



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR RECONSIDERATION DENIED: September 26, 2013

CBCA 2427-R

EM LOGGING,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

R. Allan Payne and Hollie Lund of Doney Crowley Payne Bloomquist P.C., Helena, MT, counsel for Appellant.

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

Before Board Judges **VERGILIO**, **McCANN**, and **STEEL**.

Opinion for the Board by Board Judge **VERGILIO**. Board Judge **McCANN** concurs separately.

VERGILIO, Board Judge.

On June 18, 2013, the Board received from EM Logging (purchaser) a motion for reconsideration of the Board's decision denying its appeal in a matter involving the United States Department of Agriculture, Forest Service (agency), *EM Logging v. Department of Agriculture*, CBCA 2427, 13 BCA ¶ 35,350. In particular, the purchaser maintains that the Board cannot base its decision on evidence in the record that was not discussed during the trial or in the briefs of either party; specifically this relates to the agency order establishing weight limitations in the particular forest and to vehicle registrations. Further, the purchaser contends that various factual conclusions are not supported by the record. This assertion relates to the repeated violations of the maximum weight limitation, failures to utilize approved haul routes, violations of the twelve-hour hauling limitations, and violations of the

snow plowing requirements. The agency opposes the motion, stating first that the purchaser's position regarding documents in the record is incorrect and contrary to Board Rule 4(g) (48 CFR 6101.4 (2012)), and second that the purchaser has neither met nor discussed the standard for reconsideration, Rule 26 (48 CFR 6101.26), as the purchaser simply makes different factual conclusions based upon its view of the record, while the record amply supports the conclusion regarding the repeated violations by the purchaser.

As the agency points out, the purchaser's motion for reconsideration (1) incorrectly concludes that the Board is limited in its reliance on information in the evidentiary record and (2) fails to satisfy the basic standards to obtain reconsideration.

The record contains an agency report regarding its investigation of various offenses by the purchaser, specifically including the weight limitations. Appeal File, Exhibit RE-104-582. The investigative report includes the Forest Service order that prohibits operating a vehicle in excess of 80,000 pounds gross vehicle weight, Exhibit RE-151, and notes that the report writer found no documentation that indicates that the order had been rescinded or revoked. The Board determined that the order established a maximum weight for trucks using the Forest Service roads used by the purchaser in performing the contract. As the agency notes, the document is in the record, without objection by the purchaser. That neither party directly addressed the document in briefing or during the hearing makes it no less relevant to this dispute. The purchaser has provided no support for its assertion that the Board's de novo review of the evidentiary record is restricted by the briefs and trial testimony.

Regarding the second aspect of the motion, the purchaser views the record and draws conclusions at odds with the majority of the panel. The instances of the variety of violations are well-documented in the record and highlighted in the opinion. The motion offers no basis to revisit the opinion or decision, in which the Board concluded that the "purchaser's actions with respect to violating the requirements for load limits, notice of delays, and haul routes, each independently establish a basis that alone supports the termination for breach." 13 BCA at 173,503-04. The motion adds little to the views expressed in the dissent of the judge who presided at the hearing and oversaw the development of the record, all matters expressly considered in the process of denying the appeal in question.

The Board **DENIES THE MOTION FOR RECONSIDERATION.**

JOSEPH A. VERGILIO

Board Judge

I concur:

CANDIDA S. STEEL
Board Judge

McCANN, Board Judge, concurring.

While I issued a detailed dissent to the decision on the merits in this appeal, I agree with the majority that the appellant's motion for reconsideration does not state grounds for reconsideration.

With regard to the decision on the motion, the majority again refers to an investigative report of an overweight incident, prepared over a year after the incident, which includes an order signed by the Forest Supervisor on February 24, 1986, some twenty-seven years earlier. That order prohibited the operation of vehicles weighing in excess of 80,000 pounds from operating in the Kootenai National Forest. As I indicated in my dissent, much evidence suggests that the order had not been in effect for a number of years, and was not being enforced by the contracting officer. This evidence includes the fact that the contracting officer determined that the purchaser had violated vehicle weight limitations of 80,000 pounds (sometimes) and 84,500 pounds (other times), and testified that the Montana Gross Vehicle Weight Chart applied, without mentioning the order.

The majority also states: "The instances of the variety of violations are well-documented in the record and highlighted in the opinion." As I indicated in my dissent, I disagree with this conclusion.

R. ANTHONY McCANN
Board Judge