ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
A-1 Horton's Moving Service, Inc.	)	ASBCA No. 57750
	)	
Under Contract No. 000000-00-0-0000	)	

APPEARANCES FOR THE APPELLANT: Matthew W. Osborne, Esq.
Mark G. Jackson, Esq.
Ball Janik LLP
Seattle, WA

APPEARANCES FOR THE GOVERNMENT: Raymond M. Saunders, Esq.
Army Chief Trial Attorney
MAJ Andrew J. Smith, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE GRANT ON THE GOVERNMENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION

In this appeal, A-1 Horton's Moving Service, Inc. (A-1 Horton's) asks for lost profits for alleged breach of several transportation services contracts due to the government's failure to order required transportation services from A-1 Horton's. The government moves to dismiss for lack of subject matter jurisdiction, asserting that the claim relates to transportation services contracts and is governed by the payment and review procedures of the Transportation Act, 31 U.S.C. § 3726, not the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109. A-1 Horton's opposes the government's motion, arguing that the Board has jurisdiction because breach damages for nonperformance are distinguishable from disputed charges for transportation services that have actually been provided. As set forth below, we conclude that we have jurisdiction under the CDA and deny the government's motion.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. The contracts at issue in this appeal were entered into between A-1 Horton's and the Army's Surface Deployment and Distribution Command (SDDC), for transportation services for shipping household goods and vehicles of Department of Defense (DoD) employees during the period of 1 January 2004 through 31 December 2008. These contracts were formed by SDDC issuing annual rate solicitations, and A-1 Horton's responding to those solicitations by filing rates which were accepted and certified by the government. (App. Proposed Facts (APF) ¶¶ 2, 4; compl. ¶ 11; gov't reply br. at 1) The contracts were not awarded pursuant to the FAR, but were governed

by the Defense Transportation Regulation (DTR) 4500.9-R, Part IV, which established criteria for shipping personal property for DoD (Gov't Proposed Findings of Fact (GPFF) ¶ 2).

2. The contracts provided that shipments would be offered to low rate responsible carriers whose tenders were responsive and most advantageous to the government (R4, tab 1 at 13, item 106).[1] In determining which carrier to select for a specific shipment, the government was to use a best value approach based on cost, equality of traffic distribution, and certain performance and service factors. These performance and service factors included percentage of on-time pickup and delivery, percentage of lost or damaged cargo, number of claims, and carrier availability, carrier ability to respond, carrier ability to meet the routing requirement, and carrier ability to provide in-transit visibility. (Gov't mot., ex. 1 at 5, 7-8)

3. The contracts contained a number of provisions concerning billing and payment for shipments made. The transportation service providers were to bill the government for services rendered using the Standard Form (SF) 1113, "Public Voucher for Transportation Charges" (R4, tab 5 at 22, ¶ 17). Claims for additional transportation charges not originally submitted were to be made to the agency which paid the original bill, with disputes to be addressed by the General Services Administration (GSA) (R4, tab 1 at 19, item 201j). The contracts identified the three-year statute of limitations for claims for recovery of shipping charges for delivery of property, payment for transportation for property delivered, refund of excess charges, and offsets of excess charges (R4, tab 1 at 22, item 304). All of these sections concern claims for shipments actually made.

4. The Ft. McPherson (Georgia) Transportation Office is responsible for the timely movement of personal property in 53 counties in Georgia and 44 counties in Tennessee (GPFF ¶ 3). Beginning in the fall of 2008, the U.S. Army Audit Agency (AAA) began an audit to look into allegations that had surfaced earlier concerning, among other things, unequal distribution of work to carriers by the Ft. McPherson Transportation Office. On 14 August 2009, the AAA issued its report, confirming that, as to the November 2005 through October 2008 time frame, government transportation personnel in the Ft. McPherson Transportation Office did not properly select carriers for shipments or adequately document the basis for carrier selection. (Gov't mot., ex. 1 at 2, 4, 7-8)

5. In early March 2009, A-1 Horton's filed an initial claim with SDDC, on which no contracting officer's final decision was issued, and on 2 February 2011, A-1 Horton's filed a supplemental breach claim with SDDC. A-1 Horton's did receive shipments

[1] Rule 4 file cites are to the rate solicitation in effect for 1 November 2003, though the same or similar provisions appear in all 5 rate solicitations.

under each of the five annual contracts, but contends that it should have received more shipments than it did, and that it lost profits in the amount of $594,890 as a result of the government's breach. (R4, tab 7; supp. R4, tab 8; compl. ¶¶ 9, 14) On 2 May 2011, SDDC responded, stating that the claim was for transportation-related services and thus was governed by 31 U.S.C. § 3726, not the CDA (APF ¶¶ 8, 9; supp. R4, tab 9). On 25 August 2011, A-1 Horton's appealed to the Board, treating SDDC's response and lack of a CDA final decision as a deemed denial of its claim.

DECISION

As summarized above, the government moves to dismiss for lack of subject matter jurisdiction on the basis that A-1 Horton's breach claim pertains to non-FAR-based transportation services contracts and is governed by the Transportation Act not the CDA. A-1 Horton's opposes the motion, arguing the Transportation Act payment and review scheme governs disputes about money or charges owed when transportation services have actually been provided, but does not govern a breach claim such as this one when no services were provided and there is no bill to audit or review (app. opp'n at 5-8; app. sur-reply at 1-3, *passim*). For the reasons set forth below, we agree with appellant and deny the government's motion.

The Transportation Act is part of the Interstate Commerce Act (ICA), and, among other things, sets forth a specific process for billing and paying for transportation provided to the government by common carriers, and for review of those payments. 31 U.S.C. § 3726 (Section 3726). The process outlined in Section 3726, called "Payment for transportation," begins with the carrier submitting a bill to the agency, and the agency conducting a prepayment audit before paying approved charges. 31 U.S.C. § 3726(a)(1). Carriers objecting to the payment amount can seek review from the Audit Division of GSA, and, from there, review by either the Civilian Board of Contract Appeals (CBCA) or the Court of Federal Claims. 31 U.S.C. § 3726(i); 41 C.F.R. § 102-118.650. In contrast, the CDA provides us with jurisdiction over claims concerning express or implied contracts, including, among other things, contracts for the procurement of services. The issue for resolution here is whether A-1 Horton's breach claim, which flows from its non-FAR-based transportation services contracts, is governed by the ICA scheme or by the CDA.

Both parties assert that Section 3726 supports their separate positions as to jurisdiction; however, we agree with A-1 Horton's that Section 3726, by its own terms, applies more narrowly to claims for shipments, not to damages for breach of contract. The title alone points to payment for transportation provided, rather than some broader remedial scheme, and the rest of the section flows similarly from the title. Section 3726 establishes the process for when an agency "receives a bill" from a carrier for "transporting...property," and the requirement that the agency verify the bill's correctness via a prepayment audit using regulations prescribed by GSA. 31 U.S.C. § 3726(a)(1); *see*

also 41 C.F.R. § 102-118.490. The purpose of this process thus is to review the validity of the amount claimed on the bill for the services provided, and ensure proper payment, something very different from un-auditable matters such as whether a transportation contract was breached or the type of damages recoverable.

The government argues that the reference in Section 3726 to adjudication of "transportation claims," a term that is not defined, is broad enough to encompass breach of contract, and thus A-1 Horton's claim should properly fall under the review scheme of Section 3726 and the implementing regulations. However, the term "transportation claim" needs to be read in context with the rest of the statute, which refer to "bills" presented by carriers, transportation of property, payments made or offsets taken on such bills, and the like—all of which link the "transportation claim" to specific shipments provided and being billed for. The audit function inherently focuses on accuracy of charges billed and payments made, not entitlement to breach damages. We conclude that Section 3726 governs the specifics of payment for shipments actually provided, and does not deprive us of CDA jurisdiction over a breach claim.

Our conclusion—that Section 3726 governs disputes concerning transportation charges for services provided—is consistent with the position taken by the Federal Circuit in *Inter-Coastal Xpress, Inc. v. United States*, 296 F.3d 1357 (Fed. Cir. 2002). Both parties believe *Inter-Coastal Xpress* supports their own position, but before analyzing that decision, we need to look at the predecessor decision of *Dalton v. Sherwood Van Lines, Inc.*, 50 F.3d 1014 (Fed. Cir. 1995), which sets a foundation necessary to understand the later case. *Dalton* concerned damage to property shipped pursuant to an individual government bill of lading (GBL). The court held that the property damage claim was properly a matter for the ICA claims process, not reviewable at the ASBCA under the CDA. The court found that the process established in Section 3726 was not superseded by the CDA, noting that the ICA procedure was designed for review of "simple transactions" warranting informal administrative procedures. The court specifically left open the question of whether the same result would be true if, instead of individual "spot movement" GBL contracts, the claims arose in connection with GBLs issued under a long-term tender agreement. *Id.* at 1020-21.

That expanded question—jurisdiction of transportation claims arising under a long-term tender agreement—later surfaced in *Inter-Coastal Xpress,* a key decision for our analysis here. In *Inter-Coastal Xpress*, the parties disputed the carrier's claim for "holdover" charges—fees for the carrier to keep shipped goods overnight until delivery the next day. Specifically, the case concerned whether the holdover charges that the government was obligated to pay pursuant to the tender agreement included only unscheduled overnight holdover charges, or both scheduled and unscheduled holdover charges. The Federal Circuit affirmed the lower court's decision that the claims were subject to Section 3726, and not the CDA (and consequently were time-barred because of the ICA's shorter statute of limitations). The court was not concerned that the contracts

in question were long-term tender agreements rather than "spot movement" GBL transactions; both were contracts for shipment of property, and payment disputes for such shipments fell under Section 3726. *Inter-Coastal Xpress*, 296 F.3d at 1366 ("The statute draws no distinction between transportation services governed by a Government Bill of Lading on the one hand and a long-term contract on the other."). Consequently, the court held that, "if the action involves the *amount of money owed* on a contract for transportation services," the transportation-specific provisions of the ICA applied, not the generalized provisions of the CDA. *Id.* at 1372 (emphasis added).

The *Inter-Coastal Xpress* decision contains some broad language that the government relies on for its view that even breach claims concerning transportation services contracts are subject to the ICA scheme. For example, the court referred to the ICA applying "broadly in the specific realm of contracts for transportation services," and the CDA applying to "government contracts generally." *Id.* at 1371. The government interprets this language to mean that A-1 Horton's breach claim should be under the ICA scheme because the breach claim derives from the "realm" of contracts for transportation services. However, we interpret the language differently. The crux of the decision in *Inter-Coastal Xpress* was to clearly reject any distinction that the ICA scheme depended on whether the claim stemmed from a single "spot movement" GBL or claims from GBLs issued under long-term tender agreements. Rather, the inquiry should focus on whether the dispute concerned "money owed" or "charges due" on the shipments; if so, the ICA framework applied. The court's holding is tied to this particularized situation.

The government also points to the court's statement that there needs to be a "clear line between government contracts generally and government transportation contracts specifically," as support for the view that the ICA scheme governs. However, the court's desire for a "clear line," so claimants could be spared "jurisdictional guesswork," was linked to the concern that jurisdiction not "bounce back and forth between the two statutes *depending on how one party or the other can best characterize their agreement,*" i.e., based on whether the agreement was characterized as a stand-alone spot movement GBL or a GBL order under a long-term tender arrangement. *Id.* at 1372 (emphasis added). Again, it did not matter to the court whether the contracts were individual or long-term; the ICA scheme governed *as long as* the dispute involved charges or money owed.

It is critical to recognize that *Inter-Coastal Xpress* concerned charges that were part of the terms of the tender agreement and applied to specific shipments; thus they were disputes as to money or charges owed for providing transportation services that were subject to the ICA billing, audit, payment, and review scheme. Such shipment-specific charges, however, are distinct from the general scope of the CDA which gives us broad authority to address contract disputes. *See A-Transport Northwest Co. v. United States,* 27 Fed. Cl. 206, 215 n.6 (1992), *aff'd*, 36 F.3d 1576 (Fed. Cir. 1994)

("[i]ndividual claims, not the tender agreements themselves, are reviewable by the General Services Administration").

More recently, following *Inter-Coastal Xpress*, the Court of Federal Claims found it lacked CDA jurisdiction over disputed bank fee charges contained in a non-FAR-based tender agreement. *Allstar Mayflower, LLC v. United States*, 93 Fed. Cl. 169 (2010). This decision, though not binding on the Board, supports the distinction we draw here. In *Allstar Mayflower*, the court looked at the application of the Transportation Act and the CDA in reviewing whether the claim concerning bank processing fees set forth in the tender agreement was time-barred. The court concluded that it lacked CDA jurisdiction because the claims "[arose] out of" the transportation services contract, and could not exist "but for" a transportation services contract. *Id.* at 171. The parties hotly dispute this "but for" language, but the fact remains that the dispute, although involving bank fees and not shipping fees, was still a dispute about specific charges or money owed when transportation services were actually provided, something squarely within the Federal Circuit's holding in *Inter-Coastal Xpress*.

The government asserts that *Allstar Mayflower* supports its view that A-1 Horton's breach claim is not subject to the CDA, noting that the court wanted to avoid the uncertainty of "endless and metaphysical parsing of the phrase 'transportation service charge.'" However, this language is still linked to "charges...incurred" under the contracts. The court simply stressed that whether the *charge itself* was for transportation, like *Inter-Coastal Xpress* (holdover charges), or for something else related to transportation provided (bank processing fees), both fell under the holding of *Inter-Coastal Xpress* as to disputes about charges incurred. *Id.* at 171. The generalized language in *Allstar Mayflower,* like that of *Inter-Coastal Xpress*, is tied to the specific dispute about the appropriate charges for transportation services actually provided.

We have found no cases directly on point as to whether a breach damage claim for non-performance of a non-FAR-based transportation services contract is covered by the CDA or not, nor have the parties pointed us to any. However, cases have found CDA jurisdiction when the claim related to the tender agreement was broader than specific charges contested on specific shipments. For example, in *Port Arthur Towing Co.*, ASBCA No. 37516, 89-3 BCA ¶ 22,004, we found CDA jurisdiction to address the contractor's requests for stand-by costs when the tender agreement was suspended due to a GAO protest. *Port Arthur Towing,* 89-3 BCA ¶ 22,004 at 110,629 (decision on jurisdiction), appeal denied, 90-2 BCA ¶ 22,857 (decision on merits), *aff'd,* No. 90-1889, 1991 U.S. Dist. LEXIS 9456 (D.D.C. July 9, 1991). Although *Port Arthur* involved an exemption to the ICA for bulk ocean vessel movements, the Board still noted the distinction that the dispute was not over GBLs or the movement of freight, but was about whether the contractor was entitled to payment for making transportation services available which in fact were not used. *Id.* at 110,630; *see also A-Transport*, 27 Fed. Cl. at 216 (favorably noting the *Port Arthur* distinction when addressing breach of contract

for re-soliciting a tender agreement); *Gosselin World Wide Moving NV*, ASBCA No. 55365, 06-2 BCA ¶ 33,428 at 165,733 (the Board took jurisdiction over a Prompt Payment Act (PPA) dispute because of statutory language of the PPA and because dispute did not concern *performance* of the transportation service contract). In contrast, the Board has declined CDA jurisdiction when the claim was for transportation services actually provided, even if it was unclear under what authority they were provided. *AIT Worldwide Logistics, Inc.*, ASBCA No. 54763, 06-1 BCA ¶ 33,267 at 164,860.

The distinction concerning claims for transportation services *not* provided is also found in the commercial carrier case cited by A-1 Horton's, *Steve Marchionda & Associates v. Weyerhauser Co.*, 11 F. Supp. 2d 268 (W.D.N.Y. 1998). In *Weyerhauser*, the carrier claimed liquidated damages for the shipper's failure to order the minimum load. The district court found that the shipper's claim was not governed by the ICA, because the ICA applied to services "provided by the carrier," and the claim was for liquidated damages for services *not* provided. *Id.* at 270-71. Although we agree with the government that the case is not perfectly on point, the decision certainly parallels our analysis here as to the limits of the ICA audit and review scheme.

The tender agreements here are express contracts (the parties do not contest this), and the breach claim is not the sort of transportation claim covered by Section 3726, by its implementing regulations, or by the facts and the specific holding of *Inter-Coastal Xpress*. Thus, we have jurisdiction over A-1 Horton's claim for breach of contract for failure to order transportation services.

CONCLUSION

As set forth above, we have jurisdiction under the CDA and thus deny the government's motion to dismiss.

Dated: 6 April 2012

Elizabeth M. Grant

ELIZABETH M. GRANT
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

MARK N. STEMPLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 57750, Appeal of A-1 Horton's Moving Service, Inc., rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals