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United States General Accounting Office
Washington, DC 20548

Office of
General Counsel

In Reply
Refer to: B-192200

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Navy Regional Finance Center
Washington, D.C. 20371

Attention: M. M. Constantini
Director, Freight Department

[Liability of Carrier Involved in Highway Accident]

Gentlemen:

Subject: American Farm Lines
GBL No. K-1289822

Your letter of June 15, 1978, (your file FF20 (WEH:dh) 7420 (A) X-15), requests an official determination as to whether you should terminate collection action on a claim for $793.33 presented by the Transportation Officer, Fort Jackson, South Carolina, against the American Farm Lines. The amount claimed represents costs incurred by the 48th Explosive Ordnance Disposal unit (EOD) in rendering certain services incident to a highway accident on August 19, 1977, involving a shipment of U.S. Navy ammunition being transported by an American Farm Lines vehicle on Government bill of lading No. K-1289822. Your letter further points out that the claim issued by the Navy Regional Finance Center (NRFC) on November 14, 1977, to recoup the costs of material loss and damage to Government property involved in the accident, has been paid in full without argument by the carrier, American Farm Lines. Therefore our review is limited to the single issue of American Farm Lines' liability under a purported contractual obligation embodied in a DD Form 1926, executed by the Officer-in-Charge (OIC) of the Army EOD team, and signed at the scene of the accident by the driver of the American Farm Lines vehicle.

Pursuant to 4 C.F.R. § 104.4 (1978), we advise you that in our opinion the claim brought against the American Farm Lines cannot be substantiated by the evidence presented, and we suggest that collection action be terminated in accordance with 4 C.F.R. § 104.3(d) and (e) (1978).

The administrative record before this Office reveals the following pertinent facts. On August 26, 1977, American Farm Lines vehicle No. 4058 was engaged in the transportation of certain categories of ammunition from the Naval Ammunitions Depot, Hawthorne, Nevada, to the Military Ocean Terminal, Sunny Point, Southport, North Carolina, under Government bill of lading No. K-1289822. At a point approximately 12 miles west

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of Rutherfordton, North Carolina, the vehicle No. 4058 was involved in a highway accident. The vehicle overturned and went down an embankment, which caused portions of the ammunition to penetrate the roof of the vehicle and settle in the surrounding area. Units of the North Carolina Highway Patrol and local fire department were dispatched to the scene. The Highway Patrol unit took charge, securing the area, and rerouting traffic. The accident report later filed by the Highway Patrol stated in part that the driver of the vehicle suffered minor injuries and was eventually taken to Rutherford Hospital in Rutherfordton, North Carolina; and also, that vehicle No. 4058 was speeding.

The American Farm Lines' Safety Director was notified of the accident, and of what actions were being taken at the scene. It is apparent that no danger of explosion existed, and no elements of a catastrophe were present so as to warrant use of emergency conditions and requirements. The American Farm Lines' Safety Director notified the President of the company, and then, in accordance with the requirements set forth in the Military Traffic Management Regulations (MTMR) chapter 216, section 216012, the Safety Director notified by telephone the consignee, the consignor, the Military Traffic Management Command (MTMR) and the Navy Sea Systems Command (NAVSEA). During these telephone calls, when it would have been appropriate and convenient, American Farm Lines did not request any technical assistance. On the contrary, the carrier reported that it had diverted vehicular and lift equipment located in the region to the accident scene, and maintained to those parties being notified that it could stand on its own advertised expertise and experienced capability to manage the accident situation without the support of others. Thus, during its report to NAVSEA, American Farm Lines repeated that it had a handling crew, material handling equipment, and an empty trailer en route to the accident scene, and was therefore not requesting any assistance.

It appears that at some point after arriving at the accident scene the Highway Patrol unit either suggested or attempted to contact a Navy EOD team, and this was reported to NAVSEA. Due to its expertise, NAVSEA knew that, by instruction, a Navy EOD team would not respond because Army EOD teams are responsible for explosive incidents on land. Whether NAVSEA was attempting to expedite what they considered an existing request, or in the alternative sought to initiate its own request, the record clearly reveals that NAVSEA contacted the Army EOD unit at Fort Bragg, North Carolina, which referred the request to the Army EOD unit at Fort Jackson, South Carolina, which responded immediately.

Upon arrival, but before rendering services at the accident scene, the OIC of the Army EOD team stated a requirement that one of the parties present sign a prepared DD Form 1926. This form is utilized pursuant to MTMR, chapter 216, section 216011(b) which states as follows:

"The carrier must be informed that assistance given . . . will be for carrier's account and that it may be held responsible for all expenses incurred by the Government, including salaries and wages paid by the Government. The carrier also will be advised in writing that Department of Defense personnel act and perform in these instances as carrier's agents. Government personnel assigned to assist carriers will retain their status as employees of the United States Government and, as such, will be entitled the benefits as provided by law. The Government will not recognize or submit to any action for property damage in connection with such assistance furnished, when actual labor supervision or other services are performed at the carrier's request." (Emphasis added)

The Highway Patrol unit apparently refused to sign the DD Form 1926 which would have made the Army EOD teams' activities an unbillable public service. With the Highway Patrol's insistence that area clearance begin immediately, and the OIC of the Army EOD team's insistence that the DD Form 1926 be signed, these two figures of authority approached the American Farm Lines' driver--a recent accident victim, slightly injured, and owing to the subsequent report of an excessive speed violation, admittedly under the legal compulsion of the North Carolina Highway Patrol.

Whether the driver could not, or would not sign the DD Form 1926, it is clear that a call was placed to the Safety Director of American Farm Lines. The Safety Director attests that he informed the OIC of the Army EOD team that American Farm Lines had not requested any assistance for area clearance responsibilities and therefore would not authorize any releases by way of the DD Form 1926. The OIC of the Army EOD team relayed to the Safety Director the fact that the Highway Patrol wanted area clearance operations to start immediately. Thus, following telephonic exchanges among the Safety Director, the driver, the OIC of the Army EOD team, and the Highway Patrol, the driver was directed by the Safety Director to sign anything necessary to start operations at the scene, but to do so under protest. The driver signed the DD Form 1926, and the Army EOD team then assisted in gathering up the spilled lading and placing it aboard carrier's replacement vehicle for further transportation to the Naval Weapons Station, Charleston, South Carolina, where the lading was to be surveyed.

Based upon our construction of the administrative record, we feel that to find that the driver's signature on the DD Form 1926 created a binding contract by which the carrier, American Farm Lines, was unalterably bound to pay for unrequested prospective services, is to disregard the operational requirements underlying the formation of a contract.

The Transportation Officer, Fort Jackson, South Carolina, contends that the willingness of American Farm Lines to pay for the services of the Army EOD team is identified by the driver's signature on the DD Form

1926. However, any obligation of the carrier which arises from the concept of the driver's agency capacity is obviated here by the fact that the driver was forced to call the American Farm Lines' Safety Director for instructions. As a party to that action, the OIC of the Army EOD team (who is the contracting agent for the Government unit in this case) was charged with the knowledge that the driver possessed no greater authority than that which was granted by the Safety Director on the telephone at that time. In this regard see B-171802, March 2, 1971, where we stated that:

> ". . . While truck drivers may routinely sign shipping documents acknowledging such things as receipt and delivery of goods, it does not seem reasonable to assume, without specific verification, that they are authorized to enter into contracts--setting rental rates--on behalf of their employers. * * * Even in an emergency situation, reasonable diligence would seem to require that one telephone call be made under such circumstances. To hold a principal liable for acts of its agents which are beyond the scope of their authority, and not reasonably associated with their realm of responsibility, would be unjust."

In the present case, where such a telephone call was made, the Government's contracting agent is estopped to contend that the driver possessed any ostensible or apparent authority other than that authorized by the specific instructions the driver received at that time. See also B-191181, April 27, 1978; and B-182781, January 22, 1975. With actual knowledge of the driver's limited authority to bind the carrier, the Government's contracting agent could not substitute a proposed reliance on the ostensible authority usually identified with an agent's signature on a contract. See Restatement, Agency (2d ed.) §49, 166. As the facts of the present case clearly reveal, the driver was at first instructed not to sign the DD Form 1926, and when, in the face of mounting pressure from the OIC of the Army EOD team and the North Carolina Highway Patrol unit, the American Farm Lines' Safety Director did authorize the driver to sign the form, it was to be signed under protest.

The pivotal question then becomes the effect of the protest qualification on the formation of a contract. A cursory review of the treatment of the law of Contracts, as presented in 17 Am Jur 2d §§ 1, et seq., reveals the following fundamental and generally accepted principles concerning the formation of a contract (footnotes and case law citations omitted):

> "The primary test as to the actual character of a contract is the intention of the parties, to be gathered from the whole scope and effect of the language used, and mere verbal formulas, if inconsistent with the real intention, are to be disregarded. But the existence of a contract, the meeting of the minds, the intention to assume an obligation, and the understanding are

> to be determined in case of doubt not alone from the words used, but also the situation, acts, and conduct of the parties, and the attendant circumstances." 17 Am Jur 2d Contracts § 1, at 333.

Where, as in the case before us, the parties have demonstrated that there is a substantial and material variance in their intentions and perceptions in regard to the obligations embodied in the purported contract, the duties cannot be fixed and the qualifications militate against an effective acceptance of the terms of the offer. Thus the indefinite character of the obligation and uncertainty of the agreement prevent the formation of a contract. See Restatement, Contracts §§ 59, 60; and Williston, Contracts 3d ed § 73.

While the issue presented is no doubt susceptible to protracted review and particularized arguments in regard to manifestation of assent to contract, offer and acceptance, rules of construction, and mutuality in general, we feel that the preceeding general analysis, as applied to the facts of the present case, serves to defeat the proposed contractual obligation presented by the DD Form 1926.

We also feel that the facts of this case, when construed in terms of the relative bargaining positions of the parties at the proposed time of contracting, would tend to support a contention by American Farm Lines that the formation of the alleged contract embodied by the DD Form 1926 was inherently subject to a variety of undue influences. However, arguments concerning "undue influence" would be advanced as a defense to avoid an existing contract, and as we have found that no enforceable contract was created, those arguments are superfluous here.

The provisions of MTMR, chapter 216, section 216011, deal with assistance to carriers. We have found that the requirements of sections 216011(b)(c) and (d) are not applicable to American Farm Lines in the present case because of the failure of the evidence to substantiate the formation of a binding contract for the Army EOD team's services. We note that section 216011(e) of chapter 216 of the MTMR states:

> "e. Services Furnished Without Charge to Carriers. Carriers will not be billed or held responsible for any service performed by DOD personnel that was not requested by the carriers, such as dispatching of representatives to observe transfer of loadings or to suggest corrective measures in connection with seal breakage, shifting of loads or bracings, accidents, or other adjustments." (Emphasis added.)

Under this authority, and in keeping with our findings in the present case, it would be inappropriate to refer a request to American Farm

Lines to compromise the amount of the claim for the Army EOD teams' services based on a theory of recovery in quantum meruit.

The case file relative to American Farm Lines, Government bill of lading No. K-1289822, is returned herewith.

Sincerely yours,

/s/

L. Mitchell Dick
Assistant General Counsel

Enclosure