In Re:

American Van Services, Inc.

Claimant

DATE: March 5, 1998

Claims Case No. 98021009

CLAIMS APPEALS BOARD DECISION

DIGEST

The burden is on the carrier to prove by clear and convincing evidence that the agency's calculation of damages was unreasonable particularly where the carrier did not physically inspect a damaged item that was still available for inspection and the information required to properly investigate a claim was available through such an inspection. The carrier cannot change this result by shifting the burden of inspection to the service member or the military service.

DECISION

American Van Services, Inc. (American), appeals the Settlement Certificate of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claims File 97111213, January 13, 1998, which affirmed the Army's set off of $752 for transit loss or damage in connection with the shipment of a service member's household goods.[(1)]

Background

The record shows that American picked up the shipment in Kansas City, Missouri, on June 1, 1993, and delivered it at Fort Bragg, North Carolina, on June 14, 1993. On appeal, American reclaims $643 that the Army set off against it for upholstery damage to a sofa and associated cushions. The service member's claim indicates that the sofa was purchased in June 1988 for $1,100. The sofa was reported to be soiled at pick up, but when it was delivered, the seat cushions of the sofa were reported with holes and were torn. After obtaining a repair estimate for the sofa on May 30, 1995, the service member filed a claim against the Army on May 31, 1995, and a demand was dispatched to American on September 22, 1995.

To investigate the claim, on October 9, 1995, American asked the United States Army Claims Service to provide the following information: a purchase receipt; the brand name and model; the location and size of the hole/tear; a statement from the repairer comparing the fabric chosen as a replacement and the damaged fabric; and a statement from the repairer concerning the repair costs in 1993. In response, the Army Claims Service provided the carrier a copy of the repair estimate which merely indicated that the cost of recovering the seat of the sofa was $899.76, using material costing $22 per square yard.[(2)] American responded by stating that the estimate was insufficient, and on November 8, 1995, the Army Claims Service advised American that it provided American with all of the information it had. It pointed out to American that American had chosen not to conduct an inspection which would have revealed the quality of the damaged item. After depreciating the material by 20 percent, the Army set off $797 as American's liability.

When American appealed this matter to our Office in September 1996, it stated that its liability is limited to $154 using a loss of value measure. American bases this amount on 14 percent of the "alleged" original purchase price. Therefore, it claimed a refund of $643 ($797-$154). American contends that the 1995 estimate is unreliable because it was made almost two years after delivery, and contended that the 1995 repair cost exceeded what it believed to be its depreciated value. It speculated that the damages had to be very minor because the service member had taken no action to repair the sofa for almost two years between the time of delivery and the time of the estimate. Essentially, it repeated its right to the information it requested in October 1995.

In December 1996, the Army Claims Service readjudicated American's claim and found that it was due a refund of $119. This was based on a revised total liability of $678: 50 percent of the materials ($396), or $198, plus the cost of labor ($480).

In its November 7, 1997 administrative report, the Army acknowledged that the 1995 repair costs exceeded the 1993 depreciated value. The Army Claims Service again revised its calculation of damages. It stated that the proper value is measured by replacement costs at time of delivery, minus depreciation. To arrive at a replacement cost, the Army suggested the application of its Table of Adjusted Dollar Value (TADV).[(3)] The Army multiplied the original purchase price ($1,100) by a factor of 1.22 which resulted in a replacement value of $1,342 in 1993. Thereafter, the Army depreciated the 1988 sofa at a rate of ten percent per year for five years, or a total of 50 percent. This resulted in a total liability of $604, and the Army was willing to refund another $74 to American. Our Settlement Certificate approved this additional refund.

On appeal, American contends that it does not have any duty to perform an inspection to avail itself of its rights, and that the TADV is not to be used to value ordinary household items where the claimant cannot substantiate the purchase price. American also points out that the sofa remained in use for nearly two years before a claim for reupholstery was made. It again points out that it made a request for information to support the claim such as the brand name, model, size and extent of damage within 120 days of receiving the claim. American again refers to its need to know whether reupholstering was necessary or whether patching or reweaving would have been sufficient, as well as its need to know whether the replacement material was similar to the damaged material.

Discussion

Preliminarily, the property owner, or the Army in subrogation, 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). The issue here is the extent to which damages have been established.

Our review indicates that both parties were at fault. The service member has two years to file his claim against the Army under the Military Personnel and Civilian Employees Claims Act[(4)] for carrier damage to his property, but the passage of time may hinder documentation and proof of the claim. In this case, the member's delay resulted in the creation of a repair estimate which was somewhat unreliable because it measured the cost of repair almost two years after delivery.[(5)] The Army Claims Service could have addressed some of the concerns raised by American in October 1995, by returning to the repairer to obtain further clarification of and support for the estimate. Eventually, the Army abandoned the estimate.

On the other hand, American asked for information which was relevant for claim disposition and which the firm could have obtained during the 120-day period it had to promptly and thoroughly investigate the claim.[(6)] The problem, however, is that American attempted to obtain this information by improperly shifting the burden of its investigative responsibilities to the service member and the government. American failed to thoroughly investigate the facts surrounding transit damage.[(7)] In view of the type and amount of damage involved, and the defense that American is attempting to raise, a reasonable investigation would have included the physical inspection of the damage during the inspection period.

We recognize that the carrier has the right to ask the service member or military service to support the claim by asking that the claimant establish destination value, but normally this is satisfied by providing the carrier a copy of a repair or damage estimate. See Air Land Forwarders, Inc. v. United States, 38 Fed. Cl. 547, 553 (1997). Moreover, the "support" requested included an analysis as to why the hole or tear could not have been rewoven or patched and an analysis comparing the damaged and proposed replacement material. These types of analyses clearly are investigative in nature and are the carrier's responsibility. The Federal courts will not allow a carrier to avoid liability by failing to investigate a claim, or by failing to thoroughly investigate it, when a carrier is provided sufficient information to do so. See Insurance Company of North America v. G.I. Trucking Company, 1 F. 3d 903, 907 (9th Cir. 1993), cert. denied, 510 U.S. 1044 (1994). In this case, the sofa was available for American's inspection, and if American had dispatched a repair estimator,

it could have obtained the necessary information to confirm depreciated replacement cost and repair cost. It should have been able to determine the manufacturer, model and year of manufacture. It could have compared the material in the sofa with the material that was proposed as a replacement. See DOHA Claims Case Nos. 97021808, supra and 96121606 supra. Additionally, as the Army points out, the carrier's representative knew about the damage at delivery and could have obtained most of the requested information at that time. The carrier must prove by clear and convincing evidence that the agency's calculation of damages was unreasonable,[(8)] and it would be inappropriate to reduce that burden where, as in this case, the carrier did not even make the attempt to physically inspect the damage when it could have. The carrier cannot change this result by blaming the service member or the military service for not performing the duty it was required to perform by regulation.

In these circumstances, it was not unreasonable for the Army to apply TADV to determine depreciated replacement costs. American correctly points out that TADV ordinarily would not have applied here to the service member's claim against the Army. It is not favored by our Office as a method for determining damages in carrier recoveries. However, we have recognized the reasonableness of the TADV method for determining depreciated replacement costs where the military service has committed error while attempting to obtain a reliable damage estimate and where the carrier also committed error by not thoroughly investigating the damage claim and obtaining better evidence of depreciated replacement costs. See DOHA Claims Case No. 97122315 (January 12, 1998).

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

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Member, Claims Appeals Board

1. This matter involves Personal Property Government Bill of Lading (PPGBL) SP-224,222; Army Claim No. 95-301-2238; and AVAS Reference No. 19705.

2. The breakdown was: $396 for material, $480 for labor, and $23.76 for tax.

3. 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.

4. The Act, as amended, is codified at title 31, United States Code, Section 3721 (31 U.S.C. § 3721).

5. The record does not appear to contain any explanation for the service member's almost two-year delay in the filing his claim.

6. Contrary to American's opinion, it has a duty under 49 C.F.R. § 1005.4(a) to "promptly and thoroughly" investigate a claim for damage, and to dispose of the claim within 120 days in accordance with 49 C.F.R. § 1005.5.

7. Compare, for example, DOHA Claims Case No. 97021808 (June 25, 1997); DOHA Claims Case No. 96121606 (June 6, 1997); American Van Services, Inc., B-270379, May 22, 1996;American International Moving, B-247576.9, Aug. 2, 1995; American Van Services, Inc.,

B-252972.2, Jul. 14, 1995; and American Van Services, Inc., B-256229, Sept. 8, 1994.

8. Id.