



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Resource Protection

File: B-266114

Date: April 12, 1996

DIGEST

In settling a claim against a household goods carrier for loss in transit of a service member's compact discs (CDs), the service applied a flat 10 percent depreciation rate to determine the amount of the carrier's liability. Carrier argues that the 50 percent rate applicable to phonograph records under the Joint Military Industry Depreciation Guide should be used, and that the 10 percent rate the service used, applicable in the service's settlement of claims with members, may not be applied against the carrier. In the absence of an agreed rate under the Depreciation Guide, the service applied the 10 percent rate which it states was established based on evaluation of the unique characteristics of CDs, which significantly differ from phonograph records. The carrier has not shown that the service's use of the 10 percent rate is unreasonable. Therefore, the service's action is sustained. Fogarty Van Lines, B-248982, Aug. 16, 1993, distinguished.

DECISION

Resource Protection, on behalf of Carlyle Van Lines, requests refund of \$120 setoff by the Air Force for loss to the household goods of David W. Decembly, an Air Force member, whose goods were moved by Carlyle in October 1992 under GBL TP-522,787.

BACKGROUND

The missing items in question are 19 compact discs (CDs) which the member indicates he purchased new at various times during 1992, the year in which the shipment took place. The CDs were valued at \$300, to which the Air Force applied a flat 10 percent depreciation rate and paid the member the resulting \$270 in settlement of his claim. The Air Force applied the same 10 percent rate in asserting its claim against Carlyle, and collected \$270 from Carlyle. Resource Protection does not dispute Carlyle's liability for the CDs but argues that the depreciation rate used in the claim against Carlyle should have been 50 percent rather than 10 percent, which would result in a collection from Carlyle of \$150, not \$270.

In support of its position, Resource Protection, citing Fogarty Van Lines, B-248982, Aug. 16, 1993, argues that a depreciation rate set in the service's Allowance List-Depreciation Guide governing the service's settlement of claims with its members¹ is not appropriate to apply in asserting claims against the carrier since the latter are to be evaluated under common law principles, not based on a rate set by service regulations. Resource Protection notes that no depreciation rate for CDs has been agreed upon jointly by the carriers and the services and published in the Joint Military Industry Depreciation Guide, which is used for evaluating loss and damage claims, but the Guide does provide a 50 percent depreciation rate for phonograph records, which Resource Protection states are similar to CDs, and thus the 50 percent rate should apply to CDs also.

The service states that when the Joint Military Industry Depreciation Guide was last revised in 1976, CDs were not in use and thus were not included, and as Resource Protection stated, no agreement has been reached with the carriers on a depreciation rate so as to include CDs in the Guide. The service indicates, however, that when the military services revised their Allowance List-Depreciation Guide which they use for settling members' claims, CDs were added for the first time and a depreciation rate of 10 percent was established for them. This rate, the service reports, was established in recognition of CDs' unique characteristics which make them far less subject to deterioration and give them a far longer life span than phonograph records or cassette tapes. The service states that because of the technology employed in their manufacture and use, they do not wear out and are less subject to abuse than records or cassettes.²

Concerning Resource Protection's argument that the service is arbitrarily imposing a depreciation rate taken from a service regulation, the service states that it does not do so. Rather, the service states, it developed the 10 percent rate based on the characteristics of CDs as discussed above. The service notes that in the absence of an agreed rate under the Joint Military Industry Depreciation Guide, it was necessary that the services develop a rate to apply in settling claims for CDs, and the service states that the 10 percent rate is a common-sense, reality-based rate of depreciation which fairly captures the depreciation of CDs, contrary to the carrier's assertion that the 50 percent rate applicable to the dissimilar item, phonograph records, should be used.

¹Pursuant to 31 U.S.C. § 3721.

²The service states that CDs are read by a laser beam with no friction points, unlike records, which are read by a needle resting on them, or tapes, which are read by the tape passing over a head. Thus CDs are not prone to the scratching and steady deterioration through use which affects the quality and value of records and tapes.

ANALYSIS

In Fogarty Van Lines, supra, as Resource Protection indicates, we stated that carrier liability for loss or damage to household goods is governed by common law principles under which numerous factors must be taken into account, supplemented by the Joint Military Industry Depreciation Guide, in determining the value of an item. Some of the factors to be considered are the nature of the item, original and replacement costs, age, the extent of wear and tear, and deterioration. In view thereof, we held in that case that it was improper for the Air Force in asserting a claim against a carrier, not to have taken into consideration that the damaged items may have depreciated while in a 4-year period of nontemporary storage, where the reason for not doing so was that the Air Force, in settling the member's claim against the service, did not apply depreciation for that period. Apparently, the Air Force did not do so because its regulation governing the settlement with the member did not provide for applying depreciation for periods of nontemporary storage. We stated that, whatever the reason for not considering the possibility of depreciation for that period in settling with the member, the common law principles applicable in settling the claim against the carrier required that the possibility of depreciation during this period be considered. Therefore, we returned the case to the Air Force to give due consideration to whether the items in question depreciated in value during the period of storage.

Apparently, Resource Management interprets Fogarty Van Lines to mean that in the present case the service acted improperly in applying the 10 percent rate in setting off against the carrier because it is the same rate prescribed in service regulations governing its settlement with the member. We can not agree. Where the service shows that the rate it applied was arrived at upon consideration of the types of factors discussed in Fogarty, we see no reason why that rate may not be applied in asserting the claim against the carrier. In the present case, the factors the service states it considered in setting the 10 percent rate are appropriate factors to be considered in arriving at the value of an item under the common law principles discussed above. While it also may be appropriate to consider valuations of similar items, such as Resource Protection seeks to do in relating CDs to phonograph records, significant differences affecting the values of the items clearly are appropriate considerations, as the service has noted.

In summary, the services state that they developed the 10 percent rate based on factors which we agree fall within those discussed in Fogarty, while the carrier simply wishes 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 has not shown that the service has acted unreasonably in applying the 10 percent depreciation rate to calculate the value of

the lost tapes.³ In the absence of clear and convincing evidence that an agency has acted unreasonably, we will not question the agency's valuation of loss or damage to household goods. Ambassador Van Lines, B-249072, Oct. 30, 1992; and Emerald City International Corp., B-256604, July 28, 1994. Accordingly, the Air Force's action in this case is sustained.

/s/Seymour Efros
for Robert P. Murphy
General Counsel

³We also received comments from the Household Goods Forwarders Association indicating that they recommend applying the 50 percent rate applicable to phonograph records to CDs. They indicate, without giving specifics, that used record and CD stores are common where a used CD can be purchased for half price. We do not consider this sufficient to overturn the Air Force's determination in this case, particularly where the CDs in question were less than a year old.