

January 13, 2000

In Re:

National Claims Service, Inc.

on behalf of

National Forwarding Co., Inc.

Claimant

Claims Case No. 99122001

CLAIMS APPEALS BOARD DECISION

DIGEST

A carrier fails to meet its burden of proof in showing that a military service acted arbitrarily, capriciously or unreasonably in applying a rate of depreciation to determine the measure of damages (depreciated replacement costs) for missing household property when the type of property lost is not included in the Joint Military-Industry Depreciation Guide, the carrier fails to provide clear and convincing evidence of the appropriate rate, and there appears to be a rational basis for the rate the service applied.

DECISION

The National Claims Service, Inc., on behalf of the National Forwarding Co., Inc., appeals the November 24, 1999, Settlement Certificate of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 99062113. The Settlement Certificate disallowed its request for a refund of \$62.54 of the \$155.95 set off by the Navy for the transit loss of ten video cassette tapes in a shipment of a service member's household goods by National Forwarding Co. [\(1\)](#)

Background

The record shows that National Forwarding Co.'s agent picked up the shipment in Virginia Beach, Virginia, on October 28, 1997, and another agent delivered it to the service member in Jacksonville, Florida, on November 10, 1997. For purposes of this appeal, the only issue in dispute is the proper rate of depreciation used in determining depreciated replacement costs of ten video cassette tapes. [\(2\)](#)

Normally, the rate of depreciation is not in dispute. The *Joint Military-Industry Depreciation Guide* (JMIDG) contains the rates of depreciation for various types of personal property assuming average care and usage. In this case, however, there is no specific depreciation rate for video cassette tapes because video cassette tapes did not exist when the JMIDG was last revised. National Claims Service has maintained that the rate of depreciation should be a flat 50 percent for each tape, and as authority, it cites DOHA's Settlement Certificate in DOHA Claim No. 97032118, May 15, 1997, as well as the provision in the JMIDG for a flat rate of 50 percent on "Phonograph Records or Recorded Tapes." In this appeal, National Claims Service also notes that our adjudicators committed error by relying on the fact that the industry

tentatively approved a draft agreement which may become effective in the future that may fix the rate of depreciation at 20 percent for the first year, then ten percent per year with a maximum depreciation of 50 percent. The Navy contends that the proper rate of depreciation is ten percent per year using the rate in the same depreciation guide that it uses internally to determine its own liability to the service member for the loss of the property.

Discussion

In DOHA Claims Case No. 99060725 (June 24, 1999) we held that a carrier did not meet its burden of proof in showing that a military service (the Air Force in that case) acted arbitrarily, capriciously or unreasonably in determining a rate of depreciation applicable to replacement costs for video cassette tapes when such tapes were not specifically included in the JMIDG, the carrier failed to offer clear and convincing evidence of the appropriate rate, and there appeared to be a rational basis for the rate that the service used. We found that video cassette tapes were not reasonably contemplated within the concept of "Phonographic Records or Recorded Tapes" as set forth in the JMIDG because the words "Recorded Tapes" contemplated audio tapes. In the absence of clear and convincing contrary proof from the carrier, we found the Air Force's application of the ten percent rate set forth in the internal *Allowance List-Depreciation Guide* to be reasonable.

We reviewed the Settlement Certificate and do not interpret it in the same manner as National Claims Services. The basis for settlement is in the last paragraph; the adjudicators relied on our decision in DOHA Claims Case No. 99060725, *supra*. While they mentioned the proposed agreement in the previous paragraph, it is apparent that the adjudicators intended it for background information only. To avoid possible confusion, it would have been better if the adjudicators had not mentioned the proposed agreement. In any event, our adjudicators did not find, and we do not find, that the draft agreement is an appropriate basis upon which to settle this claim. While reference to contract drafts may be appropriate for determining the intent of the parties within existing contracts, the disposition of depreciation on video cassette tapes in the draft agreement is nothing more than a proposal that may be implemented as a contractual provision at some future date. It does not affect this claim.

Regarding the Settlement Certificate in DOHA Claim No. 97032118, *supra*, we have held that settlements are not binding precedent. *See* DOHA Claims Case No. 96082104 (January 31, 1997) and DOHA Claims Case No. 96070204 (September 5, 1996) citing the Comptroller General's Decision in B-239199.2, July 9, 1991. The Settlement Certificate in DOHA Claims No. 97032118 involved an Army claim in which the Army had already adjudicated a 50 percent flat rate for video cassette tapes; the rate of depreciation was not in dispute. Our adjudicators commented that the 50 percent flat rate was "in keeping with" the JMIDG's rate for "recorded tapes."⁽³⁾ However, they did not have to determine whether the 50 percent flat rate or a lower rate was the appropriate rate, and apparently they mentioned it only to suggest that the Army had some rational basis for using it. Without a contractual or regulatory provision binding the services, the Navy and Air Force were free to exercise reasonable discretion differently.

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

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Member, Claims Appeals Board

1. This matter refers to Personal Property Government Bill of Lading ZP-158,427; Navy Claim No. 98PT066; and National Claims Service's Claim No. X-9850.

2. During the adjudication process, National Claims Service had disputed the tender of these items for shipment, and the member's claim contained the exact title of each lost tape and its replacement cost.

3. This appears to be a reference to the "Phonographic Records or Recorded Tapes" provision referenced above.