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MEMORANDUM

TO: International Association of Movers
Attn: Terry Head, President

CC: Alan Wohlstetter

FROM: Richard D. Gluck

DATE: December 2, 2011

RE: SDDC Policy on Unearned Freight When Full Recovery Value Has Been Paid

This memorandum responds to your request for our views on the lawfulness of the policy adopted by the military's Surface Deployment and Distribution Command (SDDC) to reduce the freight paid on household goods shipments when all or a portion of a shipment is lost, damaged, or destroyed in transit. SDDC has adopted this policy (reflected in the terms of its most recent solicitations) even though it also requires payment by the carrier of "full replacement value," defined by SDDC to include the cost to ship the replacement item to destination. As explained in this memorandum, a strong argument can be made that this policy, which amounts to a penalty or forfeiture of the freight charges, not only contradicts settled law and standard commercial practice, but also may exceed the Government's statutory authority to require carriers to compensate military personnel for the full replacement value of lost, damaged, or destroyed household goods.

I. Background

a) Terms of Department of Defense Contracts for Shipment of Household Goods

Members of the armed services are subject to frequent relocation throughout their careers. The movement of armed service members' and their families' personal effects is generally paid for by the U.S. military. The Department of Defense ("DoD") spends hundreds of millions of dollars each year to move hundreds of thousands of shipments of household goods. For example, in 2006 DoD moved over 680,000 shipments at a cost of over \$1.8 billion. U.S. General Accountability Office, *DOD Needs a Comprehensive Approach to Planning for Implementing Its New Personal Property Program*, GAO-07-671, p.1 (2007). Private carriers bid on these moves by submitting rates to SDDC in response to periodic, published solicitations that contain the terms and conditions to which carriers agree when they submit their rates. Among other things, the SDDC solicitations specify the liability of carriers for loss of, or damage to, the service members' shipments of household goods carried under the resulting contracts.



Historically these solicitations limited carrier liability to a released, depreciated value for the goods equal to \$1.25 multiplied by their weight unless the shipper paid an additional fee, called a valuation charge, to declare a higher value. *See, e.g.*, Surface Deployment and Distribution Command, *Domestic Personal Property Rate Solicitation D-12*, Items 307 and 415 (2007) (“D-12”). The solicitations also contained terms specifying that carriers “will not collect, or require a shipper to pay, any published freight charges (including any charges for accessorial or terminal services) when that shipment is totally lost or destroyed in transit.” *See, e.g., id.*, Item 322(a). Similarly, the terms specify that:

In the event that any portion, but less than all, of a shipment of HHG is lost or destroyed in transit [the carrier] will, at the time it disposes of claims for loss, damage, or injury to the articles in the shipment, [...] refund the portion of its published freight charges (including any charges for accessorial or terminal services) corresponding to the portion of the shipment which is lost or destroyed in transit.

See id., Item 322(b).

In 2002, concerned about widespread problems within the existing system for moving the possessions of service members and their families, the DoD submitted a report to Congress outlining proposals for improving the system. This report led to the development of the DoD “Families First” program, intended to improve the quality of household goods moves. Among the problems to be addressed was the fact that, under the existing system, service members were not fully compensated for lost or damaged goods. In support of this initiative, in November 2003, Congress included a provision in the National Defense Authorization Act for Fiscal Year 2004 (the “2004 Act”) permitting the Secretary of Defense to include a term in contracts for the transport of armed services members’ household goods that would require the carrier “to pay the full replacement value for loss or damage to the baggage or household effects transported under the contract.” Pub. L. No. 108-136, § 634 (codified as amended at 10 U.S.C. § 2636a). The same section of the 2004 Act authorized the DoD to deduct the full replacement value (“FRV”) for lost or damaged items from the amount owed by the Government to the carrier under the transportation contract if the carrier failed to settle the claim within a reasonable period of time. *Id.*

The Conference Report that accompanied the final version of the 2004 Act described the underlying rationale as follows:

The conferees understand that the Department of Defense intends to implement changes to claims procedures, including use of the full replacement value standard, as part of more comprehensive changes under the “Families First” Program. The conferees fully support implementation of the various aspects of the “Families First” program, including use of customer surveys, increased direct deliveries through customer to carrier contact, and the on-line claims filing processing. Additionally, the conferees expect that the full replacement value standard for loss or damage will be implemented in a manner that is



consistent with commercial practices and that is fully explained to military members who should benefit from this new approach.

H.R. Rep. No. 108-354, at 709 (2003).

Subsequently, the “Families First” program encountered delays in its implementation. These delays prompted Congress in 2006 to include a provision in the John Warner National Defense Authorization Act for 2007, requiring the Secretary of Defense to begin including FRV liability in all contracts for movements of service members’ and civilian military employees’ household goods. Pub. L. No. 109-364, § 363 (codified as an amendment to 10 U.S.C. § 2636a). Explaining the need for this provision, the Senate Armed Services Committee stated:

The committee believes that the time is past due for implementing the contractual authority requested by the Department in 2003 and included in section 634 of the National Defense Authorization Act for Fiscal Year 2004 (Public Law 108–136). Military personnel and their families have waited long enough for realization of the Families First promise of full replacement value for household goods lost and damaged by movers in connection with permanent changes of station.

The committee has concluded that implementation of the full replacement standard for both military members and civilian employees by means of contractual changes with carriers must precede implementation of the Defense Personal Property System (DPS) under the Families First program.

S. Rep. No. 109-254, at 335 (2006).

Pursuant to this statutory requirement, in the Fall of 2007 SDDC changed the terms of its solicitations. Under the revised terms, if a shipper files a claim within nine months of the delivery date, the carrier is made liable for the full replacement value of the lost or damaged goods, subject to a maximum liability of \$5,000 or the product of \$4.00 multiplied by the weight of the goods, whichever is greater (not to exceed \$50,000). *See, e.g.,* Surface Deployment and Distribution Command, *Domestic Personal Property Rate Solicitation D-19*, Item 307 (2010) (“D-19”); Surface Deployment and Distribution Command, *International Personal Property Rate Solicitation I-25*, Item 410 (2010) (“I-25”). Within those limits, the carrier must settle claims by replacing the lost or damaged item, or paying the shipper its full replacement value. Under the explicit terms of the solicitation and resulting contract, this liability includes any costs required to ship the replacement goods to the shipper’s new location. *D-19*, Item 307 (e)(8); *I-25*, Item 410(f)(2)(f). (“**Replacement cost is based on the replacement cost at destination. It includes any shipping charges and sales tax.**”).

These terms effectively require the carrier to remedy the situation such that the shipper is restored to the position it would have been in had the loss or damage not occurred: *i.e.*, full replacement, delivered to the destination originally specified, at the carrier’s expense. Logically, then, retaining a requirement that, in loss or damage cases, the carrier must forfeit the original freights charged to the



Government seems inconsistent with the “benefit of the bargain” rationale of FRV as defined in the SDDC solicitations. Nevertheless, in solicitations issued after implementation of FRV, SDDC retained the term from the pre-FRV solicitations requiring carriers to refund the freight costs associated with the shipment, or a portion thereof, that was lost or damaged. *See, e.g., D-19, Item 322; I-25, Item 422.*

Beginning in 2009, the SDDC began to phase in the “Families First” program, with the new name of DP3. During this phase-in, solicitations for the portions of personnel moves that had been designated as early adopters were issued using the new DP3 system, while contracts for the rest of the armed services’ personnel moves were still solicited using the older existing system. While the rate solicitations issued under the old system consistently contained provisions requiring refunds of freight charges, *see, e.g., I-25, Item 422*, the first rate solicitations issued under the new DP3 system deleted the freight charge refund provisions. *See, e.g., Surface Deployment and Distribution Command, Defense Personal Property Program International Tender – 09 (2009) (“IT-09”); Surface Deployment and Distribution Command, Defense Personal Property Program International Tender – 10 (2010) (“IT-10”).*

This deletion was consistent with the principle that, under FRV liability, once claims have been settled, and the shipper has obtained the full benefit of the services bargained for—full replacement delivered to the specified destination, or the monetary equivalent—the carrier has fulfilled its obligations and is entitled to its fair consideration. (This principle is discussed further below.)

In the most recent DP3 solicitation, however, the old provisions requiring that freight charges be refunded in the event of loss or damage, in addition to full replacement value, were reinserted. *See Surface Deployment and Distribution Command, Defense Personal Property Program International Tender – 2011, Item 402 (2011) (“IT-2011”).*

b) General Transportation Law Rules and Commercial Practices Regarding Freight Charges in Cargo Loss and Damage Claims

It is a generally settled principle of transportation law that “where [...] the shipper is also the consignee and accepts delivery of the cargo, the shipper is not ordinarily entitled to recover the freight charges” even if the cargo is damaged. *Marjan Int’l Corp. v. V.K. Putman, Inc.*, 1993 U.S. Dist. LEXIS 18243, *40 (S.D.N.Y. 1993) (citing 13 C.J.S. *Carriers* § 440). The reason for the general rule “derives from the compensatory function of contract damages. Such damages ought *go no further than to make the shipper whole* for the actual loss or injury suffered.” *Id.* at *40-41 (citing 11 WILLISTON ON CONTRACTS § 1338 at 202 (3d ed. 1968)) (emphasis added). In *Marjan*, the court explained the general “market value” rule excluding recovery of freight charges:

In the usual cases, where the main element of the damages consists of loss or damage to the cargo, recovery of freight charges has characteristically been denied in that such an award would make the plaintiffs better than whole; the usual reason appears to be that the freight charges were included in the invoice price at destination or had otherwise not been paid by the shipper. Even though the goods were damaged, the plaintiff received the



benefit of their carriage because it had the option of conducting a salvage sale and recover [*sic*] the difference as damages.

Id. at * 41-42. See also *W.A. Stackpole Motor Transp. v. Malden Spin. & Dye Co.*, 263 F.2d 47, 51-52 (1st Cir. 1958).

The Carmack Amendment to the Interstate Commerce Act specifies that carriers are generally held liable for the actual loss or injury caused to goods in their care. 49 U.S.C. § 14706(a). Insofar as a shipper's right to recover freight charges against a carrier under the Carmack Amendment is concerned, "the crux of the issue is whether the plaintiff received any benefit from the shipment and thus, whether an award of freight charges is required to make a plaintiff whole for his *actual* loss." *Marjan*, 1993 U.S. Dist. LEXIS 18243, *44 (emphasis in original). "Under the Carmack Amendment, the shipper is entitled only to such damages as are necessary to place him in the same position as if the contract of carriage had been successfully performed." *Perlow v. AAAcon Auto Transport, Inc.*, 280 Pa. Super. 52, 58-59 (1980) (citing *Albion Elevator Co. v. Chicago & N.W. Trans Co.*, 254 N.W. 2d 6, 17-18 (Iowa 1977)), *cert. denied*, 434 U.S. 904 (1977).

Where the shipper receives the benefit of the contract to the extent that the goods are neither lost nor destroyed, but rather delivered to the specified destination, albeit in damaged condition, freight charges are not recoverable as damages. See, e.g., *Perlow*, 280 Pa. Super. at 58. (carrier lost automobile en route to shippers, but recovered it in damaged condition, and then delivered the damaged vehicle to shipper's destination; court denied recovery of freight charges because shippers "received the benefit of their contract to the extent that the automobile was delivered to Albuquerque and they did not have to expend any further effort or incur any further costs to have it brought there").

Household goods are recognized to have special characteristics. As household goods are generally in used condition, the baseline for calculating liability has traditionally been based on depreciated value. Accordingly, Surface Transportation Board ("STB") regulations stated that:

When settling a claim for loss or damage, a common carrier by motor vehicle of household goods [...] shall use the replacement costs of the lost or damaged item as a base to apply a depreciation factor to arrive at the current actual value of the lost or damaged item: Provided, That where an item cannot be replaced or no suitable replacement is obtainable, the proper measure of damages shall be the original costs, augmented by a factor derived from a consumer price index, and adjusted downward by a factor depreciation over average useful life.

49 C.F.R. § 1005.5(b).

The basic STB provisions regarding loss and damage claims at 49 C.F.R. §1005 *et seq.* are reiterated by the Federal Motor Carrier Safety Administration ("FMCSA") in its regulations at 49 C.F.R. § 370 *et seq.*



The Carmack Amendment permits the STB to “establish rates for the transportation of household goods under which the liability of the carrier for that property is limited to a value established by written declaration of the shipper or by a written agreement.” 49 U.S.C. § 14706(f)(1). In accordance with the statute, the STB has granted carriers of household goods permission to provide shippers with options as to the level of liability assumed by the carrier, dependent upon the level of rates the shipper wishes to pay.

Prior to 2001, these options generally included an option to limit the carrier’s liability to \$0.60 times the weight of the goods, in which case shipping rates were correspondingly low, as well as an option whereby the shipper protected the actual depreciated value of the goods, as declared prior to shipment, in exchange for higher shipping rates. *See* Surface Transportation Board, *Amendment No. 4 to Released Rates Decision No. MC-999*, 5 S.T.B. 1147, 1148 (2001). Under the latter option, the baseline declared value was \$1.25 times the weight of the goods. *Id.* As of 2001, the STB ordered the elimination of the depreciated value option and its replacement with a full-value protection (“FVP”) option associated with higher rates. FVP is now the only alternative to released value coverage associated with lower rates. Under the FVP option, carriers could elect to replace or repair lost or damaged items, or to pay the cost of repair or replacement, up to the value declared by the shipper.

Effective August 10, 2005, in section 4207 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy For Users (“SAFETEA-LU”), Congress changed the statutorily prescribed standard cargo liability of household goods carriers. Previously, under the Carmack Amendment, the default liability was the actual (depreciated) value of lost or damaged goods. Under the new SAFETEA-LU provisions:

Unless the carrier receives a waiver in writing [...] a carrier’s maximum liability for household goods that are lost, damaged, destroyed, or otherwise not delivered to the final destination is an amount equal to the replacement value of such goods, subject to a maximum amount equal to the declared value of the shipment and to rules issued by the Surface Transportation Board and applicable tariffs.

Pub. L. No. 109-59, § 4207(2) (codified at 49 U.S.C. § 14706(f)(2), (3)).

Nothing in the legislative history of SAFETEA-LU suggests that Congress intended to alter the nature of the liability previously being assumed if the shipper selected the FVP option. Both the Conference Report for SAFETEA-LU, as well as the committee reports from two previous (unpassed) bills which contained identical provisions, S. 1978, 108th Cong. § 306 (2003) and S. 1567, 109th Cong. § 405, limit their discussion of the provision to the following explanation:

This section would change the standard liability for loss and damage to full value protection, defined as the replacement cost in the event of loss or damage up to the pre-declared total value of the shipment. Movers would be allowed to offer “released rates” only if the shipper opts out, in writing, of full value protection.



See S. Rep. No. 108-215, at 39 (2003); S. Rep. No. 109-120, at 48 (2005); H.R. Rep. No. 109-203, at 1011 (2005) (Conf. Rep.). In addition, the STB has expressly stated:

We therefore construe the term “replacement value” in 49 U.S.C. 14706(f)(2) as equivalent to the FVP option. In other words, what before SAFETEA-LU was the FVP option is now the statutorily prescribed default standard for HHG carrier liability.

Released Rates of Motor Common Carriers of Household Goods, Amendment No. 4 to Released Decision No. MC-999 (STB served June 13, 2007).

The model customer disclosures in the consumer protection regulations in Part 375 of Title 49, C.F.R. describe the carrier’s liability under the “full-value” option, as follows:

Unless you waive full-value protection in writing and agree to Release [sic] Value Protection as described below, your shipment will be transported under your mover’s *full (replacement) value* level of liability. If any article is lost, destroyed or damaged while in your mover’s custody, your mover will, at its option, either: repair the article to the extent necessary to restore it to the same condition as when it was received by your mover, or pay you for the cost of such repairs; replace the article with an article of like kind; or pay you for the cost of a replacement article at the current market replacement value, regardless of the age of the lost or damaged article.

Subpart B, *Your Rights and Responsibilities When You Move*, Appendix A, to Part 375, Title 49, Code of Federal Regulations (2010).

As to freight charges, consistent with the “benefit of the contract” decisional law cited above, FMCSA’s household goods regulations further provide that carriers of household goods may not collect freight charges for shipments that are totally lost or destroyed, 49 C.F.R. § 375.709, or for the *pro rata* portion of a shipment that is partially lost or destroyed, 49 C.F.R. § 375.707. This is consistent with the freight charge refund provisions in the SDDC solicitations currently pending, *see, e.g., IT-2011*, Item 402, but not with those issued in 2009 and 2010 under the initial DP3 solicitations IT-09 and IT-10, discussed above.

The history of the FMCSA regulation confirms that it was intended to reflect accepted commercial practice. When the predecessor to the STB, the Interstate Commerce Commission, first proposed the freight rate abatement regulations now set forth in 49 C.F.R. §§ 375.707 and 709, the DoD submitted comments on the proposed rules that emphasized the basic “benefit of the contract of carriage” principle: “the carrier’s duty to deliver household goods at destination and the shipper’s duty to pay for such transportation are at least concurrent conditions.” *Petition for Declaratory Order – Household Goods Freight Charges*, 114 M.C.C. 176, 181 (1971).



DoD expressed support for the proposed rule because, as it observed, “used clothing, furniture, and other household items have no recognized market value at the destination” and “that in the case of household goods moving by motor carrier in interstate commerce, the value of the householder’s belongings is established by a released rate order of [the ICC],” which “by its definition [was] less than the actual value of the goods.” *Id.* In light of these facts DoD contended that “it would be obviously unreasonable to limit the carrier’s liability to a released rate and yet allow it to recover freight charges.” *Id.* Such a position is wholly consistent with the principle that the shipper deserves to be made whole.

Under the post-2001 full-value protection regime, the freight charge abatements still apply. If all of a shipment is lost or destroyed, and no part of the shipment is received at the destination, the carrier may not collect freight charges. 49 C.F.R. § 375.709. If part of the shipment is delivered, even if damaged, the freight charges are abated *pro rata* to account for the undelivered portion of the shipment. 49 C.F.R. § 375.707.

Notably, and quite unlike the SDDC “full replacement value” contract terms, current household goods carrier liability regulations under Carmack *do not* define “full-value” to include costs required to ship the replacement goods to the destination. Under the FMCSA regulations, damages for lost or destroyed items are treated entirely separately from freight charges for such items. *See, e.g.*, 49 C.F.R. 375.707(d) and 709(b) (shipper’s rights to a freight refund are in addition to and not in lieu of other rights of shipper with respect to household goods lost or destroyed in transit.). “Full-value” under those regulations is based on the current replacement costs of a new, as opposed to used, item, without regard to the cost to transport the item to the destination. Unlike the SDDC definition, there is no additional component built-in to account for the costs of transporting the item to the destination specified in the contract.

Under the household goods regulations promulgated under authority of the Carmack Amendment, the shipper receives the full value of an undelivered lost or destroyed item, and an abatement of the freight charged for the undelivered item. But under that regime, the shipper is entitled only to be made whole once, and no more. These rules, and the commercial practices they govern, are rooted in and fully consistent with the traditional “benefit of the contract of carriage” principles of carrier liability.

II. Discussion

a) SDDC’s Current Terms Are Inconsistent with Settled Principles of Transportation Law and Commercial Practice

The current terms of SDDC solicitations require that, in the event that a shipper’s goods are lost or damaged while in the care of the carrier and a timely claim is filed, the carrier must either repair or replace the items, or pay the shipper the full cost required to repair or replace the items. *See, e.g., IT-2011, Item 400.*



But there is an additional requirement. Importantly, under these terms, the carrier's liability also ***expressly includes the cost of transporting the replacement item to the shipper's destination.*** See, e.g., *IT-2011*, Item 400(f)(2)(f) ("Replacement cost is based on the replacement cost at destination. It includes any shipping charges and sales tax."). Even in the case of non-delivery—where all of the original shipment is lost or destroyed—carriers who transport household goods under the current FRV SDDC contract terms are firmly bound to either replace the goods at the specified destination (including shipping and sales tax), or to pay the full cost of replacing the goods at that destination.

These requirements ensure that, at the end of the claims process, the shipper has received at its destination all of the household goods entrusted to the carrier, either repaired or replaced, or has been compensated in full for the cost of a replacement delivered to the shipper's destination. In other words, these terms assure that, when the claim has been fully settled, the shipper will have received the full benefit of the transportation services for which the Government contracted—*i.e.* having all goods delivered to the designated destination—despite the initial loss or damage.

The current terms of the solicitation, however, impose burdens on the carrier far beyond merely making the Government and shipper whole. These terms would restore the pre-FRV requirement for a refund of all of the freight charges for transportation of lost or destroyed items. See, e.g., *IT-2011*, Item 402. In the case of lost or destroyed goods, the combination of the solicitation's FRV provisions and Item 402 requires the carrier not only to *deliver a replacement to the destination*, or pay the full cost of purchasing a replacement *at the destination*, but also to refund to the Government freight charges for the lost or destroyed shipment.

The net effect is that the Government and the shipper receive the full benefit of the contract of carriage, and the carrier receives nothing. This a double benefit at the carrier's expense and a penalty upon the carrier: the carrier must fully perform its original undertaking to transport the goods to the destination, either by delivering a replacement to the location originally designated or paying the full costs of purchasing a replacement there, but forfeits any compensation for its transportation services.

The solicitation states that: "[I]iability on all shipments, whether domestic or international, will be determined in accordance with the Carmack Amendment to the Interstate Commerce Act (Title 49, United States Code Section 14076), except as otherwise provided in this Tender." See *IT-2011*, Item 400(a). In granting authority to the Secretary of Defense to include FRV liability in its contracts for carriage of household goods, the congressional conference that had convened to reconcile differing versions of the 2004 Act made clear their expectation that DoD would work with the shipping industry to ensure that their recommendations were fully considered and that impacts upon small carriers were mitigated. As was explicitly stated in the Conference Report:

[t]he conferees support adoption of industry recommendations wherever feasible [...] The conferees urge the Department to continue working closely with industry representatives to resolve open issues prior to implementation and intend to monitor both the implementation of "full replacement value" and the "Families First" Program and



assess the overall costs of the program and the impact of these initiatives on small businesses and quality of life of military members and their families.

H.R. Rep. No. 108-354, at 710. Furthermore, the Conference expressed its “expect[ation] that the full replacement value standard for loss or damage will be implemented *in a manner that is consistent with commercial practices.*” *Id.* at 709 (emphasis added).

These provisions strongly suggest that Congress intended that SDDC implement the FRV mandate in a manner consistent with traditional Carmack Amendment principles and customary commercial practices governing damages recoverable on household goods loss or damage claims. Carmack Amendment precedent regarding recovery of freight charges follows classic “benefit of the contract of carriage” principles: if the shipper has been placed in the same position as if the contract of carriage had been successfully performed, then it is not entitled to recover freight charges. *Marjan Int’l Corp. v. V.K. Putman, Inc.*, 1993 U.S. Dist. LEXIS 18243, *40 (S.D.N.Y. 1993); *Perlow v. AAAcon Auto Transport, Inc.*, 280 Pa. Super. 52, 58-59 (1980) (citing *Albion Elevator Co. v. Chicago & N.W. Trans Co.*, 254 N.W. 2d 6, 17-18 (Iowa 1977)), *cert. denied*, 434 U.S. 904 (1977).

The retention of Item 402 is inconsistent with settled Carmack Amendment principles and commercial practices governing liability for loss or damage claims. The solicitation’s “replacement cost at destination” provisions already operate as a self-executing mechanism that assures that the shipper is placed in the same position as if the contract was successfully performed, for purposes of traditional commercial rules and practices. No compensatory purpose is served by requiring a carrier who has so performed to forfeit its freight charges even after it has delivered a new replacement item to the agreed destination.

If the carrier makes the shipper whole for any lost or damaged property, delivered to the shipper’s doorstep, then the carrier has earned its freight charges, and is entitled to payment of them in full. Because it requires forfeiture of those charges under exactly those circumstances, under the contract’s so-called “unearned freight” terms, it could be argued that the current solicitation is defective on its face. This basic inequity seems to have been recognized initially by SDDC when it published its first two rounds of rate solicitations under the new DP3 system without the provision requiring a refund of freight charges. *See* IT-09; IT-10. For reasons that are not clear, however, the SDDC elected to return to this unjust arrangement in its most recent solicitation. That it did so cannot be reconciled with its earlier decision to omit the provision, and DoD’s recognition as far back as 1971, when HHG freight rate abatement regulations were first proposed, that when the carrier has provided the full benefit of the contract of carriage, the shipper has a concurrent duty to pay the freight.

b) SDDC’s Current Terms Are Unnecessary and Counter to Congressional Intent

SDDC’s requirement that household goods carriers contractually agree to forfeit payment for freight charges, despite making service members and the Government whole, also appears inconsistent with Congress’ intent in authorizing, and subsequently requiring, DoD to adopt a FRV liability scheme. As noted above, the primary intent of Congress in authorizing FRV liability was to ensure that service



members' families were made whole for lost or damaged HHG shipments. There is no evidence of an ancillary intent to penalize carriers by depriving them of the consideration earned in making good a FRV claim.

The scheme currently adopted by the SDDC, however, runs decidedly counter to these considerations. The negative impact upon small carriers of being required not simply to ensure that all losses are compensated, but also to forfeit payment for freight charges, is substantial. Such a scheme will inevitably require carriers, particularly smaller ones, to try to raise their rates to ensure they can continue to operate. This will, in turn, cost the DoD more for each shipment of household goods at a time when both defense spending and its impact upon small business are coming under increased congressional scrutiny.

Finally, the text of the 2004 Act itself and its amended, codified form at 10 U.S.C. § 2636a suggest that Congress did not intend that carriers under an FRV system would necessarily forfeit freight charges simply because they are liable for FRV claims for loss or damage. As noted above, subsection (b) specifies that:

In the case of a loss or damage of baggage or household effects transported under a contract with a carrier that includes a clause described in subsection (a), the amount equal to the full replacement value for the baggage or household effects may be deducted from the amount owed by the United States to the carrier under the contract upon a failure of the carrier to settle a claim for such loss or total damage within a reasonable time. The amount so deducted shall be remitted to the claimant, notwithstanding section 2636 of this title.

10 U.S.C. § 2636a (b) (emphasis added). Of course, “full replacement value” for these purposes includes the costs of replacing the goods at the destination or delivering them there. If the carrier does not settle such claims in a timely manner, then neither the Government nor the service member whose goods were lost or damaged has received the benefit of the contract of carriage. By providing that the amount of FRV claims not settled in the allotted timeframe could be withheld from freight payments due under the transportation contract, Congress expressed its understanding and intent that the Government is entitled to the carrier’s performance only once. Neither the statute nor its legislative history contains any further authority or expression of congressional intent permitting SDDC to offset freight charges as a penalty over and above FRV that already includes, by definition, the cost of transporting the replacement item to the shipper’s destination.

III. Conclusion

For the reasons outlined above, the current terms of the SDDC rate solicitations result in a situation where the Government and service members are assured of receiving the full benefits of the original contract of carriage, yet the carrier must nonetheless forfeit its compensation under the contract. Those terms are fundamentally unfair and inequitable. They confer a double benefit on the Government and impose a penalty upon the carrier, which goes beyond SDDC’s statutory requirement of full replacement value—value that already includes the costs of transportation to the destination. The terms



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are not consistent with congressional intent, or the settled Carmack Amendment rules and commercial practices that govern a carrier's liability for cargo loss or damage that, according to the legislative history, Congress expressly intended to measure a carrier's liability by under the FRV scheme it created. As mandated by Congress, SDDC should work with industry representatives to arrive at terms that ensure that military service members receive full and fair compensation in the event of loss or damage, without unfairly penalizing the dedicated carriers upon which SDDC relies.