UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

December 14, 2007

CBCA 888-RATE

In the Matter of AMERICAN WORLD FORWARDERS, INC.

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James F. Fitzgerald, Director, Audit Division, and Aaron J. Pound, Assistant General Counsel, General Services Administration, Washington, DC, appearing for General Services Administration.

Stephen P. Davis, Office of the Staff Judge Advocate, Military Surface Deployment and Distribution Command, Department of the Army, Scott Air Force Base, IL, appearing for Department of Defense.

FENNESSY, Board Judge.

We have before us a claim by American World Forwarders, Inc. (claimant or AWF) in the amount of $32,338.91. Claimant is a transportation service provider (TSP) which offered rates to the Department of Defense's Surface Deployment and Distribution Command (SDDC) in response to International Personal Property Rate Solicitation I-13, as amended, and successive solicitations. Claimant provides services for the transportation of household goods and unaccompanied baggage of military personnel pursuant to the terms and conditions of the successive rate solicitations, claimant's rate tenders in response thereto, and international Government bills of lading (ITGBL) issued by the shipping agency.

Pursuant to a post-payment audit, the General Services Administration (GSA) Transportation Audit Division (Audit Division) issued a notice of overcharge (NOC) to

claimant to recover the $32,338.91, because AWF erroneously billed the Government for certain surcharges on shipments of unaccompanied baggage in Code J.[1] The billed surcharges were war risk surcharges (WAR), port/terminal security handling surcharges (COF), and port congestion surcharge (CON). Thereafter, the Government offset the $32,338.91 against payments otherwise due AWF. Following an unsuccessful protest of the NOC, the Audit Division incorporated its initial determination of overcharges into a settlement certificate dated July 27, 2007. Claimant submitted to the Board a timely claim requesting review of the Audit Division's settlement action.

The Audit Division responded to the claim, relying in part upon contract provisions and factual matters not addressed in GSA's settlement certificate. Claimant contends that the Board does not have jurisdiction to review the Audit Division's disallowance of charges on any basis other than that asserted in the settlement certificate. The Board asked the parties to brief this issue. As discussed below, we determine that the Board's authority to review the actions of the Audit Division includes consideration of issues beyond those raised by the settlement certificate, including the reasons asserted in the Audit Division's response to AWF's claim to the Board.

Background

According to claimant, port agents serving military air terminals assessed the previously mentioned surcharges on Code J shipments of unaccompanied baggage as compensation for additional costs incurred due to increased security measures put in place by military installations following the September 11, 2001, attacks upon the United States. Claimant states the security measures caused port congestion and delays in accessing the ports.

Prior to the events giving rise to this dispute, the solicitations and resulting contracts provided that the transportation single factor rate for unaccompanied baggage did not include bunker fuel surcharges (BSC), air fuel charges (100), port security/congestion surcharges (CON), and/or war risk surcharges (WAR). When these surcharges were actually billed to a TSP by a third party pursuant to regularly filed tariffs with regulatory bodies or

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[1] Code J service is the movement of unaccompanied baggage whereby a TSP provides packing and pickup at origin, surface transportation to a designated Air Mobility Command (AMC) aerial port, surface transportation from a designated aerial port or receipt of property from a theater, and for shipping and consolidation point to the final delivery point. AMC provides origin and destination terminal services and air transportation between aerial ports.

commissions, the TSP was permitted to bill the Government the actual amount of these surcharges provided they were supported by invoices from the third party to the TSP.

On February 24, 2006, SDDC provided clarification for the billing of the surcharges by defining them and stating that the surcharges are not applicable to shipments in Codes T, 5, and J.

On March 25, 2006, SDDC issued further clarification, stating that the February 24 clarification was intended to "provide guidance as to how TSPs should have always billed and should continue to bill the listed surcharge." SDDC also stated, among other things, that COF surcharges are applicable to shipments in Codes T, 5, and J. SDDC further provided that, if charges had been previously denied that are within the clarification, the TSPs could rebill for those charges, explaining the reason for the rebilling.

On April 3, 2006, following a post-payment audit, GSA issued a NOC as to claimant's bills for WAR, CON, and COF surcharges based upon the information SDDC provided on February 24.

On April 11, 2006, SDDC issued yet another clarification, providing that both COF and CON surcharges are applicable to shipments in Codes T, 5, and J. This clarification repeated the advice that TSPs could rebill if the surcharges had been denied in the past.

According to all of SDDC's clarifications, WAR surcharges were always inapplicable to the shipments in question.

By letter dated April 26, 2006, claimant protested the April 3, 2006 NOC, based upon SDDC's April 11, 2006, clarification that CON and COF surcharges are applicable to Codes T, 5, and J shipments.

The Audit Division responded to the protest by an undated letter stating that it would treat the overcharges in accordance with the April 11, 2006 clarification. GSA would rescind the notice of overcharges, provided AWF rebilled them with documentation showing that the surcharges were billed to AWF by port agents pursuant to tariffs regularly filed with regulatory bodies or commissions.

AWF did not document or rebill the alleged CON/COF surcharges. It contends that port agents do not file tariffs with regulatory bodies or commissions and, therefore, that contract requirement is a legal nullity.

On July 27, 2007, the Audit Division issued a settlement certificate sustaining the NOC for the reason that it was correct as issued.

AWF then submitted a claim to the Board stating much of the foregoing background and asking the Board to reverse the Audit Division's decision reflected in the settlement certificate, find that surcharges for COF and CON surcharges are applicable to the Code J shipments, and direct GSA to repay the $32,338.91 that GSA has offset against other payments due claimant.

In response GSA has requested that the Board deny the claim. GSA states that claimant had billed at least some of the surcharges in dispute as WAR surcharges and that the various clarifications issued by SDDC did not apply WAR surcharges to the disputed shipments. Further, GSA states that, if the sums offset by GSA are truly CON/COF surcharges, claimant is entitled to recover them but must rebill them with documentation as stated in the response to AWF's protest and as required by the contracts. However, GSA's more studied position is that the surcharges in question are not the type of surcharges described in SDDC's various clarifications. According to GSA those surcharges apply to shipments through commercial ports. GSA states that the amounts in dispute are charges from claimant's subcontractors, who are not "port agents" as that term is understood in the context of the contract; that the charges were not made pursuant to regularly filed tariffs; and that the ports in question are military aerial ports where the TSPs and their agents have no responsibility for the port security and/or port congestion services for which claimant has billed. GSA states that the charges at issue are actually for waiting time at the ports and that there is a contract item under which AWF should bill for that time.

Discussion

The question presented is whether the Board possesses authority to review the propriety of the Audit Division's settlement action and AWF's resulting claim on bases other than those stated by GSA in the settlement certificate. We look to the applicable statutory and regulatory scheme for the answer.

The statutory procedures for payment to TSPs for transportation services are set forth in 31 U.S.C. § 3726 (2000). Each agency that receives a bill from a TSP is required to verify its correctness using a prepayment audit unless the GSA Administrator exempts the bills. *Id*. § 3726(a). The Administrator may conduct pre-or post-payment audits of transportation bills. *Id*. § 3726(b). The Administrator is to adjudicate claims that cannot be resolved by the agency procuring the transportation services or by the TSP presenting the bill. *Id.* § 3726(c)(1). Such a claim must be presented to the GSA Administrator by not later than three years (excluding time of war) after the latest of the date the claim accrued; the

date payment for the transportation was made; the date a refund for overpayment is made; or the date a deduction is made by the Government from an amount subsequently due the TSP. *Id*. § 3726(c)(2). The Administrator may deduct overcharges from payments subsequently due a TSP not later three years (excluding time of war) after the time an overpayment was made. *Id.* § 3726(d). A TSP may request the Administrator to review GSA's action if the request is received within a specified time. *Id*. § 3726(i)(1). The Administrator has delegated this review function to the Board.

The regulations that implement the foregoing statutory provisions provide that when the Audit Division determines that a TSP has overcharged the Government, it is to issue a NOC

> stating that a TSP owes a debt to the agency. This notice states the amount paid, the basis for the proper charge for the document reference number, and cites applicable tariff or tender along with other data relied on to support the overcharge.

41 CFR 102-118.435(f) (2006). If a TSP disputes a NOC issued as a result of a post-payment audit, it may ask the Audit Division to reconsider that notice. *Id*. 1-102-118.600. According to AWF, GSA allows sixty days for a TSP to seek reconsideration of a NOC before GSA undertakes an offset action to collect the debt. If the Audit Division disallows a claim, it issues a settlement certificate to the TSP explaining the reason for the disallowance. *Id*. 102-118.620. A TSP that desires a review of the "settlement action" may request a review with this Board or file a claim with the United States Court of Federal Claims. *Id*. 102-118.650. There is no right of appeal from the Board's decision. If the TSP is dissatisfied with the Board's decision, the TSP may independently pursue a legal remedy through the courts. *Id*. 102-118.660.

AWF argues that the foregoing statutory and regulatory scheme limits this Board's jurisdiction to a review of the Audit Division's settlement action solely on the basis asserted by the Audit Division in the settlement certificate.[2] According to AWF, if the Board

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[2] Counsel for AWF has filed twelve additional requests for review from other carriers. According to counsel, these additional requests are based on the identical facts and issues presented by this matter. Counsel also states that the issues involved in the instant matter reflect an industry-wide problem involving several million dollars. Counsel states that the Audit Division has refused to issue a settlement certificate in these other matters. Consequently, with the Board's permission, counsel filed these additional matters despite the fact that a settlement certificate has not been issued.

considers bases for the Audit Division's settlement action other than those stated in the settlement certificate, AWF will be deprived of the procedural due process provided by the regulations and improperly make the Board the initial decision-maker as to whether a charge is an overcharge. AWF also claims that it would deprive AWF of its right to select the forum, *i.e.* the Board or the Court of Federal Claims, in which to challenge a settlement action.

GSA argues in favor of a much broader role for the Board. It contends that the statutory authority, the delegation of authority from the Administrator to the Board, and the implementing regulations, all authorize the Board to review AWF's claim based upon all the relevant facts and law, not just the Audit Division's stated reasons for disallowing charges.

GSA points to the Board's Rules in support of its position. Specifically GSA points to Rule 301, which reflects the delegation of authority from the Administrator to "review an action taken by the Audit Division" and provides:

> Type of claim; review of claim. These procedures are applicable to review of claims made by a carrier or freight forwarder pursuant to 31 U.S.C. 3726(i)(1). The Board will issue the final agency decision on a claim based upon the information submitted by the claimant, the Audit Division, and the department or agency (the agency) for which services were provided. The burden is on the claimant to establish the timeliness of its claim, the liability of the agency, and the claimant's right to payment.

GSA also relies upon Rule 303, which provides that the Government's response to a claim should include a simple, concise, direct statement of the response; citations to applicable statutes, regulations, and cases, and "any additional information deemed necessary to the Board's review of the claim." According to GSA, these provisions reflect the Board's authority to review an Audit Division settlement action in light of any reason the Government might raise to the Board.

A primary reason for administrative remedies is to allow an agency to perform functions within its special competence; *i.e.* to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies. *Cf.*, *McKart v. U.S.,* 395 U.S. 185, 193-95 (1969). Here, the NOC is a claim by the Government that AWF overcharged the Government by a specific amount. AWF's claim to the Board is the flip side of the Government's claim. The Board's decision is the final remedy available in the administrative process of deciding the propriety of the assessment of overcharges. To confine the Board's review of the claim to the reason stated in the settlement certificate would

unnecessarily constrain the administrative process and would not comport with our understanding of the governing regulations.

The applicable regulatory provisions speak in broad terms of the Board conducting a review of the freight forwarder's "claim." Therefore, we base our analysis of the scope of our review authority by considering the meaning of the word "claim."

Based upon the record presently before us, we do not find any definition of the word claim as it is used in 41 CFR 102-118.650 or the Board's transportation rate case rules. Because the word "claim" has no one meaning in the law, *Johns-Manville Corp. v United States*, 855 F.2d 1556, 1560 (Fed. Cir. 1988), we look to its use in other similar circumstances to determine its meaning. The word claim is of great significance to the jurisdiction conferred upon the boards of contract appeals by the Contract Disputes Act (CDA). 41 USC §§ 601-613. We analogize the word "claim" in this situation to the way that word is understood in the context of the CDA. In both instances we are considering claims arising under Federal Government contracts. To invoke the jurisdiction of the Board or the Court of Federal Claims under the CDA, a contractor must have submitted a claim to the contracting officer for a final decision. In some cases, the Government moves to dismiss an appeal or court action because the contractor has asserted a claim before the Board or the Court that was not included in its claim to the contracting officer. In *Scott Timber Co. v. United States*, 333 F.3d 1358 (Fed. Cir. 2003), the Court of Appeals for the Federal Circuit defined a claim within the meaning of the CDA:

> An action brought before the Court of Federal Claims under the CDA must be 'based on the same claim previously presented to and denied by the contracting officer.' This standard, however, does not require rigid adherence to the exact language or structure of the original administrative CDA claim. The Court of Federal Claims correctly found that it had jurisdiction over Scott's claims in this case because they arise from the same operative facts, claim essentially the same relief, and merely assert different legal theories for recovery. . . . All that is required is that the contractor submit in writing to the contracting officer a clear and unequivocal statement that gives the contracting officer adequate notice of the basis and amount of the claim.'

Id. at 1365 (citations omitted); accord, *Lockheed Martin Aircraft Center*, ASBCA 55164, 07-1 BCA ¶ 33,472.

The "operative facts" analysis has been applied in another context involving claims against the Government. By 28 U.S.C. § 1500, Congress provided:

> The United States Court of Federal Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff . . . has pending in any other court any suit or process against the United States . . . .

Id. For the purpose of applying that statute, the test for whether the same claim is pending in two courts is whether the two claims are based upon the same operative facts. That different legal theories may be invoked in the different fora is not relevant. *Keene Corp. v. United States*, 508 U.S. 200, 210-14. (1993); *Johns-Manville Corp. v. United States*, 855 F.2d at 1562-63 (Fed. Cir. 1988).

Here, the operative facts are that the Audit Division believes certain of claimant's specific billings are overcharges according to the terms of the contracts. By its claim to the Board, AWF seeks to recoup the same funds assessed by the Audit Division. The essential nature of this claim is not altered merely because the Audit Division has relied, at the Board, upon different contract provisions to support its assessment of overcharges than the provisions stated in the settlement certificate.

Contrary to AWF's concerns, we do not believe the scope of our review will deprive it of the due process contemplated by the regulations. The offsets have already been taken. Nothing has been brought to our attention or disclosed by our research that would prohibit GSA from issuing a new settlement certificate to assert the grounds it now relies upon for the offsets. Although AWF did not have the opportunity, prior to the offset, to air its opposition to the Audit Division's newly stated justifications for the assessment of overcharges, the administrative process is not over. AWF may raise any such opposition to the Board. In this regard, if AWF needs to take discovery or call witness to testify, either orally or by way of declaration or affidavit, to oppose the Audit Division's new theories, nothing in the Board's Rules would prohibit such proceedings. Moreover, if AWF is not satisfied with the Board's decision on the merits of AWF's claim, it may commence an action in court.

The merits of the matter before us involve a question of contract interpretation. By allowing the administrative process to move forward with consideration of all the contract provisions relative to the overcharges, the administrative process is enhanced. AWF will receive due process and may possibly avoid the time and expense of a costly litigation of these issues in court.

Decision

We find that the delegation of authority from the Administrator to the Board to review the action of the Audit Division and AWF's claim is broad enough to include the issues raised in the Government's response to AWF's claim.

Order

The Government's submission is not adequate to permit a cogent review of the issues. Therefore, pursuant to Rule 305(c), we direct the Government to supplement its response by submitting by **January 18, 2008**:

A complete, legible copy of all rate solicitations and responding rate tenders in effect when the charges to AWF that are involved in this dispute were incurred by AWF;

A copy of all GBLs to the extent that they contain any terms that apply to this dispute;

A legal brief supported by citation to legal precedent and probative evidence addressing:

1) the factual and legal bases for the Audit Division's belief that the charges by AWF are not charges by an ocean freight TSP, an air TSP, or a port agent;

2) a more thorough discussion of the factual and legal bases for the Audit Division's belief that the "agents" referenced by AWF are not "port agents" as that term is used in the contract documents and understood by the industry; and

3) a response to AWF's statement in footnote 2 of its claim that no regulatory body or commission requires the filing of tariffs by port agents.

Claimant shall submit its reply to GSA's response by **February 15, 2008**.

Should the parties have any questions they should contact the Board to schedule a conference.

EILEEN P. FENNESSY
Board Judge