

March 27, 2000

In Re:

National Claims Service, Inc.

on behalf of

Eagle Van Lines, Inc.

Claimant

Claims Case No. 00022210

CLAIMS APPEALS BOARD DECISION

DIGEST

Generally, an agency's determination concerning the amount of damages is a factual matter, and we will not disturb an agency's findings in the absence of clear and convincing evidence that the agency acted unreasonably. However, it was erroneous for the agency to use a replacement estimate for a VCR with more features than the missing VCR without explanation.

DECISION

The National Claims Service, Inc. (NCS), on behalf of Eagle Van Lines, Inc. (Eagle), requests a refund of \$503.50 of the \$1,155 set off by the Army for transit loss and damage of a service member's household goods during a permanent change of station transfer in 1995. [\(U\)](#)

Background

The record shows that Eagle's agent obtained the shipment at Fort Benning, Georgia, on July 27, 1995, and delivered it to the member in Anchorage, Alaska, on October 24, 1995. One of the items in the shipment was Descriptive Inventory Items 111/112, which was described as a 3.1 cubic foot carton containing a "RCA VCR S/N303481174 M/N VR526 + misc., carrier-packed." At delivery, the shipper and Eagle's agent noted that the VCR was missing. In the *Notice of Loss or Damage* (DD Form 1840R) dispatched to Eagle on November 2, 1995, the member noted that, among other things, 25 CDs and cassettes were also missing from Items 111/112. On the *List of Property and Claims Analysis Chart* (DD Form 1844), the member stated that he paid \$450 for his RCA VR526 VCR when he purchased it in January 1995. He also claimed that the replacement cost in November 1995 in Anchorage was \$349.95. The replacement cost was based on the cost of a new Toshiba M650 stereo High Fidelity VCR. In subrogation to the member's claim, the Army also claimed \$269 for the depreciated replacement cost of the CDs, but this matter is no longer in issue because, in its administrative report, the Army allowed Eagle the entire \$269. The only issue in this appeal is the amount of Eagle's liability for the VCR.

NCS contends that there is no basis for a carrier liability of \$350 on the VCR and that the proper amount of Eagle's

liability is \$115.50. It seeks a refund of \$234.50. NCS notes that the replacement cost claimed by the member is based on a Toshiba M650 stereo High Fidelity VCR, a unit that is not comparable to the VR526 that was lost. The VR526 was not a stereo high fidelity unit, but a less expensive monaural four video head unit. NCS denies that the \$124 for which Eagle had initially admitted liability was based on an average retail/used price in the *Orion Blue Book*,⁽²⁾ but it contends that the amount for which it now admits liability (\$115.50) is calculated after applying necessary depreciation ("30% depreciation off actual age of item") because the VCR was manufactured in 1992 or 1993.⁽³⁾ NCS contends that it introduced the *Orion Blue Book* only for the purpose of showing manufacture date and VCR options of the VR526, and therefore showing that the replacement estimate offered by the member was based on a VCR which was better than the one that was lost. Eagle contends our settlement inappropriately picked up the "New List" price information from the *Orion Blue Book* (\$399) to prove replacement cost and that, in any event, it was not representative of the replacement cost at the time of the loss.

NCS offered other estimates of replacement cost at the time of the loss. NCS offered copies of pages from the 96/97 *Jewelry, Gift and Home Catalog* (Vol. 27) from Service Merchandise and directed our attention to the VR508. The catalog indicates that the VR508 was a four video head, 181-channel, 8 event/1 year, monaural VCR offered for \$179.99. NCS points out that the average cost of the VCR selections in the catalog was \$273.99. In its February 12, 1999, letter to the Army Claims Service, NCS enclosed World Wide Web pages from Prime Focus featuring, among other things, the RCA VR540 at \$145. The VR540 is a four video head unit, with VCR Plus+(TM) Programming, a universal remote and memory protection. To arrive at its \$115.50 calculation of damages, NCS proposed averaging the price of the VR540 (\$145) with the price for a Toshiba unit, the M684, listed on the Prime Focus World Wide Web page for \$185, i.e., \$165, then depreciating that amount by 30 percent for 3 years of depreciation.

We also researched prices for RCA VCR four video head monaural units offered by the Army Air Force Exchange Service (AAFES) in 1995. There is an AAFES main exchange at Fort Richardson, in Anchorage, Alaska, the destination of this shipment. AAFES advised us that it continued to list the VR526 in its database until early 1996 with a regular price listed as \$379, but that the VR526 was replaced with the VR542, a four video head monaural unit with VCR Plus+(TM) Programming. In October/November 1995, the VR542 had a regular price listed as \$275.⁽⁴⁾ Although the World Wide Web offers extensive information on current pricing data, our search for historical pricing data was unsuccessful.

Discussion

Generally, under federal law, in an action to recover from a carrier for damage to a shipment, the shipper establishes his *prima facie* case when he shows delivery in good condition, failure to deliver or arrival in damaged condition, and the amount of damages. Thereupon, the burden of proof is upon the carrier to show both that it was free from negligence and that the damage to the cargo was due to one of the excepted causes relieving the carrier of liability. *See Missouri Pacific Railroad Company v. Elmore & Stahl*, 377 U.S. 134, 138 (1964). NCS argues that the Army's *prima facie* case fails with regard to the amount of damages to the extent that the member and the Army failed to demonstrate damages beyond \$115.50.

An agency's determination concerning the amount of damages is a factual matter, and we will not disturb an agency's findings in the absence of clear and convincing evidence that the agency acted unreasonably. *See* DOHA Claims Case No. 96081202 (April 28, 1997); and DOHA Claims Case No. 96070206 (September 5, 1996). For reasons explained below, NCS did not provide clear and convincing evidence that the amount of damages was \$115.50, but based on the evidence in the record and the additional information we developed, we are also convinced that the Army did not have a reasonable basis for finding that the replacement cost was \$350.

It appears that the Army's mistake was accepting an estimate based on the M650, without substantiating that the replacement item was reasonably equivalent to the lost item. The member apparently was able to purchase a VCR with more features than the VCR lost by the carrier for less than he paid ten months earlier. The Army reimbursed the member for this new VCR and automatically sought reimbursement from the carrier. For determining carrier liability, however, the Army should have analyzed the quality/features of the lost VCR in comparison to the proposed replacement and documented in the record its rationale for determining carrier liability.⁽⁵⁾ No explanation was provided in the record for holding the carrier liable for the cost of the Toshiba M650.

Damage estimating is not an exact science, but there are too many flaws in the NCS position to support a \$115.50 estimate. First, we are unaware of any precedent for applying depreciation from the "actual age" i.e., from the date of manufacture. We recently decided another claim in which we rejected a carrier's argument that depreciation should be calculated from the date of manufacture, rather than from the date of purchase or initial possession of the item as personal property. *See* DOHA Claims Case No. 00031420 (March 24, 2000). Here, the DD Form 1844 clearly indicates that the member purchased the VR526 in January 1995, and neither NCS nor Eagle ever questioned the date of purchase. In applying three years of depreciation, it also appears that NCS simply assumed that the VCR was manufactured in 1992 without tracing the serial number to determine the actual date of manufacture.

Second, in advocating the \$115.50 damage estimate, NCS also violated a principle of damage estimating that it had strongly advocated and with which we agree: damages are estimated with respect to replacement costs at the time and place of delivery. NCS provided two 1999 prices, not two 1995 prices, to construct the \$115.50 estimate. We take administrative notice of the fact that, feature for feature, VCR prices fell significantly in the mid to late 1990s. Moreover, after arguing that the Army and the member had inappropriately compared a VCR with a high fidelity audio subsystem (the Toshiba M650) with the monaural VR526, ironically NCS proposed a comparison which included a unit (the Toshiba M684) with a stereo subsystem. Although the error was in the claimant's favor, the Toshiba M684 is a high fidelity VCR; therefore, it may not have been a good comparison for the lost VR526. As noted above, there appeared to be a premium for high fidelity as late as 1996/1997.

The Service Merchandise catalog pages that NCS provided are more relevant because they represent prices within about a year of delivery. While the VR508 at \$179.99 did not come with VCR Plus+ Programming, we note that another unit on the same page, the VR4126 with a Zenith label, came with that feature (but without commercial skip) for \$189.99. As indicated above, prices for VCRs have been falling in recent years. Adding a premium to 1996/1997 pricing and adjusting for various features, a replacement cost or cost range could be determined from the Service Merchandise catalog pages. However, NCS would have had to show that these items and prices were available in Anchorage in 1995. Not having such evidence in the record, we note that the AAFES regular price for a VR542, the unit it suggests as the replacement for the VR526, in November 1995 was \$275. For purposes of settling this claim, we adopt a replacement cost of \$275 which we will not depreciate because of the limited time between purchase and carrier receipt.

Conclusion

We allow Eagle an additional \$75 on the VCR, plus the \$269 previously allowed by the Army for the CDs.

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 refers to Personal Property Government Bill of Lading YP-106,357; Army Claim No. 96-431-0084; and NCS reference E-0383.

2. This amount is shown in a copy of a page taken by Eagle from the *1996 Orion Video & Television Blue Book*.

3. The *Orion Blue Book* indicates that the VR526 was manufactured in 1992 and 1993 by RCA and had the following specifications: VHS, 8 Event/1 yr., VISS, 4 Head, VCR Plus+ (TM) Programming, with 181 channel, on-screen programing and a remote control. (VISS indicates the VHF in search system.)

4. This information was obtained by DOHA telephonically from AAFES Main Store Support, Hardline Division, in Dallas, Texas. Although the VR526 was listed in the AAFES inventory database, there is no evidence in the record that this model was still generally available for sale in the Fall of 1995. However, it is our understanding that the VR542 would have been available at that time.

5. For example, the rationale could have included a feature-by-feature comparison with a differential for missing or additional features. Or, the rationale could have discussed the relative placement of the two VCRs in the quality range of VCRs at the time of purchase and determined if each held a similar place. The Service Merchandise catalog material provided by NCS for a period of approximately one year after the delivery date suggests that the average price for a high fidelity VCR was \$251.54, versus \$161.66 for monaural VCRs.