
In Re:

Resource Protection

on behalf of

Cartwright International Van Lines, Inc.

Claimant

)

DATE: January 6, 1999

Claims Case No. 98121413

CLAIMS APPEALS BOARD DECISION

DIGEST

1. The Military-Industry Memorandum of Understanding on Loss and Damage Rules (MOU) provides that the claims office will use a carrier's itemized estimate received more than 45 days after delivery but prior to dispatch of the Demand on Carrier if the claim has not already been adjudicated; the estimate is the lowest overall; and the repair firm selected by the carrier can and will perform adequately, based on the firm's reputation for timely and satisfactory performance. A repair estimate offered on behalf of the carrier is not untimely merely because approximately two years had elapsed between delivery and the time that the carrier's repairer prepared the estimate when it is offered by the carrier prior to the Demand on Carrier.

2. The MOU also states that when the carrier's estimate is timely, if the carrier's estimate is the lowest overall and is not used, the claims office will advise the carrier in writing of the reason. In other words, the claims office is not required to use the estimate if it articulates in writing a reasonable basis for not doing so. For example, if the claims office contends that an item is not repairable as proposed by the carrier, it must at least offer a reasonably focused estimate finding that the specific item furniture could not have been so repaired or material from the manufacturer to the same effect.

DECISION

Resource Protection, on behalf of Cartwright International Van Lines, Inc. (Cartwright), appeals the November 19, 1998, Settlement Certificate of the Defense Office of Hearings and Appeals (DOHA), which affirmed, with modifications suggested by the Army allowing a refund of $423, the Army's set off of $4,237 for transit loss and damage to the household shipment of a service member.[(1)]

Background

The record indicates that the shipment was picked up in Virginia on August 14, 1992, and delivered to the service member in Arizona on August 21, 1992. In this appeal, Resource Protection contests the appropriate amount of damages to four Descriptive Inventory Items: Item 70, a sleep sofa purchased in October 1980, with a front right leg and surrounding wooden frame broken; Items 181 and 184 (a twin headboard and footboard respectively also purchased in October 1980, with a gouge in the headboard and a broken piece and gouge on the footboard); and Item 234, four patio chairs with bent legs, purchased in June 1990. On October 30, 1992, the Army and member dispatched a Notice of Loss or Damage (DD Form 1840R) noting these additional damages. The member filed his claim in August 1994, and the Demand on Carrier was dispatched in January 1995. On behalf of Cartwright, in July 1994 a repairer prepared an estimate for repairing these items, and the member obtained repair estimates for Items 70 and 181 and 184 in August 1994. The record contains no member/government estimate for repairing Item 234 or a replacement estimate which indicates that the four chairs cannot be repaired.

Based on the member's August 1994 repair estimate, the Army set off $250 for repairing the sofa; Resource Protection's July 1994 repair estimate was for $100. The Army originally set off $255[(2)] and $338 for the headboard and footboard respectively; Resource Protection's 1994 repair estimate was $20 to repair the headboard and $30 to repair the footboard. Both items cost $200 each at the time of purchase in October 1980. Using the Table of Adjusted Dollar Value (TADV) as a check on its depreciated replacement value, the Army revised its assessment of damages to $85 for each item.

Resource Protection's repairer stated in its estimate that it would bend all four patio chairs back into proper shape for $30. The Army found that the four cushioned patio chairs, which cost $480 in 1990, could have been replaced for $640 in 1992. It appears that the depreciated replacement price was $512, but it concluded that an equitable assessment of damages was 50 percent of the depreciated replacement cost, or $256. The Army contends that the chairs were not repairable by bending.

Resource Protection argues that the Military-Industry Memorandum of Understanding for Loss and Damage Rules (MOU), effective January 1, 1992, requires the application of the repair estimate it provided. The Army notes that Resource Protection offered its estimate about two years after delivery; therefore, it was not timely.

Discussion

To establish a *prima facie* case of liability for transit loss or damage, the service member, or the military service that succeeded to the member's claim through subrogation, must establish that he delivered the item to the carrier in good condition, that it as not delivered or it was delivered in a damaged condition, and the amount of damages. *See Missouri Pacific Railroad Co. v. Elmore & Stahl*, 377 U.S. 134, 138 (1964). The issue on all of the items is the proper amount of the damages.

The MOU provides that the claims office will use a carrier's itemized estimate received more than 45 days after delivery but prior to dispatch of the Demand on Carrier if the claim has not already been adjudicated; the estimate is the lowest overall; and the repair firm selected by the carrier can and will perform adequately, based on the firm's reputation for timely and satisfactory performance. The MOU also states that if the carrier's estimate is the lowest overall and is not used, the claims office will advise the carrier in writing of the reason. In other words, the claims office is not required to use the estimate if it articulates in writing a reasonable basis for not doing so. Cartwright's July 1994 repair estimate was presented more than 45 days after delivery but before the Demand on Carrier; it is within the scope of the MOU. The argument that Cartwright's estimate was untimely is frivolous. We note that the Army and the member failed to obtain relevant estimates until August 1994 even though the goods were delivered in 1992.

Cartwright's repair estimate indicates that the front frame board of the sofa was broken, but the estimate does not mention the broken leg reported in the DD Form 1840R. Resource Protection contends that the member was confused concerning whether the damage involved damage to the leg or damage to the frame, but the member's claim (see the List of Property and Claims Analysis Chart, DD Form 1844) and the DD Form 1840R clearly distinguished between damage to a leg and damage to the frame. In its May 9, 1996, and arch 20, 1995, letters to Cartwright, the claims examiner for the Army Claims Service noted that she did not accept Cartwright's estimate for the sofa because there was damage to the leg and damage to the frame and the estimator did not reflect the damage to the leg in its estimate. In our view, the examiner's statements met the MOU requirement that the claims office must advise the carrier in writing of the reason for not using the carrier's estimate. We affirm the application of the Army's repair estimate for this item.

In its December 22, 1995, correspondence with Cartwright, the Army Claims Service rejected use of the Cartwright estimate of damages for the headboard and footboard because the estimate did not consider all of the damage claimed. The damage claimed for Item 181 involved a "gouged left side of leg" described as 7 inches long, and the damage to Item 184 involved a piece broken out of the left leg top decoration and a gouge on the right side of the leg. Cartwright's repairer noted scratches at the top left edge of Item 181 and a chipped post and gouge on right leg of Item 184. If "scratch" is substituted for "gouge" on Item 181, and "chipped" for "broken" on Item 184, it is difficult for us to see what damage Cartwright's repairer missed. Semantical difficulties are often experienced in attempting to describe damage, and it may be difficult to conclude that there is any realistic difference between a "gouge" and a "scratch."

Compare Continental Van Lines, Inc., 63 Comp. Gen. 479 (1984). Perhaps there were other reasons for rejecting Cartwright's estimate for these two items, but the Army relied on the above reason. We cannot see any reasonable basis for the Army's conclusion that Cartwright's estimator did not consider all of the damage claimed and cannot affirm the application of the Army's repair estimate for this item.

Finally, we consider the patio furniture. The record indicates that Resource Protection disagreed with the valuation of the furniture. Cartwright's inspector inspected the furniture, but it failed to offer different evidence of replacement valuation. Therefore, we will presume that the claimed replacement costs are proper. The only issue is whether Cartwright's estimate, which indicated that all four chairs could have been repaired for a total of $30, should apply. The Army had every right to question whether this furniture was repairable, but in the absence of some empirical data to support its position, we agree with Resource Protection that the Army's rejection was arbitrary. The Army could have maintained its burden with a reasonably focused estimate finding that the specific furniture could not have been repaired by bending, or material from the manufacturer to the same effect. In this case, the record does not contain a repair estimate or any other material indicating that the patio furniture could not be repaired and had to be replaced.

The Army believes that its TADV estimate sufficiently overcomes Cartwright's estimate with respect to Items 181, 184 and 234. In this case, we do not agree. The Army cited two decisions of this Board to support its position: DOHA Clams Case Nos. 98021009 (March 5, 1998) and 97122315 (January 12, 1998). However, neither involved an issue of whether it was appropriate to apply TADV to the exclusion of a carrier's timely estimate. In both of these claims, the carriers made no efforts to obtain appropriate damage estimates but simply attempted to avoid liability by arguing that the government's own estimates were defective. Unlike these two decisions, here there was better evidence, especially for Item 234 where there was a timely and un-rebutted carrier's estimate, for evaluating the damages, and the claims office was required to use it unless there was a reasonable basis for not doing so.

Conclusion

We modify the Settlement, finding for Cartwright on the amount of damages for Items 181, 184 and 234. Cartwright's estimate for repairing Item 181 was $20; Item 184 was $30; and Item 234 was $30. The Army's modified repair estimate for both Items 181 and 184 was $85 each, and $256 for Item 234. Cartwright should be refunded the difference ($346) plus the amount previously allowed ($423).

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) UP-221,152; Army Claim No. 94-051-1211; and carrier file 348147.

2. The estimate prepared for the service member provided a $450 repair cost for Item 184 and $300 repair cost for Item 181.