In Re:

Stevens Transportation Co., Inc.

Claimant

)

DATE: September 9, 1999

Claims Case No. 99080601

CLAIMS APPEALS BOARD DECISION

DIGEST

A carrier is not entitled to an enlargement of time to inspect damaged household goods merely because it was unable to contact a member who was on leave or temporary duty travel to arrange the inspection. For purposes of the *Military-Industry Memorandum of Understanding on Loss and Damage Rules (MOU)*, effective January 1, 1992, the carrier must show, among other things, evidence consistent with the member's refusal to allow the carrier its inspection rights and that the carrier aggressively pursued those rights.

DECISION

Stevens Transportation Co., Inc. (Stevens) appeals the March 26, 1997, Settlement Certificate of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 97020314. In the Settlement Certificate, DOHA allowed Stevens $228 of the $1,518 claimed as a refund and disallowed the remainder of Stevens' claim. The $228 reflected an additional depreciation for pre-existing damage (PED). The Army had offset $1,923 to recover for transit loss and damage that Stevens had caused to a shipment of a service member's household goods.[(1)]

Background

The record shows that the shipment was picked up in Portsmouth, Virginia, on January 31, 1992, and was delivered to the service member in Fayetteville, North Carolina, on March 18, 1992. A Notice of Loss or Damage (DD Form 1840R) was dispatched to Stevens on April 22, 1992. Stevens appeal involves the $1,768 offset for damage to a German schrank. Stevens contends that it provided a timely estimate from a reputable firm that was willing to repair damage to the schrank for $250, and that it was error for the Army not to consider that estimate as dispositive of its total liability. In the alternative, Stevens notes that the Army had agreed with it that the replacement cost of the schrank was $1,999.95,[(2)] but that the Army applied an incorrect rate of two percent per year depreciation instead of what it considers to be the proper rate of seven percent per year. According to Stevens, if the Army now applies the proper seven percent rate, Stevens is due $767.37 (after credit of the $228 awarded by DOHA).

Stevens cites paragraph III(B)(1) of the *Military-Industry Memorandum of Understanding on Loss and Damage Rules* (MOU), effective January 1, 1992, as authority to support its argument that the Army was required to apply its repair estimate. Paragraph III (B)(1) states that if the claims office:

"receives an itemized repair estimate from the carrier within 45 calendar days of delivery, the claims office will use that estimate if it is the lowest overall, and the repair firm selected by the carrier can and will perform the repairs adequately for the price stated, based upon the repair firm's reputation for timely and satisfactory performance. If the carrier's estimate is the lowest overall estimate and is not used, the claims office will advise the carrier in writing of the reason the lowest overall estimate was not used in determining the carrier's liability."

Stevens links the 45 calendar days the carrier has to produce this estimate to the 45 calendar days from the time of

delivery or dispatch of the Notice of Loss or Damage (DD Form 1840R), whichever is later, it has to exercise its right to inspect under paragraph II(A) of the MOU. Stevens then reminds us of the consequences of denying the carrier its inspection rights in paragraph II(B):

"If the member refuses to permit the carrier to inspect, the carrier must contact the appropriate claims office which shall facilitate an inspection of the goods. It is agreed that if the member causes a delay by refusing inspection, the carrier shall be provided with an equal number of days to perform the inspection/estimate (45 days plus delay days caused by member)."

Stevens notes that its repair firm and the member eventually worked out a mutually acceptable inspection date of June 15, 1992, and it acknowledges that more than 45 days had elapsed between the time of the dispatch of the DD Form 1840R and the inspection. However, Stevens states that it requested inspection on April 30, 1992, and that "it was determined that the carrier was unable to contact the member as the member was on vacation for the period between April 30 and May 13, 1992." Stevens continues:

"The carrier continued to have problems with the member on May 20; e.g., unable to reach; and on May 27, 1992, it was found that the phone number previously used had been disconnected and a new number assigned which was unpublished. The carrier contacted Wilma in the Claims Office to try and reach the member. Wilma advised carrier the member was on TDY and she would reach the member on onday, June 6, 1992."

Based on this record, Stevens argues that the period from April 30, 1992, until June 15, 1992, should be charged against the government for purposes of qualifying its estimate as timely received under paragraph III(B)(1) of the MOU. Stevens notes that five days had elapsed between the dispatch of the MOU and its receipt by Stevens and that it was the intent of the MOU to allow the carrier the full period of 45 days. Stevens also notes language in the September 13, 1993, letter of the Army Claims Service which it considers an acknowledgment of Stevens' efforts: "Though your correspondence reveals efforts to inspect sooner . . ."

Stevens takes exception to the amount of PED assessed by the Army and believes that the member's repair estimate was defective because it did not consider PED in determining Stevens' share of the liability but did consider PED in determining that the schrank was not repairable. Stevens also ascribes error to the administrative report's[(3)] failure to mention water damage and the broken condition of the schrank when it described the damage as being "scratched, chipped, rubbed..." Stevens points out that the schrank covered 22 line items in the descriptive inventory, not just the 13 mentioned by the Army.

The last general area appealed by Stevens involves the Army's application of a two percent rate of depreciation per year. Stevens believes that the proper rate for this schrank should be seven percent per year. The *Joint Military/Industry Depreciation Guide* (Depreciation Guide) notes that "Solid Wood (Expensive)" furniture depreciates at two percent per year, while "Ordinary Wood, Chrome, Plastic, etc." furniture depreciates at seven percent per year. Stevens argues that the replacement cost for the schrank was measured by a wall unit in the J.C. Penney 1992 Spring/Summer catalogue described as: "constructed of cherry veneers and hardwood solids, or oak veneers and oak solids." Stevens argues that any furniture involving a veneer, even a wooden one, does not meet the definition of "solid wood." Therefore, the 7 percent rate applies.

Discussion

There is no merit to Stevens' argument that it is entitled to an enlargement of time in presenting its repair estimate. For purposes of our discussion in this claim only, we assume that if a carrier is entitled to more time to inspect, then it is entitled to more time for purposes of the controlling effect of its repair estimate.[(4)] However, a fair reading of the MOU does not allow an extension of Steven's time to inspect based on the record involved here. Decisions by this Board and the Comptroller General indicate that for substantial error to exist, and for relief to be granted, three things are significant: a carrier must show that it aggressively pursued its rights; the member's conduct indicates that he/she interfered with the carrier's right more than he failed to understand that right; and that the carrier had a substantial defense which would have been developed during inspection. *See* DOHA Claims Case No. 96070233 (February 18, 1997) and the decisions cited therein. Furthermore, the plain language of paragraph II(B) of the MOU requires a

member's refusal to allow the inspection. Nothing in the record here is consistent with member refusal; it appears that the member was on vacation, on TDY, or was not aware that the carrier wanted to inspect the damaged shipment. Moreover, we are not convinced that Stevens aggressively pursued its inspection rights. The member was on vacation between April 30th and May 13th, but Stevens doesn't explain what it did between ay 13 and May 20. Thus, for either reason, Stevens' position lacks merit.

Stevens also has not established a substantial defense, but merely argues that its repair estimate is correct and that the member's estimate is defective. The member's repair estimate is not facially defective. On the surface, the inspector recounts what he observed about the schrank (footnote 2 above includes most of the inspector's comments), and he found that he was unable to repair it based on his observations. Those observations clearly indicate that the schrank was delivered in a substantially more damaged condition than the condition it was in when Stevens obtained it. This is sufficient to support a member's *prima facie* case of liability against a carrier. *See* DOHA Claims Case 96091701 (February 24, 1997). The general description in the Army's administrative report about the PED did not demonstrate a lack of understanding about the nature of these damages. Our review of the 22 line items that Stevens has associated with the schrank, indicates that only one item, Item 392 (a shelf or shelves) was reported to have water damage and two parts were reported as broken (corner broken and a shelf broken on the right side). This contrasts sharply with the amount of breakage noted at delivery. There is no basis for a finding that the Army acted unreasonably in crediting Stevens with only 15 percent for PED. Finally, Stevens repair estimate is no more detailed or informative than the member's repair estimate, and our review of it indicates that it was more general and more speculative.[(5)]

Finally, we do not believe that the Army's application of the two percent rate of depreciation from the Depreciation Guide was unreasonable for this relatively expensive item of furniture. The schrank appears to be constructed of a solid wood core with a wood veneer. Stevens offers no other support than the literal wording of the phrase "solid wood" to preclude any wood furniture, no matter how expensive, from consideration under the two percent rate of depreciation if it is composed of veneer. The Army's position appears to be that if the furniture is relatively expensive and is made of wood, the two percent rate applies. Our review of some of the industrial web sites indicates that the Army's suggestion has merit to the extent that some of the finest furniture produced is made with veneers.[(6)] There is no basis for us to find that an item of furniture cannot depreciate at a two percent rate merely because a veneer process was used, but neither do we find that all "expensive" furniture depreciates at a two percent rate. Both the member and Stevens should have obtained an estimate for the damaged schrank and identified those characteristics that impact depreciation (e.g., repair), and then each would have offered evidence on how they were consistent with a two percent or seven percent rate of depreciation. In view of the amount of time which has elapsed and the lack of support from Stevens, we find no basis for overturning the Army's adjudication. The expensive nature is one indication of quality which supports the Army's adjudication.

Conclusion

We affirm the Settlement Certificate for the reasons indicated 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

Jean E. Smallin

Member, Claims Appeals Board

1. This matter involves Personal Property Government Bill of Lading (PPGBL) UP-176,989; Army Claim 92-301-2285; and carrier claim 92-60678.

2. The member notes that he paid $3,800 for the schrank when he purchased it in May 1988.

3. Stevens quotes the administrative report's description of the transit damage: "[The member's] estimate from Gabriel's Restoration performed on April 20, 1992 indicated that the schrank was in such a bad state that it was not repairable. The schrank was broken apart in several areas. The supports and boards were split and broken. The screw holes were pulled out. The schrank was loose. The drawers were in pieces, and many pieces were wet."

4. The MOU suggests that a purpose of the carrier's right to inspect is to permit the carrier an opportunity to verify the nature and value of the damages. However, a carrier may do so without producing its own damage estimate. Whether the enlargement of time to conduct an inspection necessarily always results in an enlargement of time to offer a binding repair estimate is reserved for a later decision.

5. The carrier's repairer stated that it could have repaired it for $250, but the basis for that amount is not explained.

6. *See*, for example, Thomasville's web page at http://206.132.10.140/vee.htm.