278

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH - CENTRAL DIVISION

In re:	
R. D. BAILEY RIGGING, INC.,	Bankruptcy Number 87B-02430
Debtor.	[Chapter 11]
R. D. BAILEY RIGGING, INC.,	Consolidated Adversary Proceeding Number 87PB-0475
Plaintiff,	
.v.	
UNITED STATES OF AMERICA, (GENERAL SERVICES ADMINISTRATION, DEPARTMENT OF THE ARMY, U.S. ARMY FINANCE AND ACCOUNTING CENTER),	
Defendant.	

MEMORANDUM OPINION

Larry A. Kirkham, Esq., of Nygaard, Coke & Vincent, of Salt Lake City, Utah, appeared on behalf of R. D. Bailey Rigging, Inc.

Richard D. Parry, Esq., Assistant United States Attorney, United States Department of Justice, of Salt Lake City, Utah, appeared on behalf of General Service Administration and Department of the Army of the United States of America.

INTRODUCTION

This adversary proceeding came on for trial to resolve the parties' dispute relating to charges for hauling freight for United States government agencies. The plaintiff, R. D. Bailey Rigging, Inc. (Bailey), alleges that it undercharged the defendants, General Service Administration and Department of the Army of the United States of America (United States), for freight hauled. The United States has filed an amended claim in the debtor's main case asserting that it was overcharged by Bailey. Bailey objects to this amended claim. The issues in this adversary proceeding and the issues related to the objection to the United States' proof of claim in the main case are based upon the same factual dispute. The parties have stipulated that the matters be heard at the same time to economize the assets of both the parties and the court.

This court has jurisdiction over the subject matter and parties pursuant to 28 U.S.C. § 1334(b). The court has determined that the resolution of Bailey's objection to the amended proof of claim of the United States is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2)(B). The court has further determined that the adjudication of the claims of Bailey against the United States is a matter related to this

confirmed chapter 11 case under 28 U.S.C. § 1334(c)(1).[1] The parties have consented to the court entering findings of fact, conclusions of law and final judgment.[2]

FACTS

Bailey is a reorganized chapter 11 debtor conducting business as a trucking company both in the State of Utah and nationwide. From 1983 through part of 1987, Bailey was a freight hauler for the armed services branches of the United States.

Bailey offered to perform freight hauling services for the United States pursuant to the terms set forth in a document dated February 1, 1984, entitled *Uniform Tender of Rates and/or Charges for Transportation Services*. A second tender, denominated BYRG 2, was filed with the United States by Bailey in 1986.

The agreement or contract to haul freight between Bailey and the United States has several components. Among these components are (1) the tenders submitted by Bailey and accepted by the United States, (2) the initial verbal order placed by the shipper on behalf of the United States requesting services from Bailey, (3) the bills of lading and the annotations thereon, and (4) the rules, regulations and routing instructions related to government freight hauling. All bills of lading are prepared by the United

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[1] A copy of this opinion shall be filed in both the adversary and main case files.

[2] The adversary proceeding, though non-core, is best determined in this forum. *In re Nell*, 71 B.R. 305 (D. Utah 1987). Bailey's confirmed Chapter 11 Plan retained jurisdiction in this court to resolve these matters through this proceeding.

States or its agent as shipper. Payment is made by the United States to the carrier from the bill of lading. The carrier, however, is responsible for the accuracy of the bill of lading.

In order to be paid, Bailey submitted bills of lading to the United States. The United States, specifically the GSA, has the authority to audit for overcharges on bills of lading for a period up to three years after payment. In 1986 the GSA began auditing the bills of lading and charges of Bailey for the periods 1984, 1985 and 1986. The GSA's audits concluded that Bailey had both billed and been overpaid for items and rates that did not conform to the terms of the tenders or bills of lading. As a result, the GSA determined that there were a number of overcharges. Notices of overcharge were then sent to Bailey. Upon receipt of the notices, Bailey forwarded $3,074.19 to the GSA.

After receiving the notices of overcharge, Bailey reviewed its billings for the years 1984 through 1987 and thereafter submitted supplemental claims to the United States. Most of the claims were for expedited services. Bailey contends that it undercharged the United States in certain instances when it provided expedited services and is therefore entitled to charge additional sums to correct the difference.

The term *expedited service* is described or defined by Bailey's tenders and bills of lading. The term *time delivery* is described in Item No. 120 of Bailey's tenders (exhibit B)[3] and provides that:

> When a shipment requesting a specific time delivery is accepted by carrier, carrier will accept such shipment subject to a written bill of lading annotation requesting a specific delivery time at an additional charge of 35 cents per loaded mile, which charge shall be in addition to all other applicable rates and charges.

The form bill of lading (exhibit H) gives further instructions regarding the proper method of filling out the bill of lading.

> 2. Where accessorial or special services, such as exclusive use of a car or truck, expedited service, protective service, reconsignment, etc., are ordered incident to the line-haul transportation, the bill of lading shall be endorsed to show the name of the carrier upon which the request was made and the kind and scope of the special services ordered. The endorsement may be placed on the face hereof in the 'Marks and Annotations,' block 15, or in the space provided on this page for 'Special Services Ordered,' and shall be signed by or for the person who ordered the services. ... Where accessorial or special services are shown as ordered but were not furnished, the bill of lading shall be so annotated.

Bailey now argues that *time delivery* is equivalent to *expedited service* and that for those bills of lading in which it met a specific delivery time, it should be entitled to be paid an extra 35 cents a mile.

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[3] The same description of *time delivery* is included in BYRG 2 (exhibit D) as Item No. 160.

The United States uses a complex rating system to determine the desired time of delivery of its freight. No publicly available written codification of this rating system existed prior to the publication of MTMC Freight Traffic Rules Publication No. 1 (MFTRP No. 1) issued August 15, 1986, and effective October 1, 1986 (exhibit F). Interpretation of the rating system depended upon verbal instruction as well as a document entitled "How to do Business with the DOD, 1 June 1986" (exhibit 14).

Bailey inquired of personnel at Military Traffic Management Command (MTMC) in California in July or August of 1986 regarding the use of the designations DDD (desired delivery date) plus a TP (transportation priority) to indicate expedited service. At the MTMC, Bailey received both verbal instructions and a copy of the opinion in *J. H. Rose Truck Line, Inc. v. United States*, 462 F.2d 502 (Ct. Cl. 1972) to be used as a basis for interpreting its tenders in rating its bills of lading. Based upon the verbal instruction and the *Rose* opinion, Bailey believed that the designation DDD plus a TP on a bill of lading constituted a request for expedited services and could therefore be billed accordingly.

After receiving the notices of overcharge, Bailey reviewed past bills of lading to see if, by chance, they contained any unbilled DDD plus TP designations. If the haulage services were actually performed within the time limit, Bailey forwarded to the United States a request for payment for expedited services in addition to that previously billed.

Bailey further complained of discrepancies on the bills of lading prepared by the United States. In many cases the verbal requests made by persons initiating a shipment at a military base for and on behalf of the United States did not coincide with the information on the bills of lading. Frequently, weights, mileage or other services verbally requested at the time of shipment differed from the annotations on the bills of lading. Such discrepancies were not corrected by Bailey upon receipt of the load and bill of lading.

Although Bailey held itself out as the carrier that would physically perform the services, in approximately one-half of all instances, Bailey acted merely as a broker selling the loads to independent truckers. Brokering loads is prohibited by the United States in these circumstances. Bailey's business practice was to actually agree with and pay the independent trucker for the services in advance of receiving payment from the United States. In most cases, Bailey paid the trucker in full before ever seeing the bill of lading. If the freight charge on the bill of lading was less than the charge computed upon the shipper's verbal requests at the time of shipment, Bailey suffered a loss.

On January 9, 1986, Bailey updated its rates by issuing and filing with the United States its tender denominated BYRG 2. The effective date set forth on the tender was February 23, 1986. The tender was originally accepted by the United States but later rejected for technical deficiencies. Bailey, however, calculated its bills of lading based on BYRG 2 from February 23, 1986, forward. The United States notified Bailey

of the rejection of BYRG 2 in the first part of March, 1986; a date after the tender's effective date. Notwithstanding that notification, Bailey was told by the United States' agent, Lester H. Finotti, Jr. of the GSA, that the new rates would be effective February 23, 1986, despite the rejection. In reliance upon the information provided by the United States' agent, and upon the previously accepted tender, Bailey continued to perform services and quote rates based on BYRG 2.

Bailey filed a chapter 11 petition for relief on May 15, 1987. Its plan of reorganization was confirmed on August 8, 1988. The claim against the United States was anticipated as part of the terms of Bailey's plan and the within complaint was initiated to resolve the claim. Bailey asserted that the undercharges were the result of unbilled expedited services, inaccuracies in the bills of lading and the disallowance of increased rates billed under BYRG 2. As a result, Bailey has filed a claim for undercharges against the United States in the amount of $99,633.36.

The United States, after conducting an audit of Bailey's bills of lading, filed an amended proof of claim dated September 22, 1988. The amended proof of claim reflected an amount due the United States as a result of overcharges of $73,917.91. Total credits on accounts payable, unpaid bills of lading, and checks received and deposited to Bailey's account totaled $23,724.14. The United States now asserts a balance due from Bailey in the amount of $50,193.77 (exhibit A).

DISCUSSION

A. CLAIMS OF BAILEY AND AMOUNTS OWED TO IT

1. ACCURACY OF THE BILLS OF LADING

Carriers have the legal duty to ensure that bills of lading are correct in all material respects, even when the bill of lading is prepared by the shipper. *Matter of A-Line, Ltd.*, Comptroller General Decision B-228785, p. 3 (January 29, 1988). Where a bill of lading contains material deficiencies, a carrier has a duty to seek clarification. *Id.*

The determination of whether the bills of lading corresponded with the verbal requests of the shipper was in the control of Bailey. Bailey also had a corresponding duty to verify the accuracy of the bills of lading before hauling the shipment. Bailey operated at its own risk in brokering loads to independent truckers and in impliedly transferring to them the responsibility of ascertaining the accuracy and completeness of the bills of lading. To the extent the verbal requests and written bills of lading differed, the verbal requests merged into the written documents unless the carrier objected to the contents of the bills of lading. If the independent truckers failed to correct inaccuracies in the bills of lading, Bailey cannot now complain that the United States failed to pay for services rendered but not reflected in the bills of lading.

2. RDD DESIGNATIONS

Bailey contends that the use of the designation RDD (Required Delivery Date) on the bills of lading required delivery at a specific time and therefore Bailey is entitled to additional compensation of 35 cents per mile. The testimony at trial established that a RDD designation was viewed by both Bailey and the United States as a request for expedited service. Such request was noted on the face of the bill of lading.

The annotation RDD constitutes a specific express request for expedited service or time delivery. Bailey is therefore entitled to charge for expedited service and time delivery for each bill of lading annotated with RDD (exhibit 1) and a specific date, if the delivery was timely made. The amount of undercharges on bills of lading annotated RDD is $6,975.15. The evidence (exhibit 24) establishes that all such deliveries were timely made.

3. DDD PLUS TP DESIGNATION

Tenders are drafted by the carrier, but are uniform in form and suggested language. Bailey's tenders do not specify that the freight bill should be marked or stamped *expedited service* or *High Speed Transportation* or *Priority 1, 2, 3,* or *4,* or any other annotation. Item 120 of the tenders merely indicated that any specific delivery time would be subject to the additional 35 cents per loaded mile charge. At trial, Bailey conceded that a specific date plus some other indication of urgency was required to establish the right to the higher rate. Bailey contends that the use of desired delivery

dates (DDD) together with transportation priorities (TP) on the bills of lading constitutes a specific written request for expedited service or timed delivery entitling it to charge an additional 35 cents per mile. The testimony at trial established that desired delivery dates assist the shipper, carrier and consignee and describe standard transit times. Transportation priorities however are assigned by the shipper for the benefit of the consignee as a designation of how freight should be processed once it is delivered. Transportation priorities are not assigned for the benefit of the carrier.

The terms of the contract between the government and Bailey with respect to expedited service are partially are set forth in the bills of lading used by the parties (exhibit H). The bills of lading state that in order for the government to be obligated to pay for expedited service, the request must be explicitly stated on the bills of lading. Bailey's tender is consistent with the bills of lading and requires a written request for a specific delivery time. Terms such as DDD and TP, standing alone, do not constitute a specific written request. Verbal requests by government agents are similarly insufficient to obligate the government to pay for expedited services unless clearly noted on the bill of lading.

The evidence at trial established that the designations DDD plus a TP written on the bills of lading were not intended by the United States to constitute a request for expedited service. To request expedited service, the shipper must write in

English on the bill "expedited service requested". An additional charge would then be authorized.

In instances in which the verbal request for service set forth a date by which the shipment should arrive at its destination, the evidence established that the request was made only for the purpose of ascertaining whether the carrier had the available equipment and employees to timely haul the freight. If the carrier could not perform within the time given, another carrier would be contacted. The mere assertion that the shipment should be completed by a specific date, without appropriate annotation on the bill of lading or some other annotation indicating urgency, does not alone constitute a request for expedited service entitling Bailey to an extra 35 cents per mile.

The case law with respect to claims against the government is well established. Claimants against the United States must come forward with evidence establishing their claim. Proof of the correctness of a carrier's charges must be "as full and satisfactory as that required for the establishment of any other contract to hold the government liable". *Southern Pacific Co. v. United States*, 60 Ct. Cl. 662, 671 (1925) *aff'd*, 272 U.S. 445 (1926); *Pacific Intermountain Express Company v. United States*, 167 Ct. Cl. 266, 270 (1964). In order for a carrier to recover premium charges for special services, such as expedited services, it must prove that the service was actually requested and actually performed. *Pacific Intermountain*, 167 Ct. Cl. at 270-71.

The case law with respect to claims of shippers and carriers is equally well established. Contracts between shippers and carriers should be construed to give the shipper the benefit of the lowest applicable rate. *Baggett Transportation Company v. United States*, 670 F.2d 1011, 1012 (Ct. Cl. 1982). Any ambiguity in a tariff or tender prepared by a carrier must be construed against the carrier. *Union Pacific Railroad Company v. United States*, 287 F. 2d 593, 598 (Ct. Cl. 1961).

Although the case law argues in favor of resolving claims in favor of the United States, this court must look at all the facts and circumstances surrounding the transactions between these parties. Although the United States claims its military transport procedures are clear and unambiguous, this court, as a court of equity, is constrained to examine whether Bailey, to its detriment, was misinformed or misled by agents of the United States into performing services for which it thought it would be compensated. This court will review Bailey's claim for undercharges, even though they would not ordinarily be allowed, if (1) the actions of the United States were relied upon by Bailey to its harm, (2) Bailey performed services beneficial to the United States based upon mistaken information, and (3) the unilateral mistake was caused by the United States.

Bailey relies heavily on *Rose* ,a copy of which its representatives obtained from personnel at MTMC. *Rose* is a per curiam Court of Claims opinion regarding

additional payments charged as a result of expedited services rendered by the carrier to the United States.

The facts of *Rose* differ from this case. In *Rose*, the plaintiff's general manager attended a seminar for persons involved in the transportation of military goods. At the seminar, government personnel explained the Uniform Material Issue Priority System. The general manager then offered Rose's tender in compliance with his understanding of "Expedited Service" or "High Speed Transportation" and proceeded to perform services for the United States based upon that tender. The tender items provided a minimum charge for expedited service or high speed transportation. The tender further provided that each bill of lading would be "marked or stamped 'Expedited Service' or 'High-Speed Transportation' or 'Priority 1, 2, 3 or 4' or 'any other annotation such as a definite deadline delivery date requiring expedited service or high-speed transportation in order to meet such deadline delivery date'." *Rose*, 462 F.2d at 504.

In the instant case, the majority of the claims for expedited service were made long after the shipments were actually delivered, as opposed to *Rose* where they were made concurrently with the shipments. Also, Bailey's tenders were drafted before the information was obtained from MTMC, not after.

The language in Bailey's tenders is also different. Item 120 refers only to timed delivery not expedited service. Bailey now seeks to conform the language in its tender to authorize additional payment if 1) the request was made orally by the shipper

for delivery within a specified time, 2) a designation is found on the bill of lading indicating a DDD, 3) a TP 1, 2 or 3 is included, and 4) the delivery was timely made. If any element is missing, even under Bailey's interpretation, it is not entitled to charge for expedited service.

In both *Rose* and this case, none of the bills of lading are stamped or marked with the words *expedited service* or *high-speed transportation*. In both cases, the plaintiffs rely on the DDD and TP designations to establish the basis for expedited service or timed delivery.

In *Rose*, the court specifically found that the designation TP2 or TP3 could not reasonably have been construed as a request for expedited service or high-speed transportation in light of the United States' issue priority system. *Rose*, 462 F.2d at 508. The court likewise found that a *desired* delivery date as opposed to a *required* delivery date was not, by itself, a request for expedited delivery. *Rose*, 462 F.2d at 507.

Bailey asks this court to determine that the combination of a DDD and a TP2 or TP3 designation should constitute a request for expedited service. The credible evidence presented by government witnesses does not support this determination. Neither does the analysis in *Rose*. Therefore, Bailey could not have relied to its detriment on *Rose*, either in actually accepting cargo for shipping, in applying its rates, or in paying its independent contractors.

The court is left with the issue of whether a DDD plus a TP1 designation could be construed as a request for expedited service and whether Bailey relied on that designation in accepting the shipment. *Rose* held that TP1 shipments which were timely delivered were entitled to additional compensation because they constituted requests for expedited service. The *Rose* court found that under the government's priority rating system, certain consignments were designated TP1 and required high speed modes of transportation of such an extraordinary nature that additional compensation should be awarded.

Bailey lists 72 bills of lading with a designation of DDD plus a TP1 (exhibit 3). The total of the asserted undercharges is $30,059.89. All but one of the 72 bills, R1165377, was actually delivered within the allotted time (exhibit 24). Of those bills designated DDD plus a TP1, 16 were for loads hauled after representatives from Bailey visited MTMC in July or August of 1986 (exhibit 24). After reading the *Rose* case, Bailey could have reasonably believed it was entitled to charge for expedited services for the 16 loads designated DDD plus a TP1. Loads hauled after October 1, 1986, however, should be excluded because that is the effective date of the MTMC Freight Traffic Rules Publication No. 1 (exhibit F) which clearly indicates that a DDD plus a TP1 designation does not constitute a request for expedited services. The publication states that "requests for expedited service must be annotated on the bill of lading clearly and specifically" (exhibit F at p. 38).

The court determines that those loads hauled between July 1, 1986, and October 1, 1986, were carried in reliance on *Rose* and its interpretation that a DDD plus a TP1 designation constituted a request for expedited service. The total of these bills is $3,218.29 (*See* attachment 1 of this opinion).

The court finds that the designations DDD plus a TP1 were not understood or relied upon by Bailey as a request for expedited service at the time the service was performed if performed prior to July 1, 1986. The great majority of Bailey's claims for expedited service were made long after the services were rendered. There was no evidence that Bailey relied on an expedited service rate prior to July 1, 1986, in paying its independent contractors.

4. RELIANCE WITH RESPECT TO BYRG 2

Bailey reasonably relied on its BYRG 2 tender submitted and initially accepted by the United States for bills of lading rated from February 23, 1986, forward. In addition, Bailey reasonably relied on the United States agent's representation that the new rates would be effective despite the tender's rejection for technical deficiencies. The United States received a benefit because Bailey may not have performed the haulage service had it known its tender would be retroactively rejected. The United States is therefore estopped from claiming a retroactive rejection of the BYRG 2 tender, especially when the rates were not the objectionable portion of the tardily rejected tender.

B. CLAIM OF THE UNITED STATES AND AMOUNTS OWED TO IT

The United States twice audited all bills of lading in preparation of its amended proof of claim. The claim sets forth those funds held by the United States which should be credited against the amounts owed by Bailey. The testimony of Carl Crea at trial further supported the amended proof of claim. Bailey has set forth no specific, credible evidence to refute the claim.[4] The evidence established that Bailey had been overpaid $73,917.91 by the United States. The evidence also established that the United States holds receivables owed to Bailey in the amount of $23,724.14. The amount owing to the United States from Bailey, after offset[5] is $50,193.77.

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[4] Under Bankruptcy Rule 3001(f), a proof of claim which has been properly executed and filed in accordance with the Bankruptcy Rules "shall constitute prima facie evidence of the validity and amount of the claim". The Editor's Comments to the 1983 amendments to Rule 3001(7) further state:

> The evidentiary effect of subdivision (f) is to create a status for a complying proof of claim which does not come into operation unless the creditor's claim is challenged, since it "is deemed allowed, unless a party in interest . . . objects", as provided in Code § 502(a). Upon objection, a confirming claim will survive an attack as to either or both its genuineness and amount unless substantial contradictory evidence is adduced.

Therefore, in the absence of any substantial contradictory evidence presented by Bailey to refute the claim, the United States' claim will be "deemed allowed" under 11 U.S.C. § 502(a) and as such constitutes "prima facie evidence of the validity and amount of the claim" under Bankruptcy Rule 3001(f).

[5] The parties have not placed at issue whether Bailey's funds held by the United States are credited against the amount owed by way of offset or recoupment. *In re B & L Oil Co.*, 782 F.2d 155 (10th Cir. 1986); *Midwest Service*, 44 B.R. 262 (D. Utah 1983). Because the issue was not argued at trial, and because the plaintiff appears to desire the obligation, if any, satisfied, either through setoff or recoupment, or payment under the confirmed plan, the court makes no further ruling on the issue.

CONCLUSION

Based on the evidence presented to the court, the court makes the following determinations:

Bailey is entitled to judgment against the United States in the amount of $6,975.15 as a result of undercharges on those bills of lading annotated RDD, unless already paid or credited.

Bailey is entitled to judgment against the United States in the amount of 35 cents per mile for the period from July 1, 1986, to and including September 30, 1986, for bills of lading denominated DDD plus TP1, that were actually timely delivered. The bills of lading containing annotations of DDD plus a TP1 constitute either an express or implied request for expedited service or time delivery upon which Bailey relied and Bailey is entitled to charge for those services. The amount of those bills of lading totals $3,218.29, unless already paid or credited.

Bailey is entitled to judgment against the United States in the amount of its increase in its freight rates from BYRG 1 to BYRG 2 from February 23, 1986, forward unless already paid or credited.

Bailey is not entitled to retroactively recover from the United States the surcharge on bills of lading annotated DDD plus TP1, for the period prior to July 1, 1986, which were not billed at the time of service. Nor is Bailey entitled to recover from

the United States the sums of $15,216.00 on those bills of lading annotated with DDD plus TP2, or $14,148.80 on those bills of lading annotated with DDD plus TP3. Neither is Bailey entitled to recover the sum of $14,768.70 represented to the court as miscellaneous undercharges on 33 separate bills of lading because insufficient evidence was presented to establish its right to payment.

The United States is entitled to a claim against Bailey for overcharges in the amount of $73,917.91. The United States is also entitled to setoff against its claim for overcharges, receivables of the debtor held by the United States totaling $23,724.14.

THEREFORE, it is hereby

ORDERED, that Bailey shall prepare a judgment against the United States in conformity with the foregoing opinion, and, it is further

ORDERED, that the United States shall prepare an order allowing its claim in conformity with the foregoing opinion.

DATED this 10 day of March, 1989.

JUDITH A. BOULDEN
United States Bankruptcy Judge

ATTACHMENT "1"

Freight Charge	Invoice Number	GBL Number	Pickup Date	Desired Delivery Date	Date Delivered
$525.21		R0829694	7/01/86	7/03/86	7/03/86
224.73		C0169767	7/21/86	7/28/86	7/24/86
136.20		T0195456	7/21/86	7/22/86	7/22/86
559.35	260804	S459495 [a]	8/13/86	8/19/86	8/18/86
429.23	260805	R1547164 [b]	8/12/86	8/14/86	8/14/86
171.50	260816	S4715712 [c]	8/26/86	8/29/86	8/26/86
297.10		S4715713	8/26/86	8/29/86	8/26/86
303.10	260907	C171011 [d]	9/04/86	9/10/86	9/08/86
298.90		C0263163	9/23/86	9/30/86	9/26/86
272.97		C0169609	7/16/86	7/21/86	7/17/86
$3,218.29					

a GBL #S4591495 on exhibit 3

b GBL #R1647164 on exhibit 3

c GBL #C4715712 on exhibit 3

d GBL #C0171011 on exhibit 3