

Enhancing Recovery—A Claims Primer

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Introduction

On 19 November 1995, Congress passed the 1996 Legislative Appropriations Act, which contained, inter alia, authority for the Comptroller General to transfer to the Office of Management and Budget numerous functions, including the authority to decide carrier appeals of offsets taken by the military claims services on personnel property claims. The Office of Management and Budget further delegated this authority to the Defense Office of Hearings and Appeals, a branch of the Defense Legal Services Agency, Department of Defense (DOD).²

While this transfer of decision-making authority removed the Comptroller General from deciding carrier appeals, it did not negate the precedential power of prior Comptroller General decisions in this important area. These decisions will serve as a standard for subsequent similar cases. Based on this premise, this primer seeks to identify several issues which carriers continue to raise to defeat a field claims office's demand for monetary recovery for loss and/or damage to a servicemember's personal property. This article will also suggest actions a field claims office can take to counter a carrier's denial of payment.

Discussion

Before addressing specific carrier challenges to demand requests, the preliminary question every claims judge advocate or claims examiner must ask and answer is, "has the Army claimant (the shipper) established a prima facie case of carrier liability?" In *Missouri Pacific Railroad Co. v. Elmore & Stahl*,³ the United States Supreme Court held that for a shipper to meet

this requirement, the shipper must show three things: (1) tender of the goods to the carrier in a particular condition; (2) delivery of the goods in a more damaged condition [or no delivery at all]; and (3) amount of damages.⁴ "Moreover, when goods pass through the custody of more than one bailee [e.g., a carrier or a warehouse], it is a presumption of the common law that the damage [or loss] occurred in the hands of the last one."⁵ A carrier's allegation that the shipper caused the damage to claimed items subsequent to delivery is not sufficient to shift the burden from the carrier.⁶

If the shipper successfully establishes a prima facie case of carrier liability, the burden then shifts to the carrier to prove that the damage to, or loss of, personal property did not occur while the property was in the carrier's custody or that the damage or loss can be attributed to one of five exceptions to carrier liability.⁷ A claims judge advocate's or claims examiner's first step is to gather the most complete claims packet possible from the claimant. Properly completed and substantiated claims forms, starting with DD Form 1840R, Notice of Loss or Damage, usually withstand challenge by a carrier.

Notice—DD Forms 1840/1840R

Notice and Later-Discovered Loss or Damage. The Joint Military-Industry Memorandum of Understanding on Loss and Damage (MOU) provides that a carrier must accept written documentation advising the carrier of later-discovered losses or damages and that such documentation is evidence which overcomes the presumption of correctness of the delivery receipt, so long as the agency dispatches this documentation no later than seventy-five days after the carrier has completed delivery.⁸

1. I thank Ms. Phyllis Schultz for her comments and guidance.

2. Patriot Forwarders, Inc., Claims Appeals Board, Claims Case No. 96070217 (Nov. 19, 1996) ("Pursuant to Public Law No. 104-53, November 19, 1995, effective June 30, 1996, the authority of the GAO to adjudicate carrier's reclaims of amounts deducted by the Services for transit loss/damage was transferred to the Director, Office of Management and Budget who delegated this authority to the Department of Defense.")

3. 377 U.S. 134 (1964).

4. *Id.* at 138.

5. Towne Int'l Forwarding, Inc., Comp. Gen., B-260768 (Dec. 28, 1995); Stevens Transp. Co., Comp. Gen., B-243750 (Aug. 28, 1991).

6. Andrews Van Lines, Comp. Gen., B-270638 (May 21, 1996) (The shipper moved personal property from the garage to the house after delivery, and the carrier argued that the shipper was the "last handler."); Stevens Worldwide Van Lines, Inc., Comp. Gen., B-251343 (Apr. 19, 1993) (The shipper moved personal property from Alabama to Florida, but the carrier failed to inspect.); Interstate Van Lines, Inc., Comp. Gen., B-197911.3 (Feb. 2, 1990) (The shipper moved personal property within the home after delivery.)

7. See McNamara-Lutz Vans and Warehouses, Inc., 57 Comp. Gen. 415, 418 (Apr. 18, 1978). The five exceptions are: (1) act of God, (2) public enemy, (3) act of shipper, (4) act by public authority, and (5) inherent vice or nature of the goods. *Id.*

In *Senate Forwarding, Inc.*,⁹ the Comptroller General held that the dispatch date, not the date postmarked on the envelope, controlled.¹⁰ This decision allows the field claims office to dispatch the DD Form 1840R as late as the seventy-fifth day after delivery and not lose the presumption because the Army postal system did not mail it on that same day. However, “[t]o avoid needless litigation on this issue, a [field] claims office should mail each DD Form 1840R promptly on the date indicated on the bottom of the form. Moreover, the office should avoid sending multiple DD Forms 1840R with different dates in the same envelope.”¹¹ To do otherwise only invites challenge by the carrier, and it becomes difficult for the field claims office to argue timely dispatch for any of the forms contained in the envelope. Additionally, the practice of sending multiple DD Forms 1840R with different dispatch dates in the same envelope is contrary to United States Army Claims Service (USARCS) instructions, and field claims office SOPs should reflect the requirement for separate envelopes.

Continuation Sheets. If a claimant has completed the DD Form 1840R and has additional items to identify, claims personnel must ensure that the claimant uses a continuation sheet to note the additional damage or loss. The reverse side of the form (*i.e.*, the DD Form 1840 side) should *not* be used to complete the listing of additional items. “Erroneously noting loss or damage on the wrong side of either the DD Form 1840 or DD Form 1840R, however, does not necessarily preclude carrier recovery for those items.”¹² Field claims personnel should also ensure that each continuation sheet is signed and dated by the appropriate claims person, just as was done on the original DD Form 1840R.

Carrier’s Failure to Complete the DD Form 1840/1840R. In *National Forwarding Co.*,¹³ the Comptroller General held that

an agency has the responsibility to make a reasonable effort to find the carrier’s address instead of holding the DD Form 1840/1840R until the seventy-five day time period expires.¹⁴ In upholding the carrier’s appeal of no timely notice, the Comptroller General found that National had included its name, the government bill of lading number, and the address of National’s agent. The Army could find the correct address and timely dispatch the DD Form 1840R with minimal difficulty.¹⁵ On the other hand, the Comptroller General has also held that Army field claims offices are not required to make an effort to discover a carrier’s address and to timely dispatch the DD Form 1840R when the carrier fails to provide any information on the DD Form 1840/1840R.¹⁶ The best practice for field claims offices is to determine the responsible carrier and to dispatch timely notice whenever possible. This approach should eliminate challenges on this issue, avoid what would otherwise be an offset action, and hopefully result in a quicker settlement of the demand.¹⁷

The Army’s Failure to Complete the DD Form 1840R. In *Patriot Forwarders, Inc.*,¹⁸ the new Claims Appeals Board held that the government’s failure to complete the DD Form 1840R by omitting the carrier’s address in block 3a, did not negate otherwise timely notice.¹⁹ Since the carrier’s address was contained in block 9 of the DD Form 1840, the Army established a prima facie case of dispatching the form to the carrier within seventy-five days, as indicated by the dispatch date in Block 3b of the DD Form 1840R.²⁰ *Patriot Forwarders* demonstrates that field claims personnel should take time to ensure that all blocks of the DD Form 1840R are properly completed. Taking time early in the claims process to fill in all documents with the correct information will eliminate issues for the carrier to challenge later.

8. Joint Military-Industry Memorandum of Understanding on Loss and Damage Rules (1 Jan. 1992), *reprinted in* ARMY LAW., Mar. 1992, at 45. See Household Goods Recovery Notes, *Digest of Recent Comptroller General and GAO Decisions*, ARMY LAW., Dec. 1992, at 34.

9. Comp. Gen., B-249840 (Mar. 1, 1993).

10. *Id.*

11. Personnel Claims Recovery Notes, *Proper Dispatch of DD Form 1840R*, ARMY LAW., Oct. 1992, at 43.

12. Personnel Claims Recovery Notes, *Use of Continuation Sheets for the DD Form 1840*, ARMY LAW., June 1993, at 53. The outbound transportation counselor should counsel the soldier on the use of continuation sheets when completing the DD Form 1840, Joint Statement of Loss or Damage at Delivery.

13. Comp. Gen., B-247457 (Aug. 26, 1992).

14. *Id.*

15. *Id.*

16. Department of the Army, Comp. Gen., B-255795 (June 3, 1994) (The carrier gave the shipper a blank form.).

17. See Claims Report, *The Search for Mr. Goodbar and Storage—Revisited*, ARMY LAW., Oct. 1994, at 71.

18. Claims Appeals Board, Claims Case No. 96070217 (Nov. 19, 1996).

19. *Id.*

20. *Id.*

Adequate Notice—Damage Descriptions and Errors. In numerous opinions, the Comptroller General has held that:

[W]hen the DD Form 1840R provides written, timely notice to the carrier of additional loss or damage after delivery, that notice need not include specific itemized exceptions Notice of a claim is sufficient if it alerts the carrier that damage or loss occurred for which reparation is expected so that the carrier may promptly investigate the facts.²¹

In *Resource Protection*,²² the carrier argued unsuccessfully that the shipper's failure to list inventory numbers on the DD Form 1840/1840R for four of nine boxes which were missing negated carrier liability.²³ In another case, the GAO Claims Group, in reviewing a carrier's challenge to no timely notice, held that a shipper's listing of the inventory number "83" for an item on the DD Form 1840R instead of "283," which was the correct number for the item, was an understandable error and that such an error did not negate timely notice.²⁴

Similarly, in *Allied Transcontinental Forwarding, Inc.*,²⁵ the Comptroller General held that a shipper's act of listing "books and tackle box" on DD Form 1840 with a nonconforming inventory number did not shift liability away from the carrier.²⁶ The shipper listed the inventory number as "5" when it should have been "65." Allied claimed that there was no proof of tender because: (1) there were no books or tackle box listed for inventory number "5," (2) the shipper did not state that he had listed the wrong inventory number when filing his claim, and (3) "there was not sufficient evidence that the books and tackle box the shipper claimed to be missing were those actually inventoried as item #65."²⁷ The Comptroller General found that the inventory indicated that these items were tendered to the carrier.²⁸ The inventory was prepared so that the "6" in "65"

was listed at the beginning of the ten-digit series that started the "60" series, but no "6" was placed in front of the "5." It was an understandable error, and there was only one inventory line item with "books and tackle box" listed on the inventory.²⁹

The concept of adequate notice to the carrier was also highlighted in *AAA Transfer and Storage, Inc.*,³⁰ where the carrier argued that it was not responsible for the damage claimed to an antique mirror. There was no pre-existing damage to the mirror noted on the inventory. On the DD Form 1840R the shipper indicated the mirror was scratched, and the repair firm noted scratches and dents on the mirror. The carrier took the position that because it did not receive timely notice of the dents, it was not liable for the damage claimed. The Comptroller General found no merit in the carrier's argument. Regardless of whether a scratch is different damage than a dent, the carrier received notice of a scratched mirror and was adequately alerted to promptly investigate.³¹

These cases illustrate that attention to detail is important in claims processing. Claims personnel should take sufficient time while the claimant is present in the claims office to review the DD Form 1840R to determine that it is completely filled out, the inventory numbers match those on the inventory, and the description of the claimed damage is accurate. If questions arise, ask the claimant to answer them. The more that can be done to perfect the claim in its early stages, the easier it will be to defend it if challenged later by a carrier.

Damage Discovered After Dispatch of the DD Form 1840R. Claims personnel can still provide timely notice to a carrier after the DD Form 1840R is dispatched, so long as the seventy-fifth day has not expired. In *Stevens Transportation Co.*,³² the Comptroller General held that damage, so long as it is timely reported, may be reported on other forms than the DD Forms 1840/1840R.³³ The DD Form 1843, Government Inspection

21. Resource Protection, Comp. Gen., B-270319 (May 21, 1996); American Van Serv., Inc., Comp. Gen., B-252671 (Aug. 19, 1993); American Van Serv., Inc., Comp. Gen., B-249834 (Feb. 11, 1993); Continental Van Lines, Inc., Comp. Gen., B-215507 (Oct. 11, 1984) (A clear delivery receipt does not overcome the later dispatched DD Form 1840R.).

22. Comp. Gen., B-270319 (May 21, 1996).

23. *Id.*

24. GAO Settlement Certificate, Z-2862118 (Aug. 3, 1992). GAO decisions cannot be cited for precedent. Nevertheless, the reasoning used by the Claims Group may assist claims personnel in responding to a carrier challenge of a similar nature.

25. Comp. Gen., B-270314 (Feb. 16, 1996).

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. Comp. Gen., B-248535 (Oct. 22, 1992).

31. *Id.*

Report, was dispatched to the carrier within seventy-five days of delivery, and that was sufficient to notify the carrier about broken legs on a dresser. The carrier had complained that the DD Form 1840 indicated that the dresser legs were chipped, but on the DD Form 1844, List of Property and Claims Analysis Chart, the dresser legs were listed as broken. The carrier argued that the damage was so different that there was no timely notice. As noted above, the Comptroller General found that the carrier did receive the DD Form 1843 with notice of the dresser's broken legs within the prescribed notice period and that was sufficient notice.³⁴ Field claims personnel should always be alert to later-discovered damage or other damage noted on the claimant's DD Form 1844 that is different from that damage noted on DD Forms 1840/1840R. If field claims personnel make such a discovery, they should not hesitate to mail the claimant's DD Forms 1844, or any other notice document, to the carrier.

Tender of Service: Inventories—Missing Items

Checking All Items on Inventory at Time of Delivery. Carriers will often argue that they are not liable for missing items (especially items missing from cartons) where the signed delivery inventory indicates that the shipper checked off on the line numbers for the missing items. However, the Comptroller General has held that such initials or check marks are not conclusive evidence of delivery of the items which will overcome a DD Form 1840R which is properly dispatched later.³⁵ Claims personnel should be alert to this situation and, if a claim has missing items, check the inventory to see if check marks or the claimant's initials appear beside the line items. If such markings are present, obtain a statement from the claimant explaining what occurred at delivery regarding the annotations on the inventory and the later-discovered missing items. The claimant must explain why the inventory items were checked off or initialed as received but later claimed as missing.

Household Goods (HHG) Not Listed on the Inventory but Missing. The HHG descriptive inventory is an extremely important document in the claims process. It serves several different functions: proof of tender, proof of ownership, and description of preexisting damage (PED). It is a document that a soldier needs to take interest in while it is being completed by the carrier's representative prior to his/her departure with the soldier's HHG. The Comptroller General has held that a carrier does not have to list every item on an inventory; however, "a carrier can be charged with the loss even if household goods are not listed on the inventory, where circumstances are sufficient to establish that the goods were shipped and lost."³⁶ What are such "circumstances?" The claimant must present some substantive evidence of tender to establish the first element of a prima facie case.³⁷ An acknowledgment on the claim form of the penalties for filing a false claim;³⁸ an unsupported, self-serving acknowledgment;³⁹ or filled-in preprinted forms will not suffice.⁴⁰ What the Comptroller General has found acceptable is a *personal written statement* by the claimant that describes the circumstances surrounding the packing, moving, delivery, and discovery of the loss of the missing items.⁴¹

A very detailed personal statement from the claimant will greatly improve a claims office's chances of successfully refuting a carrier's argument of no tender. These chances are further improved if the statement is combined with other supporting documentation of proof of ownership (especially for items over \$100), such as, sales receipts, canceled checks, credit card receipts, or photographs; proof of tampering with the carton (e.g., use of different colored tape than originally used); and proof that the item was listed on premove documents (DD Form 1701, Inventory of Household Goods, and DD Form 1299, Application for Shipment and Storage of Personal Property).⁴² For example, in *Fogarty Van Lines*,⁴³ the Comptroller General held that the surrounding circumstances supported tender to the carrier of a vacuum that was left off of the inventory and was not delivered.⁴⁴ The claimant had completed a "Hi-Val" inven-

32. Comp. Gen., B-244701 (Jan. 9, 1992).

33. *Id.*

34. *Id.*

35. Resource Protection, Comp. Gen., B-265978 (Apr. 26, 1996); Andrews Van Lines, Comp. Gen., B-257399 (Dec. 8, 1994); National Forwarding Co., Reconsideration, Comp. Gen., B-238982.2 (June 3, 1991). See Personnel Claims Note, *Checking Items Off the Inventory*, ARMY LAW., Dec. 1996, at 39.

36. Fogarty Van Lines, Comp. Gen., B-23558.4 (Mar. 19, 1991) (unpub.).

37. Department of Army—Reconsideration, Comp. Gen., B-205084 (June 8, 1983).

38. National Claims Serv., Inc., Comp. Gen., B-260385 (Aug. 14, 1995).

39. Cartwright Van Lines, Inc., Comp. Gen., B-243746 (Aug. 16, 1991) ("Although every household good need not be listed, we would not permit a shipper to establish tender to the carrier only on the strength of an unsupported, self-serving acknowledgment.").

40. OK Transfer & Storage, Inc., Comp. Gen., B-261577 (Mar. 20, 1996); Aalmode Transp. Corp., Comp. Gen., B-240350 (Dec. 18, 1990).

41. Department of Army—Reconsideration, Comp. Gen., B-205084 (June 8, 1983). See Personnel Claims Note, *Missing Packed Items: A Trumpet Missing from a Carton of Games, Jewelry Missing from a Jewelry Box*, ARMY LAW., July 1995, at 70; Personnel Claims Notes, *Proof of Tender When Items are not Listed on the Inventory*, ARMY LAW., July 1994, at 49.

tory five days prior to completion of the standard shipment inventory in which the vacuum was listed; the claimant made a detailed statement explaining how the vacuum was the last item loaded on the moving truck; and the standard shipment inventory described two items as vacuum parts (which suggests the claimant would not have the one without the other).⁴⁵ *Valdez Transfer, Inc.*⁴⁶ involved a similar situation. A waterbed thermostat turned up missing but was not listed on the inventory. The Comptroller General found sufficient evidence to support tender through the detailed statement of the claimant and the inventory which listed other waterbed parts.⁴⁷ Additionally, “a carrier is not relieved of liability for missing items merely because it delivered the carton in which the items were packed in the same sealed condition that it was in when the carrier received the items. The carrier must show that the items were not removed from their carton while the carton was in the carrier’s possession.”⁴⁸

Field claims personnel must recognize potential roadblocks to a successful recovery demand and thoroughly question the claimant. Claimants should provide information to address the following issues:

1. How does the claimant know that the item was tendered?
2. Describe the circumstances at the time of tender (for example, the location of the item in the home, special packing or handling required, and comments about the item made to or by the carrier’s representatives).
3. Did the claimant see the carrier’s representative pack the item?
4. Was the item listed on the inventory? If not, why not? Why did the claimant sign the inventory when the item was not listed? If yes, did the inventory accurately describe the item? If the item was packed in a carton, but not specifically identified

on the inventory, was the inventory description for the carton reasonably related to the missing item?

5. Does the claimant have proof of ownership, such as proof of purchase (paid receipt, canceled check, installment agreement, credit card statement), photograph, or insurance inventory?

6. Are there witnesses, including the spouse, who can attest to the ownership of the missing item (e.g., a friend or neighbor who visited the home just prior to the move and saw the item in the home)?

7. Is there any evidence of carton tampering?

8. Did any unusual circumstances exist at the time of delivery?

9. If the claimant failed to notice the item was missing at the time of delivery, why did this happen?

10. Why did the claimant check or initial inventory line numbers without checking to see if the item was in fact delivered?⁴⁹

For items claimed as missing which were not listed on the inventory, the Comptroller General has upheld offset action against the carrier if the military claims service could show that the missing item was packed in a carton with a reasonably related item that *did* appear on the inventory. In *American International Moving, Corp.*,⁵⁰ the Comptroller General held a carrier liable for “items claimed lost from a carton that [did] not exactly fit the carton’s inventory description where it would not have been unusual to pack those items in such carton, particularly where the carrier did the packing and prepared the inventory list.”⁵¹ In this case, clothing was missing from a carton labeled “linen.” Other examples include drapes packed in a carton labeled “clothes” and Halloween items missing from a carton labeled “Christmas Tree;”⁵² golf shoes missing from a carton labeled “shoes;”⁵³ a trumpet missing from a carton

42. See *Allied Freight Forwarding, Inc.*, Comp. Gen., B-260695 (Sept. 29, 1995). The inventory did not list a VCR, and Allied did not deliver a VCR. However, Allied was held liable because the claimant, on DD Form 1701, the premove inventory sheet completed by a shipper prior to carrier packing, listed a Goldstar VCR purchased in 1986. This document, combined with a detailed statement from the claimant that he believed Allied packed the VCR with other items, was sufficient proof of tender. See also *National Claims Serv., Inc.*, Comp. Gen., B-260385 (Aug. 14, 1995); *Department of Army—Reconsideration*, Comp. Gen., B-205084 (June 8, 1983).

43. Comp. Gen., B-235558.4 (Mar. 19, 1991).

44. *Id.*

45. *Id.*

46. Comp. Gen., B-197911.8 (Nov. 16, 1989) (unpub.).

47. *Id.*

48. Household Goods Recovery Notes, *Digests of Recent Comptroller General and GAO Decisions*, ARMY LAW., Dec. 1992, at 33. See *Cartwright Van Lines, Inc.*, Comp. Gen., B-243746 (Aug. 16, 1991); *Aalmode Transp.*, Comp. Gen., B-240350 (Dec. 18, 1990); *Olympic Forwarders, Inc.*, GAO Settlement Certificate, Z-2866988(15) (Aug. 15, 1993).

49. Personnel Claims Note, *Missing Packed Items: A Trumpet Missing from a Carton of Games, Jewelry Missing from a Jewelry Box*, ARMY LAW., July 1995, at 70; Personnel Claims Notes, *Proof of Tender When Items are not Listed on the Inventory*, ARMY LAW., July 1994, at 50.

50. Comp. Gen., B-247576.2 (Sept. 2, 1992).

51. *Id.*

labeled “games;”⁵⁴ a waterpick packed with “bathroom items;” a camera packed with “storage items;” a basket packed with “games;” a plaque packed with books (because a plaque is flat, like a book); a vacuum cleaner brush packed with the vacuum; a VCR and computer programs packed with cartons labeled “tapes” and “miscellaneous;” and a framed picture packed with “dried flowers” (because both are decorative items).⁵⁵ On the other hand, the Comptroller General “absolved the carrier of liability for the claimed loss of a shotgun from a carton labeled ‘Wardrobe stuffed animals.’”⁵⁶

The importance of the claimant’s detailed statement cannot be stressed enough. In *American Van Pac Carriers*,⁵⁷ the Comptroller General held a carrier liable for a telephone that was missing from a carton labeled “kitchen glass” on the inventory and for a camera that was missing from a carton labeled “lamps.”⁵⁸ The claimant provided a detailed statement of how those items came to be packed in those cartons even though the listed items were seemingly unrelated to the missing items.⁵⁹

Pay attention to how the carrier labels the contents of a carton on a particular line item on the inventory. If improper descriptive terms are used and the claimant states that a missing item was packed in such a carton, the carrier will have difficulty refuting tender. In *Andrews Van Lines, Inc.*,⁶⁰ the GAO found in favor of the USARCS where:

[I]n preparing the inventory, Andrews’ agent annotated item #98 as “1.5 ctn, LR items, CP” [1.5 cubic foot carton, living room items, carrier packed]. In this instance, the carrier has failed to properly identify the contents of the carton in accordance with Paragraph 54(d) [now paragraph 55d], of the Tender of Service, which directs the carrier to avoid the use of general descriptive terms when preparing inventories. Paragraph 54(e)

[now paragraph 55e], further directs the carrier to list and describe items of property to the extent necessary to properly identify them. Paragraph 54(r) [now paragraph 55s] reminds the carrier to avoid the use of vague descriptive terms, and further warns the carrier that if such terms are used it cannot contest a claim for missing items.⁶¹

In this case, the claimant listed six Hummel figurines on DD Form 1840R as missing from carton #98, and he provided a statement that the items were tendered for shipment.

Even if claims personnel have supporting documentation, it will be difficult to prove tender when the missing items are very valuable. For example, in GAO Settlement Certificate Z-2817671(70), 22 March 1995, the GAO claims group held that the carrier was not liable for missing valuable rings, despite a vigorous defense by the USARCS which included detailed statements from the claimant, proof of ownership, and reasonable relationship of missing items to the item listed on the inventory (missing rings from an inventory line item labeled “jewelry box”).⁶² GAO maintained there was insufficient proof of tender and stated that they would closely scrutinize missing high value items. The USARCS did not appeal this decision. Therefore, the burden is on the claimant to make sure such items are listed and well described on the inventory. Generally, such losses are not payable. Field claims personnel should make every effort to publish such information in local media to achieve the widest possible dissemination. When field claims personnel are faced with such an issue, they should gather as much information as possible to support the Army’s position regarding tender and then call the USARCS to discuss possible action before asserting a demand.⁶³

Internal Damage to Electronic Items

52. Carlyle Bros. Forwarding Co., Comp. Gen., B-247442 (Mar. 16, 1992).

53. Paul Arpin Van Lines, Inc., Comp. Gen., B-213784 (May 22, 1984) (unpub.).

54. Andrews Van Lines Inc., Comp. Gen., B-257398 (Dec. 29, 1994) (unpub.).

55. Household Goods Recovery Notes, *Digests of Recent Comptroller General and GAO Decisions*, ARMY LAW., Dec. 1992, at 35.

56. Carlyle Bros. Forwarding Co., Comp. Gen., B-247442 (Mar. 16, 1992).

57. Comp. Gen., B-256688 (Sept. 2, 1994).

58. *Id.*

59. *Id.* See GAO Settlement Certificate, Z-2862146(29) (Jan. 18, 1995). The GAO held a carrier liable for a missing display case filled with valuable military insignia. The display case was not listed on the inventory, but the claimant provided a detailed statement as to how the carrier packed the item in a mirror carton. The inventory had 14 picture cartons listed (it had to be one of them), and the claimant supplied pictures of a display case similar to his.

60. GAO Settlement Certificate, Z-2729037-75-347 (Oct. 12, 1993).

61. *Id.*

62. GAO Settlement Certificate, Z-2817671(70) (Mar. 22, 1995) .

If there is one area of constant tension between the military claims services and the carrier industry, it is the area regarding internal damage to electronic items without corresponding external damage. Recall that to establish a prima facie case of carrier liability, field claims personnel must establish that the item was tendered to the carrier in a certain condition, that the item was damaged while in the carrier's possession, and the amount of the damage. One of the difficulties revolves around establishing tender of the item in good condition. Unfortunately, the inventory prepared by the carrier is of little help here.

Carriers are not required to know or note the working condition of electronic items or appliances prior to shipment. The tender of service and many decisions of the Comptroller General preclude the government from arguing that the absence of inventory notations establishes a presumption that the item was in good working condition prior to shipment. These decisions recognize that for both practical and safety reasons, carriers cannot be expected to plug in electronic items to see if they work⁶⁴

A claimant's personal statement as to the working condition of the damaged electronic item prior to shipment is extremely important to establish the condition of the item at the time of tender to the carrier. Field claims personnel should assist claimants in preparing such statements. Claimants should avoid submitting "fill-in-the blank" statements. Claimants must prepare personal statements that specifically address the condition of their electronic items. Statements should address several questions: what is the make and model of the item, is it new or used, has it been repaired recently, when was it last used before the move (the closer in time between the time the item was used and the time of the move, the better), and is there a third party who can establish the working condition of the item prior to the move? Additionally, claims personnel should have claimants provide any information that will help explain the damage, such as how the item was packed, how the item was loaded on the moving van, who packed the item, and whether the item was dropped.⁶⁵

Obtaining a detailed personal statement from the claimant is only half of the battle. To substantiate that the internal damage is shipment related, the claimant will need an estimate of repair from a qualified electronics repair firm. Such a repair estimate must be *detailed, credible, and convincing*. Field claims offices should have estimate of repair forms for use by the claimant and should include the forms in the claims packet. A sufficient estimate of repair should, at a minimum, address the following questions:

1. Is this the type of damage that [could have] occurred in transit? Why?
2. Are there loose components in the [item]?
3. Can loose parts be heard?
4. Was there a cracked circuit board?
5. Did solder points come loose or break during shipment due to rough handling?
6. Were electronic parts misaligned due to improper handling or inadequate packing for shipment?
7. How is this damage different from normal wear and tear [e.g., dried out parts due to long-term storage or due to claimant's negligence; burned out power supply because the item was subjected to dual voltage]?⁶⁶

If field claims personnel are not satisfied with the information provided by the estimate of repair, they should not hesitate to contact the repair firm to ask questions. Estimates of repair that merely state that the damage "possibly occurred in shipment" or that the item was "damaged in shipment" require more explanation. Record all phone conversations on the claims chronology sheet along with the name of the person spoken to and the name of the person making the call.⁶⁷

Armed with a claimant's detailed statement and a good estimate of repair, field claims personnel can rebut carrier allegations that the damage was not caused by the carrier. In *Carlyle Van Lines, Inc.*,⁶⁸ the Comptroller General held a carrier liable for damage to a television when the military claims service provided a statement from the claimant as to the good working condition prior to shipment and the estimate of repair indicated that the main circuit board was broken due to mishandling or dropping.⁶⁹ In *Allied Intermodal Forwarding, Inc.*,⁷⁰ the claim-

63. Personnel Claims Note, *Missing Packed Items: A Trumpet from a Carton of Games, Jewelry Missing from a Jewelry Box*, ARMY LAW., July 1995, at 70; Personnel Claims Note, *Proof of Tender When Items are not Listed on the Inventory*, ARMY LAW., July 1994, at 50.

64. Personnel Claims Notes, *Internal Damage to Electronic Items—Revisited*, ARMY LAW., Jan. 1994, at 40.

65. Personnel Claims Note, *Internal Damage to Electronic Items*, ARMY LAW., May 1993, at 50.

66. Personnel Claims Note, *The Importance of Repair Estimates for Electronic Items*, ARMY LAW., Aug. 1996, at 36.

67. *Id.*

68. Comp. Gen., B-257884 (Jan. 25, 1995).

69. *Id.*

70. Comp. Gen., B-258665 (Apr. 6, 1995).

ant indicated in his statement that his television worked prior to pickup, did not work at delivery, and there were no signs of external damage. The carrier argued that there was no proof the television worked prior to pickup and that the damage was due to normal truck vibrations. However, the estimate of repair indicated that the shadow mask loosened inside the television, which was consistent with the television being dropped or subjected to stress applied to the face of the tube. Based on this evidence, the Comptroller General held for the military claims service.⁷¹ The importance of the claimant's statement and the estimate of repair is further illustrated in *Dep't of the Army—Reconsideration*,⁷² where:

[T]he GAO Claims Group held for the carrier because there was no proof that the video cassette recorder (VCR) worked at origin and there was no external damage to the VCR. The Comptroller General reversed the GAO settlement certificate citing the [servicemember's] personal statement that stressed the VCR worked at origin and the broken circuit card was consistent with an item having been dropped.⁷³

Exceptions to Carrier Liability

A carrier is liable for "damage to goods transported by it unless it can show that the damage was caused by (a) an act of God; (b) a public enemy; (c) an act of the shipper himself; (d) action by public authority, or (e) the inherent vice or nature of the goods."⁷⁴ Of these five exceptions, three are fairly clear. Claims personnel will likely need to rely on case law for an understanding of the remaining two, which are discussed below:

Act of God. It is important for field claims personnel to carefully evaluate a carrier's argument that no liability attaches to it because an act of God caused the loss or damage to a claimant's HHG. When evaluating the carrier's argument, first determine if the alleged event constitutes an act of God, (e.g., a flood), then look to see if there is an intervening fault that can be attrib-

uted to the carrier which will not free it from liability. In two cases involving Atlas Van Lines, the Comptroller General held in favor of the military claims services when Atlas argued that the "Great Midwest Flood of 1993" was an act of God that exonerated it of liability for HHG stored in a warehouse flooded by the Missouri River.⁷⁵ The Comptroller General found that "although a flood [is] an act of God, the failure to take action to move the household goods before the crest of the flood reached the storage facility constitute[d] the intervening fault of negligence."⁷⁶ Through thorough investigation, the military claims services were able to show that severe flooding occurred on the upper Missouri and Mississippi Rivers and continued downstream towards Chesterfield, Missouri, where the HHG were stored. Atlas was, or should have been, aware of the significance of this flood. It had time, had it acted promptly, to move the HHG. "The fact that the structural failure of the Monarch Chesterfield levee was not anticipated [did] not absolve Atlas of liability, since flood waters had overtopped the levee long before the levee failed."⁷⁷

2. *Inherent Vice or Nature of the Goods.* The Comptroller General has defined "inherent vice" as "an existing defect, disease or decay, or the inherent nature of the commodity, which will cause it to deteriorate over time without any outside influence."⁷⁸ A carrier is not liable for such damage to HHG if this exception applies, but field claims offices should not accept at face value a carrier's statement denying liability because of this exception. Once a servicemember establishes a prima facie case against the carrier for damage to the servicemember's HHG, the burden shifts to the carrier to prove that inherent vice is responsible for the claimed damage and that the carrier is free of liability.

In *Aalmode Transportation Corp.*,⁷⁹ the carrier denied liability for damage to certain pieces of furniture by alleging that humidity had caused the packing material to stick to the furniture and that such damage was caused by the "operation of natural laws." The USARCS argued that the damage was caused by poor quality packing materials and/or labor that was used to pack the furniture. The Comptroller General agreed with the USARCS and pointed out that Aalmode did not refute the

71. *Id.*

72. Comp. Gen., B-255777.2 (May 9, 1994).

73. Personnel Claims Notes, *Recent Comptroller General Decisions*, ARMY LAW., Nov. 1995, at 53.

74. *Missouri Pac. R.R. Co. v. Elmore & Stahl*, 377 U.S. 134, 138 (1964); *McNamara-Lutz Vans and Warehouses, Inc.*, 57 Comp. Gen. 415, 418 (Apr. 18, 1978). See *Cartwright Int'l Van Lines*, Comp. Gen., B-260372 (Oct. 31, 1995).

75. *Atlas Van Lines*, Comp. Gen., B-261321 (Apr. 22, 1996); *Atlas Van Lines*, Comp. Gen., B-261348 (Feb. 16, 1996).

76. *Atlas Van Lines*, Comp. Gen., B-261321 (Apr. 22, 1996).

77. *Atlas Van Lines*, Comp. Gen., B-261348 (Feb. 16, 1996).

78. *Caisson Forwarding Co.*, Comp. Gen., B-251042 (Apr. 21, 1993).

79. Comp. Gen., B-237658 (Feb. 12, 1990).

Army's argument. The Comptroller General was unable to conclude that the nature of the furniture finish alone was such that it would lead to humidity-generated damage to the property over a transit period of two days in mid-June.⁸⁰ In *Caisson Forwarding Co., Inc.*,⁸¹ a case of similar facts, the carrier argued that damage to a dresser and a coffee table was the result of the inherent vice or nature of the items. "Caisson relie[d] on a statement from its repair firm which simply described a dresser [as having] the 'inherent vice' of a 'soft finish,' and a coffee table as having the 'inherent vice' of being 'over waxed.'"⁸² The Comptroller General held that the repair statement did not overcome the carrier's liability.⁸³ The carrier offered little evidence that it exercised reasonable care in padding the furniture, and it "also [had] not shown why the soft finish and over-waxing were not detectable at origin in this case by ordinary observation, or why items with such characteristics [could] not be prepared for shipment to avoid damage."⁸⁴

In a more recent case, the Comptroller General held the carrier liable for a carpet damaged by mildew, dry rot, and insect infestation.⁸⁵ The facts indicated that the carrier picked up the carpet, along with other HHG, from a nontemporary storage (NTS) contractor, but the carrier did not inspect the carpet or take exception to the carpet's condition on the rider. However, "several months after delivery, an appraiser found that the carpet was infested with live moths and active moth larva, and that moth damage pervaded the entire carpet. The carpet also had extensive areas of mildew and dry rot, and in some areas the carpet had disintegrated from dry rot damage."⁸⁶ The carrier, Towne, argued inherent vice but failed to meet its burden of proof. The Comptroller General stated:

Towne did not present any expert evidence with regard to mildew, dry rot, or insect infestation which would have precluded the probability that these damages had occurred in transit in view of the amount of time the-

carpet remained in Towne's custody [eleven days versus three years for the NTS contractor] and the condition in which it was shipped.⁸⁷

Failure to inspect and record findings on the rider and no expert opinion to demonstrate when the damage occurred resulted in Towne's liability for the carpet.⁸⁸

While the burden of proof on the carrier may seem onerous, field claims personnel should not hesitate to demand from the carrier proof (such as an expert opinion) beyond an allegation or general comment from the carrier's repair firm that the damage was caused by an inherent vice or the nature of the goods. At the same time, do not forget common sense in responding to the carrier's denial. A compromise may be in order in certain cases where damage by inherent vice is questionable. Contact the USARCS to discuss such cases.

Carrier Inspection Rights

The Carrier Must Pursue Its Inspection Rights. The MOU, at paragraph II, provides that:

(A) The carrier shall have 45 calendar days from delivery of shipment or dispatch of each DD Form 1840R, whichever is later, to inspect the shipment for loss and/or transit damage.

(B) If the member refuses to permit the carrier to inspect, the carrier must contact the appropriate claims office which shall facilitate an inspection of the goods. It is agreed that if the member causes a delay by refusing inspection, the carrier shall be provided with an equal number of days to perform the

80. *Id.*

81. Comp. Gen., B-251042 (Apr. 21, 1993).

82. *Id.*

83. *Id.*

84. *Id.*

85. Towne Int'l Forwarding, Inc., Comp. Gen., B-260768 (Dec. 28, 1995).

86. *Id.*

87. *Id.* See Eastern Forwarding Co., Comp. Gen., B-248185 (Sep. 2, 1992); Stevens Transp. Co., Comp. Gen., B-243750 (Aug. 28, 1991). The carrier in *Stevens* was held liable for warpage to a waterbed even though it had possession of the item for three weeks and the NTS warehouse had the item for more than two years. The carrier presented no evidence as to the actual conditions at the warehouse or as to how the warehouse caused the damage. Nor did the carrier show that there was something inherent in the nature of the waterbed that would lead to warpage without outside influence.

88. Towne Int'l Forwarding, Inc., Comp. Gen., B-260768 (Dec. 28, 1995). See American Intercoastal Movers, Inc., Comp. Gen., B-265689 (Feb. 22, 1996). The carrier in *American* argued that damage to a dining table and wall unit (vener cracking) was attributable to climatic conditions. The Air Force Claims Service argued that the damage was attributable to water damage. The Comptroller General held for the Air Force and indicated that the carrier presented no evidence other than a comment by its inspector to rebut its liability.

inspection/estimate (45 days plus delay days caused by member).⁸⁹

A difficult issue for field claims personnel to resolve is whether the carrier vigorously pursued these rights when the carrier argues that its inspection rights were denied and that, therefore, no liability attached. In *Stevens Worldwide Van Lines, Inc.*,⁹⁰ the Comptroller General set forth guidance that field claims personnel should apply to each claim where inspection rights become an issue. "A carrier is not prima facie liable for damage to an item of household goods where the carrier vigorously pursued its inspection rights within the time permitted by the [MOU] . . . and the record indicates that the carrier had a substantial defense involving facts discoverable by inspection."⁹¹

When a carrier raises the issue of denial of inspection rights, claims personnel should obtain answers to the following questions:

1. Did the carrier attempt to contact the claimant to arrange an inspection within the time allowed by the MOU? How was contact attempted (by telephone, by letter, by both)? How many attempts were made?

2. What was the claimant's response, if any?

3. Did the carrier contact the field claims office for assistance? If yes, what assistance was provided? (Remember that field claims personnel can deduct lost potential carrier recovery from a claimant who will not cooperate.)

4. Did the claimant dispose of the item? Did the claimant have the item repaired?

5. Does the carrier have a substantial defense involving facts that could have been discoverable by an inspection? For example, did the claimant dispose of an item that possibly could have been repaired?

6. Has the field claims office informed the claimant, either orally or in writing, not to dispose of any items until the inspec-

tion period has run? (This is a good practice to adopt if the field claims office has not already done so.)

7. Has the carrier's conduct contributed in any manner to its failure to inspect?

In *Stevens Worldwide Van Lines, Inc.*,⁹² the Comptroller General held the carrier not liable for damage to a waterbed which was given by the claimant to a neighbor, who was an unqualified repairman. The neighbor threw the waterbed away before the carrier could inspect it.⁹³ Stevens wrote the claimant, but was unable to contact him. In turn, Stevens contacted the local Air Force claims office for assistance. The claims office gave Stevens the claimant's new address. The claimant had moved from Alabama to Florida, but he had left the waterbed in Alabama with a neighbor to repair. The carrier also argued that the subsequent move denied it the right to inspect other damaged items; however, the Comptroller General held that "a carrier cannot usually avoid being held prima facie liable for loss or damage to the household goods it transports merely because circumstances prevent it from inspecting the damage Stevens could have observed the shipment in Florida, after it was moved, or in Alabama before it was moved"⁹⁴

Several other cases illustrate what the Comptroller General means by "vigorously pursue inspection rights." In *Fogarty Van Lines*,⁹⁵ the carrier encountered an uncooperative claimant, but failed to contact the local field claims office for assistance. Such action was insufficient to defeat liability.⁹⁶ In *American Intercoastal Movers, Inc.*,⁹⁷ the carrier attempted to inspect a pair of skis, but neither the skis nor the claimant were at the claimant's home when the carrier's inspector visited. (Only the claimant's son was home.) The carrier made no other attempt to inspect, did not request assistance from the field claims office, and the claimant did not intentionally deny the carrier the right to inspect. The Comptroller General held the carrier liable.⁹⁸ However, in *Move U.S.A.*,⁹⁹

89. Joint Military-Industry Memorandum of Understanding on Loss and Damage Rules (1 Jan. 1992).

90. Comp. Gen., B-251343 (Apr. 19, 1993).

91. *Id.*; National Forwarding Co., Comp. Gen., B-260769 (Nov. 1, 1995). The carrier vigorously pursued inspection rights with respect to large quantities of broken crystal glasses. The claimant discarded the items before an inspection could be made. The issue was whether the carrier had a substantial defense involving facts discoverable by inspection. The value of the items was questionable, the claimant had no purchase receipts, and the Comptroller General, holding for the carrier, determined it was reasonable for claimant to retain the broken crystal in its shipping carton for the carrier to inspect. See also *Ambassador Van Lines*, GAO Settlement Certificate, Z-2862212-19 (undated); Personnel Claims Note, *Recent Comptroller General Decisions*, ARMY LAW., Nov. 1995, at 54.

92. Comp. Gen., B-251343 (Apr. 19, 1993).

93. *Id.*

94. *Id.*

95. Comp. Gen. B-235558 (Dec. 19, 1989).

96. *Id.* See Personnel Claims Notes, *Carrier Inspection Rights*, ARMY LAW., Oct. 1996, at 48.

97. Comp. Gen. B-265689 (Feb. 22, 1996).

98. *Id.*

[T]he carrier made numerous attempts to arrange an inspection in a timely manner. It tried to schedule an inspection directly with the [servicemember] . . . It then sent a certified letter to the claims office asking for assistance. The claims office was unresponsive. The carrier then followed with another letter to the claims office, but still got no help in arranging an inspection.¹⁰⁰

The carrier was held not liable for damage to the compact discs it wanted to inspect.

Carrier's Failure to Inspect After Notice. When a carrier receives adequate notice of damaged items, the carrier is alerted that inspection may be required.¹⁰¹ Failure to inspect, for whatever reason (e.g., business cost), when inspection could have resolved the issue, is to the carrier's detriment. In *Able Forwarders, Inc.*,¹⁰² the carrier argued that a damaged mattress was smaller than the claimed king-size mattress because the inventory indicated that it was packed in a carton which was too small for a king-size mattress. The Comptroller General found for the military claims service.¹⁰³ The claimant stated that he owned a king-size mattress, and the carton listed on the inventory, a "3/3" carton, was too small to hold a mattress. The Comptroller General remarked that he was unaware of any standard carton size such as the one listed by Able. Therefore, Able may have understated the dimensions for the mattress when it prepared the inventory.¹⁰⁴ Regardless, "Able was notified at delivery . . . that the damage had occurred; it had the opportunity to inspect and ascertain the size of the damaged article."¹⁰⁵ Field claims personnel should highlight a carrier's failure to inspect when inspection could have resolved the

issue. The carrier should not be allowed to benefit from its inaction where inspections are concerned.

Additionally, carriers have "the responsibility to inspect all prepacked goods to ascertain the contents, [the] condition of the contents, and that only articles not otherwise prohibited by the carrier's tariff/tender are contained in the shipment."¹⁰⁶ Claims personnel should keep this carrier responsibility in mind. Carriers often attempt to escape liability by arguing that items packed by the claimant were not identified on the inventory and were therefore not tendered. While this argument will generally fail, the responsibility to inspect prepacked goods has some limits. The GAO has determined that while "a carrier is responsible to inspect all goods prepacked by another carrier, [that responsibility does not extend to] goods that are factory packed."¹⁰⁷ The case involved "a headboard [which] was picked up by the carrier packed in the factory crate. There was no damage to the crate at pick-up and no damage was noted at delivery."¹⁰⁸ A different conclusion may have been reached had the crate reflected some transit damage.

Inventory Riders (Exception Sheets)

Field claims personnel must forward to the USARCS for recovery action all claims involving a carrier and an NTS warehouse, but, before doing so, field claims personnel must prepare a demand. To properly prepare such a demand, claims personnel must understand the purpose of a rider; who is responsible for completing it; and how a rider, properly executed, can shift liability from the carrier back to the NTS warehouse.¹⁰⁹ With this knowledge, field claims personnel are better equipped to prepare a complete demand packet that successfully identifies the liable party or parties.

99. Comp. Gen. B-266112 (May 15, 1996).

100. *Id.*

101. American Van Serv., Inc., Comp. Gen., B-252671 (Aug. 19, 1993).

102. Comp. Gen., B-248892 (Oct. 30, 1992).

103. *Id.*

104. *Id.*

105. *Id.*

106. Ambassador Van Lines, Inc., GAO Settlement Certificate, Z-2862212.19 (undated).

107. Emerald City Int'l Corp., GAO Settlement Certificate, Z-2864434(6) (June 9, 1993).

108. *Id.*

109. See Household Goods Recovery Note, *Carrier Exception Sheets and NTS Storage*, ARMY LAW., Aug. 1992, at 37:

The government often will issue a "through government bill of lading" (TGBL), authorizing a carrier to pick up a soldier's [HHG] from [an NTS] warehouse in which these goods have been stored pursuant to the Military Traffic Management Command Basic Ordering Agreement (BOA). The TGBL carrier then is liable for loss and damage as the "last handler" of the shipment, unless it can show that the items in question were lost or damaged before the carrier collected the shipment from the NTS warehouse. To prove that losses or damage occurred before pickup, the carrier's agents must prepare an exception sheet, or "rider," in accordance with paragraph 54m [now paragraph 55m] of the Personal Property Household Goods and Unaccompanied Baggage Tender of Service . . .

In *American Van Services, Inc.*,¹¹⁰ the Comptroller General held the carrier liable for damage to missing items that were packed by the NTS warehouse.¹¹¹ The rider stated that the respective cartons were crushed, but nothing more. American did not open and inspect the items in the cartons at the time of pick up from the NTS warehouse. American had the right to inspect, and its speculation as to the cause of damage did not shift liability to the NTS warehouse.¹¹² In *Cartwright International Van Lines*,¹¹³ the carrier picked up a six-piece bedroom set from an NTS warehouse. The carrier also picked up many drawers that did not belong to the set. "Two night stands had four incorrect drawers, a chest had two wrong drawers out of five, and all six drawers in a dresser were incorrect."¹¹⁴ Had a thorough inspection of the items been done, these discrepancies would have been noticed. Cartwright did not complete the rider reflecting these discrepancies, and, as the last handler, it was liable. In this case, the Comptroller General noted the importance of the ability of the claimant to produce the original receipt for the bedroom set and the Army's subsequent inspection.¹¹⁵ In *Towne International Forwarding, Inc.*,¹¹⁶ the Comptroller General held the carrier liable for dry rot, mildew, and insect damage to a carpet, where the carrier failed to unroll the carpet, inspect it, and properly note the damage on the rider.¹¹⁷ Even though the carrier was in possession of the carpet for a short period of time in relation to the time the NTS warehouse held the item (eleven days versus three years), failure to annotate the rider with a description of the damage resulted in carrier liability. The Comptroller General had no factual basis to conclude that the damage claimed could not have occurred while the carpet was in Towne's possession.¹¹⁸

These decisions clearly demonstrate that to shift the burden to the NTS warehouse, the carrier must present clear evidence that the damage or loss occurred prior to the carrier's receipt of the HHG from the NTS warehouse. The Comptroller General's holdings also demonstrate the type of evidence needed for a carrier to successfully shift the burden. In *Fogarty Van Lines*,¹¹⁹ the Comptroller General did not hold the carrier liable when the carrier demonstrated that the damage to a chandelier did not occur while in its possession.¹²⁰ It is unclear from the decision whether the rider was an issue. However, Fogarty showed that the damage claimed was clearly listed on the original inventory prepared by the NTS warehouse, and no additional damage was noted on the DD Form 1840 or DD Form 1840R.¹²¹ In *Carlye Van Lines, Inc.*,¹²² "a prima facie case of carrier liability [was] not established where a shipper provide[d] no evidence to support his claim that the [red carpet with flowers] he received from the carrier was different than the one he [said] he had tendered to [an NTS] contractor for shipment . . ."¹²³ The carrier received the carpet from the NTS warehouse and noted on the rider that it was rolled, soiled, and badly worn. The claimant alleged the carpet tendered to the NTS warehouse was an oriental 9' x 12' carpet worth \$3400, but he had no proof of quality or value. The Comptroller General indicated that it expected the record to contain more detailed evidence of the nature of the item, its value, and how the claimant's particular carpet was tendered.¹²⁴ Field claims personnel must be ever vigilant to recognize these issues and require appropriate statements and proof of ownership, quality, and value from the claimant.

In dealing with HHG which had been stored in an NTS warehouse, field claims personnel should keep in mind the following information:

110. Comp. Gen., B-249834 (Feb. 11, 1993) (unpub.).

111. *Id.*

112. *Id.*

113. Comp. Gen., B-260372 (Oct. 31, 1995).

114. *Id.*

115. *Id.*

116. Comp. Gen., B-260768 (Dec. 28, 1995).

117. *Id.*

118. *Id.*

119. Comp. Gen., B-247449 (July 27, 1992) (unpub.).

120. *Id.*

121. *Id.*

122. Comp. Gen., B-247442.2 (Dec. 14, 1993) (unpub.).

123. *Id.*

124. *Id.*

1. Carriers can be held liable for missing hardware needed to reassemble furniture, unless noted as missing on the rider.

2. Carriers can be held liable for items missing from cartons (including sealed cartons), unless indicated on the rider.

3. Carriers can be held liable for mold and mildew damage to items, unless noted on the rider.

4. Carriers can be held liable for “concealed” damage to packed items (e.g., where there is visible damage to a carton but the carrier does not inspect the contents of the carton), unless noted on the rider.

5. Riders are invalid unless signed by both the NTS warehouse firm and the carrier. Initials by one or the other party are insufficient, unless the party whose employee’s initials are on the rider acknowledges this mark. Claims personnel should question the NTS warehouse when the rider does not contain a signature or initials in the signature block.

6. If the carrier and the NTS warehouse firms are subsidiaries of the same company, then the value of the rider becomes questionable. There should be an arms-length transaction between the parties in preparing a rider because the liability for each is different.¹²⁵

Claims personnel should call the USARCS to discuss possible approaches to these issues.¹²⁶

Depreciation

Depreciating Items in NTS. In *Fogarty Van Lines*,¹²⁷ the Comptroller General held that the military claims services must consider the “possibility of depreciation” for the time an item is in NTS.¹²⁸ The decision does not mandate that depreciation will be taken on every item that spent some time in an NTS warehouse. However, it does require field claims personnel to consider whether depreciation is appropriate, rather than arbitrarily taking no depreciation for the time such items are in NTS. In *Resource Protection*,¹²⁹ the Comptroller General held that the Army’s use of a two percent rate of depreciation per year for each year a cabinet was in NTS was reasonable even though the carrier had not agreed to such a rate.¹³⁰ It is important to note,

however, that the Comptroller General “did not hold that items depreciate at the same rate in storage that they do when in active use or service.”¹³¹

Claims personnel must be able to articulate why no depreciation, or an amount of depreciation which is less than that listed in the Joint Military-Industry Depreciation Guide, is used to calculate carrier liability for an item.¹³² After consulting with numerous manufacturers, retail sales personnel, and repair firms, the USARCS determined the rate of depreciation for items in NTS and created a depreciation list for these items.¹³³

Depreciating New Items not Listed on the Joint Military-Industry Depreciation Guide. If a new item is discovered which requires depreciation to determine a carrier’s liability for the item but which is not specifically identified by category or item on the Depreciation Guide, claims personnel should contact the USARCS. The Air Force Claims Service successfully argued to the Comptroller General that compact discs (CDs) should be depreciated at a flat rate of ten percent a year.¹³⁴ The carrier argued that the depreciation rate should have been fifty percent, the same rate applicable to phonograph records listed in the Joint Military-Industry Depreciation Guide. However, the carrier failed to show, by clear and convincing evidence, that the Air Force Claims Service had acted unreasonably in valuing the CDs.¹³⁵

The Reasonableness of the Amount Demanded

The typical carrier argument that claims examiners encounter is that the Army claims office has paid too much to the claimant for an item and that the carrier should not have to reimburse the Army for this amount. The key to any response to such a carrier argument is reasonableness. Does the claim file have a well-prepared estimate of repairs or a replacement cost estimate?¹³⁶ Has preexisting damage, where applicable, been factored into the amount demanded from the carrier?¹³⁷ Has depreciation been taken from the replacement cost of an item, and not from the original cost of the item?¹³⁸ Has the

125. Liability for the carrier is \$1.25 times the net weight of the shipment, but the NTS warehouse’s liability is \$50 per line item.

126. Household Goods Recovery Note, *Carrier Exception Sheets and NTS Storage*, ARMY LAW., Aug. 1992, at 37. See *In re A-1 Ace Moving and Storage, Inc.*, Comp. Gen., B-243477 (June 6, 1991) (unpub.). The USARCS follows this holding when the facts of a case specifically track A-1 Ace’s facts.

127. Comp. Gen., B-248982 (Aug. 16, 1993).

128. *Id.*

129. Comp. Gen., B-260833 (May 2, 1996).

130. *Id.*

131. *Id.*

132. See DEP’T OF ARMY, PAMPHLET 27-162, LEGAL SERVICES: CLAIMS, App. G (15 Dec. 1989).

133. Until a new military-industry depreciation table is established, claims personnel should use the NTS depreciation guide created by the USARCS.

134. Resource Protection, Comp. Gen., B-266114 (Apr. 12, 1996), *aff’d*, Defense Office of Hearing and Appeals, Claims Case No. 96081208 (Dec. 20, 1996); *Move U.S.A.*, Comp. Gen., B-266112 (May 15, 1996).

lesser of the replacement cost or repair cost for an item been demanded from the carrier?¹³⁹ These are some of the questions that claims personnel must routinely answer before asserting a demand against the carrier.

The Comptroller General has determined that “in [the] absence of competent evidence from the carrier concerning the unreasonableness of the cost of repairs or market value of the damaged property, [it] will not reverse an administrative determination on such issues.”¹⁴⁰ The carrier’s allegation that the amount is too much, by itself, is insufficient to overcome the claims office’s determination. When faced with such a challenge by the carrier, field claims personnel should ask the carrier to support the allegation with proof that the claims office acted unreasonably.

Conclusion

This article should provide field claims personnel with sufficient information to prepare appropriate responses to carrier challenges. Once the claims office establishes a prima facie case, the carrier has the burden to rebut with evidence of unreasonableness or incorrect application of the law. Mere allegations are not enough. Depending on the facts, a compromise may be in order. Fairness in dealing with carriers and the moving industry is important. Compromise, withdrawal of a demand, or not asserting a demand may be appropriate, and claims personnel should not see this as failing to perform. The carrier industry is aware of the Comptroller General decisions, and if these decisions support the field claims offices’ position on a case, the vast majority of carriers will settle the demand.

135. Resource Protection, Comp. Gen. B-266114 (Apr. 12, 1996) *aff’d*, Defense Office of Hearings and Appeals, Claims Case No. 96081208 (Dec. 20, 1996). The opinion stated:

[T]he services state[d] that they developed the 10 percent based on factors which we agree fall within those discussed in *Fogarty*, while the carrier simply wishe[d] to apply a 50 percent rate applicable to phonograph records without giving any weight to the distinguishing differences affecting the values of the two items. In such circumstances, the carrier ha[d] not shown that the service ha[d] acted unreasonably in applying the 10 percent depreciation rate to calculate the value of the lost tapes [sic]. In the absence of clear and convincing evidence that an agency acted unreasonably, we will not question the agency’s valuation of loss or damage to household goods.

136. See Personnel Claims Note, *The Estimate of Repair: What Should It Provide?*, ARMY LAW., May 1995, at 75. This note presents a very good, detailed discussion of what a field claims office should require in an estimate of repair.

137. See *Valdez Transfer, Inc.*, Comp. Gen., B-197911.8 (Nov. 16, 1989) (unpub.) (A carrier is not liable for damage to an item if the damage is not shown to be greater than the preexisting damage to that item, as noted on the inventory prepared at origin.).

138. See GAO Settlement Certificate, Z-2867005 (July 24, 1992); Household Goods Recovery Notes, *Digests of Recent Comptroller General and GAO Decisions*, ARMY LAW., Dec. 1992, at 36.

139. See *Allied Intermodal Forwarding, Inc.*, Comp. Gen., B-258665 (Apr. 6, 1995) (The carrier’s liability should have been limited to the depreciated replacement cost, which was less than the depreciated repair cost.).

140. *Beach Van & Storage*, Comp. Gen., B-234877 (Dec. 11, 1989). See *American Van Serv., Inc.*, Comp. Gen., B-259198 (May 5, 1995); *Midwest Moving and Packing*, Comp. Gen., B-256603.2 (May 3, 1995); *Andrews Forwarders, Inc.*, Comp. Gen., B-257613 (Jan. 25, 1995).