In Re:

American Van Services, Inc.

Claimant

DATE: February 27, 1998

Claims Case No. 98021008

CLAIMS APPEALS BOARD DECISION

DIGEST

1. The government does not present sufficient evidence concerning the amount of damages owed by the carrier for the loss of a service member's carpet in transit when the record only establishes the original purchase price and does not indicate whether the carpet lost was similar to the one upon which the estimate was based.

2. Generally, we will not review a claim based on a theory of recovery which was not raised by the claimant until appeal.

3. We will not question an agency's calculation of the value of the damages or relevant replacement costs for transit loss or damage unless the carrier presents clear and convincing evidence of the agency's unreasonableness, especially when the amounts involved are small, the damaged items are available for inspection and salvage, and the carrier offers no contrary evidence of value.

DECISION

American Van Services, Inc. (American) appeals the January 6, 1998, Settlement Certificate of the Defense Office of Hearings and Appeals (DOHA) in Claim No. 97092511. In the Settlement, this Office affirmed the Air Force's set off of $203.23 (except for a $33 refund) for transit loss and damage to the shipment of a service member's household goods.[(1)]

Background

The record shows that American picked up the shipment at Robins Air Force Base, Georgia, on June 15, 1993, and delivered it in Wichita, Kansas, on July 15, 1993. A Notice of Loss or Damage (DD Form 1840R) was dispatched on August 27, 1993, but the Air Force did not dispatch its claim to American until February 8, 1995, and American settled the claim in a letter dated February 17, 1995. American did not inspect the damage, and the Air Force did not inspect until January 24, 1995. American reclaims amounts set off by the Air Force for the following items.

Item 166 is described on the Descriptive Inventory as a "child rocker" with pre-existing damage (PED). The PED involved scratches on the bottom left side, scratched left and right legs, and a loose and dented right arm. The chair was reported as broken on the DD Form 1840R, and the List of Property and Claims Analysis Chart (AF Form 180) described the additional damage as including a broken back and arm joints which came apart. The Air Force's inspector stated that the item was pulled apart at the joints. The AF Form 180 indicates that the shipper purchased the chair in December 1989 for $40; the replacement cost was $50; the depreciated replacement cost charged to American was $39.50; and the Air Force had applied a 15 percent depreciation rate to cover the period from purchase to shipment. On appeal, American contends that the proper rate of depreciation was 20 percent per year. During the adjudication period, American had argued it had the right to accelerate depreciation to maximum depreciation rate of 80 percent due to PED.

Item 181 was described on the Descriptive Inventory as a "large rug" which had pre-existing soil marks and a torn edge. It was reported as missing on the DD Form 1840R, and the AF Form 180 described the carpet as 21.33 square yards (12' X 16'), purchased in December 1990 for $200, with a replacement cost of $316.24. The associated estimate merely indicated that the cost of replacing 21.33 yards at $14 per yard was $298.62 plus $17.62 in sales tax. The associated

Adjudication Worksheet indicated that this item was "carpet padding" with 10' X 12' dimensions. American was charged with a liability of $252.99 using depreciated replacement costs at a 20 percent total rate (10 percent per year). American argued that there was no evidence that the replacement item was equivalent to the lost item, but it offered to pay 25 percent of the original cost (maximum depreciation), or $50, for the loss.

Items 247 and 257 were described on the Descriptive Inventory as a toy plastic stove and a toy guitar, respectively. No PED was noted. The toy guitar was reported as missing and the hardware was reported missing for the toy stove. On the AF Form 180, the toy stove was further described as a "Little Tykes Play Kitchen" purchased in December 1988 for $55 and with a replacement cost of $60. American was charged with $30 of liability. The plastic toy guitar was purchased in December 1992 for $10, the replacement cost was $10, and American was charged with $10 of liability. American contends that depreciation should have been charged against the guitar, which is a 50 percent flat rate for toys of this type under the Joint Military/Industry Depreciation Guide (JMIDG), and that even 50 percent depreciation on the plastic stove results in an "excessive" recovery for the service member. American cites the Navy's JAGINST 5890.1, dated January 17, 1991, as authority for depreciating toys even when they are less than six months old. In settling the claim, American had allowed $5 for the guitar and only $10 for the stove stating that it had no information as to the "types" and "numbers" which needed replacement.

Finally, Item 256 was described on the Descriptive Inventory as a coat rack. It was reported as broken on the DD Form 1840R, and the AF Form 180 further described it as a wooden coat rack that was purchased in December 1992 for $20. The replacement cost was $25, and American's liability was assessed at $25. American argues on appeal that the Air Force inspector was not shown any damage for this item. When it settled the claim, American argued that it was entitled to depreciation and that its liability was only $23.25.

Discussion

Preliminarily, the property owner must show three things to establish a prima facie case of liability against a carrier for property damage: tender of the item to the carrier, delivery in a damaged condition, and the amount of damages. See Missouri Pacific Railroad Company v. Elmore & Stahl, 377 U.S. 134, 138 (1964). American focuses its defense on the amount of its liability. Also, as a general rule, in the absence of a specific agreement between the military and the industry, we have recognized the Air Force practice of not applying depreciation to replacement costs through the first five months and that the month of purchase and month of pick up are disregarded. This general rule does not apply where the carrier can demonstrate that the Air Force practice is unreasonable under the circumstances. See DOHA Claims Case No. 96070214 (January 6, 1997). See also American Van Services, Inc., B-270379, May 22, 1996.

In Item 166, the carrier raised the issue of the appropriate standard rate of depreciation. However, our review of the record does not indicate that this issue had been raised prior to this appeal. The Comptroller General has advised American Van Services in prior claims that it is inappropriate to raise new theories of recovery on appeal. See American Van Services, Inc., B-252972.2, July 14, 1995. Compare also DOHA Claims Case No. 96081208 (Dec. 20, 1996), a reconsideration request, where we explained the general policy of the Comptroller General and this Office against consideration of a claim at appellate level which is predicated on new material facts. Accordingly, we will not consider this issue further.

We agree with American that the Air Force did not properly support the damages in Item 181. Prices for carpeting vary widely depending on the manufacturer and quality. Nothing in the record suggests that the $14 per square yard carpeting in the estimate was similar to the carpeting that was actually lost, and because the carpet was lost, the carrier would have had a more difficult task in ascertaining replacement cost if it had conducted a proper investigation. There is no description anywhere on the record of either the lost carpet or the one that provided the basis for the estimate. American asked for such information during its investigation, and never obtained it. A claimed replacement cost of $316.24 for carpeting selling for only $200 just 30 months prior to shipment begs some explanation. The only thing we can assume for certain was the December 1990 purchase price of $200. We are not sure whether the lost carpeting was carpeting worth $5-$10 per square yard, for which the depreciation rate under the JMIDG is 10 percent per year with a maximum depreciation rate of 90 percent, or over $10 per square yard, for which the depreciation rate is seven percent per year with a maximum depreciation rate of 75 percent. The original purchase price at a total 20 percent depreciation yields $150 before consideration of PED. The Air Force's Administrative Report indicates that installation officials believed

that $126.49 would have been a fair compromise considering PED. Accordingly, we find that depreciated replacement cost for the lost carpeting is $126.49, and that the Air Force should refund the difference between the amount set off ($271.97) and $126.49, or $145.48. We do not suggest that original purchase price would have been the only proper basis for determining replacement costs in the absence of an opinion from installation claims officials concerning a fair result.

There is no basis to relieve American from liability on any of the last three items. All involved relatively minor amounts, and two of the items were available for the carrier's inspection. American could have exercised its salvage rights on the toy stove. American chose not to physically inspect the two damaged items nor to offer alternative damage estimates on any of the three. No depreciation was applied to the toy guitar and the coat rack in accordance with the general rule noted above. While it may be appropriate under the JMIDG to accelerate depreciation for any item subjected to more than average use, in this instance, no PED was noted on any of the three items. At the time, internal Air Force procedures did not require repair estimates for damages to items up to $100. See para. 2.47 of Air Force Instruction 51-502, *Personnel and Government Recovery Claims* (25 July 1994). Under such circumstances, we will not question an agency's calculation of the value of the damages or relevant replacement costs unless the carrier presents clear and convincing evidence of unreasonableness. Compare American Van Services, Inc., B-260394, Aug. 15, 1995.

Conclusion

We modify the Settlement with respect to Item 181, and otherwise affirm.

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 (PPGBL)

SP-239,342; Air Force Claim No. McConnell 95-233.