In Re:

Cinco Star Forwarding

Claimant

)

DATE: July 30, 1999

Claims Case No. 99071916

CLAIMS APPEALS BOARD DECISION

DIGEST

The burden is on the carrier to prove by clear and convincing evidence that the military service's calculation of damages was unreasonable particularly where it is undisputed that damage occurred during transit; the carrier did not physically inspect the damaged item despite numerous opportunities to do so; essential information about the damaged item may have been discovered during inspection; and a service official determined the replacement cost by physically inspecting the damaged item and comparing it to a similar item in the catalog of a major department store, contemporaneously recording the basis for the estimate in a chronology sheet provided to the carrier.

DECISION

Cinco Star Forwarding (Cinco Star) appeals the June 1, 1999, Settlement Certificate of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 99051307, disallowing its claim for a refund of $134 of the $173 set off by the Army to recover for transit loss and damage in connection with the shipment of a service member's household goods.[(1)]

Background

The record indicates that the shipment was picked up in Indianapolis, Indiana, on January 31, 1997, and was delivered to the service member in Mannheim, Germany, on April 9, 1997. On the *Joint Statement of Loss or Damage at Delivery* (DD Form 1840), the shipper and the carrier's representative noted that Inventory Item 201, a pool table, was "broken." The Descriptive Inventory described Item 201 as a "Pool Table Child 2 x 4" without pre-existing damage. A *Demand on Carrier/Contractor* (DD Form 1843) and other documents associated with the claim were dispatched to the carrier on August 13, 1997. One of those documents, the *List of Property and Claims Analysis Chart* (DD Form 1844), describes the pool table as "top riped"[sic], "legs broken off," and "broken pieces'" with "screws missing." On the DD Form 1844 the member states that he purchased the pool table for $245 in November 1996, but he claimed a depreciated replacement cost of $134. The record also contains photographs taken before and after shipment. The Army claims office physically inspected the pool table. According to a chronology sheet in the record, the claims office applied the price in the J.C. Penney 1996 Christmas catalog to adjudicate the claim at $134.[(2)] In a letter to the carrier dated December 4, 1997, the Army Claims Service provided a copy of the chronology sheet to Cinco Star, but we cannot determine whether it also provided copies of the pages from the catalog to the carrier.[(3)]

Cinco Star does not dispute that it broke the pool table during shipment, but it contends that it is not liable for any monetary damage because the Army and service member failed to prove the third element of a *prima facie* case of liability against it; namely the amount of the damage. The firm presents several auxiliary arguments to support this position, but it did not offer any evidence on the proper value of the damaged pool table. It argues that the claimant first must present some form of what it considers to be "verifiable" evidence before it has any duty to investigate or voluntarily pay the claim. Having not received the type of evidence it deems appropriate, Cinco Star believes that it rightly advised the Army, within its 120 day settlement period, that it had "deferred" settlement of the claim until it

received "substantiation of value." It argues that the Army offered only "two pieces of evidence of dubious value: the original purchase price as listed on the DD Form 1844, and an internal file chronology." It contends that "these personal statements are hearsay, and are not sufficient without supporting substantiation, such as a copy of the purchase receipt, and /or a copy of the page of the referenced catalog." The carrier notes internal Army regulations and publications indicating that a member should normally have a purchase receipt or similar evidence for an item in excess of $100, and title 49 of the Code of Federal Regulations, Section 1005.4(b) (49 C.F.R. § 1005) which indicates that claimant must establish destination value before a carrier may voluntarily pay a claim.

Discussion

As Cinco Star suggests, there are three elements on which the service member or his service in subrogation must present to establish a *prima facie* case of liability on the part of the carrier: tender of an item to a carrier, delivery in a damaged or more damaged condition, and the amount of damages. *See Missouri Pacific Railroad Company v. Elmore & Stahl*, 377 U.S. 134, 138 (1964). The first two elements are not in dispute.

The Army's adjudication of this matter was less than ideal. There is an unexplained discrepancy between the original purchase price ($245) and the replacement cost claimed by the member and adjudicated by the Army ($134) less than a year thereafter. We agree that a reasonably prudent service member would have retained receipts, especially for major purchases. But many members fail to do so, and when this occurs, alternative forms of documentation are considered. In this regard, the claims office should have obtained a statement from the member containing as much detail as possible concerning the purchase. Also, when the claims office physically inspected the pool table, it should have noted any manufacturer-specific data affixed to it (e.g., model, serial number, etc.). Subject to copyright protections, it should have provided the carrier with copies of the pages it used from the J.C. Penney catalog. The result of the Army's inspection should have been properly recorded on a Government Inspection Report (DD Form 1841) and included significantly more detail. With this type of information, the Army and the carrier should have more easily ascertained the proper replacement cost.

On the other hand, Cinco Star was not a helpless bystander. It prepared the DD Form 1840 with the member, and at delivery its agent was in a position to obtain information involving the pool table, like any manufacturer-specific information mentioned above. To the extent that the J.C. Penney catalog was relevant, Cinco Star could have verified the information therein simply by asking J.C. Penney for a copy of the catalog from the previous Christmas. As the Settlement Certificate noted, Cinco Star had an opportunity to obtain this information in an inspection it chose not to make. Also, it appears that the carrier could have exercised its right to the salvage. During the settlement period, it demanded "documentation of value," but it appears that Cinco Star avoided asking the Army for specific information to determine the proper replacement cost. Cinco Star's claim is even less meritorious than that of the carrier in DOHA Claims Case No. 98021009 (March 5, 1998), which also refused to take advantage of similar damage inspection opportunities yet requested that the Army provide it with manufacturer-specific information within 120 days of receipt of the Army's claim. DOHA Claims Case No. 98021009, *supra*, is dispositive of this claim, but we will address other issues raised by the carrier.

Cinco Star contends that Federal regulations do not require it to determine replacement cost, but the Federal courts have held that a carrier cannot avoid liability by failing to investigate a claim, or failing to thoroughly investigate it when 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). The relative contractual obligations between the Department of Defense and Cinco Star are described in several publications,[(4)] but in relevant part, paragraph IV of the *Military-Industry Memorandum of Understanding on Loss and Damage Rules* (MOU), effective January 1, 1992, notes that the carrier has 120 days in which to investigate a claim after receipt of the formal claim. We have looked to the regulations in 49 C.F.R. § 1005 to help interpret the carrier's duties during the period of claim investigation. *See* DOHA Claims Case No. 98012618 (February 12, 1998), *aff'd* DOHA Claims Case No. 98030604 (June 19, 1998). Under 5 C.F.R. § 1005.4(b), as Cinco Star points out, the carrier requires the claimant to establish destination value before it can pay the claim. Item 410, b(9) of Solicitation I-7 also states that the carrier may, at its option, require proof of loss or damage claimed. The Army provided such proof. The fact that the table was damaged in transit is undisputed, and while not the best evidence possibly available, there is at least a reasonable basis for the Army's determination on the amount of damages which was sufficient to establish a *prima facie* case of liability. The Army claimed a specific amount as the

replacement cost at destination: $134. The Army established this amount after an official physically compared the damaged pool table to the pool table in the J.C. Penney catalog and contemporaneously recorded the source of the estimate in a chronology sheet. In December 1997, the Army provided a copy of its chronology sheet to the carrier. Cinco Star's agent had observed the actual damaged item at delivery, and as part of its investigation and disposition of the claim, the company had sufficient actual knowledge of the damaged object (or opportunities to obtain it) to challenge any inaccuracy in the Army's valuation. Under 49 C.F.R. § 1005.5(b), as part of the investigation and disposition of a claim, a carrier of household goods is required to use depreciated replacement cost as the first alternative in determining the value at which to settle a claim. This necessarily means that the carrier's investigation had to determine the proper replacement costs, either confirming the amount offered by the claimant or providing an alternative and the basis therefore.

There is no merit to Cinco Star's arguments that the chronology sheet and the purchase price noted in the DD Form 1844 should be ignored as incompetent evidence. Applicable regulations do not specify that the Federal Rules of Evidence with the hearsay rule and its exceptions control the settlement of this type of administrative claim. *See* the Comptroller General's former regulations in 4 C.F.R. Parts 30-32 (1996) which we have adopted as part of our interim procedures pending the issuance of DoD's own regulations (61 Federal Register 50285, September 25, 1996). Even if the Federal Rules of Evidence had applied here, chronology sheets may be admitted as an exception to the hearsay rule for records of regularly conducted activity. Also, although the claims office used an incorrect form to memorialize its inspection and more detail should have been included, there appears to be some basis to admit the chronology sheet as a hearsay exception for evidence of the source of the replacement cost estimate. *See Air Land Forwarders, Inc. v. United States,* 38 Fed. Cl. 547, 554-555 (1997); *aff'd* 172 F. 3d 1338 (Fed. Cir. 1999). The Army may not have had the best evidence available to support its *prima facie* case of liability, but it did not need it.

In the final analysis, a significant problem here was that Cinco Star offered nothing to rebut an otherwise weak basis for the Army's determination of value. The carrier is required to establish the liability of the United States. *See* 4 C.F.R. § 31.7. With no clear and convincing contrary evidence of value, we uphold the Army's determination. *See* DOHA Claims Case No. 98022314 (March 13, 1998).

Conclusion

We affirm the Settlement Certificate for the reasons noted herein.

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 YP-287,276; and Army Claim No. 97-E24-0450.

2. The sale price in the catalog was $119.99 until December 31, 1996, which reflected a $15 saving below the regular sale price.

3. Cinco Star quickly rebutted the December 4, 1997, letter, contending in a December 16, 1997, letter that the documents provided by the Army Claims Service's were not "documentation of value." It appears that a copy of the chronology sheet was provided to Cinco Star in this letter, but it is not clear that a copy of the relevant catalog pages were also included. Cinco Star contends that it was not provided relevant pages from the catalog although they are in the record.

4. In addition to the MOU, contractual references include the Military Traffic Management Command's International Personal Property Rate Solicitation I-7, effective October 1, 1996, and the bill of lading with its terms and conditions.