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Dwight J. McCann.

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Recommended Citation

H.R. Rep. No. 84, 42nd Cong., 2nd Sess. (1872)

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5N 1543

DWIGHT J. McCANN.

MAY 24, 1872.—Ordered to be printed.

Mr. HOLMAN, from the Committee of Claims, submitted the following

REPORT :

[To accompany bill H. R. 2890.]

The Committee of Claims, to whom were referred the papers and evidence in the claim of Dwight J. McCann, of Nebraska, having considered the same, make the following report :

On the 23d of April, 1866, the Commissioner of Indian Affairs, on behalf of the United States, entered into a written contract with the claimant, who was to furnish land transportation from Omaha, Nebraska, for the annuity goods and provisions of the Indian Bureau for the year 1866, as follows :

Forty tons, more or less, to be delivered at Fort Laramie, Dakota Territory, or such other point in that vicinity as the agent may direct, at the rate of pay of \$1.59 per one hundred pounds for each hundred miles of transportation.

Forty tons, more or less, at the Winnebago agency; twenty tons, more or less, at the Omaha agency; and twenty-five tons, more or less, at the Pawnee agency, to be transported in good, well-covered wagons to the points mentioned, as the agent may direct, at the rate of pay of \$1.45 per one hundred pounds, for each hundred miles of transportation.

This contract was made, in pursuance of law, "by advertising a sufficient time previously for proposals respecting the same."—(*See act of the 2d of March, 1861, sec. 10, 12 Stats., p. 220.*)

The Commissioner's advertisement, dated the 27th of January, 1866, invited proposals at three different places, at the offices of three different superintendents, at the head of three different transportation routes, as follows :

I. At Atchison, Kansas, for transportation from Atchison to posts in New Mexico.

II. At Nebraska City, Nebraska, for transportation to Great Salt Lake City, Utah, and *intermediate points*.

III. At Omaha, Nebraska, for transportation to Fort Laramie and other posts, which last was awarded to the claimant.

The first and second were awarded to other parties.

It was stated in the advertisement, as a material part of the service to be performed, that "the goods to be delivered at Great Salt Lake City and *intermediate points* must be transported by mules, those delivered elsewhere by oxen;" or, in other words, that the contractor for the sec-

ond contract, here designated, would be required to furnish mule transportation, and the first and third would supply cattle transportation. The teams and wagons were further to be subjected to inspection, and must be in readiness at any time after the first day of April, on ten days' notice being given by the proper superintendent.

Under these stipulations the claimant entered into contract, with bond and surety in twenty thousand dollars, for the proper performance of the service, agreeing to receive and transport the goods with expedition, immediately upon their arrival at Omaha, and admitting the right of the agent to reject any wagon or team which should be considered unserviceable.

On the 23d of May following, the claimant received from the agent at Omaha, ready to be dispatched for Fort Laramie, fifty thousand pounds of goods, by mule-teams, and loaded the remainder on a train of twenty-three ox-wagons, for departure. The superintendent then, for the first time, objected to this means of transportation, for the reason that he held that Fort Laramie was an *intermediate point*, between Omaha and Salt Lake City, to be supplied by mule-teams, and not by cattle transportation; that an exigency had arisen requiring the goods and provisions to be delivered at that post by the 15th of June, to answer the ends of a proposed treaty with the Indians, several bands of which were to assemble there at that time, and because the subsistence on hand might become exhausted, and the presence of 2,000 Indians without rations might defeat the prospects for a treaty, and invite actual danger to the officers and commissioners of the Government.

To avert these evils, mule-teams were demanded, which it was supposed could reach the point in twenty-two days, while an ox-train would occupy thirty-five.

The claimant replied that Fort Laramie was not an *intermediate point* between Omaha and Salt Lake City, and that the terms of his contract called for ox-teams only, but to meet the exigencies of the Government, he had supplied and loaded a mule-train with fifty thousand pounds of goods, sufficient to answer the wants of the council in treaty until the balance should be delivered according to contract.

The superintendent's agent telegraphed to the Commissioner at Washington for instructions, and was answered, "Send the goods the quickest possible way," but without directions to suspend the contract.

Under these circumstances, the goods were taken from the claimant's possession, by a writ of replevin, at the suit of the superintendent at Omaha, and the transportation given to other parties, at the same rate of pay, though the current rate, throughout Nebraska, had then fallen to \$1 per hundred.

The action of replevin, after considerable injudicial ceremony, was suffered to drop out of court, without trial, and the claimant was left without remedy at law.

The claimant then charged the United States with a violation of the contract, as follows:

1. For rate of pay, as per contract.....	\$13,180 17
2. For detention of trains at Omaha, \$5 per day per wagon.....	1,840 00
3. For ferrage over Platt River.....	30 00
Total losses and expenses.....	15,050 17
And deducted the actual cost and value of the service, at \$1 per hundred..	8,289 42
And asked a payment of the balance.....	6,760 75

On this basis, the claimant, in 1868, brought his claim before the Commissioner of Indian Affairs, who certified his approval to the Secretary of the Interior, and recommended its payment. The Secretary of the Interior, April 28, 1868, rejected the claim as an account for unliquidated damages not within the authority of an executive department to pay, unless specially conferred by act of Congress.

The committee, in reviewing the subject, have not questioned the proper motives of the Commissioner in his recommendation, and are satisfied of the sound judgment of the Secretary in making his decision. They are of the opinion, from the evidence, that Fort Laramie was not an *intermediate point*, geographically, between Omaha and Salt Lake City, nor within the meaning of the parties to this contract. There was, therefore, no technical violation of the contract on the part of the claimant, who had fulfilled his stipulations and had gone far toward meeting the special exigencies of the occasion in supplying mule transportation, in part, as demanded. The contract was, therefore, broken by the officers of the Government, entailing a considerable and certain loss on the contractor, for which he ought to have relief.

But the principle of *demurrage*, set up in the second item of claimant's account, does not seem proper to be considered in this claim. It was not provided for in the contract, and ought, together with the third item, for *ferriage*, in the opinion of the committee, to be rejected. These were not expenses arising out of a breach of the contract, but were the necessary expenses of executing the contract. All excess at contract rates over the current rates of transportation, at the time and place of the service, seems to be the proper measure of damages, for which the claimant should be entitled to relief.

Deducting these items from the amount claimed, this committee find that \$5,062 is the true amount of the claimant's losses in this transaction.

The committee, therefore, recommend that this claim be re-examined by the Secretary of the Interior, and that he be authorized to adjust and settle the same on equitable principles, and pay such sum as may be found due, not exceeding \$5,062, in full satisfaction of the claim, and for that purpose report the accompanying bill and recommend its passage.