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In Re:

Resource Protection

on behalf of

Ozark Forwarders, Inc.

Claimant

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DATE: June 24, 1999

Claims Case No. 99060725

## CLAIMS APPEALS BOARD DECISION

### DIGEST

A carrier fails to meet its burden of proof in showing that a military service acted arbitrarily, capriciously or unreasonably in applying a rate of depreciation to determine the measure of damages (depreciated replacement costs) for missing household property when the type of property lost is not included in the Joint Military-Industry Depreciation Guide, the carrier fails to provide clear and convincing evidence of the appropriate rate, and there appears to be a rational basis for the rate the service applied.

### DECISION

Resource Protection, on behalf of Ozark Forwarders, Inc. (Ozark), has filed a claim with the Defense Office of Hearings and Appeals (DOHA) for the refund of \$121.85 in excess of the amount it believes was proper for set off by the Air Force to recover for transit loss and damage in connection with the shipment of a service member's household goods in 1996.<sup>(1)</sup>

### Discussion

The claimed loss and damage included 41 missing videotapes. Resource Protection argues that the proper rate of depreciation for videotapes should be a 25 percent flat rate of depreciation for average care and/or usage. It contends that the *Joint Military-Industry Depreciation Guide (JMIDG)* already covers videotapes because there is a category described as "Phonographic Records or Recorded Tapes" which provides for a 50 percent flat rate of depreciation for average care and/or usage. It views a videotape as "recorded tapes."<sup>(2)</sup> Resource Protection offered no substantive evidence on the proper depreciation rate for videotapes.

The Air Force argues that the proper rate of depreciation should be 10 percent per year for average care and/or usage. This is the same average annual rate from the *Allowance List-Depreciation Guide* that it applies to service member claims filed under the Military Personnel and Civilian Employees Claims Act. See Air Force Instruction 51-502, *Personnel and Government Recovery Claims*, paragraph 2.71 (July 25, 1994). The Air Force argues that the JMIDG did not contemplate videotapes because they were not commercially available when the JMIDG was created in 1973.<sup>(3)</sup> The Air Force interprets the words "Recorded Tapes" as audio tapes.

### Discussion

We agree with the Air Force that the parties did not intend to include "videotapes" within the concept of "Recorded Tapes." The meaning of "Recorded Tapes" must be viewed in the context that the first word in the phrase

("Phonographic") indicating a machine that reproduces sound or voice.

When the JMIDG does not address a new technology, the carrier has the burden of proving that the measure of damages including the rate of depreciation applied by the service was arbitrary, capricious or unreasonable. The rate of depreciation for average care and/or usage is a question of fact, and Resource Protection does not offer clear and convincing factual evidence to support its claim; *e.g.*, the industry practice in depreciating videotapes as lost or destroyed household goods or the prevailing opinion among experts concerning the comparative characteristics of audio tapes and videotapes for depreciation purposes. Moreover, there appears to be a reasonable basis for the application of a 10 percent rate. While the ALDG does not govern the carrier's obligations to the government, the government's internal regulation reflects its own practices and policies in dealing with a similar depreciation problem when it settles members' claims against it. *Compare Resource Protection*, B-266114, Apr. 12, 1996; *aff'd* DOHA Claims Case No. 96081208, December 20, 1996.

### **Conclusion**

We affirm the Air Force's set off.

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 refers to Personal Property Government Bill of Lading YP-630,766; Air Force Claims No. Kirtland AFB 96-652; and Ozark File No. 96-0035. DOHA has not issued a Settlement Certificate, and the Claims Appeals Board is directly settling this claim.
2. It is not clear why Resource Protection argues for a 25 percent rate when it bases its position on a category in the JMIDG providing for a 50 percent rate, a rate which is more beneficial to the carrier.
3. In *Resource Protection*, B-266114, Apr. 12, 1996, the Comptroller General noted that the JMIDG was last revised in 1976, and in its administrative report, the Air Force notes that the services and the industry are working on an updated JMIDG which covers more modern technologies.