In Re:

Stevens Transportation Co., Inc.

Claimant

)

DATE: October 5, 1999

Claims Case No. 99090101

CLAIMS APPEALS BOARD DECISION

DIGEST

A pick up and delivery charge, which was part of a carrier-provided repair estimate which the Air Force used to determine the carrier's liability, should be included as an element of damage without the member showing that he actually incurred the charge by having his goods removed for repair.

DECISION

Stevens Transportation Co., Inc. (Stevens) appeals the February 18, 1999, Settlement Certificate of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 99011405. In the Settlement Certificate, DOHA disallowed Stevens' claim for a refund of $100 for unincurred pickup fees which was part of the $382.40 offset from Stevens by the Air Force for transit loss and damage to the household goods of a service member.[(1)]

Background

The record shows that the shipment was picked up in North Dakota on July 22, 1996, and delivered to the service member in Eielson AFB, Alaska, on August 16, 1996. The member and carrier's agent reported all loss or damage on the *Joint Statement of Loss or Damage at Delivery* (DD Form 1840). The member filed a claim against the Air Force based on a repair estimate provided by Adventures in Wood, a commercial furniture repair facility in North Pole, Alaska.[(2)] Pursuant to the *Military-Industry Memorandum of Understanding on Loss and Damage Rules* (MOU) (effective January 1, 1992) Stevens obtained its own repair estimate from Fairbanks Refinishing and Upholstery, another commercial furniture facility. Like the member's estimate, this estimate also included a $100 charge for pick up and delivery of the damaged furniture.[(3)] In adjudicating the claim, the Air Force adopted Stevens' estimate of the damages with the pick up and delivery charge.

Stevens appeals on the basis that there was no proof that the member repaired the damaged furniture; therefore, there is no basis for finding that the additional charge for pick up and delivery of the furniture was incurred. Stevens argues that if the charge was not actually incurred, then it is inappropriate to assess it against a carrier. We found Stevens' supporting arguments to be somewhat confusing, but Stevens appears to offer the following rationale. Stevens believes that the Air Force committed error in assessing liability against it because the Air Force relied on a provision in an internal regulation which states that a member may be paid up to $100 for expenses incident to repair and replacement (including pick up and delivery charges) plus additional amounts if actual payment of expenses is demonstrated.[(4)] Stevens contends that its liability is not necessarily measured by what the Air Force is willing to pay its member; a carrier's liability is measured by common law principles and the contractual agreements between the Department of Defense and the industry. The Air Force may not be able to recover from the carrier the same amount as it pays the service member. Stevens cites our decision in DOHA Claims Case No. 96070206 (September 5, 1996) and the Comptroller General's decisions *Fogarty Van Lines*, B-248982, Aug. 16, 1993; *American International Moving Corp.,* B-247576, Sept. 2, 1992*;* and *Fogarty Van Lines*, B-235558.5, Apr. 29, 1991. Finally, Stevens refers us to the MOU to

support its argument that if the member or claims office had not requested the carrier to attend to the repairs, then any pick up/delivery charge which was part of the estimate cannot be accepted.(5)

Discussion

The only issue here is whether the pick up and delivery charge, which was part of Stevens' estimate and which was used to determine Stevens' liability, should be included as an element of damage without the member showing that he actually incurred the charge by having his goods removed for repair. For purposes of this appeal, we will assume without deciding that the member did not repair the damaged items.

We agree with Stevens that AFI 51-502 is not directed at carriers and does not directly control a carrier's contractual rights and liabilities. *See* DOHA Claims Case No. 99080602 (September 9, 1999).(6) Thus, unless one of the various contractual agreements between the Department of Defense and the industry addresses this issue, we would determine whether this type of damage was reasonably foreseeable. *See* DOHA Claims Case No. 96080207, *supra*.

Stevens' interpretation of paragraph III (B)(5) of the MOU is faulty. For one thing, the wording of this paragraph cannot be interpreted to preclude the application of the pick up/delivery charge portion of Stevens' estimate without also precluding acceptance of the remainder of the estimate. By inference, Stevens' interpretation would also lead to other anomalous results. The general requirement that the claims office use the carrier's estimate under paragraphs III(B)(1) and (2) could be obviated simply by the member deciding not to repair his household goods,(7) or it could be argued that no damage estimates from either the carrier or the member would be accepted if the member decided not to repair the damaged items--resulting in no liability against the carrier. The obvious interpretation of the last sentence of paragraph III(B)(5) is that the military service adjudicating the member's claim will not accept an estimate prepared either for the carrier or for the member if the firm that prepared the estimate does not perform the type of repairs being considered.

Even if the member does not repair his damaged property, he still experienced a loss. The award of damages is designed to place the member in the position that he would have occupied if his goods had been delivered undamaged. As both estimates indicate, at least some of the damaged property had to be picked up, transported to the repairer, and redelivered in order for the member to be placed into the same position he would have been in if the property had not been lost or damaged. Clearly, such damages were foreseeable. While AFI 51-502 did not directly control Stevens' contractual rights, paragraph 2-28 alerts the industry that such charges may apply.(8)

Conclusion

We affirm the Settlement Certificate.

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) YP-476,763; Air Force Claim Eielson

AFB #97-31; and carrier claim #96-41220.

2. The member's estimate was $570 (including $100 for pick up and delivery) plus a $50 estimate fee.

3. Stevens estimate was $360 (including $100 for pick up and delivery), excluding an item which was not economical to repair. The Air Force adopted Stevens's estimate after factoring in the depreciated replacement cost for the unrepairable item, which resulted in carrier liability of $382.40.

4. Apparently Stevens is referring to paragraph 2.28 of Air Force Instruction 51-502, *Personnel and Government Recovery Claims* (July 25, 1994). There is a similar provision in paragraph 2.28 of the current instruction of March 1, 1997.

5. The last two sentences of paragraph III(B)(5) of the MOU state: "The carrier agrees to do the repairs in a reasonable time if requested by the member or the military claims office. Carrier and member estimates provided by firms that do not perform repairs will not be accepted."

6. In *Andrews Van Lines, Inc.*, B-270469, May 29, 1996, the Comptroller General held that the carrier was not liable for sales tax on a replaced cupboard set until the tax was incurred. Interestingly, this outcome was as a result of the controlling Army policy in Department of the Army Pamphlet 27-162 which limited reimbursement of sales taxes by the Army to the member to those sales taxes actually incurred. The outcome was different in the Air Force where the Service's sales tax reimbursement policy was different. *See* DOHA Claims Case No. 96080207 (June 6, 1997) and decisions cited therein.

7. There is no requirement that the member must actually repair or replace his damaged or lost household goods.

8. The courts have indicated that a service's or agency's internal regulations provide guidance in interpreting contractual requirements and are indicative of the government's shipping practices which a carrier must be aware of. *See Baggett Transportation Co. v. United States*, 23 Cl. Ct. 263, 272 n.5 (1991), *aff'd* 969 F. 2d 1028, 1033 (Fed. Cir. 1992) and DOHA Claims Case No. 99080602, *supra*.