DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

(61436)

FILE: DATE: SEP 2 1976 98086

MATTER OF: B-185503

DIGEST: Transportation claim of United States against Standard Transmission

Interpretation of readjustment provisions in contracts for transportation of fuel in pipelines is upheld where carrier's intention is plain on the face of its offer, where carrier receives a reasonable return on investment, and where if offer were ambiguous it would have to be construed strongly against the carrier author.

This is an advance decision to the Secretary of Defense concerning the propriety of overcharges totaling nearly $200,000 allegedly made on behalf of the Defense Fuel Supply Center (DFSC) to Standard Transmission (Standard) for the transportation of jet fuel in pipelines to three Air Force bases during 1973 and 1974. The overcharges depend upon the Government's interpretation of the readjustment provisions contained in three offers by Standard to the Government for pipeline transportation services from El Paso, Texas, to Holloman Air Force Base, New Mexico (hereafter El Paso-Holloman); Macon, Georgia, to Robins Air Force Base, Georgia; and Port Everglades, Florida, to Homestead Air Force Base, Florida.

Standard disagrees with the Government's interpretation of the readjustment provisions; since Standard used substantially similar language in the three offers, we will use the El Paso-Holloman offer to illustrate the dispute.

In February 1972, Southern Pacific Pipe Lines, Inc. (Southern), and Standard tendered to the United States under section 22 of the Interstate Commerce Act, 49 U.S.C. 22 (1970), an offer to transport jet fuel owned by the Government. The offer, published as Southern's and Standard's Section 22 (ICC) Quotation 1, names in item 2, titled "Rates To Be Applied," a two-factor combination rate of 29 cents per barrel; the first factor, 20 cents per barrel, applied over the lines of Southern and Standard from Southern's El Paso station to Standard's terminal in Alamogordo, New Mexico; the second factor, 9 cents per barrel, applied onward to Standard's location at Holloman Air Force Base.

In a letter dated February 15, 1973, the Military Traffic Management and Terminal Service (Service), on behalf of DFSC,

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requested that Standard consider establishing a scale of rates for the El Paso-Holloman transportation of jet fuel. The letter set forth this graduated scale:

"Projected Annual Pipeline Volume (BBLS)	Rates Per Barrel to be Applied
Less than 550,000	.42
550,000 - 599,999	.38
600,000 - 649,999	.35
650,000 - 699,999	.33
700,000 - 749,999	.30
750,000 - 799,999	.29
800,000 - 849,999	.27
850,000 - 899,999	.25
900,000 and over	.24"

The letter continued:

"The proposed rates are based on estimated CY 1973 operating expenses plus a reasonable return on your investment. The rates will be assessed on individual shipments based on the scale which applies to the annual projected volume. For example, if at the beginning of the annual period the projected thruput falls between 700,000 and 749,999 barrels, the rate of $0.30 per barrel would apply on all shipments throughout the entire 12 month period. At the end of the 12 month period, if the actual volume failed to equal or exceeded the projection, the rate level would be adjusted for the applicable volume on the scale. The annual projection for calendar year 1973 and the succeeding 4 years are reflected in the Inclosure. An annual update of these projections will be furnished by the shipper service."

In a letter dated March 8, 1973, the Service stated:

"Pursuant to telephone conversation with Mr. P. I. Voshell, this headquarters on 28 February 1973, our proposal has been modified to provide for assessment at a rate of 33 cents per barrel on all shipments occurring throughout the annual period. When the actual volume fails to equal 650,000 barrels or exceeds 699,999 barrels, the rate level will be adjusted for the applicable volume on the scale as indicated in the referenced letter."

Representatives of Standard and of the Service met in Washington to work out together the text of an amendment to Quotation 1. The amendment which applied to all shipments moving under Quotation 1 from origin stations on and after January 1, 1973, named in item 2 a combination rate of 33 cents per barrel. The first factor, 20 cents per barrel, applied over the lines of Southern and Standard from Southern's El Paso station to Standard's terminal in Alamogordo, New Mexico; the second factor, a sliding scale of rates, applied onward to Standard's location at Holloman. The second factor reads in pertinent part:

"From	Via	To Location on ST at	Annual Volume (Barrels)	Rate in Cents Per Barrel
Standard Transmission Terminal, Alamogordo, Otero County, New Mexico	Standard Transmission	Holloman A.F.B., Otero County, New Mexico	Less Than 550,000	22¢
			550,000 - 599,999	18¢
			600,000 - 649,999	15¢
			650,000 - 699,999	13¢
			700,000 - 749,999	10¢
			750,000 - 799,999	9¢
			800,000 - 849,999	7¢
			850,000 - 899,999	5¢
			900,000 and Over	4¢

* * * * *

"NOTE

A combined rate of thirty-three cents (33¢) per barrel from El Paso to Holloman AFB will be initially assessed and collected on all shipments made under this quotation throughout the entire annual period. When the actual aggregate annual volume delivered at Holloman Air Force Base fails to equal 650,000 barrels or exceeds 699,999 barrels, the rate level for that portion of the movement from Alamogordo to Holloman Air Force Base will be adjusted for the applicable volume on the scale in Item 2 at the end of the annual period. Certification of quantities transported on annual volume rate basis is required. At the close of the annual period the Carrier will prepare a statement showing the actual quantity delivered to Holloman Air Force Base, New Mexico, during the annual period. The statement will be Certified by the Base Transportation Officer verifying the actual quantity as being delivered. The Certified statement will be

attached to the Supplemental Billing or Refund as appropriate and forwarded to the Finance Center, Indianapolis, Indiana. /Underscoring Supplied/"

The disputed words, underscored in the amendment, are "that portion," and "applicable volume." DFSC and the Service contend that the words "that portion" refer to geographical locations (Alamogordo to Holloman) whereas Standard contends that they refer to the increments of 50,000 barrels on the volume scale. Likewise, DFSC and the Service contend that the words "applicable volume" refer to the total annual volume of barrels transported, whereas Standard contends that this also refers to increments of 50,000 barrels. Based on the Government's interpretation, and assuming that 800,000 barrels was the annual volume, the Government would pay only $.07 per barrel for the Alamogordo to Holloman portion of the movement. Using Standard's interpretation, the Government would be charged a rate of $.22 for less than 550,000 barrels, $.18 for the next 50,000 barrels, $.15 for the next 50,000 etc., until the appropriate annual volume is reached.

Rules for the interpretation of tariffs and quotations under Section 22 of the Interstate Commerce Act are the same as rules for the interpretation of contracts. Hughes Transportation, Inc. v. United States, 169 Ct. Cl. 63 (1965). And the intent of the parties is controlling. Union Pacific R.R. v. United States, 434 F.2d 1341 (Ct. Cl. 1970); Union Pacific R.R. v. United States, 287 F.2d 593, 598 (Ct. Cl. 1961). The intent of the Service is expressed in its letter of February 15, 1973, to the president of Standard. We note that the $.30 rate referred to in the letter includes the first factor of $.20 per barrel for that portion of the movement from El Paso, Texas, to Standard's terminal at Alamogordo, coupled with the second factor of $.10 per barrel on the sliding scale.

Thus, the intention of the Service appears clear on the face of the letter and is further clarified by the inclusion of an example of how the rates apply. If Standard's interpretation of its offer were followed, and using the example of 700,000 to 749,000 shown in the letter, it would be necessary to apply a $.42 per barrel rate for less than 550,000 barrels, a $.38 per barrel rate for the next 50,000 barrels, a $.35 per barrel rate etc., until the $.30 per barrel rate was reached. However, the letter specifically states "the rate of $.30 per barrel would apply on all shipments throughout the entire 12 month period." As a result of the letter, Standard issued its amendments to the three quotations using the language shown in the note, which corresponds to the language in the original letter from the Service.

The record contains a letter dated December 6, 1974, from the vice president of Standard to the Service. The third paragraph of that letter reads:

> "Our analysis of your letter of 15 November, 1974, based on meetings among A.C. Gilliam and W.J. Goss (both of whom were involved in the original negotiations) and myself is that there was apparently a miscommunication of information from the beginning of negotiations. The interpretations, yours and ours, apparently existed from the start but were not discovered, so now we have this problem."

However, the "miscommunication of information" does not invalidate the transportation contracts already performed. As was stated in Iowa-Des Moines National Bank v. Insurance Co. of North America, 459 F.2d 650 (8th Cir. 1972), at pages 655-656:

> "Ordinarily, in contract law if there is no meeting of minds then no contract exists. However, as stated in 1 Williston on Contracts, § 95, pp. 349-350 (3d ed. 1957):
>
> > 'It is often said broadly that if the parties do not understand the same thing there is no contract. But . . . it is clear that so broad a statement cannot be justified. It is even conceivable that a contract may be formed which is in accordance with the intention of neither party. If a written contract is entered into, the meaning and effect of the contract depends on the interpretation given the written language by the court. The court will give that language its natural and appropriate meaning. . . .'
>
> "This is not the Peerless case where both parties had a different ship in mind. In the instant case a premium was paid, a contract entered into, a certain hazard insured against. It is agreed there was some kind of coverage purchased--only the extent of it is really at issue. The insurer cannot be entitled to a verdict on the ground that there existed no meeting of the minds simply because it is able to produce evidence showing that at the time the contract was executed the insurer disagreed with the insured over the contract's interpretation. Cf. Lamson v. Horton-

Holden Hotel Co., 193 Iowa 355, 361, 185 N.W. 472, 474 (1921); Morrison-Knudsen Co., Inc. v. Phoenix Ins. Co. of Hartford, Conn., 172 F.2d 124, 128 (8 Cir. 1949). Such an outcome would wholly defeat the law's well-founded position that where two reasonable interpretations exist, the one that will sustain the claim and cover the loss will be adopted over the interpretation which will defeat recovery. State Automobile and Casualty Underwriters by Automobile Underwriters v. Hartford Accident & Indemnity Co., 166 N.W.2d 761 (Iowa 1969); Eckard v. World Insurance Co., of Omaha, Nebraska, 250 Iowa 782, 96 N.W.2d 454 (1959); Service Life Ins. Co. of Omaha, Neb. v. McCullough, 234 Iowa 817, 13 N.W.2d 440 (1944)."

It is also Standard's contention that the rates are unreasonable if the Service's interpretation is followed because Standard's net revenue reaches a height at the low volume level of 500,000 barrels and then declines until it reaches 1,071,050 barrels. In our opinion the Service has successfully rebutted this argument by showing that Standard would still receive a minimum return of 10 percent on investment even at the lower level of net revenue.

Standard further contends that the custom and usage in the industry is to apply the scale of rates on an incremental basis. However, the Service has furnished as an example another pipeline that contracted with it using the same type of rate scale.

We are of the opinion that the terms of the amendments to the three quotations are clear on their face. However, assuming that they are ambiguous, it would be necessary to construe the agreement against Standard, as the author of the agreement. Penn Central Company v. General Mills, Inc. 439 F.2d 1338 (8th Cir. 1971); C & H Transportation Co. v. United States, 436 F.2d 480 (Ct. Cl. 1971); Union Pacific R.R. v. United States, 434 F.2d 1341 (Ct. Cl. 1970); United States v. Great Northern Ry. 337 F.2d 243 (8th Cir. 1964); United States v. Strickland Transp. Co., 204 F.2d 325 (5th Cir. 1953). California Tanker Co. v. Todd Shipyards Corp., 339 F.2d 426 (2nd Cir. 1964).

Accordingly, we concur with the Service and DFSC in their interpretation of the amendments to the three rate quotations. Action can be taken against Standard in whatever manner is deemed necessary under agency regulations promulgated pursuant to the provisions of the Federal Claims Collection Act of 1966, 31 U.S.C.

951-953 (1970). Such action should be taken not later than October 1, 1976, to avoid any question of time limitations raised by Standard.

Acting R.F.KELLER

Comptroller General
of the United States