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COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-178604 August 20, 1973

REA Express
219 East 42nd Street
New York, New York 10017

Attention: James H. Boland, Director
Claims & Claims Attorney

Gentlemen:

Consideration has been given to your request by letter dated April 24, 1973, REA Express Claim No. GHL D-4014432, for review of the action taken by our Transportation and Claims Division by letter dated April 4, 1973, TC-GR-014935-EW, which disallowed your claim for $316 ($316.60) deducted by the Department of the Air Force Freight Claims Branch from revenues otherwise due REA Express (hereafter REA).

The amount deducted represents overhead assessed by the Sacramento Air Material Area, McClellan Air Force Base, California, as part of the cost of repairing damage to three radar sets (electrical instruments, NOI) for which REA is responsible incident to transportation of the property from McGuire Air Force Base, New Jersey, to McClellan Air Force Base, California, under Government bill of lading No. D-4014432, dated October 15, 1968. REA accepts responsibility for the damage and has voluntarily refunded $123.33 which was billed as direct material cost ($246) and direct labor ($77.33) but rejects the overhead costs of $316.60 (39 direct man-hours at $8.118) billed by the work center. You contend that the overhead costs amounting to 43 percent of the total expenditure for direct material and labor costs in repair of the radar sets is unreasonable and that the Department of the Air Force failed to allow any consideration for the enhancement in value to the Air Force of the radar sets by reason of the repair job.

Section 20(11), Part I, of the Interstate Commerce Act, 49 U.S.C. 20(11), made applicable to motor carriers by section 219 of Part II of the Act, provides that a carrier that receives and transports property shall be liable "for the full actual loss, damage, or injury to such property" which the carrier causes or which is caused by a connecting carrier to which the property is delivered. The law is concerned

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with restoration of the claimant to the position he would have occupied had there been no loss or damage to the shipment. Atlantic Coast Line Railway Co. v. Roe, 118 So. 155 (1928).

It is generally held that where goods are damaged which are susceptible of repair, the owner is obligated to accept the property and to do whatever is necessary to mitigate the extent of the damages. The owner, however, is entitled to recover the cost of such replacements and repairs as are necessary to restore him to the position he would have occupied had there been no loss or damage to the shipment. See United States v. Delaware Bay & River Pilots Assoc. (The L-1), 10 F. Supp. 43 (1935); Aetna v. Boland, 104 F. 2d 133 (1940); Kohl v. Arp, 17 N.W. 2d 824 (1945).

You state that reliance by the Government upon Conditioned Air Corporation v. Rock Island Motor Transit Co., 114 N.W. 2d 304 (1962) and the L-1, supra, to support the general application of a 43 percent burden is misplaced. In both of these cases overhead costs were included in the damages allowed. In Conditioned Air Corporation, the Iowa Supreme Court stated at pages 307, 310 and 311:

> The authorities generally distinguish between operating and overhead expense. The former consists of those items inseparably connected with the productive end of the business. The latter consists of charges generally of a nonproductive or indirect nature such as administrative costs incident to the management, supervision or conduct of the capital outlay of the business. Lytle, Campbell & Co. v. Somers, Fitler & Todd Co., 276 Pa 109, 120 A 409, 27 ALR 41, 43-44; Mann v. Schnarr, 228 Ind 654, 95 NE2d 139, 141, 142-143.
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> "'Overhead' cannot be defined with precision. 'It may be said to include broadly the continuous expenses of a business irrespective of the outlay on particular contracts.'" Wynkoop Hallenbeck Crawford Co. v. Western Union Tel. Co., 268 NY 103, 196 NE 760, 761; Grand Trunk Western R. Co. v. H. W. Nelson Co., 6 Cir, Mich, 116 F2d 833, 839.
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Gordon Form Lathe Co. v. Ford Motor Co., 6th Cir, Mich, 133 F2d 487, 500-501, is a patent infringement case which considers the effect of overhead in determining profits. We quote from the opinion: "It is a

matter of common knowledge that all well-managed manufacturing businesses recognize overhead costs as financial outlays expended in the production of an article or process. . . .

"There is probably no single phase of determining cost of manufacturing a device or machine which is more elusive or difficult than the allocation of overhead to a particular article. The impossibility of precise allocation is generally recognized and the law is not so exacting as to require a delicately balanced scientific method of determination, which reaches a mathematical certainty. . . .

"The cost of manufactured products consists of the sum of direct costs, that is, direct material and direct labor, plus indirect costs, or manufacturing expense. Because of its indirect and general nature, manufacturing expense cannot be charged directly to each production order as can direct material and direct labor. It must therefore be distributed over production in such manner that each kind of product and each lot of work produced will be charged with its fair share of the indirect expense."

In the Conditioned Air Corporation case the objection raised by the defendant was not primarily to the extent of the allowance for operating and overhead expense in addition to the direct cost of labor and material but was to any allowance at all for operating and overhead expense. The court there did not accept defendant's contention and allowed operating and overhead expense.

You contend that overhead expense to be recoverable must be reasonably foreseeable and properly allocated and such overhead items are capable of being established by competent proof and as reasonably related to the repairs performed as a result of carrier's negligence.

The above-cited cases hold that in addition to direct cost of labor and materials, damages include a fair allowance for operating and overhead expense. It is our view that since the item assessed for overhead was based upon cost developed by the Air Force installation cost accounting records, there was a reasonable basis therefor and since the cost was reasonably related to the repairs and materials in restoring the radar sets, the overhead item is clearly supportable. In this connection, Air Force regulations

specify that overhead is the product of actual direct hours times the predetermined or standard overhead rate. Such rate is based on the fiscal year overhead budget and activity estimate. The rate is determined from the depot and field maintenance cost accounting system. You apparently accept an allowance for overhead as being an item of damages since you indicate that in similar situations NEA has been willing to accept a charge of 20 percent for overhead.

Your reference to "special damages" which are not a natural and probable result of the loss or damage and for which the carrier is not generally liable in the absence of notice of special conditions is inapposite. As shown above there is ample authority for including overhead costs in any damage claim and, if the repairs had not been made at the Government facility, there would have been an additional charge for transporting the damaged property to and from the place of repair plus profit for a private contractor.

You indicate that the Department of the Air Force should have allowed you some consideration for the enhancement in value of the radar sets by reason of a presumably competent repair job. In Louisiana Trade Bank v. Irene, 228 S.W. 2d 127, 129 (1950), involving cost of repairing in transit damage to an accounting machine, the decision states:

> "When the plaintiff introduced evidence to show the reasonable and necessary cost of restoring the accounting machine, including labor and transportation, to the identical condition it was in immediately prior to the damage thereto, a prima facie case was made out by the plaintiff. Presumably, if the expense incurred restored the machine to the same condition it was in prior to the accident, there was no enhancement in its value. Under such a fact showing, if the defendant desired to allege and prove by competent evidence that the value of the machine had been enhanced by the repairs made on it, then it was incumbent upon him to show defensively that there had been an enhancement. While the burden of the whole case was upon the plaintiff, still when the prima facie showing was made, as in this instance, the burden of proceeding shifted to the defendant to show that the repairs, as made, resulted in added value to the article in question."

The disallowance of your claim was, therefore, proper and is sustained.

Sincerely yours,

PAUL G. DEMBLING

For the
Comptroller General
of the United States