In Re:

Stevens Forwarders, Inc.

Claimant

)

DATE: October 6, 1999

Claims Case No. 99090102

CLAIMS APPEALS BOARD DECISION

DIGEST

The member purchased a signed, numbered print which was issued in 1985. In 1995, the member shipped the print with his household goods. When the print arrived at destination, the frame surrounding it was damaged and the glass was shattered. The member also states that the print itself was damaged by the shattered glass. The Army calculated the measure of damages based on the replacement cost of the print even though the member kept the print and reinstalled it in the frame with new glass. When the carrier requested salvage, the member refused to turn over the damaged print to the carrier; the Army credited the carrier with a 25 percent credit. A more reasonable method of calculating the measure of damage in this instance was to appraise the print to determine its current value at delivery and base damages on the difference between that amount and the replacement cost.

DECISION

Stevens Forwarders, Inc. (Stevens) appeals the July 20, 1999, Settlement Certificate of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 99060707. In the Settlement Certificate, DOHA disallowed Stevens' request for a refund of $547 of the $600 offset for transit damages to a print and frame shipped with a service member's household goods.[(1)] Other damages to the shipment are not in issue.

Background

The record shows that the shipment was picked up in Fort Sill, Oklahoma, on June 22, 1995, and was delivered to the service member in Carlisle, Pennsylvania, on July 28, 1995. Descriptive Inventory Item 2 was a mirror carton containing pictures. On the Joint Statement of Loss or Damage at Delivery (DD Form 1840), the shipper and the carrier's representative noted that the "picture of signed numbered print has glass shattered, condition of print questionable." The signed, numbered print was later identified by the member as a print called *Hazlett's Battery*, #322 of 750, issued by Dale Gallon Historical Art in Gettysburg, Pennsylvania, in 1985. The member obtained a list of prices from Dale Gallon; the price to replace this 1985 work of art if still in mint condition was $800. The List of Property and Claims Analysis Chart (DD Form 1844) indicates that the frame containing the print was broken and the glass cover was shattered. The Settlement Certificate notes that on August 16, 1995, the member obtained a repair estimate to replace the glass and repair the frame from Carlisle Art and Frame.[(2)] In the DD Form 1844, the member claimed $800 as the replacement cost of the print plus $53 to repair the glass frame. The DD Form 1844 also noted that the print had been cut many times by the broken glass. When the member did not turn over the print to Stevens for salvage, the Army reduced Stevens liability to a total of $600 ($53 to repair the frame plus $547 for damage to the print).

Stevens objects to any liability beyond the $53. While it does not contest that the frame containing the print was tendered and delivered damaged, it raises a number of other objections to liability. First, it contends that the Army and the member denied its right to inspection. Stevens notes that the Army's administrative report suggests that Prescott Furniture, the company that prepared the carrier's estimate and conducted the inspection for Stevens on other damaged items, should have contacted Dale Gallon. But, Stevens points out the print was not located at Dale Gallon but that it

was apparently located at Carlisle Art and Frame. It also appears that Stevens questions whether the print was located at the member's residence when it conducted its inspection because the purchase receipt for services already rendered by Carlisle Art and Frame was dated 5 weeks prior to the inspection.

Stevens also contends that it was denied its right to salvage. Acknowledging that the Army did reduce its liability by 25 percent, Stevens points out that at 1:30 p.m. on August 8, 1996, the member indicated that the print was not available for salvage, which Stevens argues foreclosed another opportunity to examine the print and shows that the reinstalled print was not completely destroyed. Stevens argues that it vigorously pursued its inspection rights both through the inspection process and the salvage process, and that the carrier's rights were violated in both instances.

Additionally, Stevens contends that the administrative report was erroneous because it suggested that the packer or driver could have determined the value of the print. Also, as evidence that the print was not completely destroyed, Stevens argues that the member reinstalled the print in the repaired frame and that the member would not have done this if the print did not retain some value. As such, replacement cost has no meaning. Stevens points out that neither the claims office nor the member obtained an appraisal of the damaged print. At various times Stevens has questioned whether the print was what the member claimed it to be, and if it was an authentic print, whether it was in mint condition prior to transit.[(3)]

Discussion

A carrier has the right to inspect items it damaged in transit,[(4)] and it is error for the service or the service member to deny a carrier its inspection rights. But 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. 99080601 (September 9, 1999); and 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. The member noted his exception to the condition in which the print/frame combination was delivered on the delivery date, July 28, 1995. Stevens did not transmit a letter to the member stating its desire to inspect until September 12, 1995, 45 days after delivery. A copy of Stevens letter was not received by the claims office until September 18, 1995. On the surface, we question whether Stevens timely exercised its right to inspect because the MOU requires that a carrier inspect within 45 days. Additionally, nothing in the record here is consistent with member refusal. It appears that the member cooperated and allowed Prescott Furniture to conduct an inspection. Also, as the administrative report indicates, there is nothing in the record which suggests that Stevens aggressively sought the opportunity to examine the print when it was not located at the member's residence. We see nothing more about this matter until after the Army forwarded the *Demand on Carrier* in July 1996. For all of these reasons, we find that Stevens failed to demonstrate substantial government error with respect to its inspection rights.

Stevens now seeks to enlarge its inspection rights by arguing that its inspection rights were denied because its salvage rights were denied. But, the *Joint Military-Industry Memorandum of Understanding on Salvage*, effective April 1, 1989, "does not affect the carrier's claims settlement process, appeals process, or inspection rights." Under paragraph d of this agreement, if the carrier is unable to exercise its salvage rights, where appropriate, the carrier will receive a credit equal to 25 percent of the item's depreciated replacement value. In prior decisions we have noted that a carrier who does not inspect may have another opportunity to examine the damaged property and develop evidence to defend its pecuniary interests after it exercises any salvage rights. *See*, *for example*, DOHA Claims Case No. 98021008 (February 27, 1998); and DOHA Claims Case No. 96070214 (January 6, 1997). But nothing in these decisions or in the *Memorandum of Understanding on Salvage*, as noted above, suggests that this opportunity to develop evidence to defend itself affords the carrier any enlargement of its inspection rights. *Compare also* DOHA Claims Case No. 99081806 (September 14, 1999). However, following transmittal of the *Demand on Carrier* on July 18, 1996, Stevens quickly asserted its right to salvage of the print.

During the investigation of the claim, Stevens argued that it was denied its inspection rights. We disagree for the reasons stated above. However, Stevens also expressed concern about the sufficiency of the evidence on the amount of damage to the print and asserted its salvage right. Stevens states that it contacted the member at 1:30 p.m. on August 8, 1996,

and at that point, the member refused to give up the salvage. The record shows that the member's spouse advised the Army in 1998 that she did not recall Stevens requesting salvage of the print. In a separate E:MAIL in 1998, the member advised the Army that he did not replace the print. The member said that he replaced the glass and repaired the frame, but the print was damaged and was not repairable.

Assuming that it was not repairable, generally damages would have been measured by depreciated replacement costs. But, as Stevens points out, the member did not believe the print was so damaged that he felt the need to replace it. This appears to be an unusual situation in which neither repair costs nor depreciated replacement costs adequately measure the true damage. In seems evident, especially in view of Steven's timely objections, that the most reasonable measure of damage would have included an appraisal of the print to determine the current reduced value at the time of delivery. In making an award to the member for property damage under the Personnel Claims Act, 31 U.S.C. § 3721, Army policy provides that in some instances compensation may be a fair and reasonable award that reflects current reduced value. *See* Department of the Army Pamphlet (DA Pam) 27-162, *Claims Procedures*, paragraph 11-14 f(4), April 1, 1998. One characteristic indicating use of such an award is that the member has substantiated a loss in some amount but not in amount claimed. We believe that a more appropriate measure of damage would have been to appraise the print to determine its actual value and compare the value with the replacement cost at the time of delivery.

Normally we would not suggest an appraisal more than four years after delivery, but we believe that it is likely that the member adequately safeguarded his property during the past four years and the condition of the print is likely not to be significantly different than its condition at delivery. We point out, however, that the carrier's liability may be the same or may be an amount greater or lesser than the amount previously adjudicated.

Conclusion

We remand this matter to the Army Claims Service for appraisal of the print.

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 shipment involved Personal Property Government Bill of Lading (PPGBL) VQ-102,185; Army Claim No. 96-354-0217; and Stevens' Claim No.95-64794.

2. Stevens argues that this was not an estimate but a receipt for the replacement of the glass, repair of the frame, and a charge for reinstalling the print in the frame.

3. Stevens has not adequately raised the issue of whether the tendered print is what the member claims it to be. The record contains some evidence of delivery of a limited edition print that was signed and had a specific number. As Stevens contends, its representative at delivery was in no position to provide a valuation of the damaged print, but he could have rebutted the member's assertion that the damaged property he delivered was a signed, numbered print if that was not so.

4. Paragraph II (A) of the *Military-Industry Memorandum of Understanding on Loss and Damage Rules* (MOU), effective January 1, 1992, provides that "the carrier shall have 45 calendar days from delivery of shipment or dispatch of the DD Form 1840R, whichever is later, to inspect the shipment for loss and/or transit damage." Additionally, paragraph II (B) provides in relevant part that "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."