In Re:

Andrews Van Lines, Inc.

Claimant

DATE: January 12, 1998

Claims Case No. 97122315

CLAIMS APPEALS BOARD DECISION

DIGESTS

1. The two-year statute of limitations in the Military Personnel and Civilian Employees Claim Act, 31 U.S.C. § 3721, is designed to limit the government's exposure under that Act. There is no legal authority which suggests that the two-year limit in this Act was also intended to protect third-party non-governmental entities, like a household good motor carrier, which became liable to the government in subrogation after a government agency decides that the service member's claim against the government is still timely and it pays the service member's claim for transit damage by a carrier.

2. Replacement costs are generally favored in determining the carrier's liability to the government in subrogation for transit damage to a service member's household goods. As an exception, repair costs are applied when they result in less carrier liability. In some instances, other measures like actual cash value estimated through the Table of Adjusted Dollar Value, may be reasonable. However, the carrier's opportunity to require support for the loss or damage claimed is within the 120-day period of claim settlement following the presentation of the claim against the carrier, and when the carrier does not question the calculation of damages within that period of time, the government will maintain its burden of proof for purposes of a prima facie case of liability against the carrier when it uses any reasonable method of calculating damages.

DECISION

Andrews Van Lines, Inc. (Andrews), appeals the March 27, 1997, Settlement Certificate of the Defense Office of Hearings and Appeals (DOHA) in Claim No. 97020313. In the Settlement, this Office affirmed the Army's set off of $1,945 against Andrews for transit loss and damage to a shipment of a service member's household goods.[(1)]

Background

The record shows that the shipment was picked up in Alexandria, Virginia, on April 24, 1990, and placed into non-temporary storage (NTS) in Baltimore, Maryland. The PPGBL indicates that Andrews obtained the shipment from the NTS facility on July 15, 1992, and delivered it in Colorado, on August 3, 1992.

Andrews argued that it was not liable for the loss and damage because the service member had filed his claim more than 2 years after delivery, and therefore, "over the two year limit per Title 31 US Code Sections 240-243."

On appeal, Andrews also argues that it was not provided a copy of the government inspection report, which was conducted more than two years after delivery, and therefore it did not have an accurate account of the damage. It argues that it has no damage estimate for the dining table (Descriptive Inventory Item 11 and 12)[(2)] and chairs and that the government failed to offer sufficient proof on the amount of damages; therefore, the government failed to present a primafacie case of liability against it. It states that the only estimate it received is one dated May 17, 1994 (the Brooks estimate). Andrews also believes that the Settlement was in error because the adjudicators did not consider the damage it noted on the rider it created when it obtained the shipment at the NTS facility. While it did not specify any such items in its original claim before the General Accounting Office,[(3)] in this appeal it itemizes the following items from the Descriptive Inventory: 6, 19, 20, 26, 27 and 29, all Dining chairs. Andrews argues that it excepted to the receipt of all of

these items (except 20) as faded, worn, soiled, etc. and that Item 20 was reported as broken, which is the claimed damage.

In its administrative report, the Army Claims Service found that the service member had timely filed his Military Personnel and Civilian Employees' Claim Act claim against the service within the two years permitted by statute. The Army states that the service member brought his signed claim (Claim for Loss or Damage to Personal Property Incident to Service, DD Form 1842) to the local claims office on July 29, 1994, even though the DD Form 1842 is stamped September 1, 1994. A supporting chronology sheet indicates that on July 29th, the claims office received the member's file and advised him that items covered by insurance would be "0'd" until claimant receives claim forms from his insurance company. Nevertheless, even if the service member had not timely filed his claim, the Army's legal position is that the time limitations in Military Personnel and Civilian Employees Claim Act does not foreclose the government's right to recover against the carrier in subrogation under title 28, United States Code, Section 2415 (28 U.S.C. § 2415), where the statute of limitations is six years.

The Army Claims Service also reports that this was a large claim and that Andrews received timely notice of the loss and damage[(4)] in 1992. Nevertheless, Andrews chose not to inspect the damages. The Army points out that Andrews has alleged that the repair estimate was not prepared until May 17, 1994, but the Army reports that an inspection involving the dining table and most of the damaged items was completed on May 5, 1993.[(5)]

The Army notes that Andrews did not except to Items 11 and 12 on its rider. The Army states that the two items involved a teak table and two teak table leaves purchased in 1976 for a total of $600 that were delivered badly water damaged, dented, mildewed, chipped, and rubbed. A repair estimate from American Refinishing Services, dated May 5, 1993, indicated that it would cost $900 to repair the table and two leaves and $160 each for the chairs. Considering the year of purchase, the Army applied the Table of Adjusted Dollar Value (TADV) method of ascertaining damages to the table and leaves, with maximum depreciation, and it found that the appropriate measure of damages was $370.50. Of that amount, Andrews was charged with $325 for the table and leaves.

Discussion

Preliminarily, the Army's factual finding that the service member timely filed his Military Personnel and Civilian Employees' Claim Act claim on July 29, 1992, is supported on the record. In disputed questions of fact between the claimant and government administrative officers, we accept the statement of fact furnished by the administrative office in the absence of clear and convincing contrary evidence. See McNamara-Lunz Vans and Warehouses, Inc., 57 Comp. Gen. 415, 417 (1978). Here, the Army explained the discrepancy between the September 1, 1994, stamp and the date of the claimant's signature on the DD Form 1842, July 29, 1994.

Moreover, the Army Claims Service and the adjudicators of our Office correctly concluded that even if the service member had not filed his claim against the government in a timely manner, Andrews would not benefit. There is no legal basis to estop the service member or the government from prosecuting a transit damage claim against a carrier solely because the service member had not filed his claim against the government within the two-year limit in the Military Personnel and Civilian Employees' Claim Act.[(6)] The two-year statute of limitations in the Claim Act is designed to protect the government from exposure under the Claim Act. The carrier has not cited us to any authority, and we are not aware of any authority, which indicates that the two-year limitation was also intended to protect non-government third parties that may become liable to the government through subrogation.

Otherwise, the major issue here is whether the Army presented enough evidence to establish a prima facie case of liability against Andrews. The service member, and the Army in subrogation, must show that Andrews received the goods in a certain condition; that it delivered them in a more damaged condition; and the amount of damages. Thereafter, the burden would shift to Andrews to show that it was free from negligence and that the damage was due to an excepted cause relieving it from liability. See Missouri Pacific Railroad Company v. Elmore & Stahl, 377 U.S. 134, 138 (1964). As indicated above, Andrews is arguing here that the Army never established a prima facie case of liability for the dining table (with leaves) (Items 11/12) and chairs because it failed to prove the amount of damages. Andrews also argues that there is no prima faciecase of liability for the chairs because the government cannot show that Andrews delivered them in a more damaged condition.

In light of the particular circumstances here, we find that the Army had a sufficient basis to establish the amount of damages for the table, table leaves and chairs. If it did not do so, the Army should have provided a copy of the inspection report to Andrews. But the failure to do so would not have inhibited Andrew's from inspecting the reported damages or investigating the claim after it was filed. Paradoxically, Andrews suggests that it should not be held liable because it did not receive a copy of the Army inspection, yet it also suggests that an inspection conducted more than two years after delivery is not very probative. The Army maintains that its inspection involving the dining table and most of the damaged items was completed on May 5, 1993. Also, while Andrews complains that the inspection was untimely, as the Army reminds us, Andrews chose not to inspect this shipment even though it received timely notice of considerable loss and damage. If Andrews had inspected the loss and damage when it received notice, as it had the right to do, probably it could have developed more timely and probative evidence of the damages involved than that offered by Army.

In any event, once the claim was filed, Andrews was required by Federal regulation to investigate it. See 49 C.F.R. § 1005.5. But, Andrews did not develop its own valuation and other evidence as part of its investigation. Instead, it chose to rely on the unsupported argument that the TADV method of calculation of damages, which was actually used by the Army to determine damages both to the table and chairs, was legally inappropriate.(7) Andrews suggests that it never received a copy of the American Refinishing estimate,(8) and its position also appears to be that the Army's prima facie case necessarily fails whenever the government does not determine depreciated replacement cost of a damaged item. To prevail, Andrews believes that it does not need to offer substantive evidence which may have been more favorable to its financial interests. Compare B-252972.2, July 14, 1995.

We agree that the government's application of the TADV method of ascertaining damages should not be relied upon in the first instance. The Army's own policy guidance provides that this method should be avoided and should be used when no better method of valuing the service member's claim against the government is available. Moreover, Federal regulations state that when a carrier settles claims against it for damaging household goods, generally it must consider depreciated replacement costs. See 49 C.F.R. § 1005.5(b). For personal property shipped at government expense, we have recognized that normally the carrier is liable for depreciated replacement cost, or repair costs if less expensive. See DOHA Claims Case No. 97062427 (July 15, 1997).(9) We take official notice of the fact that teak dining tables are still produced although they are now relatively expensive. Therefore, the better practice would have been for the Army to have ascertained a depreciated replacement cost for the furniture involved in this dispute. The Army did not use repair costs in its adjudication against the carrier in view of the age of the furniture, but it did not indicate why depreciated replacement costs were unobtainable.

However, 49 C.F.R. § 1005.5(b) also recognizes that "where an item cannot be replaced or no suitable replacement is obtainable, the proper measure of damages shall be the original costs, augmented by a factor derived from a consumer price index, and adjustment downward by a factor depreciation over average useful life." In effect, this is the TADV method of calculation of damages. Under 49 C.F.R. § 1005, it is the carrier, not the shipper or consignee, who ultimately must ascertain the depreciated replacement costs, and the carrier determines this during its 120-day claim settlement period.(10) While Andrews had the right to request clearer proof of the damages, it did not raise the issue of the sufficiency of the damage estimates until well after the 120-day period.(11) Accordingly, since the government offered some proof of the value of the loss, and Andrews never offered substantive data on valuation, there is reasonable support on the record for the Army's settlement. To prevail, Andrews must demonstrate by clear and convincing evidence that the Army's calculation of damages was unreasonable. See, for example, DOHA Claims Case No. 96081210 (April 28, 1997); DOHA Claims Case No. 96081202 (April 28, 1997); DOHA Claims Case No. 96081902 (January 8, 1997); American Van Services, Inc., B-259198, May 5, 1995; Andrews Forwarders, Inc., B-257613, Jan. 25, 1995; American Van Services, Inc., B-256229, Sept. 8, 1994; and American Van Services, Inc., B-250492, Apr. 21, 1993. While neither the Army nor Andrews processed this claim in an exemplary manner, in light of all of these circumstances, we find that the Army offered at least a minimal amount of evidence on damage for purposes of a prima facie case of liability.

There is no evidence that the Army ignored Andrews' rider which noted PED. In its correspondence to Andrews dated June 20, 1995, the U.S. Army Claims Service specifically advised Andrews that its rider was considered, but that the

rider did not note the water and mildew damage claimed. Accordingly, the Army found that it was improper to charge the warehouse for such damage. A review of the DD Form 1844 also indicates that the Army split the liability for Items 19, 26, 27 and 29 between the warehouse ($35 each item) and Andrews ($30 each item). In Item 20, the rider appears to indicate that the chair was broken, but even here mildew damage was claimed and the Army split liability between the warehouse ($40) and Andrews ($30). Moreover, the DD Form 1844 does not indicate that any liability was imposed against Andrews for Item 6, and that Andrews had not raised the issue of its liability with respect to Item 6 until this appeal.[(12)] Concerning these items, there is a reasonable basis for the Army's allocation of liability; accordingly, we will not consider these items further.

Conclusion

We affirm the Settlement.

Signed: Michael D. Hipple

Michael D. Hipple

Chairman, Claims Appeals Board

Signed: Christine M. Kopocis

Christine M. Kopocis

Member, Claims Appeals Board

Signed: Jean E. Smallin

Jean E. Smallin

Member, Claims Appeals Board

1. This matter involves Personal Property Government Bill of Lading RP-790,925, Army Claim 94-061-1913, and Carrier Claim 92-592.

2. Item 11 was the table and 12 was the leaves.

3. As the Settlement Certificate explained, statutory responsibility for settlement of this type of claim under 31 U.S.C. § 3702 was transferred from GAO to the Executive Branch and ultimately to the Department of Defense pursuant to Public Laws 104-53 and 104-316.

4. A one-page DD Form 1840, Joint Statement of Loss or Damage at Delivery and a two-page Notice of Loss or Damage, DD Form 1840R.

5. The record contains an estimate by American Refinishing Services (American Refinishing estimate) dated May 5, 1993. Immediately thereafter in the record, there is a one-page document which appears to be an inspection by the Fort Carson claims office. But, there is no cross-reference on the face of the inspection to the American Refinishing estimate, and the association between the two documents is not facially apparent.

6. The Act, as amended, is codified at title 31, United States Code, Section 3721 (31 U.S.C. § 3721), not 31 U.S.C. §§ 241-243, as cited by the carrier.

7. This method is referenced in Army Regulation 27-20, *Claims*, para. 11-13c (February 28, 1990), which was applicable at the time of shipment, and explained in Department of the Army Pamphlet (DA Pam) 27-162, *Claims*, para. 2-39e (December 15, 1989). It is available when no better method of valuing a service member's claim against the government is available and is to be avoided if possible, especially when ordinary household items are involved. These

authorities do not directly apply to carrier recoveries.

8. The Army Claims Service's January 24, 1995, correspondence to Andrews indicates that it had enclosed copies of repair estimates to Andrews.

9. See also Item 5, 2b of the Military Traffic Management Command's *Domestic Personal Property Rate Solicitation D-4*, November 1, 1995, which anticipates a consideration of replacement costs, repair costs or actual cash value in determining a carrier's liability. Similar provisions existed at the time of movement.

10. See *Paragraph IV(A) of the Military-Industry Memorandum of Understanding on Loss and Damage Rules*, and 49 C.F.R. 1005.5(a).

11. On January 31, 1995, Andrews settled the claim on the basis of the two-year statute of limitations, and it did not challenge the Army's evidence for calculating damages until June 26, 1995 when the Army was adjudicating the subrogation claim.

12. In its June 26, 1995, correspondence to the Army Claims Service, Andrews specifically discussed its liability with respect to each item, but it did not mention Item 6.