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United States
General Accounting Office
Washington, D.C. 20548

Office of the General Counsel

B-252972.2

July 14, 1995

Robert D. Walker
Claims Adjuster
American Van Services, Inc.
P.O. Box 2317
Fort Walton Beach, FL 32549

Dear Mr. Walker:

We refer to your inquiry of January 11, 1995, regarding the status of American's request for reconsideration of our decision B-252972, July 16, 1993. In that decision, we upheld our Claims Group's settlement of your claim under 31 U.S.C. § 3702 for the recovery of $241.88 that the Air Force set off for damages that American caused to a service member's household goods while transporting them in 1988. The issues involved in the settlement affirmed by our decision were proof of loss or damage claimed, and the need for a carrier's inspection of the items damaged. These issues were raised in connection with preexisting damage to a wooden chair, a Victrola, and the qualifications of a repairer to make an estimate for damage to a washer. We affirm that decision.

You have raised a pair of preliminary issues. First, you note that you requested reconsideration of our decision on July 30, 1993. However, this Office has no record of receipt of any request for reconsideration from you prior to our receipt of your January 11, 1995, correspondence. We are treating your latest correspondence as the request for reconsideration.

Also, you contend that our summary decision of July 16, 1993, was improper because it was "mere rubber stamping" of the position we stated in our settlement. You request that we address the specific issues that you raise for review.

In your January 11, 1995, inquiry, you state (and we agree) that the carrier is not liable for preexisting damage (PED). You suggest, however, that PED was not considered in the adjudication of damages. In this respect, we disagree. For example, the member tendered the wooden chair (item 11) to American with chips,

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rubs, and scratches; the top was loose. But, when the chair was tendered, its back was still attached, and American delivered it detached. The $45 estimate adopted by the Air Force was the charge to reglue the back, not to repair other damages.

Similarly, the Air Force reduced American's liability on the Victrola (item 18) to reflect PED, and as explained in the settlement certificate, we reduced it further to reflect our view that American was not liable for water damage. Nothing we see in the record suggests that American was charged for the repair of damages that it did not cause.

With respect to the washer (item 3), you suggest that the repairer was not qualified to make the estimate. As we explained previously, an unsupported allegation about the repairer's competency is neither evidence of that incompetency nor evidence of the actual value of the damaged item. See American Van Services, Inc.--Reconsideration, B-249834.2, Sept. 3, 1993.

You point out that American is not required to exercise its right of inspection in order to maintain its other contractual rights. American did, however, have a duty to investigate the claim. See 49 C.F.R. § 1005.4. By not exercising its inspection right as a part of that investigation, American lost an opportunity to obtain evidence more favorable to its financial interests; it defended its position by allegation and suggestion.

Next, you place considerable emphasis on your interpretation of Item 5i of the Military Traffic Management Command's (MTMC) Domestic Rate Solicitation D-2, and its predecessors. Item 5i states that the carrier may, at its option, require proof of loss or damage claimed. You suggest that the claim record provided to you must contain acceptable proof on any factual aspect related to any of three elements of the prima facie case (including the value of the loss). In your view, if it does not contain such proof, it may be challenged at any point in the adjudication process without the necessity of offering contrary evidence. The general rule is well established: for the shipper to shift the burden of proof to the carrier, he must offer evidence that the item was tendered to the carrier; that the carrier did not deliver it or delivered it in a more damaged condition; and the amount of the loss or damage. See generally Missouri Pacific Railroad Co. v. Elmore & Stahl, 377 U.S. 134, 138 (1964). Item 5i was intended to facilitate the carrier's investigation and disposition of a claim within 120 days of its receipt, as required. See 49 C.F.R. § 1005.5. Item 5i is not intended to adjust the application of burden-of-proof rules in the treatment of a prima facie case.

With regard to item 11, which was purchased in 1972 as a part of a set, the member's unchallenged estimate of the value of his damages is a reasonable basis for adjudicating value. We describe the situation as unchallenged because American did not raise the issue of the value of the chair (except PED) during its claim

investigation, and it did not offer its own evidence of the value of the chair. After having had an opportunity to investigate the claim on the chair, you denied the claim, not because the member failed to establish its original value or replacement cost, but because you thought that its condition was an inherent vice (the top was loose) and/or there was too much PED. You did not challenge the lack of support on the record for the valuation of the chair during your investigation, and you did not inspect it and provide your own evidence of value. Our Claims Group found no inherent vice, and we affirmed that finding on review. You did not question the valuation until our review. We do not decide here whether a carrier must exercise its option to require proof of loss or damage within the period allowed for investigating a claim. We base our decision in this case on the rule that it is inappropriate to raise a new theory of recovery on review, as we have stated in previous decisions. See A&A Transfer & Storage, Inc., B-252974, Oct. 22, 1993.

We trust that this response addresses the concerns you raised.

Sincerely yours,

Lowell for Dodge

Robert P. Murphy
General Counsel