

DECISION



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

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FILE: B-214459

DATE: March 18, 1985

MATTER OF: Unauthorized use of United States Government
National Credit Card

DIGEST: Generally, the Government should not pay for unauthorized transactions involving the use of a United States Government National Credit Card (SF-149) when (1) the expiration date embossed on the SF-149 passed before the transaction occurred; (2) the purchaser was not properly identified as a Federal agent or employee; or (3) the vehicle was not properly identified as an official vehicle. However, where these three items are satisfied, the Government should reimburse oil companies for otherwise legitimate purchases involving SF-149's, even though the authorized purchaser later made unauthorized use of the supplies or services so acquired (unless it can be demonstrated that the oil company or its agents or employees knew, or had strong reason to know, that the transaction was not authorized or would be used for unauthorized purposes). In those cases, after paying the oil company, the Government should seek reimbursement from the person who improperly acquired or misused the purchased services and supplies.

The Controller of the General Services Administration (GSA) has requested our opinion on the liability of the Government for unauthorized use of the United States Government National Credit Card (SF-149). For the reasons given below, we find that, under the terms of the governing contracts and regulations, the Government is not bound to pay for unauthorized uses of the SF-149. However, we recommend that the Defense Fuel Supply Center (DFSC) of the Defense Logistics Agency and GSA revise their respective contracts and regulations to make this clearer.

Background

The SF-149 is a plastic credit card issued by GSA which may be used by Government officials and employees (pursuant to a series of procurement contracts issued and administered by DFSC) to make credit purchases of fuel and other supplies and services from commercial oil company retailers for use

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in Government vehicles engaged on official business. 41 C.F.R. § 101-26.406-1 (1983). The card is embossed with a billing account number, agency name, card identification number, expiration date, and replacement code. See Federal Supply Schedule FSC 75, pt. VII, § 13 (sch3 Nov. 30, 1982) (hereafter referred to as "FSC 75"). In addition to the embossed information, the following information is printed on the front and back of the card, respectively.

FRONT OF THE CREDIT CARD:

"U.S. GOVERNMENT NATIONAL CREDIT CARD

"This card is valid only for the supplies and services listed on the reverse side when furnished (1) to the vehicle bearing the tag or identification shown below or (2) if no tag number is shown to any properly identified U.S. Government vehicle, boat or small aircraft. If found please return to GSA, YTF, Washington, DC 20406."

BACK OF THE CREDIT CARD:

"In accordance with the terms of Defense Supply Center Contract Bulletin DSA600-3.33, when presented, this card may be used to purchase any of the following supplies or services for properly identified U.S. Government motor vehicles, boats, or small aircraft:

- "(a) For motor vehicles--regular and premium grade gasoline, leaded and unleaded; diesel fuel; regular and premium grade lubricating oil; lubricating services; oil filter elements; air filter service; tire and tube repairs; battery charging; washing and cleaning services; mounting and dismounting chains; permanent type anti-freeze; emergency replacement of defective spark plugs, fan belts, windshield wiper arms and blades; lamps; and other minor emergency repairs.
- "(b) For boats--regular and premium grade gasoline, leaded and unleaded; diesel fuel; and regular and premium grade lubricating oil.

"(c) For small aircraft--aviation fuel and lubricating oil.

"USE OF THIS CARD FOR OTHER THAN OFFICIAL PURPOSES AS STATED ABOVE IS A CRIMINAL OFFENSE SUBJECT TO FINE AND/OR IMPRISONMENT." FSC 75, § 14 (emphasis added).

Under the applicable GSA regulations, the identification number on an SF-149 represents either the license tag of a specific vehicle, or a unique serial number assigned to that card. 41 C.F.R. § 101-38.1202(a)(1). Cards with vehicle license tags for identification numbers may be used to procure services or supplies only for that vehicle. Cards embossed with unique serial identification numbers may be used to procure supplies or services for "any properly identified U.S. Government vehicle, boat, small aircraft, nonvehicular equipment or motor vehicle that is leased or rented for sixty continuous days or more and is officially identified in accordance with [41 C.F.R.] § 101-38.305-1." Id. (The legend on the front of the card, as quoted above, generally restates these provisions.)

Section 101-38.305-1, referred to above, provides that "[e]ach motor vehicle acquired for official purposes * * * shall display official U.S. Government tags mounted on the front and rear of the vehicle * * *." Particular Government vehicles may be exempted from the requirement to display "official U.S. Government tags" whenever "conspicuous identification on the vehicles would interfere with the performance of the functions for which the vehicles were acquired and are used." 41 C.F.R. § 101-38.601. See generally 41 C.F.R. subpt. 101-38.6. However, under the GSA regulations, SF-149's normally would not be used to service or supply vehicles when disclosure of the official status of the vehicles "would interfere with the performance of the functions for which the vehicles were acquired and are used." 41 C.F.R. § 101-26.406-1(a).

In addition to displaying U.S. Government license tags, official governmental vehicles are also required to display the words "U.S. Government," the agency name, and the words, "For Official Use Only." 41 C.F.R. § 101-38.401. This requirement is also subject to the exceptions, discussed above, for vehicles covered by 41 C.F.R. §§ 101-38.601 through 101-38.605.

As noted above, the statement printed on the back of the SF-149 stipulates that the card's use is subject to the

terms of the Defense Supply Center Contract Bulletin DSA600-3.33. That bulletin contains, among other things, the standard terms of the contracts that oil companies enter into with DFSC. By those terms, the oil companies agree to "honor" the SF-149 and bill the Government at a later date for the supplies and services rendered. Clause No. L157 and L159. The standardized terms specifically provide that the oil companies, through local service stations with which they are affiliated, shall "deliver and provide petroleum products, related supplies and services called for in [the] contract when and in such quantities as may be ordered by the ordering officer * * * in consideration of which the contractor shall be paid at the contract price." Clause No. L157. The term "ordering officer" is defined to mean one of a number of high ranking Government officials (or their designees), or "the driver of a Federal vehicle or boat, or pilot of a Federal aircraft authorized to place orders under a service station contract." Clause No. L105(f)(xiii). Under the standard terms, title to the supplies obtained under the contract passes to the Government "upon formal acceptance, regardless of when or where the Government takes possession." Clause No. L6.03(a). The contractors are entitled to be paid "upon submission of proper invoices for supplies and/or services rendered and accepted." Clause No. L159(a). When submitted, the contractors' invoices must be accompanied by "delivery receipts" which show:

- "(i) Name and address of service station and date of delivery;
- "(ii) Item, quantity, and grade of product, other supplies or service delivered;
- "(iii) For each individual item delivered, the unit price with extended totals;
- "(iv) License tag or identification number of the vehicle;
- "(v) The signature of the credit card holder making the purchase, acknowledging receipt of delivery." Clause No. L158(a).

The Issue

Neither the DFSC contracts, nor the GSA regulations, directly or expressly address the question of who bears

liability for the purchase of supplies or services through an unauthorized use of an SF-149. For example, a lost or stolen SF-149 might be presented to and honored by an oil company in order to service a nonofficial vehicle, or an employee entrusted with a card might use it to service his or her privately-owned vehicle for personal use.

According to GSA, each year SF-149's are used in over 3.5 million transactions to purchase \$70 million worth of fuel, oil, and other products and services from commercial service stations. GSA anticipates that its new "Credit Card Accounts Payable System" will detect and report many unauthorized uses of SF-149's. GSA asked us to determine whether the Government is required to pay those portions of bills that are found to represent unauthorized transactions. Among the factors GSA suggests we consider are whether (1) the expiration date embossed on the card had passed before the transaction occurred; (2) the purchaser was at that time a Federal employee; (3) the vehicle was appropriately marked and identifiable as a Government vehicle, and (4) the oil company was unaware of the illegal nature of the transaction.

Discussion

We understand that, in response to previous oil company inquiries, officials of the DFSC have taken the position that the contracts under which the SF-149's are used do not constitute an agreement by the Government to pay for unauthorized uses of SF-149's. That conclusion is based on DFSC's analysis of the contract clauses quoted above. The DFSC argues that the contracts only bind the Government to pay for orders placed and accepted by "ordering officers" (Clause No. L158, L159(a), L6.03(a)), who primarily are the drivers or pilots of Government vehicles who have been authorized to place orders (Clause No. L105(f)(xiii)). From this, DFSC concludes that a person who is not an "ordering officer," i.e., who has not been authorized to use an SF-149 for a private vehicle, or uses the supplies or services procured with an SF-149 for private purposes rather than official purposes, cannot bind the Government under the contract. Moreover, DFSC concludes that unauthorized uses of SF-149's do not accomplish delivery to or acceptance by the Government (as required in Clause No. L159(a)). This is because the person misusing the SF-149 was not acting as an agent of the Government. DFSC maintains that two of our previous decisions, 23 Comp. Gen. 582 (1944), and 32 Comp. Gen. 524 (1953), support these conclusions.

We generally agree with DFSC's construction of the relevant contract provisions and the applicable legal principles. With regard to DFSC's construction of the oil company contracts, we agree that the Government has not contracted to accept liability for unauthorized purchases involving SF-149's. The DFSC contracts, GSA regulations, and the terms on the SF-149 itself, expressly contemplate presentment of an SF-149 by a Government employee for use in purchasing supplies or services for a properly identified Government vehicle. The DFSC contracts only bind the Government to pay for the supplies and the services ordered and accepted by authorized Government employees. The GSA regulations and the terms printed on the SF-149 itself clearly limit use of the card to the purchase by properly identified Government employees of specific services or supplies for a properly identified Government vehicle.

In the past, in the context of the theft and misuse of commercial credit cards assigned to the Government for official use, this Office has applied the established principle that the Government "is neither bound nor estopped by acts of officers or agents acting without authority," nor is it bound by "acts of persons [such as thieves] who never have been its agents." 23 Comp. Gen. at 584. See also 32 Comp. Gen. at 525. In those decisions, it was noted that:

"* * * [I]t is a basic principle of the law of agency that every person dealing with an agent is bound to investigate and assure himself that an agency [relationship] actually exists. * * *

"* * * A distinction between the liability of individuals and that of the Government with respect to their agents has long been recognized by the courts. Although the former are liable to the extent of the power apparently given to their agents, due to the necessity of protecting the public interests the Government is liable only to the extent of the authority or power it has actually given to its agents." 23 Comp. Gen. at 583-84. See also 32 Comp. Gen. 524-25.

Keeping these principles in mind, we turn to the specific questions raised by GSA.

(1) Is the Government liable for a purchase made through the use of an expired SF-149? Each SF-149 is embossed with a clearly designated expiration date. The use of expiration dates on credit cards is a common practice among companies that issue commercial credit cards, including most, if not all, of the oil companies that have contracted with DFSC to honor the Government's SF-149. It should be obvious to the oil companies that the honoring of an SF-149 after the expiration date on the card has passed is not consistent with the DFSC contracts and GSA regulations. Consequently, the Government clearly is not liable under the DFSC contracts to reimburse oil companies for transactions involving expired SF-149's. However, with regard to transactions involving expired SF-149's where, but for the expiration, the transaction would otherwise be legitimate, it may be possible, depending on the facts and circumstances of the particular case, to reimburse the oil company under the principles of quantum meruit or quantum valebat. See, e.g., 62 Comp. Gen. 337, 338-39 (1983).

(2) Is the Government liable for purchases made through the use of an SF-149 by a person who was not a Federal officer or employee? Obviously, the acceptance of an SF-149 by an oil company contractor where the person offering the card is not properly identified as a Government employee transcends the bounds of the agreement between the oil company and the Government. Lost or stolen credit cards and vehicles constitute facts of life which are frequently encountered by merchants. Long ago, this Office pointed out that:

"* * * The possession of a credit card, or of the official car identified thereon, in itself alone, does not justify an extension of credit to the bearer as a representative of the United States. The service station employees to whom such cards are presented should require competent evidence as to the identity and official status of the persons holding them. All Federal employees authorized to use official cars and purchase gasoline and oil on the credit of the Government have available means of readily establishing these facts." 23 Comp. Gen. at 583. See also 32 Comp. Gen. 525.

Oil company contractors are not significantly or unfairly burdened by the requirement that they investigate the bearer's actual authority to make a purchase using an

SF-149. (Government employees involved in "undercover" or other assignments in which it would be inappropriate for them to carry credentials to establish their official status normally would not carry or use SF-149's. Cf. e.g., 41 C.F.R. subpt. 101-38.6 and 41 C.F.R. § 101-26.406-1(a).) In any event, by accepting an SF-149, the oil company binds itself under the GSA regulations and DFSC contracts (as reiterated on the card itself) to verify the bearer's official status, and may not be reimbursed by the Government unless it can demonstrate that it did so.

(3) Is the Government liable for transactions in which SF-149's were used to service or supply vehicles not appropriately marked and identified as official Government vehicles? The DFSC contracts and the GSA regulations limit the card's use to the purchase of services or supplies for properly identified Government vehicles. Since GSA regulations require most official Government vehicles to display Government license tags and the words "U.S. Government" and "For Official Use Only," the oil companies are neither significantly nor unfairly burdened by the requirement to verify the vehicle's official status. Cf. 23 Comp. Gen. 582, supra; 32 Comp. Gen. 524, supra. (As noted above, SF-149's normally would not be used for vehicles involved in certain types of "undercover" work.) Where the vehicles are not so identified, the instructions on the SF-149 limit its use to the vehicle bearing the tag or identification listed on the credit card. Consequently, the oil companies have contractually bound themselves to verify the official nature of the vehicle, and may not be reimbursed unless they can demonstrate that they did so.

(4) Is the Government's liability affected by the fact that the oil company may have been unaware of the illegal nature of the transaction? Here, we must distinguish between purchase and subsequent use. As has been discussed, the authority to make a purchase using the SF-149 is reasonably easy to verify. If the merchant fails to compare the name on the SF-149 and the name on the employee's Government identification card and further fails to examine the vehicle tags or other identifying markings to be sure it is a Government car, he should bear the consequences of failing to do so.

Of course, it is possible that a given purchase may be entirely legitimate on its face, but the subsequent use of the gasoline purchased may be unauthorized. For example, a Government employee with proper credentials might purchase gasoline for a properly identified Government vehicle, and then proceed to use the vehicle for personal (unauthorized)

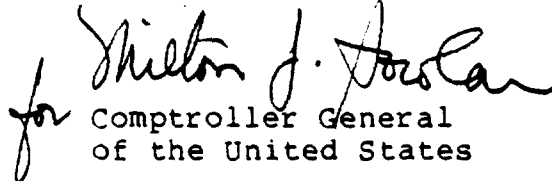
matters. In our opinion, merchants should not be held responsible for this later unauthorized use as long as all the required identifications were properly verified at the time the purchase was made.

Conclusions

Based on the foregoing discussion, we conclude generally that the Government should not pay for unauthorized transactions involving the use of SF-149's when (1) the expiration date embossed on the SF-149 passed before the transaction occurred; (2) the purchaser was not properly identified as a Federal agent or employee; or (3) the vehicle was not properly identified as an official vehicle. However, where these three items are satisfied, the Government should reimburse oil companies for otherwise legitimate purchases involving SF-149's, even though an authorized purchaser later made unauthorized use of the supplies or services so acquired (unless it can be demonstrated that the oil company or its agents or employees knew, or had strong reason to know, that the transaction was not authorized or would be used for unauthorized purposes). In those cases, after paying the oil company, the Government should seek reimbursement from the person who improperly acquired or misused the purchased services and supplies. Collection should be pursued in accordance with the Federal Claims Collection Standards, 4 C.F.R. ch. II, as amended, 49 Fed. Reg. 8889 (1984).

While we think these conclusions follow from existing law and the applicable contractual and regulatory provisions, we nevertheless urge GSA and DFSC to amend those regulations and contracts to expressly state and make clear the situations in which the Government will and will not be liable. This should reduce future disputes and guarantee that oil companies know and understand the obligations that they have assumed.

Finally, we suggest that GSA explore the feasibility of developing a system for reporting lost or stolen credit cards to the oil companies with which DFSC has contracted. This would enable the oil companies to distribute lists of lost/stolen cards to the individual retailers, similar to the lists used for commercial credit cards, and thereby help to reduce the potential for unauthorized use of the cards.


for Comptroller General
of the United States