



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: February 28, 2008

CBCA 697

GREAT BEAR TRANSPORT LLC,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Kirk Huseby, President of Great Bear Transport LLC, Hamilton, MT, appearing for Appellant.

Jennifer T. Newbold, Office of the General Counsel, Department of Agriculture, Missoula, MT, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **DeGRAFF**, and **DRUMMOND**.

DRUMMOND, Board Judge.

This appeal arose under Emergency Equipment Rental Agreement AG-0351-06-223 (EERA or agreement) between Great Bear Transport LLC (appellant or GBT) and the Department of Agriculture, Forest Service (FS or Government). The agreement, signed in June 2006, was for the possible future rental of four separately listed vehicles without drivers. Only the three 4x4 pickup trucks, a 2005 Chevy truck referred to as E-357 and two 2006 Chevy trucks referred to as E-358 and E-359 (collectively trucks or equipment), are at

issue in this proceeding. Appellant submitted three claims to the contracting officer totaling \$3216.42 for alleged damages to the trucks. The contracting officer (CO) granted \$807.41 and denied the balance of appellant's claims. Appellant filed a timely appeal pursuant to the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, which gives the Board jurisdiction. At the election of the parties, this appeal is being decided on the written record.¹

Findings of Fact

1. In June 2006, the parties entered into this EERA, which, *inter alia*, provided for the possible future rental, without drivers, of GBT's three trucks referred to as E-357, E-358, and E-359 for use by the FS in fighting fires. The rate specified in the agreement for each truck was \$.33 per mile with a guarantee of at least \$64 per day. Appeal File, Exhibits 3, 7.²

2. The agreement contained Federal General Provisions to Emergency Rental Agreement Form OF-294. One pertinent general provision provided, in part:

Equipment furnished under this agreement may be operated and subjected to extreme environmental and/or strenuous operating conditions which could include but is not limited to unimproved roads, steep, rocky, hilly terrain, dust, heat, and smokey conditions. As a result, by entering into this agreement, the contractor agrees that what is considered wear and tear under this agreement is in excess of what the equipment is subjected to under normal operations and is reflected in the rates paid for the equipment.

Appeal File, Exhibit 7.

3. The agreement also contained Clause 9, Loss, Damage, or Destruction, which, *inter alia*, provided:

¹ The record consist of the appeal file and the declaration filed with the Government's brief. Appellant did not submit a brief or additional documents.

² Rule 4(b) of the Board's Rules of Procedures states, *inter alia*, that "[t]he numbering for appeal file exhibits shall be consecutive, in whole Arabic numerals (no letters . . .)." Notwithstanding this unambiguous requirement, the Rule 4 file submitted by the Government contained exhibits tabbed A-H. In accordance with Rule 4(b) of the Board's Rules of Procedures, the Board, *sua sponte*, renumbered exhibits A-H as exhibits 1-8.

(a) For equipment furnished under this EERA without operator, the Government will assume liability for any loss, damage or destruction of such equipment, except that no reimbursement will be made for loss, damage or destruction due to (1) ordinary wear or tear, (2) mechanical failure, or (3) the fault or negligence of the Contractor or the Contractor's agents or employees or Government owned and operated equipment.

Appeal File, Exhibit 7.

4. The equipment rented under the EERA, GBT's three trucks, was dispatched for use at the Derby Fire in the Gallatin National Forest in Bozeman, Montana, on September 5, 2006. Appeal File, Exhibit 3. GBT's trucks were used for transportation before being released from service on September 19, 2006. *Id.* The record does not contain any documentary evidence suggesting that the operations at the Derby Fire were unusual.

5. Big Sky Muffler & Auto Body (Big Sky) estimated the cost of repairing the three trucks. Big Sky made separate estimates for repairing damages which had been incurred prior to the FS's use of the trucks for the Derby Fire ("old damages") and repairing damages which were incurred during that use ("new damages"). On September 25, 2006, Big Sky estimated the cost of repairing old damages to truck E-357 at \$3722.20, and on October 4, 2006, Big Sky estimated the cost of repairing new damages to that truck at \$1284.02. Appeal File, Exhibits 2, 8. On October 4, 2006, Big Sky estimated the cost of repairing old damages to truck E-358 at \$6338 and the cost of repairing new damages to that truck at \$1346.55. *Id.* That same day, Big Sky estimated the cost of repairing old damages to truck E-359 at \$5192.80 and new damages to that truck at \$585.85. *Id.* None of the estimates contains notes describing the extent of the damages or the dates on which the damages occurred. The FS's inspections of the trucks before use at the Derby Fire did not indicate the existence of any damages. *Id.*, Exhibit 3. The CO later stated in his declaration that "[i]t is highly unlikely that the many of the minor items . . . such as small dents, would have been captured at the pre-use inspection due to their insignificant nature." Declaration of William M. Pfeifer dated September 14, 2007, ¶ 8.

6. Clayton Rideout, a FS employee, inspected the trucks on September 19, 2006, when they were released from service. The FS's inspection of truck E-357 at the end of use indicated numerous scratches and one scuff mark on the outside body. The FS's inspection of truck E-358 indicated a small ding and numerous scratches and scrapes on the outside body, a torn and oil-stained rear seat, and a cracked fender. The inspection of truck E-359 indicated scratches and dents on the outside body, and missing floor mat and rubber for the

brake pedal. Appeal File, Exhibit 3. Mr. Rideout described the conditions that he observed in his notes as normal wear and tear caused by operating in a forest environment. Mr. Rideout also stated in his notes that it is likely that the pre-use inspector did not note on the pre-use report the minor items that are usually considered to be normal wear and tear. *Id.*, Exhibit 4. The CO observed these inspections and considered most of the alleged damages to be normal wear and tear. Pfeifer Declaration ¶¶ 4, 9.

7. At the request of GBT, its trucks were reinspected again by Mr. Rideout, the FS inspector, and Kirk Huseby, the owner of GBT, on September 21, 2006. Appeal File, Exhibit 4. According to the FS, GBT had complained that some damages had been overlooked during the inspection on September 19, 2006. *Id.*, Exhibit 2; Pfeifer Declaration ¶ 4. The reinspection of E-357 indicated, *inter alia*, the existence of “2 small fifty cent size dents, minor scraps (sic) on inside door panel and additional scratches on rubber under guard of bumper and outside pickup exterior.” Mr. Rideout considered the dents to be preexisting items that did not show up on the pre-use inspection. He considered the other damages to E-357 to be normal wear and tear due to operating in an extreme fire environment. During the reinspection of trucks E-358 and E-359, Mr. Huseby identified additional minor scratches which Mr. Rideout also considered to be normal wear and tear caused by the extreme fire environment. Appeal File, Exhibit 4. There is nothing in the record to indicate that the scratches, dents, interior stains and tears, and scrapes were a consequence of anything other than normal wear and tear as defined by the EERA.

8. In November 2006, GBT submitted “Determination & Finding” reports to the FS, claiming damages to its trucks for excess of normal wear and tear. Appellant’s claims totaled \$3216.42. The estimates for the repairs prepared by Big Sky were attached. Appeal File, Exhibit 2. Appellant has offered no other proof, such as photographs, documenting the damages.

9. Claimed damages for truck E-357 totaled \$1284.02, which included \$739.02 for replacement parts and \$545 for labor. The damages were identified by GBT as scratches to the body, broken toggle light switch, broken left front door rear view mirror, and interior stains. The estimated total included \$30 for an air filter, \$10 for labor, and \$49.95 for an oil change. Appeal File, Exhibit 2. The quantum of GBT’s claim is broken down in the estimate by Big Sky dated October 4, 2007. *Id.*, Exhibits 2, 8.

10. Claimed damages for truck E-358 totaled \$1346.55, which included \$355 for labor; \$865.35 for parts; and \$126.20 for paint materials, shop materials, and hazardous waste disposal. The damages were identified by GBT as a dent, torn door panels, broken

plastic cooling air deflector, and broken inside electrical plug. The quantum of GBT's claim is broken down in the estimate by Big Sky dated October 4, 2006. Appeal File, Exhibit 2.

11. Claimed damages for truck E-359 totaled \$585.85, which included \$105 for labor, \$446.05 for replacement parts, and \$34.80 for paint materials and hazardous waste disposal. The damages were identified by GBT as scratches, missing cigarette lighter, and torn door panel. The quantum of GBT's claim is broken down in the estimate by Big Sky dated October 4, 2006. Appeal File, Exhibit 2.

12. The CO issued a final decision dated January 10, 2007, partially denying GBT's claims based upon the language in the EERA and his determination that many of the items claimed by GBT constituted normal wear and tear in an extreme fire environment. The CO stated that because of the clear language in the EERA, GBT was aware that the equipment may be returned scratched, dented, or dirty, and had agreed to the rates set out therein as compensation for the more expensive wear and tear. Appeal File, Exhibit 1. Determinations concerning normal wear and tear were made by the CO based on the notes of the inspector, the language in the EERA, and his own judgment and personal observations. Pfeifer Declaration ¶ 23. Generally, the CO considered the exterior dents and scratches, and interior stains and tears, to be normal wear and tear occurrences under the terms of the EERA. Appeal File, Exhibit 1.

13. The CO granted a total of \$807.42 to cover damages that he considered exceeded normal wear and tear as per the agreement. For truck E-357, the CO allowed \$10 for the broken toggle switch, \$648.10 to replace the broken mirror, and \$50 for one hour of time for the mechanic to replace both the mirror and switch. For E-358, the CO allowed \$40 for the broken electrical plug and \$50 for one hour of mechanic time to replace the plug. Finally, for E-359 the CO allowed \$9.31 for the missing cigarette lighter. There is no dispute as to appellant's entitlement to these costs in this appeal. The CO also denied the claim for an oil change for truck E-357, stating that the FS does "not pay for oil changes when the vehicle is used less than 3000 miles." Appeal File, Exhibit 1.

Discussion

Appellant claims that it is entitled to the balance of the alleged damages. Appellant contends that the use of its trucks at the Derby Fire caused the claimed damages. It asserts that its trucks were in "very good condition when . . . [the FS] took possession," and points to the pre-use inspection reports by the FS inspector as support. It further asserts that the alleged "dents, scratches through the clear coat into the paint, tears in the leather door panels, [broken plastic cooling air deflector], front wheel fender flare cut into the plastic, or . . .

[interior] mud, dirt, coffee stains, and black ash stains and finger prints all over the seats and roof panels” are in excess of normal wear and tear. Appeal File, Exhibit 2.

The CO refused to pay more than \$807.41 of the claimed damages based upon his determination that many of the claimed damages constituted normal wear and tear caused by operating in an extreme fire environment and that appellant had been made aware that the equipment would be subject to harsh environmental conditions based upon the clear language in the EERA. The EERA provides, *inter alia*, in section 9 of the general provisions, that the Government will assume liability for any loss, damage, or destruction of appellant’s equipment, except that no reimbursement will be made for loss, damage, or destruction due to ordinary wear and tear, mechanical failure, or negligence of the contractor or its agents. Ordinary wear and tear for purposes of this agreement means “in excess of what the equipment is subjected to under normal conditions and is reflected in the rates paid for the equipment.” Appeal File, Exhibit 7. Appellant must initially show that the alleged damages occurred. Appellant must meet this burden by establishing the fundamental facts of liability, causation, and resultant damages. Thereafter, the FS has the burden of proving that the damages were due to ordinary wear and tear as defined in the agreement in order to escape liability. *Thomas B. Prescott*, AGBCA 98-151-1, 00-1 BCA ¶ 30,583, at 151,040 (1999); *William Harvey*, AGBCA 82-152-1, 87-1 BCA ¶ 19,577, at 99,004; *Tom Forster*, AGBCA 77-117, 78-1 BCA ¶ 12,890 (1977). The FS argues that appellant has not satisfied its burden. We agree.

Appellant contends that the use of the trucks at the Derby Fire caused the damages. Appellant points to the pre-use inspection reports by the FS inspector to support its contention that the trucks were in good condition when placed in service, and the release inspection reports to support its contention that the FS damaged its trucks.

In this case, the FS inspector did not note any minor damages during the pre-use inspection due to their insignificant nature. Appellant has provided no authority, however, in support of its belief that omissions on the pre-use inspection reports proves the condition of the trucks at the beginning of operations at the Derby Fire. The FS has presented evidence that the trucks had minor damage that was not recorded during the pre-use inspection. Appellant has neither offered evidence to the contrary nor addressed the old damages which existed before and after service at the Derby Fire. Likewise, appellant has provided no authority in support of its belief that inclusion of minor damages on the release inspections proves that the damages occurred during service at the Derby Fire. The FS has presented evidence that the damages recorded after use at the Derby Fire, other than those for which it has agreed to compensate appellant, were minor damages consistent with operating in a fire

environment. Appellant has offered no evidence to the contrary. Accordingly, we do not find appellant's argument persuasive.

The EERA clearly states that the contractor recognizes the environment in which the trucks will be used and that the rates paid account for the type of wear and tear to be expected. Appellant should have been fully aware that its trucks would be subjected to extreme operating conditions. It is logical to conclude that the trucks would become scratched and dented and the interior soiled during use. The estimates by Big Sky do not indicate that the damages exceeded normal wear and tear as defined by the agreement, or that the damages occurred during operations at the Derby Fire. There is no evidence in the record that suggests that the use of the trucks exceeded the conditions reflected in the operating rates. While release inspection reports do show that the trucks had some damages, the FS has presented evidence that most of the damages were minor and a consequence of normal wear and tear as defined by the agreement.

We find that appellant has proved neither liability nor causation. Failing proof of liability, damages are not payable. We therefore affirm the CO's decision.

Decision

Appellant's claim for additional damages beyond those awarded by the CO are hereby **DENIED**.

JEROME M. DRUMMOND
Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge

MARTHA H. DeGRAFF
Board Judge