

DATE: October 29, 1999

In Re:

National Claims Services, Inc.

on behalf of

Covan World-Wide Moving, Inc.

Claimant

Claims Case No. 99092001

CLAIMS APPEALS BOARD DECISION

DIGEST

The Claims Appeals Board will accept the Air Force's finding that the proper rate of depreciation for music compact disks is ten percent when there is no agreement between the industry and the Services concerning the rate of depreciation for CDs and the carrier has not provided clear and convincing evidence showing that a higher rate is appropriate.

DECISION

National Claims Services, Inc. (NCS), on behalf of Covan World-Wide Moving, Inc. (Covan), appeals the August 26, 1999, Settlement Certificate of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 99072825. In the Settlement Certificate, DOHA affirmed Covan's liability for the transit loss of music compact disks (CDs) in a shipment of a service member's household goods.⁽¹⁾ In this appeal, NCS challenges the application of a 10 percent flat depreciation rate used by the Air Force to adjudicate Covan's liability and seeks a refund of \$109.37 of the \$247.37 that the Air Force offset.

Background

The record shows that Covan's agent picked up the shipment in Philadelphia, Pennsylvania, on December 8, 1994, and another agent delivered it to the member in San Antonio, Texas, on January 19, 1995. At delivery, both the shipper and Covan's representative noted on the *Joint Statement of Loss or Damage at Delivery* (DD Form 1840) that Item 250, a dish pack carton that included CDs, was missing. In February 1995, the Air Force dispatched to Covan its subrogated claim for \$247.37. The *List of Property and Claims Analysis Chart* (DD Form 1844) assessed the replacement cost at \$276 for 23 CDs, then depreciated this amount by a flat rate of ten percent. These CDs were purchased at various times in 1992 and 1993.⁽²⁾

The only issue in dispute here is the rate of depreciation. Normally, both the Department of Defense and the industry would rely on the *Joint Military/Industry Depreciation Guide*, a publication that contains an agreed rate of depreciation for various household items. However, music CDs generally were not available for domestic purposes until after the

publication of this Guide. In prior decisions, both this Office and the Comptroller General allowed the services to adjudicate specific claims using a ten percent flat rate of depreciation because the industry failed to provide clear and convincing evidence that a higher rate should have applied. See *Resource Protection*, B-266114, April 12, 1996; *aff'd* DOHA Claims Case No. 96081208 (December 20, 1996). See also DOHA Claims Case No. 98061502 (June 16, 1998).

NCS contends that the Settlement Certificate in the present claim was issued in error because our adjudicators merely cited prior Comptroller General and DOHA decisions without responding to the "myriad of new information" that it provided to support its theory that a 50 percent flat rate of depreciation should be applied. NCS requests our specific review of four items: the State Farm Depreciation Guide, which it offered to prove the theory that "obsolescence" is important; a letter by David Maloney, a certified member of the International Society of Appraisers, dated June 26, 1996; "the establishment that the carrier's legal liability is actual cash value;" and "evidence of a used market for CDs." In its July 29, 1999, letter to DOHA, NCS also asked us to consider the used CD market on the Internet, and it provided a printout of albums and prices from *CD Delight*.⁽³⁾ Prior correspondence in the record amplifies NCS's position in two respects. First, based on the opinion of Mr. Maloney and *Resource Protection's* expert in DOHA Claims Case No. 96081208, *supra*, NCS believes that economic obsolescence is the "greatest factor" in value reduction of CDs because music passes its popularity peak. Even some CDs that NCS describes as "classics" "are often the very ones that you find in the \$4.99 bin at Best Buy or Musicland." Second, in absence of any agreement, the "actual cash value" of a CD is the limit on the carrier's liability for a particular item.

The most important "new information" NCS offers is Mr. Maloney's letter. Most of Mr. Maloney's comments involve property generally, but he added a few key observations concerning CDs. He stated that two issues are important in appraising CDs: proper handling to prevent damage and the popularity of the CD. Mr. Maloney noted that a CD is subject to damage like vinyl phonographic records, but not to the same degree as the vinyl record. And like vinyl records, the popularity of a CD will affect its value. Mr. Maloney observed that new CDs sell for about \$16 at popular retail establishments in the Washington, DC, area. But, there are two main secondary markets: estate sales where CDs sell for about \$4 each; and secondary retail outlets which specialize in selling used CDs for about \$7 each.

Discussion

There is no support for the inference that NCS is trying to draw from Mr. Maloney's letter. Mr. Maloney's comments about a secondary market for CDs in the Washington, DC, area may not be relevant to any market that may or may not have existed in 1995 at destination in San Antonio. (Later, we will address the effect of any secondary market that may now exist as a result of sales through the Internet.) More significantly, based on Mr. Maloney's brief discussion about a secondary market for CDs in the Washington area, NCS wants us to find that the measure of damage for a CD lost/damaged in a household shipment is actual cash value. NCS urges us to look to estate sales and wholesale used CD markets to determine that actual cash value.

NCS ignores our finding in DOHA Claims Case No. 96081208 that it was error to measure a household goods owner's measure of loss by reference to a used household goods market. Due to its fundamental importance, we repeat here our analysis from that decision:

"On the other hand, the appraiser started her analysis from a faulty legal assumption concerning valuation of used household goods and effects owned and kept for personal use. The courts recognize that actual value to the owner of a lost or damaged item (excluding fanciful or sentimental value) is a significant consideration in assessing damages to

household goods and other personal property because the used household goods market, to the extent that it exists at all, may not adequately reflect the value of a household or personal item to its owner. In such a secondhand market, sales are usually at a sacrifice. In determining the actual value to the owner, the fact finder has wide latitude, and he may consider such evidence as the cost of the article when new, the length of time it was in use, its condition at the time of loss or injury, the expense to the owner to replace it with a like item in similar condition, other facts which will assist in determining the worth of the article to the owner. Ownership of property qualifies the owner to give his estimate of what actual loss was, for evaluation in assessing the measure of damages. See DeSpirito v. Bristol County Water Co., [102 R.I. 50, 227 A.2d 782, 34 A.L.R. 3d 809 (1967)]; see also Annotation, Valuation Of Wearing Apparel Or Household Goods Kept By Owner for Personal Use, In Action For Loss or Conversion Of, Or Injury To, Such Property, 34 A.L.R. 3d 816 (1970). The Comptroller General also recognized the validity of this rule to personal property lost in transit by a carrier. See American Van Services, Inc. --Reconsideration, B-249834, B-249834.2, Sept. 3, 1993."

The owner of household goods ought to be restored to the position he was in prior to transit loss, and measuring the value of a lost item by reference to typical prices for similar items in sacrifice situations like an estate sale underestimates the value of the item to the member. A service member is not equivalent to the decedent in an estate sale, and he is not a collector in a secondary market. Usually, he/she seeks to replace the item that he lost for the same purposes that he owned it prior to the transit loss.

There is no indication that an Internet secondary market existed for CDs in 1995. We agree with NCS that today a shopper may be able to save money by obtaining the CDs of some notable artists and albums through a secondary Internet market. At NCS' suggestion, we have considered *CD Delight* as a somewhat typical secondary Internet market. Our review of the current catalogue from *CD Delight* indicates that not all artists and albums are available.⁽⁴⁾ We are not aware of any common household item where a service member is expected to seek replacement through a used, secondary market, and it is not appropriate to force a service member to replace CDs that a carrier has lost through such a market, especially when that market appears to be spotty at best.

The relevancy of the version of the State Farm Depreciation Guide that NCS offers is questionable. For purposes of this appeal, we assume that the popularity of the music may effect its value. But, NCS does not indicate when State Farm published this Guide. It appears to us that this Guide was published at the beginning of 1988, more than six years before this shipment moved. CDs are not mentioned in the Guide, yet admittedly they incur less wear and tear than some other media such as vinyl records. We would not question the relevancy of depreciation guides issued by the major insurers of household goods (like State Farm) that were effective around the time of loss and included music CDs.

Finally, we find no justification in this record to depreciate the CDs in this claim by a flat 50 percent from replacement value. For purposes of this claim, we will accept the NCS assumption that loss of popularity of a CD is the main basis for its loss of value. We compared the total replacement cost of the 23 CDs claimed by the service member (\$276, or an average of \$12 each), that were presumably based on 1995 prices, with today's total replacement cost for the 23 using prices quoted on *Amazon.Com*.(www.amazon.com). *Amazon.Com*'s prices tend to be lower than many local retail stores, and the prices we used do not include *Amazon.Com*'s standard domestic shipping cost of \$.95 per CD plus \$3.00 per shipment. Thus, we believe that *Amazon.Com*'s prices are a conservative index of a CD's value. We were unable to determine the price for four of the CDs, but the total replacement cost for the other 19 was \$246.31.⁽⁵⁾ If the replacement cost for each of the other four averaged \$7.42, then the total replacement cost today for the 23 CDs would be about equal to the member's replacement cost of 5 years ago. oreover, we found no basis for NCS' comment that even the "classics" "are often the very ones that you find in the \$4.99 bin at Best Buy or usicland."⁽⁶⁾ We do not detect any loss of popularity for the claimant's selection of music.

In the absence of clear and convincing evidence concerning some higher amount of depreciation, we accept the administrative determination that the proper rate of depreciation is a flat 10 percent. *Compare McNamara-Lunz Vans and Warehouses, Inc.*, 57 Comp. Gen. 415, 419 (1978).

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 shipment involved Personal Property Government Bill of Lading (PPGBL) SP-639,445; Air Force Claim No. Lackland AFB 95-651; and NCS Claim No. E-0006.
2. We do not have sufficient space here to specifically identify all 23 CDs. Examples are noted in the discussion below.
3. This site at "www3.pgh.net/~thud" describes itself as "your Internet source for quality used CDs."
4. For example, in reviewing the member's list of lost CDs, we found that *CD Delight* offers Nirvana's *In Utero* album for \$8, but *Amazon.Com* offered the same album for \$13.99 and lists a normal retail price of \$17.97. The other lost Nirvana album, *Incesticide*, is not currently available through *CD Delight*. *CD Delight* offers the Genesis album *We Can't Dance* for \$5, but *Amazon.Com* offers the same for \$12.99 and lists a normal retail price of \$16.97. However, *CD Delight* does not currently offer any U2, Cranberries, Police or Lionel Ritchie albums, and it does not offer the albums that the member lost by Red Hot Chili Peppers, Smashing Pumpkins, REM, and Depeche Mode.

5. Dick Clark's Golden Oldies, Volume 2 was not available; the member did not know the title of his Depeche Mode album; the title of the Lionel Ritchie album was not provided; and we are uncertain of the correct title to the Red Hot Chili Peppers album.

6. We are not certain how NCS would define the "classics." Looking at the music that this member claims he lost, some of the albums with older release dates are among the more expensive. For example, the album *Synchronicity* by the Police was released in 1987 and is offered by Amazon.Com for \$13.99; REM's *Green*, released in 1988 is \$11.49; REM's *Out of Time*, released in 1991 is \$12.99; and Peter Gabriel's *Shaking the Tree*, released in 1990 is \$13.99.