



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

October 29, 2009

CBCA 1317-RATE

In the Matter of UNION PACIFIC RAILROAD

Rebecca B. Gregory and Raymond J. Hasiak of Union Pacific Railroad, Omaha, NE, appearing for Claimant.

Mary C. Bates, Acting Director, Transportation Audits Division, Office of Travel, Motor Vehicles & Card Services, Federal Acquisition Service, General Services Administration, Arlington, VA; and Aaron J. Pound, Office of General Counsel, General Services Administration, Washington, DC, appearing for General Services Administration.

Janet D. Kaminski, Office of the Staff Judge Advocate, Headquarters, Military Surface Deployment and Distribution Command, Department of the Army, Fort Eustis, VA, appearing for Department of Defense.

GILMORE, Board Judge.

This case is proceeding under 31 U.S.C. § 3726(i)(1) (2006), which provides that a carrier or freight forwarder may request the Administrator of the General Services Administration (GSA) to review an action taken by the Audit Division of GSA's Office of Transportation and Property Management. The Administrator has delegated the review function to the Civilian Board of Contract Appeals (CBCA). Rule 301 (48 CFR 6103.301 (2008)). The burden is on the claimant to establish the timeliness of the claim, the liability of the agency, and the claimant's right to payment. Rule 301(b). We conclude that the deductions at issue were untimely under the applicable statute and reverse the deductions.

General Background

The Department of Defense (DOD) contracted with Union Pacific Railroad (UP or claimant), to transport goods in the United States. As UP completed certain deliveries under the contract, it submitted bills of lading (BOLs) for payment, and the Government paid the bills. After completing post-payment audits, GSA discovered UP had overcharged DOD on seventy-four of the BOLs and, therefore, issued seventy-four notices of overcharge to UP. UP disputed the overcharges. After attempts to resolve the disputes failed, GSA eventually submitted the alleged overcharged amounts to the Department of the Treasury (TD) for collection. UP subsequently filed claims with the Board regarding the seventy-four BOLs in dispute. Since the initial filing, the parties advised the Board that they had resolved sixty-seven of the original claims. On May 12, 2009, the Board granted the parties' joint motion to amend the proceedings to add five overcharge claims that involved the same two issues for resolution as were presently before the Board.

Background on Twelve Overcharges in Dispute

At present, there are twelve overcharges in dispute. They all involve BOLs where the transportation contract required the Government to annotate on the BOLs the railway car sizes ordered and the car sizes provided. The Government entered the information on the face of the BOLs and UP was paid accordingly. After the bills were paid, GSA discovered that the information noted was incorrect and that UP had substituted railway car sizes different from those ordered (which was allowed under certain conditions). GSA then adjusted each bill to reflect the lower cost resulting from the car substitution, and issued a notice of overcharge to UP on each of the twelve BOLs. UP disputed the adjustments, and after the parties were unable to resolve the disputes, the overcharges were submitted to the TD for collection. The deductions were made by TD at various times during 2008. By October 31, 2008, all of the alleged overcharges had been deducted from UP's account. There is no dispute, however, that the deductions under each of these twelve BOLs were taken more than three years after the bills were paid.

UP has raised two issues in conjunction with the claims:

Issue 1: Is the Government precluded under the provisions in 31 U.S.C. § 3726 from deducting the alleged overcharges more than three years after the subject bills were paid?

Issue 2: Can the Government, which had the responsibility to enter the sizes of the cars ordered and actually supplied on the face of the BOLs for payment purposes, assert that the information entered was incorrect, and adjust the amounts due, after the bills were paid?

Issue 1Facts

Title 31 U.S.C. § 3726(d) provides that:

Not later than three years (excluding time of war) after the time a bill is paid, the Government may deduct from an amount subsequently due a carrier or freight forwarder an amount paid on the bill that was greater than the rate allowed under--

....

- (2) a lawfully quoted rate subject to the jurisdiction of the Surface Transportation Board.

The parties agree on the dates the bills were paid and the dates the deductions were made as follows:

<u>BOL</u>	<u>Overcharge</u>	<u>Date Bill Paid</u>	<u>Amount Deducted</u>	<u>Date Deducted</u>
W45QQ90009822	\$17,936.54	1/20/2005	\$17,936.54	6/16/2008
W45QQ90009825	\$13,148.05	1/20/2005	\$13,148.05	6/16/2008
W45QQ90009832	\$21,942.47	2/11/2005	\$21,942.47	10/15/2008
W45QQ90009833	\$ 8787.44	2/02/2005	\$ 8787.44	4/15/2008
W45QQ90009838	\$ 4388.49	2/11/2005	\$ 4388.49	4/15/2008
W45QQ90009856	\$ 8776.98	2/11/2005	\$ 8776.98	4/15/2008
W45QQ90009858	\$ 4369.90	2/11/2005	\$ 4369.90	4/15/2008
W67G230008416	\$ 3304.60	1/27/2004	\$ 3304.60	10/10/2008
W67G230008417	\$ 4798.79	2/05/2004	\$ 4798.79	10/10/2008
W5CQRF0017135	\$ 4665.31	2/09/2004	\$ 4665.31	10/10/2008
W45QQ90006106	\$12,073.83	3/01/2004	\$11,979.02	10/31/2008
W45QQ90006013	\$33,421.64	2/06/2004	\$33,259.16	10/31/2008

UP's Position

UP contends that under 31 U.S.C. § 3726(d), the Government has three years from the date of payment of a bill to deduct an amount that is greater than the allowable rate from amounts otherwise due the freight carrier. It contends that the language is clear and unambiguous and that after the three-year period has run, the Government can no longer deduct the overcharge from its account. In support of its position, UP relies primarily on the

court's analysis in *American Airlines, Inc. v. Austin*, 75 F.3d 1535 (Fed. Cir. 1996), a case in which the Court of Appeals for the Federal Circuit found that 31 U.S.C. § 3726 required the Government to deduct rate overcharges within three years after the bill is paid, citing *Alaska Airlines, Inc. v. Johnson*, 8 F.3d 791, 793 (Fed. Cir. 1993), while holding that the statute did not place a time limit on the Government's right to recover advanced payments made for unused transportation under 31 U.S.C. § 3726(f) (1988). *American Airlines*, 75 F.3d at 1539.

Government's Position

The Government argues that the three-year period for deduction places a limitation only on the method of collection outlined in that section and that the Government's failure to deduct the overcharge within the three-year period neither extinguishes the debt nor prohibits the Government from using alternative methods of collection. The Government argues that under 31 U.S.C. § 3716, the Government is authorized to effect administrative offset using common-law precedents separately from any limitations stated in other statutes. It also argues that the deduction action referenced in 31 U.S.C. § 3726 relates to an external procedure used to collect debts through the use of Government disbursing centers detailed in 41 CFR 102-118.640(b) under which other agencies collect debts on behalf of GSA. It contends that an administrative offset is different from a deduction action, and that an administrative offset is still available as a method of collection after the running of the three-year period for a deduction action. In support of its position, it relies on *United States v. Munsey Trust Co.*, 332 U.S. 234 (1947), in which the Court held that the Government has the same right as every creditor to apply moneys of his debtor, in his hands, to extinguish the debt due him. The Government relies also on *Burlington Northern Inc. v. United States*, 462 F. 2d 526, 529 (Ct. Cl. 1972), in which the court concluded that the Government's claim was one for "damages," since it involved the carrier's unauthorized use of a Government-owned flatcar and, thus, the three-year limitation for deductions of "overcharges" did not apply. GSA also argues that the disputed amounts were not "overcharges" under 31 U.S.C. § 3726, but were "ordinary debts" which were subject to the ten-year statute of limitations found in 31 U.S.C. § 3716.¹

¹ Under the Debt Collection Act of 1982 (31 U.S.C. § 3716), the Government is allowed to collect a debt by administrative offset after attempting to collect under 31 U.S.C. § 3711 on debts no more than ten years old.

Discussion

The Government has alleged that UP overcharged it for transportation services because the proper rate had not been applied due to UP's substitution of railway cars that were different sizes from those ordered. GSA eventually sent the overcharged amounts to the TD for collection. The TD deducted the overcharges from amounts otherwise due UP for services under various Government contracts. These deductions were taken more than three years after the bills were paid.

The statutory procedures under which transportation service providers are paid for their services are set forth in 31 U.S.C. § 3726. The statute prescribes time limits on both the Government and the transportation service providers for bringing transportation claims. *See American World Forwarders, Inc.*, CBCA 888-RATE, 08-1 BCA ¶ 33,744 (2007). Under 31 U.S.C. § 3726, GSA has the responsibility of performing post-payment audits of bills for transportation services provided to federal agencies, and if there are any discrepancies, the Government may offset any amounts deemed to be overcharges. The Government's right to offset, however, is not left unchecked. Rather, the statute gives the Government a period of "3 years . . . after the time a bill is paid" to "deduct from an amount subsequently due a freight carrier or freight forwarder an amount paid on the bill that was greater than the rate allowed under . . . a lawfully quoted rate subject to the jurisdiction of the Surface Transportation Board." 31 U.S.C. § 3726(d)(2); *see also PJAX Freight System*, CBCA 552-RATE (Apr. 19, 2007). UP's rates are subject to the Surface Transportation Board, which has exclusive jurisdiction over "transportation by rail carriers." 49 U.S.C. § 10501(b).

The three-year deduction limitation for overcharges under 31 U.S.C. § 3726(d) is clear and unambiguous. Although the issue of whether the Government can deduct the alleged debt once the three-year period has run is one of first impression for this Board, the Comptroller General, who decided these claims prior to the GSA Board of Contract Appeals and this Board, addressed this issue in a number of reviews under the same statute. The Comptroller General concluded that the three-year statute of limitations for overcharges precludes the Government from deducting the overcharged amount once the three-year period has run. *Double "M" Transport*, B-236378 (Feb. 6, 1991) (statute precludes deduction of overcharges after three years but does not apply to loss or damage claims); *Mike Meadors Trucking*, B-225138 (May 22, 1987) (Government in error in deducting carrier's debt three years after payment); *TransCountry Van Lines, Inc.*, B-188647 (Dec. 28, 1977) (deduction not authorized after three years is a nullity).

This conclusion is also supported by the Federal Circuit's analysis in *American Airlines*, and the Court of Claims' analysis in *Burlington Northern*, where the courts in these

cases looked to the legislative history of 31 U.S.C. § 3726(d) in reaching their decisions on the ultimate issues. In *American Airlines*, 75 F.3d at 1540, the Federal Circuit stated:

As the Court explained in [*United States v.*] *New York, New Haven [& Hartford R.R.*, 355 U.S. 253 (1957)], prior to enactment of the 1940 [Transportation] Act, “the Government protected itself against transportation overcharges by not paying transportation bills until the responsible government officers, and, in doubtful cases, the General Accounting Office, first audited the bills and found that the charges were correct.” *Id.* at 255, 78 S.Ct. at 214. The 1940 Act replaced this means of protecting against overcharges with the statutory right to collect them from subsequent bills. *Id.* at 257, 78 S.Ct. at 215. The right to deduct overcharges from subsequent bills of the carrier was deemed necessary to protect the government since bills would have to be paid when presented and prior to audit. *United States v. Western Pac. R.R.*, 352 U.S. 59, 74, 77 S.Ct. 161, 170, 1 L.Ed.2d 126 (1956).

“Congress was desirous of aiding the [transportation carriers] to secure prompt payment of their charges, but it is also clear that . . . the Government’s protection against overcharges available under the preaudit practice should not be diminished.” 355 U.S. at 260, 78 S.Ct. at 216 (footnote omitted). Thus, “the Government’s statutory right of setoff was designed to be the substantial equivalent of its previous right to withhold payment altogether until the carrier established the correctness of its charges.” *Id.* at 261, 78 S.Ct. at 217. Importantly, the government’s setoff right was not limited or qualified by time. *See* S. Rep. No. 334, 85th Cong., 2d Sess. (1957), *reprinted in* 1958 U.S.C.C.A.N. 3923, 3927; *see also Strickland Transp. v. United States*, 334 F.2d 172, 180 (5th Cir. 1964).

In 1958, however, Congress determined that “a reasonable time limitation should be established for such deductions.” S. Rep. No. 334, *reprinted in* 1958 U.S.C.C.A.N. at 3927. It therefore amended section 322 to expressly limit the government’s right to deduct overcharges to a period of three years after the payment of the original bill. Act of Aug. 26, 1958, Pub.L. No. 85-762, § 2, 72 Stat. 860 (codified, as amended, at 31 U.S.C. § 3726(b) [predecessor to § 3726(d)]). By this act, Congress also added the three-year limitation on contractor claims against the government. *Id.* (codified, as amended, at 31 U.S.C. § 3726(a)).

In *Burlington Northern*, 462 F.2d at 528-29, the court held that an offset for damages owed to the Government for the unauthorized use of a Government-owned rail car was not subject to the three-year statute of limitations, stating:

The Government is authorized by 49 U.S.C. § 66 [a predecessor statute of § 3726] to deduct overcharges by any carrier from other amounts due that carrier. As is apparent from the definition given that term, an overcharge occurs only when the carrier submits a bill for services that is in excess of the amount properly due the carrier. This is quite different from a claim for damages. The defendant admits this, and we agree.

The Government cited the *Burlington Northern* decision in support of its position. However, it actually supports UP's position that the three-year limitation period applies specifically to "overcharges."

Although the Government sent UP a "Notice of Overcharge" for each BOL, it now contends that the amounts claimed are "ordinary debts" under 31 U.S.C. § 3716, which provides a ten-year statute of limitation for offsets, and are not "overcharges" under 31 U.S.C. § 3726, which provides a three-year limitation for deductions. This argument is confusing and illogical. The Government appears to be arguing that once the three-year period has run for an overcharge deduction, the debt becomes an ordinary debt, subject to offset under 31 U.S.C. § 3716. The Government's argument makes the three-year limitation in 31 U.S.C. § 3726 meaningless. Statutes are to be interpreted to give effect to all portions of the statute if possible, and to further the intent of the legislature. *United States v. Zacks*, 375 U.S. 59 (1963). Moreover, the United States Supreme Court has held that a more specific statute will not be superseded by a more recent general statute unless there is a clear indication of the intent to do so. *Morton v. Mancari*, 417 U.S. 535 (1974). It is clear that Congress, in enacting 31 U.S.C. § 3726(d), intended to treat the Government's collection of transportation "overcharges" in a specific and distinctive manner.

The Government's own regulations recognize this Congressional intent. "Overcharges" are defined in 41 CFR 102.118.35 as "those charges for transportation and travel services that exceed those applicable under the contract for carriage." "Ordinary debt" is defined in 41 CFR 102.118.35 as "an amount that a [transportation service provider] owes an agency other than for repayment of an overcharge." The record shows that the amounts involved in this claim were properly classified as "overcharges" by the Government in its initial notices and, therefore, 31 U.S.C. § 3726 provides the proper guidance. Also, because the claims in this case are "those arising from the audit of transportation accounts pursuant to 31 U.S.C. § 3726," they are required to "be determined, collected, compromised,

terminated, or settled in accordance with the regulation published under the authority of 31 U.S.C. § 3726 (*see* 41 CFR part 101-41 . . .).” 41 CFR 105-55.018(b).

Decision

We conclude that any deductions made for “overcharges” for transportation services are required under 31 U.S.C. § 3726(d) to be made no later than three years after the bills were paid. Here, the deductions were made after the three-year period had run and, thus, made in violation of the statute. The amounts deducted should, therefore, be refunded to UP. Because the deductions were improper under 31 U.S.C. § 3726(d), and must be refunded, Issue 2 is now moot.

BERYL S. GILMORE
Board Judge