In Re:

Resource Protection

on behalf of

American Red Ball International, Inc.

Claimant

)

DATE: March 10, 1999

Claims Case No. 99021627

CLAIMS APPEALS BOARD DECISION

DIGEST

The *Joint Military-Industry Agreement on Carrier Recovery on Code 5 and Code T Shipments*, effective May 1, 1975, provides that "the Government will offer to accept a compromise of 50% of the amount the Government determines to be due" for loss/damage in Code 5 and Code T shipments. The 1975 Agreement also provides that the offer of compromise is predicated upon prompt acceptance and payment of the Government offer because the purpose of the 50/50 compromise rule is to reduce the amount of time and paperwork involved in settling claims. The carrier is deemed to have waived its right to such a compromise settlement if it does not settle the claim within 120 days or it chooses to argue its liability as to individual items in the shipment.

DECISION

Resource Protection, on behalf of American Red Ball International, Inc. (ARBA), appeals the October 23, 1998, Settlement Certificate of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 98100207 which disallowed ARBA's claim for $1,276.95, part of the amount offset by the Navy for transit loss and damage in connection with the shipment of a service member's household goods.[(1)]

Background

The record indicates that ARBA's agent packed and picked up the service member's household goods in New Jersey in May 1996, and transported them to Keflavik, Iceland, as a Code 5 shipment[(2)] where they were delivered on July 26, 1996. *The Joint Statement of Loss or Damage at Delivery* (DD Form 1840) executed at delivery, the *Notice of Loss or Damage* (DD Form 1840R) and "Sheet 1," a continuation sheet, reported the missing or damaged items. The member dispatched the DD Form 1840R to ARBA with the additional damages on October 3, 1996. By DD 1843 dispatched to ARBA on March 26, 1997, the Navy presented a subrogated claim for $1,220.78 (50 percent of $2,441.56). ARBA received the claim on March 31, 1997. The Navy presented a claim for only half of the amount of damages in accordance with the 50 percent rule in the *Joint Military-Industry Agreement on Carrier Recovery on Code 5 and Code T Shipments*, effective May 1, 1975 (the 1975 Agreement).

ARBA transmitted to Naval Air Station (NAS) Keflavik a check dated June 10, 1997, for $581.50, as its settlement of the claim. In response, on June 24, 1997, NAS Keflavik acknowledged that it received the June 10, 1997, check and advised ARBA that it was returning the check because it was unsatisfactory. ARBA had denied liability because Descriptive Inventory Items 107, 112, 119, 129, 84 and 71 were not listed on either the DD Form 1840 or the DD Form 1840R, but NAS Keflavik noted that these items were listed on the DD Form 1840R continuation sheet dispatched 69 days after delivery. NAS Keflavik agreed with ARBA's denial of liability for one item (Descriptive Inventory Item 63),

and it adjusted the total liability to $2,362.79 and ARBA's liability to $1,181.40. NAS Keflavik also advised the carrier that if payment of that amount was not received before July 26, 1997, 120 days after presentation of the subrogated claim, the Navy would recover its claim by offset. In a second letter dated June 27, 1997, NAS Keflavik advised ARBA that unless payment of the 50 percent amount, or an explanation, was received within 30 days, the file would be forwarded to DFAS for collection of the entire amount by offset. Facially, both letters were addressed to the same ARBA address in Seattle, Washington.[(3)] The record contains no indication of further activity until set off of $2,362.79 in August 1998.

On September 15, 1998, International Claims Service (ICS), the former agent of ARBA, requested a refund of $1,276.95, based on several errors: first, the carrier had 120 days from receipt of the claim to respond with a settlement offer or denial. ICS states that ARBA responded with an "initial offer" of $581.50 on June 10, 1997, and did not receive the June 24th correspondence "[p]ossibly because . . . the address is incomplete." Second, the General Accounting Office Settlement Certificate Z-2862191 of November 13, 1990, stated that "full liability may be assessed only where the record clearly establishes that the carrier was solely responsible for the loss/damage." Third, concerning Item 84, a recliner chair, ICS believed that the Navy acted inappropriately in allowing depreciated replacement cost of the entire chair because there were some missing arm and back pads. It urged a fair and reasonable replacement cost for the pads.

Our Settlement Certificate noted that ARBA had not paid the amount demanded within 120 days of the date that it received the claim (March 31, 1997); that the 1975 Agreement required payment of the amount demanded within 120 days of the receipt of the claim, not within 120 days of the June 24, 1997, letter to ARBA; that there was substantial evidence that ARBA received the Navy's June 24, 1997, letter because it was sent to the same address as the one noted on the DD Form 1840/1840R and the *Demand on Carrier/Contractor* (DD Form 1843); that it was not clear whether the loss or damages occurred while in the custody and control of the carrier or the government; and that the Navy exercised reasonable discretion in calculating reasonable replacement costs for Item 84, a recliner chair.

On appeal, Resource Protection offers a new approach by building on arguments presented previously by ARBA and ICS. Resource Protection now argues that the 1975 Agreement does not apply until the Navy, or other military service, presents an "accurate" demand. Here, according to Resource Protection, the demand was not accurate because, among other things, the Navy inaccurately calculated depreciation on Items 84 and 119.[(4)] Resource Protection also suggests that the demand was inaccurate because Items 84 and 119 were not listed on the DD Forms 1840/1840R.[(5)] Resource Protection points out that ARBA offered the check with its settlement within 90 days; therefore, under the *Military-Industry Memorandum of Understanding on Loss and Damage Rules*, effective January 1, 1992 (1992 MOU), the Navy had to present ARBA with an item by item rebuttal. Resource Protection suggests that ARBA never received the June 24, 1997 NAS Keflavik letter, and the June 27, 1997, letter did not meet the requirements of the 1992 MOU for item-by-item rebuttal. Resource Protection contends that the circumstances in Comptroller General decision B-239199, May 3, 1991, are very similar to the ones here. It appears that Resource Protection agrees with its client that the $581.50 carrier settlement was merely an "initial offer." From there, Resource Protection argues that ARBA should be excused for not raising the depreciation rate issue previously because the carrier never had the "opportunity" to do so in that it never received a rebuttal to Item 84 or 119. Resource Protection now suggests that DOHA's settlement is at fault for not correcting the Navy's "obvious" error and applying the proper rate of depreciation on ARBA's behalf *sua sponte*.

Discussion

Resource Protection's appeal is untimely. When ARBA received the Navy's claim on March 31, 1997, the *List of Property and Claims Analysis Chart*, DD Form 1844, noted the rates of depreciation the Navy had applied to adjudicate Items 84 and 119. At that point, there was sufficient information for ARBA, or ICS to object to the rate used. This Office and the Comptroller General have both found that it is inappropriate to raise a new theory of recovery for the first time on appeal. *See* DOHA Claims Case No. 98030602 (April 30, 1998) and decisions cited therein. The Navy has not had an opportunity to address this issue, and it is inappropriate to suspend action on the claim and initiate supplemental discovery when a party is at fault for not raising the matter earlier. We will not consider the proper rates of depreciation; Resource Protection may file a new claim with the Navy for refund based on that issue if otherwise timely.

Likewise, Resource Protection's new arguments based on interpretations of the 1975 Agreement and the 1992 MOU are untimely. However, Resource Protection's misconstruction of these agreements and the prior Comptroller General

decisions suggests that comment by this Board would be helpful.

The contract between the Department of Defense (DoD) and ARBA includes the 1975 Agreement and the 1992 MOU. As suggested in the Settlement Certificate, in service like Code 5 where the carrier and the government share responsibility for transporting household goods, it is often difficult or impossible to determine custody at the point of loss or damage. Accordingly, the DoD and the industry agreed to the operating procedures found in the 1975 Agreement. In relevant part, the 1975 Agreement states:

"In situations in which an accurate determination cannot readily be made whether loss or damage to a Code 5 or Code T shipment occurred while in the custody and control of carrier, the Government will offer to accept a compromise of 50% of the amount the Government determines to be due. The Government will endeavor to correctly assess liability based on correct weights and values of items and costs of repairs. The offer of compromise is predicated upon prompt acceptance and payment of the Government offer."

In the event the carrier does not desire to accept the Government's adjudication of a particular claim falling within this category, then normal negotiating procedures will apply and the 50% compromise will not be applicable."

The 1992 MOU applies independently of the 1975 Agreement. Paragraph IV(A) states:

"(A) The carrier shall pay, deny, or make a firm settlement offer in writing within 120 calendar days of the receipt of the formal claim from the Government. If a carrier makes an offer within 90 calendar days of receipt of a formal claim which is not accepted by the Government, a written response to the offer will be made prior to offset action."

The need for accuracy is apparent, but no reasonable reading of the 1975 Agreement suggests that "accuracy," as defined by Resource Protection or as later determined by a review authority like DOHA, was a condition precedent to the offer of compromise. In Code 5 and Code T shipments when the loss/damage does not clearly occur either in the custody of the government or the carrier, the Agreement directs that military service claims officials "will offer to accept a compromise of 50% of the amount the Government determines to be due." Resource Protection complains that the services are normally inaccurate in their initial adjudications, but as the prior decisions of our office and the Comptroller General indicate, complexity and even reasonable discretion often preclude absolute accuracy. The Agreement states that "[t]he services will endeavor to correctly assess liability." The word "endeavor" recognizes that an absolute assurance of accuracy was never anticipated; a good faith effort on the government's part to determine liability was anticipated. In this claim, it appears that the Navy field activity mistakenly applied the depreciation guidelines for personnel claims filed against the Naval service (the *Allowance List-Depreciation Guide*) rather than the depreciation guidelines in the JMIDG as agreed between DoD and the industry. In any event, ARBA did not have to accept the offer, and for other reasons, it chose not do so here. A carrier may settle the claim by accepting the service's adjudication, or it may reject the adjudication, and as permitted in the 1975 Agreement settle its liability on another basis adhering to the 1992 MOU and other authority.

Resource Protection's "accuracy" requirement is merely a subterfuge to urge us to adopt a position that the Comptroller General refused to adopt in prior claims, *i.e.*, that the Agreement allows the carrier to continue disputing liability over specific items while limiting its liability to 50 percent of the lowest assessment of liability after the adjudication and settlement process run its full course. In circumstances similar to the ones in the present claim, the Comptroller General found that the Navy was justified in suspending application of the 50/50 rule and collecting the total amount of its demand where the Navy demanded $852 but the carrier offered only $278.50 based on denials of liability coupled with application of the 50/50 Rule after that. *See* DOHA Claims Case No. 98092827 (December 3, 1998); and *Swift International, Inc.*, B-257612, January 25, 1995. The purpose of the 50/50 rule is to reduce the time and paperwork involved in settling claims, and does not apply if the carrier does not pay within 120 days or attempts to argue its liability as to individual items. *Id*; *see also Jet Forwarding*, *Inc.*, B-213835, May 10, 1984. As the Settlement Certificate emphasized, the application of the 50/50 compromise is "predicated upon prompt acceptance and payment of the Government offer."

The Comptroller General decision *American VanPac Carriers, Inc.*, B-239199, May 3, 1991, 91-C.P.D. ¶ 431, cited by Resource Protection, actually supports the government's position. In the second part of the decision, the Comptroller General reviewed the proper measure of calculating damages to three items. In two instances, the Comptroller General

agreed with the calculations in the Settlement Certificate, and in one instance, the Comptroller General reversed the Settlement Certificate and found for the Air Force. The Air Force's initial adjudication was clearly less than "accurate" as Resource Protection would view it. Nevertheless, in the first part of the decision, the Comptroller General found that the carrier lost the option to accept the government's offer of a 50-50 settlement by failing to respond within 120 days after receipt of the government's adjudication and offer. The facts in the decision also indicate that the carrier responded with a check that was less than 50 percent of the compromise amount offered by the Air Force, even though, as later settled, the Air Force's adjudication should have resulted in lower carrier liability for two items. The Comptroller General found that there was no authority to hold the government's offer open beyond 120 days of receipt of the government's claim, and he specifically rejected the attempt "to establish an absolute sharing rule" merely because one of the contractual documents, the International Personal Property Rate Solicitation, was silent with respect to a time frame for carrier acceptance.

Here, as in *Swift*, ARBA rejected the Navy's compromise offer, disputed the items noted above, and tendered an amount lower than the Navy requested. There is no basis for holding that ARBA's action was merely an "initial offer" which invited rebuttal. As the above authorities indicate, the rejection of the Navy's offer, by itself, was sufficient to suspend the 50/50 compromise offer. At that point, the Navy could have adjudicated the claim for the full amount of liability, but exercising available discretion, on June 24, 1997, the Navy accepted ARBA's position on Item 63. Then, the Navy issued a new offer without considering Item 63. The Navy also provided specific rebuttal to ARBA's position on the other items. The Navy provided a time limit within which the offer had to be accepted. On June 27, 1997, the Navy sent a second letter specifying the time limit (July 26, 1997) and the amount ($1,181.40). There is no suggestion that the carrier did not receive the second letter, and the two letters were sent to the same address. There is a reasonable basis for finding that ARBA received the June 24, 1997, letter. The June 24, 1997, letter, fully complied with the requirement for a written response in the 1992 MOU. The record indicates that ARBA did not respond to either letter. In our view, while the Navy's adjudication may not have been flawless, it did have a sufficient justification to set off the full amount of the debt.

Conclusion

We affirm the Settlement Certificate. ARBA may file a claim with the Navy for a refund of excess depreciation if otherwise proper.

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 refers to Personal Property Government Bill of Lading VQ-059,026; Navy Claim No. 96-126; and International Claim Service No. RB-6295.

2. Movement of household goods in Military Traffic Management Command-approved door-to-door shipping containers whereby a carrier provides linehaul service from origin residence to military ocean terminal, the government provides ocean transportation to designated port of discharge, and the carrier provides line-haul service to destination

residence, all without re-handling of container contents. *See Department of Defense Personal Property Traffic Management Regulation*, Definition 18d (October 1991).

3. American Red Ball International, P.O. Box 75986, Seattle, Washington 98125-0986.

4. Resource Protection appears to be correct. Under the *Joint Military/Industry Depreciation Guide* (JMIDG), upholstered furniture is depreciated at 10 percent per year, not 5 percent per year. Thus for Item 84, the amount demanded from ARBA should have been $314.30, not $381.65. For Item 119, a basket in a carton of craft items, the item should have been depreciated by 60 percent (20 percent per year over 3 years) for a total amount of liability of $18, not $36. However, for reasons stated below, we decline to consider this issue any further.

5. Items 84 and 119 were listed on "Sheet 1" entitled as the "Continuation of form DD Form 1840" by the member which he transmitted with his DD Form 1840R.