

RR & VO, L.L.C.,)	AGBCA No. 99-154-2
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Appellant)	
)	
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DECISION OF THE BOARD OF CONTRACT APPEALS

 July 1, 1999

OPINION BY ADMINISTRATIVE JUDGE JOSEPH A. VERGILIO

On April 6, 1999, RR & VO, L.L.C. (the carrier) filed this appeal involving a wholly owned Government corporation, the U. S. Department of Agriculture (USDA), Commodity Credit Corporation (CCC or Government). By contract with the shipper, the carrier was to transport cargo to Odessa, Ukraine; the CCC would pay transportation costs. The carrier guaranteed “the commencement of the arrival of the cargo at the final destination within 40 days after completion of loading.” The carrier arrived in Odessa with the cargo on the eighteenth day after loading--within the 40-day period. The shipper, who was responsible for customs clearances, had not obtained clearances at the time of arrival, such that the cargo could not be unladed from the vessel. On the twenty-seventh day after loading, the carrier departed for another port, with the cargo. On the thirty-fifth day after loading, the shipper obtained customs clearances, but the carrier did not again deliver the cargo until 57 days after loading. The CCC concluded that the carrier was late in its delivery of the cargo and that the delay was not excusable. The CCC reasoned that the carrier was obligated to deliver within the 40-day period, the shipper had obtained clearances for customs within that period,

and the carrier should have remained in port with the cargo, or acted otherwise so as, to effectuate delivery within the 40-day period. Because delivery occurred outside of that period, the CCC assessed \$27,267.10 for delivery delay, said to represent the contractually prescribed assessment for 17 days of unexcusable delay. The carrier maintains that it satisfied the terms of the contract, such that the assessment of delay damages was erroneous.

The Board has jurisdiction over this timely-filed appeal pursuant to the Contract Disputes Act of 1978, as amended, 41 U.S.C. §§ 601-613 (CDA). The carrier has elected the small claims (expedited) procedures, such that this is a decision by one judge, which is final and conclusive and shall not be set aside except in cases of fraud. The decision shall have no value as precedent. 41 U.S.C. § 608; Rule 12. The parties have submitted the case pursuant to Rule 11, without a hearing. In May and June 1999, the Board received briefs and a reply.

The carrier satisfied the terms of its contract--the cargo arrived in Odessa within 40 days after loading was completed. Moreover, the carrier waited a reasonable period of time to unload the cargo. The carrier did not assume the risk that it would be unable to unload the cargo because documentation for which it was not responsible was not complete. The assessment of damages was improper. The Board grants the appeal. The carrier is entitled to receive payment of \$27,267.10, plus interest pursuant to the CDA, 41 U.S.C. § 611.

FINDINGS OF FACT

1. On August 6, 1996, the CCC and CitiHope International entered into a contract (amending an agreement dated December 28, 1995) under which the Government would pay ocean transportation and other costs associated with providing commodities to CitiHope for sale in the Ukraine under the Food for Progress Act, 7 U.S.C. § 1736o (Exhibit A) (all exhibits are in the appeal file). Under the contract, CitiHope “will arrange and coordinate all transport, bagging and handling at the port(s) of discharge and points of entry in Ukraine to respective inland storage or distribution sites in Ukraine” (Exhibit A at 11 (¶ 7)).

2. CitiHope, through its agent, obtained bids for the transportation of the cargo in question, with the discharge port identified as Odessa, Ukraine (Exhibit B). The invitation specified that “offers must be basis full berth terms, all inclusive, no demurrage, no despatch, no detention on vessels/containers/trailers/trucks/tractors both ends.” The terms specified that the “named vessel(s) must be provided with ETA [estimated time of arrival] load port(s) as well as ETA discharge port.” Also, the terms required that the carrier guarantee “the commencement of the arrival of the cargo at the final destination within 40 days after completion of loading of this cargo (B/L [bill of lading] date). Shipper will impose a delivery-delay assessment penalty of US \$1.00 per mt [metric ton] per day, or pro-rata, for each day used in excess of the maximum days allowed.” (Exhibit B at 23 (¶¶ 5, 8, 9).)

3. A “booking note” (or contract) was made as of September 30, 1996, between CitiHope (as the shipper) and RR & VO, L.L.C. (as the carrier). The terms include a provision fully incorporating

the underlying invitation for bids referenced in Finding of Fact (FF) 2 (Exhibit C at 25, 30 (¶ 40)). The terms specify a cargo availability date of November 20, 1996 (Exhibit C at 25 (¶ 6)). Additionally, the “carrier agrees that unless it receives prior written permission from the shipper to the contrary, the cargo will be discharged only at its scheduled destination port on the outbound phase of the voyage as advertised” (Exhibit C at 27 (¶ 20)). The agreement also specifies that, upon the submission of specific documents, 100 percent of the gross freight earned is payable upon confirmation of vessel arrival at ultimate discharge port, by USDA (Exhibit C at 28 (¶ 26)). The booking note does not specify the estimated time of arrival at the Odessa port (Exhibit C).

4. While the carrier was available to load the cargo by November 20, the cargo was not yet available, and was not fully available until November 27. The cargo was loaded by November 28. (Exhibits 4, 15 at 1-2 (¶ 4).) At the latest, as of December 10, the carrier had informed CitiHope that December 16 was the estimated date for arrival in Odessa (Exhibits K (¶ 4), 5).

5. The vessel arrived in port at Odessa on December 16. Although the carrier was prepared to unlade the cargo in question, the cargo could not be off-loaded. The shipper had not completed necessary tasks; the cargo had not cleared customs. On December 25, the vessel sailed for its next destination with the cargo which could not be discharged because it had not cleared customs; there was no assurance as to when delivery could occur. (Exhibits 15 at 2-4 (¶¶ 6, 8-11), 17, P at 80-81.)

6. On January 2, 1997, the shipper obtained clearances from customs, such that the cargo could be discharged. On January 24 a different vessel returned the cargo to Odessa; by the end of the first week of February the cargo was unladed (Exhibit P at 80-81.) The record demonstrates no inexcusable delay by the carrier throughout this period from January 2 through 24 (Exhibits L at 69, P at 81-82).

7. By decision dated January 6, 1999, the CCC assessed \$27,267.10 for a delay in the delivery of the cargo in question. The CCC recognized that although

the carrier may have agreed to commence delivery at a certain time, the carrier should not be held liable for a breach of that obligation if the failure to perform is due to a breach of an obligation by the other party to the contract. Here, the shipper/consignee has the obligation to obtain any necessary government permits to enter the country. If an omission by the consignees made the carrier’s performance impossible, the carrier should not be liable. However, the carrier’s breach should not be excused if they obtained clearance in time to meet the discharge deadline and the carrier failed to perform because the [vessel] had sailed to [another port].

(Exhibit P at 81.) The CCC concluded that because customs clearance was complete as of January 2, within the 40-day period for the commencement of delivery (FF 2, 4), the carrier was responsible for the delay in delivery for the period between January 7 (40 days after loading was complete) and January 24 (the day delivery commenced).

8. On April 6, 1999, the carrier both filed this appeal with the Board and elected to utilize small claims (expedited) procedures. The carrier maintains that it complied with the terms of its agreement, such that the assessment of damages was erroneous. It seeks payment of the \$27,267.10 withheld, plus interest, fees and costs.¹

DISCUSSION

The carrier satisfied its contractual obligations to avoid the assessment of delay damages. The carrier had guaranteed “the commencement of the arrival of the cargo at the final destination within 40 days after completion of loading” the cargo (FF 2). The carrier arrived in Odessa, ready to discharge the cargo, within the 40-day period. The cargo could not be discharged; the shipper had failed to obtain customs clearances. (FF 4). The carrier remained in port for a reasonable period. The assessment is inconsistent with the clause.

The Government interprets the contract as requiring this carrier to have remained in port until the shipper had satisfied its obligations to obtain customs clearances, if those clearances were ultimately obtained within the 40-day period after loading. The Government has not demonstrated that its interpretation is faithful to the contract or is consistent with custom and trade practice. Neither the Government nor the shipper objected to December 16 as the estimated time of arrival of the cargo at Odessa (FF 2, 4). The contract does not state that the carrier could not arrive in port before a given date. The contract specifies that gross freight is payable upon confirmation of vessel arrival at the discharge port, not upon unloading (FF 3). This suggests, consistent with the reference to “arrival” in the provision for a delivery-delay damages assessment (FF 2), that the triggering factor is not the unloading of the cargo, even if unloading remains a contractual obligation of the carrier.

Further, the contract envisions that a vessel is not dedicated to the cargo in question and that a vessel will make various stops to discharge cargo (FF 3). A carrier could not efficiently plan to move cargo, should it be obligated to remain in each port (for up to 40 days after loading cargo) while a shipper attempted to satisfy its contractual obligations and obtain clearances.

DECISION

The Board grants the appeal, the carrier is entitled to receive payment of \$27,267.10, plus interest pursuant to the CDA, 41 U.S.C. § 611.

JOSEPH A. VERGILIO

Administrative Judge

Issued at Washington, D.C.

July 1, 1999

¹ The request for fees and costs is readily disposed of as prematurely submitted. Rule 35.