



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

April 19, 2007

CBCA 552-RATE

In the Matter of PJAX FREIGHT SYSTEM

Nell Nunn, President of Nunn, Yoest, Principals & Associates, Inc., Gladstone, MO, appearing for Claimant.

James F. Fitzgerald, Director, Audit Division, Office of Transportation and Property Management, Federal Supply Service, General Services Administration, Arlington, VA; and Michael Tully, Office of Regional Counsel, General Services Administration, Atlanta, GA, appearing for General Services Administration.

DeGRAFF, Board Judge.

PJAX Freight System carried shipments of freight for federal agencies and received payments for its services. Subsequently, the General Services Administration (GSA) audited PJAX's bills and notified PJAX that it had overcharged for security check services, which would entitle GSA to deduct the amount of the overcharges from payments due PJAX in connection with subsequent shipments. In the claim submitted to us, PJAX contends that GSA cannot make deductions for some of the alleged overcharges because some of GSA's notices of overcharge were untimely. PJAX also contends that all of the notices of overcharge were unfounded, regardless of whether they were timely made.

Timeliness

Before we summarize the background and discuss the merits of this claim, we examine PJAX's contention that GSA cannot make deductions for some of the alleged overcharges because some of GSA's notices of overcharge were untimely. For the reasons set out below, we reject PJAX's position.

Federal statute confers upon GSA the responsibility for conducting post-payment audits of bills for transportation services provided to federal agencies, for deducting any amounts deemed to be overcharges, and for settling transportation claims. 31 U.S.C. § 3726 (2000). Section 3726(d) establishes the time within which GSA may make deductions for overcharges:

Not later than 3 years (excluding time of war) after the time a bill is paid, the Government may deduct from an amount subsequently due a carrier or freight forwarder an amount paid on the bill that was greater than the rate allowed under [49 U.S.C. § 13712] or an equivalent arrangement or exemption.¹

31 U.S.C. § 3726(d).

The regulations which implement 31 U.S.C. § 3726 are found at 41 CFR parts 102-117 and 102-118 (2006). When GSA performs a post-payment audit and identifies an overcharge, GSA sends the transportation services provider (TSP) a notice of overcharge for each bill which contains an overcharge. 41 CFR 102-118.435. The regulations allow GSA to make deductions for overcharges within the three-year period set out in section 3726(d). 41 CFR 102-118.530, -118.640. The regulations also allow carriers to dispute notices of overcharge and to present claims to GSA. 41 CFR 102-118.470, -118.600. If a carrier presents a claim which is denied by GSA, the carrier can ask the Board to review GSA's decision. 41 CFR 302-118.650, -118.655.

Although 31 U.S.C. § 3726(d) and its implementing regulations give GSA three years to make deductions for overcharges, PJAX says GSA should not be allowed to make deductions for some of the alleged overcharges because some of GSA's notices of overcharge were untimely.

PJAX finds support for its position in 49 U.S.C. § 13710. Section 13710(a)(3) is titled "Billing disputes — ." Section 13710(a)(3)(B) reads as follows:

¹ Section 13712 of title 49 allows carriers to provide transportation services to the Federal Government at a rate lower than the applicable commercial rate. This section allows the Government to make its own arrangements with carriers and does not bind the Government to practices which are applicable to entirely private transactions. *Household Goods Carriers Bureau, Inc. v. United States Department of Defense*, 783 F.2d 1101, 1103 (D.C. Cir. 1986).

Initiated by shippers. -- If a shipper seeks to contest the charges originally billed or additional charges subsequently billed, the shipper may request that the [Surface Transportation Board] determine whether the charges billed must be paid. A shipper must contest the original bill or subsequent bill within 180 days of receipt of the bill in order to have the right to contest such charges.

49 U.S.C. § 13710(a)(3)(B). According to PJAX, the second sentence of this section prevents GSA from making a deduction for an overcharge unless it sent PJAX a notice of overcharge within 180 days after PJAX's bill was received by the agency responsible for paying the bill. For two reasons, we do not conclude that section 13710(a)(3)(B) supports PJAX's position.

The second sentence of section 13710(a)(3)(B) does not apply to the bills submitted by PJAX to federal agencies because when GSA issues notices of overcharge and makes deductions pursuant to section 3726(d), it is not exercising a right to contest a carrier's charges within the meaning of section 13710(a)(3)(B). In a declaratory order, the Surface Transportation Board (STB) expressed the view that the second sentence of section 13710(a)(3)(B) means a shipper must provide notice to a carrier within 180 days as a "precondition for pursuing a claim." *Carolina Traffic Services of Gastonia, Inc. -- Petition for Declaratory Order*, STB No. 41689 at 3 (June 7, 1996). In a second declaratory order, the STB confirmed its view that a shipper who fails to provide notice to a carrier within 180 days thereby fails to perfect its right of action and, thus, forfeits its right to pursue a claim. *National Association of Freight Transportation Consultants, Inc. -- Petition for Declaratory Order*, STB No. 41826 at 5 (Apr. 9, 1997). We agree with the STB that the language of section 13710(a)(3)(B) imposes the 180-day requirement upon a party which wishes to initiate a dispute and exercise its right to pursue a claim against a carrier. By issuing notices of overcharge and making deductions for overcharges, however, GSA is neither initiating a dispute nor exercising its right to pursue a claim. The post-payment audit procedure established in 31 U.S.C. § 3726 anticipates that if an audit reveals an overcharge, the carrier will pay for the overcharge by having a deduction made from a payment due to the carrier for a subsequent shipment. If the carrier believes the deduction was not warranted, the carrier can pursue a claim against GSA. Neither the notice of overcharge nor the deduction constitutes a claim which GSA has the burden of pursuing and proving. Any claim belongs to the carrier. *United States v. New York, New Haven & Hartford Railroad Co.*, 355 U.S. 253 (1957). Because notifying a carrier of overcharges and making deductions for overcharges do not amount to either initiating a dispute or exercising a right to contest a claim, the 180-day limit contained in section 13710(a)(3)(B) does not apply to the bills PJAX submitted to federal agencies.

In addition, even if the second sentence of section 13710(a)(3)(B) did apply to bills submitted by PJAX to federal agencies, the 180-day provision would not prevent GSA from raising whatever defenses it has to the claim which PJAX presents to us. In *United States v. Western Pacific Railroad Co.*, 352 U.S. 59 (1956), the Court decided that although a statute might have barred the Government from filing suit because the statute's time limit for filing had expired, the statute did not prevent the Government from raising defenses to a suit brought by a carrier which challenged deductions made by the Government for overcharges. Consistent with the Court's holding, the STB has expressed the view that the 180-day requirement contained in section 13710(a)(3)(B) applies only to actions initiated by shippers, not to defenses raised by shippers in actions initiated by carriers. *National Association of Freight Transportation Consultants* at 6. Following the Court's precedent and giving credit to the opinion of the STB, we conclude that even if the 180-day requirement applied to the bills submitted by PJAX to federal agencies, it would not prevent GSA from raising whatever defenses it has to the claims which PJAX asks us to resolve.

PJAX says it is unfair to permit GSA to make deductions for overcharges long after PJAX received payment for its services. Regardless of what might seem to PJAX to be a fair length of time to permit GSA to make deductions, 31 U.S.C. § 3726 allows GSA to make deductions for three years.

Background

In a letter dated March 12, 2004, the Director of GSA's Property and Traffic Management Division asked TSPs to submit rate offers for moving freight shipments from May 1, 2004, through April 30, 2005. Offers were required to comply with the terms and conditions of GSA's standard tender of service, which includes GSA General Freight Tender of Service No. 1-F and GSA National Rules Tender No. 100-D. Offers were also required to comply with a set of special filing instructions which required a TSP to certify that by submitting an offer, it would comply with the provisions of the standard tender of service. The special filing instructions explained that GSA would make the accepted offers available to other federal agencies which would be able to generate electronically a list of TSPs based upon anticipated shipping dates, the origin and destination of shipments, the weights of shipments, and available accessorial services. An agency could then compare the prices and services offered by several TSPs and decide which one it wished to use for a shipment. The special filing instructions also explained that being included on such a list did not guarantee a TSP that it would receive any shipments. In addition, the special filing instructions provided that all shipments handled pursuant to the standard tender of service would be subject to the terms and conditions contained in 41 CFR parts 102-117 and 102-118.

In a letter dated March 7, 2005, GSA asked TSPs to submit rate offers for moving shipments from May 1, 2005, through April 30, 2006. In a letter dated March 8, 2006, GSA asked TSPs to submit rate offers for moving shipments from May 1, 2006, through April 30, 2007. These letters, both from the Director of GSA's Property and Traffic Management Division, contained the same terms set out in the preceding paragraph.

GSA General Freight Tender of Service No. 1-F explained that acceptance of the tender of service was a prerequisite for any motor common carrier to transport property shipped by an agency which used the tender of service, and said the conditions of the tender of service were in addition to the provisions of the carrier's tender or tariff and GSA National Rules Tender No. 100-D. Item 4-2 of the tender of service required carriers to provide special services as requested or annotated on the bill of lading. Item 4-2 also provided that carriers would provide a signed, dated delivery receipt as proof of delivery when needed. Item 4-6 of the tender of service said only special services annotated on the government bill of lading by the consignor or provided for by an amendment to the bill of lading were authorized and would be paid for by the Government.

GSA National Rules Tender No. 100-D, beginning in September 2002, contained Item 1050, Special Service - Security Check by Consignor or Consignee, which allowed TSPs to impose an added charge if the consignor or consignee of a shipment required a loaded vehicle to be unloaded, audited, and reloaded or scanned or x-rayed while the TSP waited for its vehicle to be released. Prior to September 2002, Item 1050 allowed TSPs to impose an added charge if the consignor (not the consignee) required the TSP to wait while a loaded vehicle was unloaded, audited, and reloaded. GSA amended Item 1050 in September 2002 to address security check services required by either consignors or consignees and to mention scanning and x-raying shipments because after the events of September 11, 2001, many federal agencies implemented new security procedures which affected access to their facilities, and the new procedures caused TSPs additional work when they moved freight which was sent from one federal agency to another.

Several provisions found in 41 CFR parts 102-117 and 102-118 are relevant to this claim. A bill of lading is defined as a receipt of goods, evidence of title, and a contract of carriage between the TSP and the agency. 41 CFR 102-118.35. A receipt is a written or electronic acknowledgment by the consignee or TSP as to when and where a shipment was received. 41 CFR 102-117.25. An overcharge is a charge made by a TSP which exceeds the charge applicable under the contract for carriage. 41 CFR 102-118.35. In order to receive payment for its services, a TSP is required to submit a bill of lading attached to a voucher. 41 CFR 102-118.195. The regulations also say the mandatory rules governing the use of bills of lading are found in the "U.S. Government Freight Transportation Handbook" (the Handbook). 41 CFR 102-118.125, -118.135.

The Handbook explains that federal agencies must rely upon the bill of lading as the record which establishes that the TSP is entitled to be paid for its services. Handbook at 39. Therefore, all special services must be properly annotated on the bill of lading. Handbook at 38. If, for some reason, it is not practical to place the request for special services on the bill of lading, the request can be set out on a document separate from the bill of lading, so long as the other document identifies the bill of lading and is signed by the person who ordered the special services, and so long as the bill of lading refers to the other document. Handbook at 38. TSPs can submit supplemental bills for services which were provided, but not included on the original bill. Handbook at 85, 91. The Handbook cautions consignees to be careful to note loss, damage, or other discrepancies when they sign for a shipment, because signing the TSP's delivery documents "constitutes the final receipt of the shipment in its delivered condition." Handbook at 40.

PJAX is a TSP which accepted shipments from federal agencies in 2004, 2005, and 2006, and delivered them to other federal agencies. In 2006, as the result of conducting post-payment audits, GSA issued notices of overcharge to PJAX for amounts it had billed and been paid for security check services for some shipments. When PJAX protested the notices of overcharge, GSA decided the notices were proper because the bills of lading for the shipments contained no request or authorization for security check services by either the consignor agency or the consignee agency. In this claim, PJAX asks us to review GSA's decisions.

When PJAX sent us its claim, it attached a list of approximately 1000 shipments for which it said GSA ought not to have issued notices of overcharge. PJAX provided copies of GSA's decisions denying PJAX's protests of the notices of overcharge for ten of the shipments.

PJAX and GSA agree that PJAX transported the approximately 1000 shipments using bills of lading which did not mention the security check services authorized in Item 1050 of the rules tender. Nonetheless, says PJAX, it had to perform such services in order to make deliveries at some federal government offices. PJAX determined that advising its drivers to verify when they provided security check services "was not working" because "this was not part of their routine." PJAX letter to GSA (Sept. 25, 2006). As a result, PJAX says, beginning in 2004, whenever it accepted any shipments from a federal agency, it placed a statement on the delivery receipt which said, "SECURITY CLEARANCE REQUIRED FOR DELIVERY." PJAX says it did this "with the intent that if the service was not provided, the consignee would so notate the receipt." *Id.* PJAX subsequently billed for security check services unless the person who signed for the delivery of a shipment noted on the delivery receipt that such services had not been provided.

PJAX says e-mail messages between PJAX and the employee of a contractor who performed audits for GSA in 2004 establish that GSA approved the procedure PJAX used to bill for security check services. In the messages, the auditor asked PJAX to show her where its tender set out the rate or percentage it charged for security check services. PJAX answered her question and the auditor thanked PJAX for its help. No mention was made of the procedure PJAX was using to bill for such services. Putting aside the legal issue of whether the employee of the contractor was authorized to approve anything on behalf of GSA, the e-mail messages do not establish that GSA approved PJAX's procedure of including a statement on a delivery receipt saying security clearance was required and billing for security check services unless the person who accepted delivery altered the delivery receipt to say no such services had been provided.

We asked GSA to provide copies of the bills of lading for the ten shipments which were the subject of the GSA decisions denying ten of PJAX's protests. GSA supplied the bills of lading, as well as the delivery receipts for each of these ten shipments. None of the bills of lading mention security services. The delivery receipts contain the pre-printed statement "RECEIVED IN GOOD CONDITION AS NOTED" above the consignee's signature block. Two of the ten delivery receipts contain the statement "SECURITY CLEARANCE REQUIRED FOR DELIVERY." None of the remaining eight delivery receipts mention security services.

Discussion

PJAX's claim is based upon its contention that it placed the statement "SECURITY CLEARANCE REQUIRED FOR DELIVERY" on all of the delivery receipts for the approximately 1000 shipments for which it says GSA ought not to have issued notices of overcharge. However, not all of the delivery receipts for these shipments contain such a statement, as is shown by its absence on eight of the ten delivery receipts for the shipments which were the subject of the GSA decisions denying ten of PJAX's protests. Even if all of PJAX's delivery receipts had contained the language which PJAX thought they contained, this would not provide a sufficient legal basis for granting the claim.

The relationship between PJAX and the federal agencies for which it carried freight is contractual.² When PJAX provided its services pursuant to the standard tender of service, PJAX and the Government agreed that PJAX would provide special services as requested

² For purposes of resolving this claim, we do not need to decide whether the contract consisted of only the bills of lading or a combination of the bills of lading and the standard tender of service.

or annotated on a bill of lading, and that only special services annotated on a bill of lading by the consignor or provided for by an amendment to the bill of lading were authorized and would be paid for by the Government. In order to be paid for its services, PJAX agreed to submit the bill of lading attached to a voucher. PJAX and the Government agreed that a bill of lading could be amended and that PJAX could submit supplemental bills for services which were provided, but not included on the original bill. They agreed that the bill of lading is the document which establishes that PJAX is entitled to be paid, and that the delivery receipt serves as proof of when and where delivery is made and the condition of the shipment upon delivery. There is nothing in the agreement between the parties which would allow PJAX to receive payment for special services based upon a statement which it placed on a delivery receipt.

PJAX argues it had good reasons for deciding to include a statement regarding security clearances on its delivery receipts. PJAX says when one federal agency shipped items to another federal agency, the consignor agency likely did not know whether the consignee agency would require security check services, which explains why bills of lading prepared by a consignor agency did not say this special service would be required at the delivery destination. PJAX also says there is no clear procedure for collecting charges for security check services, so it should not be penalized if it failed to comply with technical paperwork requirements regarding such services.

PJAX might be right that a consignor agency did not always know whether a consignee agency would require security check services. However, PJAX's agreement with the Government recognized this was a possibility when it provided PJAX would be paid for security check services required by either the consignor or the consignee. The agreement allowed PJAX to obtain an amendment to a bill of lading and provided that PJAX would be paid for security check services required by an agency if PJAX submitted a voucher with an attached bill of lading showing the agency had ordered the services. Requiring PJAX to comply with the parties' agreement as a condition for being paid does not amount to penalizing PJAX. If the process for collecting charges for security check services was not clear to PJAX, PJAX could have asked GSA to clarify the process before PJAX submitted its tenders to GSA or before it accepted shipments. After PJAX submitted its tenders and accepted shipments, however, it was entitled to be paid for special services only if it complied with the terms and conditions of the parties' agreement for ordering such services. *Baggett Transportation Co. v. United States*, 969 F.2d 1028 (Fed. Cir. 1992). PJAX's agreement with the Government does not entitle it to be paid based upon language it unilaterally decided to include on its delivery receipts, no matter how good PJAX thought its reasons were for including such language.

PJAX also argues it ought to be paid for security check services based upon its delivery receipts unless the people who signed the receipts altered them to note that no security check services had been required. However, the absence of a note on a delivery receipt does not establish that an agency required PJAX to provide security check services. The purpose of a delivery receipt is not to set out or to alter the terms and conditions of the agreement between the parties. Instead, a delivery receipt functions as a document which acknowledges a shipment has arrived at its destination and which serves as a record of the condition of the shipment. This is what is provided for in the tender, the regulations, and the Handbook, which were part of the parties' agreement, and this is consistent with the language contained in PJAX's delivery receipts. We cannot assume that everyone who signed delivery receipts realized they needed to alter the receipts if an agency did not want to require security check services. This assumption would be contrary to the parties' agreement, which provided that PJAX would be paid for security check services when an agency requested such services. The agreement did not provide that PJAX would be paid unless someone noted on a delivery receipt that an agency was not making such a request. Government action, not inaction, was necessary in order to request security check services. The absence of a notation on a delivery receipt does not establish that the Government ordered or requested security check services for which PJAX ought to be paid.

In summary, PJAX was entitled to be paid only for services which the Government requested and it was entitled to be paid only in accordance with the terms and conditions of its agreement with the Government. The agreement said the Government would order and pay for security check services requested or annotated on a bill of lading or in an amendment to a bill of lading. The agreement did not allow PJAX to create a procedure which obligated the Government to pay for security check services for every shipment the Government made unless the people who signed delivery receipts altered them to say the Government had not ordered any such services.

The claim is denied.

MARTHA H. DeGRAFF
Board Judge