

FORMAN
Tampa

DECISION



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

8032

FILE: B-1J0955

DATE: OCT 13 1976

MATTER OF: Ace Doran Hauling & Rigging Co., Inc.

DIGEST

1. Where carrier's rate tender specifies delivery point of Portsmouth, New Hampshire, for items for Portsmouth Naval Shipyard and shipyard is located 1 1/2 miles from Portsmouth, New Hampshire, in Kittery, Maine, "highly unusual circumstances" exist requiring resort to extrinsic evidence to ascertain whether carrier's intent was to include Kittery, Maine, within the Portsmouth, New Hampshire, destination.
2. Intent of carrier, when analyzed in terms of circumstances of this case, which included different mailing and delivery addresses for the shipyard, the type of items shipped, the conduct of the Government shipping agent and the carrier's agent, and the subsequent communications between the parties, was to deliver items to Portsmouth Naval Station in Kittery, Maine, and GSA validly determined that carrier's rate tender was applicable to the shipments.

Ace Doran Hauling & Rigging Co., Inc. (Ace Doran), through its attorney, requests review of the General Services Administration's (GSA) action on 34 of its bills for transportation services. See Section 201(3) of the General Accounting Office Act of 1974, 49 U.S.C. 66(b) (Supp. V, 1975). After auditing the bills, GSA notified Ace Doran of overcharges totaling \$3,328.86, which in the absence of refund were collected by deduction from moneys otherwise due the carrier. 49 U.S.C. 66(a) (Supp. V, 1975). Under the regulations implementing Section 201(3) of the Act, deduction actions are reviewable settlement actions [4 C.F.R. 52.1(b)(1) and 53.2(1977)]; Ace Doran's letter complies with the criteria for requests of review of those actions. 4 C.F.R. 53.3 (1977).

The record submitted by GSA shows that the overcharges were made on 34 shipments of "batteries, electric storage, dry assembled, NOI", transported on Government bills of lading (GBL) during the period of February 2, 1974, to November 11, 1974, from Gould, Inc., in West Kankakee, Illinois, to the Portsmouth Naval Shipyard in Kittery, Maine.

According to GSA, the shipment transported under GBL No. K-6423237 is representative of the 34 shipments. Among other things,

it shows West Kankakee, Illinois, as the shipping point; Gould, Inc., as the shipper; Transportation Officer, Portsmouth Naval Shipyard, Portsmouth, New Hampshire, as the consignee; and Kittery, Maine, as the destination. It also shows that the shipment was to be loaded by the shipper and unloaded by the consignee.

Ace Doran collected freight charges on the 34 shipments based on its regular tariff rates. GSA, in its audit, determined that lower freight charges applied. These charges were derived from Ace Doran's Section 22 Quotation I.C.C. No. 187, as supplemented (Tender I.C.C. 187), or its I.C.C. No. 237, as supplemented (Tender I.C.C. 237). This determination by GSA resulted in overcharges of \$3,328.86 which in the absence of refund were collected by deduction.

Ace Doran contends that Tender I.C.C. 187 and Tender I.C.C. 237 were not applicable to the shipments in question because the Tenders specified Portsmouth, New Hampshire, as the destination point and the bills of lading show that the actual delivery point was Kittery, Maine. Furthermore, Ace Doran contends that a patent ambiguity on the face of a document is necessary before resort can be had to extrinsic evidence to determine the intent of the parties.

Quotations of freight rates, such as Tender I.C.C. 187 and Tender I.C.C. 237, are made to the United States pursuant to Section 22 of the Interstate Commerce Act, 49 U.S.C. 22, made applicable to motor carriers by Section 217(b) of that Act, 49 U.S.C. 317(b) (Supp. V, 1975). They are considered to be continuing offers to perform transportation services at the quoted rates subject to the terms and conditions contained in the offers. C & H Transportation Co. v. United States, 436 F.2d 480 (Ct. Cl. 1971). They are the same as any other offer made by a party seeking to form a contract and their interpretation is subject to traditional rules of contract law. Union Pacific R.R. v. United States, 434 F.2d 1341, 1345 (Ct. Cl. 1970).

Traditional rules of contract law specify that "absent highly unusual circumstances [emphasis supplied], the parties to a contract should be able to rely on their contract's express language." Artisan Electronics Corporation v. United States, 499 F.2d 606, 611 (Ct. Cl. 1974). Such special circumstances may arise when the underlying purpose of the contract may only be determined by going beyond the plain meaning of words and terms used in the contract. See Brubrad Company v. United States Postal Service, 404 F. Supp. 691, 694 (E.D.N.Y. 1975). For example, a shipping contract calling for a railroad to transport certain freight to the "Grand Coulee dam" required resort to extrinsic evidence to determine the meaning of the term "Grand Coulee dam". United States v. Northern Pacific Ry., 188 F.2d 277 (8th Cir. 1951).

In the instant case, the question of whether the destination point of Portsmouth, New Hampshire, includes Kittery, Maine, is such

a special case as to require extrinsic evidence to so determine. See Red Bull Motor Freight, Inc. v. United States, Nos. 253-73 and 419-73 (Ct. Cl. May 28, 1976) and 51 Comp. Gen. 724 (1972), in which both the Court of Claims and our Office dealt with the issue of whether a Section 22 Quotation, specifying New Brighton, Minnesota, as the pick up point for freight, included a United States Army ammunitions plant 2 1/2 miles away outside the municipal limits of New Brighton; though the pick up point of New Brighton seemed unambiguous, the circumstances dictated that extrinsic evidence be considered to determine if New Brighton included the United States Army ammunition plant. Thus, as in the Red Bull Motor Freight case, the present case presents similar circumstances which indicate an ambiguity in the term "Portsmouth, New Hampshire."

In interpreting a contract and its provisions, the controlling factor to be considered is the intent of the parties. Union Pacific R.R. v. United States, supra. In ascertaining the intention of the parties, the areas to be considered consist of the circumstances surrounding the making of the agreement, including the object nature and subject matter of the writing, as well as the situation of the parties at the time of contracting. See American Commercial Lines, Inc. v. Valley Line Co., 529 F.2d 921, 925 (8th Cir. 1976). Inherent in this analysis of the intent of the parties is the principle that a reasonable interpretation is preferred which effectuates the general purpose of the contract in a valid and reasonable manner, as it cannot be presumed that the parties intended to enter into a meaningless or void contract. Cordovan Associates, Inc. v. Dayton Rubber Co., 290 F.2d 858, 361 (6th Cir. 1961).

An analysis of the factual background of this case in terms of the legal principles involved in construing contracts makes it manifest that Tender I.C.C. 187 and Tender I.C.C. 237 apply to the shipments in dispute.

The Portsmouth Naval Shipyard has a mailing address of Portsmouth, New Hampshire, but is physically located 1 1/2 miles from Portsmouth, New Hampshire, in Kittery, Maine. Freight shipments by land routes have a destination point of Kittery, Maine, whereas freight shipments by water have a destination point of Portsmouth, New Hampshire. Each city is within the commercial zone of the other. 49 C.F.R. 1048.101(a) (2) and (3) (1974).

Of additional importance is the nature of the items shipped. The items were batteries used in submarines and would have no feasible application to anyone, other than the United States Navy. Clearly, the only realistic destination for these batteries was the Portsmouth Naval Shipyard. And the bills of lading indicate that the consignee, the shipyard, was to unload the batteries.

B-190755

Even more probative of the intent of the parties are the facts supplied by the record relevant to what transpired when the items were shipped and delivered. The GBL's all cited either Tender I.C.C. 187 or Tender I.C.C. 237 as applying to the shipments. Not only did the Government agent responsible for the shipment believe that the rates offered in Tender I.C.C. 187 or Tender I.C.C. 237 applied but so did Ace Doran's agent, as no protest was ever made to the reference in the bills of lading to either Tender. If the respective agents of the parties had not considered Tender I.C.C. 187 or Tender I.C.C. 237 to be in effect, some evidence of this would be in the record. Indeed, if Ace Doran had protested, it is most probable that the Government Agent would have secured other carriers ready, willing and able to deliver the goods at the rate in Tender I.C.C. 187 or Tender I.C.C. 237.

The conclusion that Ace Doran intended the shipments to move under the tender rates is clearly illustrated in a letter of June 26, 1975, to the Department of the Army, Eastern Area Military Traffic Management and Terminal Service from B. F. Baum, Ace Doran's Vice President for Traffic. Mr. Baum notes that eventually Ace Doran's Tender I.C.C. 237 was amended to reflect Kittery, Maine, as the destination point (Tender I.C.C. 237, supplement No. 3 effective October 25, 1974) and that this was indicative of Ace Doran's intent to have its route to Portsmouth, New Hampshire, encompass Kittery, Maine. In ascertaining the intent of Ace Doran's Tender I.C.C. 187 and Tender I.C.C. 237, it is relevant to consider both this letter and the supplements to the Tenders. See Trans Ocean Van Service v. United States, 426 F.2d 329, 336 (Ct. Cl. 1970), and citations thereto; Pennsylvania R.R. v. United States, 165 Ct. Cl. 1, 10 (1964); Union Pacific R.R. v. United States, 287 F.2d 593 (Ct. Cl. 1961).

Finally, if there be any doubt as to the intention of the parties, it must be resolved against Ace Doran, the carrier, as its rate tenders created the ambiguity. Hughes Transportation Co. v. United States, 169 Ct. Cl. 63, 68 (1965). The fact that there was an ambiguity is even clearer upon a reading of the standardized form letter of February 11, 1977, received by GSA from Gene Nance, Ace Doran's Traffic Manager. This standardized form letter indicated that Ace Doran was declining GSA's claim for one of the overcharges in this case (GBL No. K-6423237) because Tender I.C.C. 237 named rates to Kittery, Maine, and the shipment was consigned to Portsmouth, New Hampshire. This letter is erroneous in its factual contention, as the reference to the destination point of Kittery, Maine, was based on a supplement to Tender I.C.C. 237 enacted subsequent to the shipment under discussion; however, it is indicative of the ambiguity in Tender I.C.C. 187 and Tender I.C.C. 237 created by the fact that the Portsmouth Naval Shipyard has a New Hampshire address and a Maine location.

B-190955

5

Thus, based on the differing addresses of the Portsmouth Naval Shipyard, the type of items involved, the GFL's and subsequent documents relating to the contract, it seems clear that Ace Doran's intent was to execute a valid contract with the Government for the delivery of submarine batteries to the Portsmouth Naval Shipyard.

Based on the present record, GSA's settlement actions on the 34 shipments are correct and are sustained.

~~R. P. KELLER~~

Acting Comptroller General
of the United States