive at the current actual value of the lost or damaged item. See 49 C.F.R. 1005.5(b) and DOHA Claim No. 97062427 (July 15, 1997). The Services have policies to recover from the carrier the least of depreciated replacement cost, repair cost or the carrier's contractual liability. In this case, the Army offset Stevens for the full replacement cost of a 2-year old loveseat with PED. The record indicates that the PED noted on the inventory was determined to be ordinary wear and tear of a 2-year old loveseat but does not indicate why depreciation was not considered when determining the carrier's liability. Without such justification in the record, we agree that Stevens should receive a refund of 20% depreciation, or $367.80.

Conclusion

We modify the Settlement as to the china cabinet, 2 coffee tables, and loveseat. We affirm the Settlement as to the stereo cabinet and the bed.

_/s/_____

Michael D. Hipple

Chairman, Claims Appeals Board

_/s/_____

Christine M. Kopocis

Member, Claims Appeals Board

_/s/_____

Jean E. Smallin

Member, Claims Appeals Board

1. Involves Government Personal Property Bill of Lading RP-698,049; Army Claim 39-351-0499; and carrier claim 92-67022.

2. Section III(B)(3) states: "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."

3. China cabinet: Stevens' estimate was $198, offset was $780, difference is $582. Coffee tables: Stevens' estimate was $100 each, minus 10% depreciation for 2 years, offset was $719 each, difference is $1,278.