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Report : Memorial of B. Holladay

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Recommended Citation

S. Rep. No. 583, 44th Cong., 2nd Sess. (1877)

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IN THE SENATE OF THE UNITED STATES.

JANUARY 17, 1877.—Ordered to be printed.

Mr. MITCHELL submitted the following

R E P O R T :

[To accompany bill S. 1144.]

The Committee on Claims, to whom was referred the memorial of Benjamin Holladay, having had the same under consideration, beg to submit the following report :

The memorialist avers in his memorial, in brief, that he is a citizen of the United States; that from the year A. D. 1860, until the 13th day of November, A. D. 1866, he was contractor for the transportation of the United States mails on what was then known as the Overland Mail Route, between the Missouri River and Salt Lake City, in the Territory of Utah; that in the performance of his service in the transportation of the United States mails, amounting during much of said time to more than fifty tons of mail-matter per quarter, he employed 110 coaches, 1,750 horses and mules, and upward of 450 men; that he was, at great expense, compelled to erect buildings, houses, stables, stations, and shelters for the convenience, shelter, and protection of his men and animals along said mail-route and its tributaries; and also to provide, at great expense of cost and transportation, large supplies of food, forage, and wood.

It is further alleged that, while so engaged in the discharge of his duties as such contractor, his service was interfered with, impeded, and obstructed by large and numerous bands of Indians, who murdered his agents, servants, and employés, captured and carried away large numbers of his horses and mules, burned his store-houses, station-houses, barns, stables, large quantities of forage, provisions, wagons, harness, clothing, and other property which had been provided by him for properly conducting the business of the transportation of the United States mails over said route, and which he was compelled to replace at great expense and with tedious delays and damage in order to enable him to continue properly to perform such postal service for the United States Government.

The memorialist further complains that after he had erected his buildings, as hereinbefore stated, and secured his supplies for men and horses, &c., at his several stations along said mail-route, he was compelled, in consequence of the Indian depredations, by military orders, to abandon a large number of his buildings and stations, and a very considerable amount of his supplies, and to change the line of his mail-route to parallel lines far distant from the first route; that he was also compelled, on making such changes, to erect new buildings, stations, houses, barns, &c., with constantly increasing expenses and losses.

The memorialist further avers that while so engaged in the transportation of the mails, large quantities of his hay, grain, and other supplies were taken by the military authorities of the United States, and by them carried away for the use of the Government troops and the Government agents, and by them used for the benefit of the Government of the United States, and for which no compensation has ever been made to memorialist.

The memorialist states as a reason for delay in urging his claim for compensation for his losses as stated, that his claims were presented to Congress in A. D. 1866; that on the 24th day of January of that year his petition for redress was referred to a committee of the House of Representatives, and that subsequently, by a disagreement of the two houses of Congress as to the measure of relief to be granted, the bill failed by the adjournment of Congress.

Your committee, on a careful consideration of the testimony, find that the memorialist was a mail-contractor, and did carry the United States mails on what was then known as the Overland Route from the Missouri River to Salt Lake City, Utah Territory, from the — day of September, A. D. 1861, until the 13th day of November, A. D. 1866, continuously; that in the performance of this service he employed 110 coaches, over 1,700 horses and mules, and about 450 men; that he was at great expense in erecting buildings, houses, stables, stations, and shelters for the convenience, shelter, and protection of his men and animals, and in supplying at his various stations food, forage, and wood; that the length of said route was about 1,200 miles, and lay almost exclusively through the Indian country.

Your committee further find that during said period, and while memorialist was so engaged in transporting said United States mails, his service was interfered with and obstructed by large and hostile bands of Indians, who murdered his agents, servants, and employés, captured and carried away large numbers of his horses and mules, provisions, stores, wagons, and other property of great value, and who burned large numbers of his store-houses, barns, stables, and large quantities of forage, provisions, wagons, harness, clothing, and other property, and which said Benjamin Holladay was at great cost and expense in replacing; that said depredations were continued during the greater portion of the time that said Holladay was so engaged in transporting said mails on said route, and the effect of which was to prevent travel over said line, and to render it a task of constant peril to the men engaged in running said coaches and in transporting said mails; that the evidence as to the amount and value of the property so taken and appropriated, being in the form of *ex-parte* affidavits, is to a great extent unsatisfactory; and your committee, although satisfied that a large amount of valuable property belonging to memorialist was so taken, do not feel justified in attempting to determine with any degree of accuracy the amount or value thereof.

Your committee further find from the testimony that, during the time said Indian depredations were being carried on, the Government of the United States, through the military authorities, undertook to give protection to said memorialist, and to guard his said mail-route and property from further interference on the part of said Indians; and, in order to give such protection, said Holladay was, by military orders, compelled to change the line of his said mail-route to parallel lines far distant from the first route; that on the 2d day of December, A. D. 1864, Col. J. M. Chivington, then in command of that military district, issued the following military order:

HEADQUARTERS DISTRICT OF COLORADO,
Denver, December 2, 1864.

SIR: I am directed to furnish your line complete protection against hostile Indians, which I can only do by its removal from the Platte to the Cut-off route. As it now runs I am compelled to protect two lines instead of one. You will therefore remove your stock to the Cut-off route, which will enable me to use troops retained for an active campaign against these disturbers of public safety.

I am, sir, with respect, your obedient servant,

J. M. CHIVINGTON,
Colonel, Commanding District.

BENJAMIN HOLLADAY, Esq.,
Proprietor Overland Stage Line.

Your committee find that, in pursuance of this military order, said Benjamin Holladay removed his stage-line from the route it was then on, from Junction City to sixty miles northwest from Denver City, over and on to an entire new route, many miles—an average of thirty miles—distant from the old route, and for a distance in length of about 140 miles; that in making this change of route in accordance with said military order, said Holladay was put to great cost and expense in removing barns, houses, stations, corrals, stock, provisions, and other property, and was necessarily compelled to abandon other houses, stations, barns, and other property of value that could not be moved to the new route.

Your committee further find that large quantities of hay, grain, and other supplies, belonging to said memorialist, were taken by the military authorities under direction of military commanders of the United States forces, and by them used in the subsistence of Government troops then in service on the plains along the line of said overland mail-route, and for which no compensation was ever made; that the amount and value, respectively, of property lost and abandoned by reason of said military order, and of property so taken and used by the military authorities as a necessity for the use of the Government troops, and the cost and expense of changing said mail-route, do not definitely appear from the evidence in the case.

To summarize: Your committee find that the grounds of relief presented by the memorial and evidence are of the three following classes:

1st. For property taken and destroyed by hostile bands of Indians, which property belonged to memorialist, and was, at the time the same was so taken and destroyed, being used by him as a mail-contractor in the business of the transportation of the United States mails through an Indian country, and at a time during which the Government of the United States, through its agents, the President and the Postmaster-General, had given assurances of protection against Indian depredations, and against which depredations the Government of the United States attempted, so far as in its power, through its military arm to protect memorialist;

2d. For property abandoned and lost necessarily, and the cost and expense of transferring other property by reason and in pursuance of a military order of the United States Government; and,

3d. For the value of property, hay, grain, and other supplies, belonging to memorialist, taken and used by the military authorities of the United States for the use and benefit of the Government of the United States.

As to the liability of the Government to make just compensation to the memorialist for the claims specified in the two classes last designated, there can, in the judgment of your committee, be no room for controversy or doubt. And your committee, passing over these, would in-

quire into the more debatable proposition as to the liability of the Government in equity and good conscience on the facts presented in the class first specified. And your committee, in determining this question, have carefully considered it, not only on principle and in the light of that well-established relation existing between the Government and its contractors engaged in the transportation of the mails, but also in the light of legislative precedents. The question, while it bears a certain degree of sameness to the liability of the General Government to the individual citizen not engaged in performing Government service, to make compensation for damages resulting from Indian depredations, is not that case, but, on the contrary, quite another and different one. And the fact that the latter might be decided in the negative does not by any means control rightfully the decision of the case at bar. While, should the case as to the right of the private citizen to recover in such contingency be decided in the affirmative, (and upon that question the committee do not pass,) *a fortiori* may the question as to the duty of the Government to afford protection to its mail-contractors engaged in the business of transportation of the United States mails through an Indian country, and to make just compensation on failure to give such protection, be decided in the same way. The case under consideration, furthermore, is peculiarly exceptional, from the fact that protection was repeatedly affirmatively guaranteed by the Government, and from other circumstances herein stated, and its determination either way should not be regarded as a rule applicable to mail-contractors generally, or a precedent for cases where these exceptional circumstances do not exist. Without pausing, therefore, to inquire into the former proposition as one foreign to, and the decision of which is not necessarily involved in, the present investigation, and bearing steadily in mind the distinction between the two, your committee come directly to the consideration of the question as to the liability of the Government, in equity and good conscience, for damages resulting to a person engaged in transporting the United States mails through the Indian country of the United States, by the appropriation or destruction by force of his property by him being used in said Government business, by hostile bands of Indians, under the exceptional circumstances of this case.

It must be conceded that the regular transportation of United States mails with "celerity, certainty, and security," is a matter of vital importance to the business, political and social interests, and commercial prosperity of the whole people. And, to accomplish this, the good faith and fidelity of the contractor, united with every reasonable and necessary protection upon the part of the Government, whereby all interruptions to the line by obstruction to the route would be prevented, would seem to be necessary; and only by the strict performance of such reciprocal obligations upon the part of Government and contractor can this important branch of the Government service be faithfully performed. And acting upon this identical idea, the Government has, since the days of the Confederation, legislated by the enactment of criminal statutes for the protection of mail-routes and against interruption of United States mails. And to-day it is a capital offense in the United States to rob the United States mails by threatening the carrier. Before the United States mails can be transported between two or more points in our country, a post-route must, by the authority of Congress, be established between those points. This is the first indispensable step to the transmission of the mails between such points. And one principal reason why this is so is in order that the jurisdiction of Congress to protect the mails from interruption and to afford protection to the carrier

on the route may be complete. Yet, while this is true in all ordinary cases, the liability of both contractor and Government should be determined by the terms of the written contract. In the present case, a mail-route was established between the border line of the eastern settlements and those pioneer people who, not content with the slow progress of simply moving the frontier line west by solid and self-protecting settlements, forced their way in advance across the great American desert, and over and through the passes of the Rocky Mountains, and built the foundations of empire on the coast line of the Pacific. Mail communication became a necessity between the East and the extreme West, and the track of that communication lay, of necessity, across a wilderness inhabited by hostile and savage men. To establish such a mail-route and force the mails over it was an undertaking upon the part of the Government that challenges a parallel in the history of mail transportation, commands admiration, and is highly illustrative and characteristic of the indomitable enterprise and unyielding energy of the American people; for no government in the world ever before established weekly, much less daily, lines of mail-service over hundreds and thousands of miles of waste desert and unsettled country, even in the absence of dangers incident to a country infested with hostile bands of depredatory Indians. The Government availed itself of the private enterprise of its citizen, the memorialist, to perform this hazardous service, and the obligation, in equity and good conscience, to protect him and his property when Indian hostilities commenced, which was subsequent to the commencement of this service, was at once acknowledged by the Government. That the Government so understood it at the time is plainly evident from the fact that it did attempt to afford such protection by placing a portion of the United States Army along the line of said route, and by changing a portion of said line by military order, to the end that more complete protection might be afforded. If the Government failed in its protection, it was not the fault of him who undertook its business; and if it did fail without any lack of diligence or good faith upon the part of the contractor, and by reason of such failure the contractor suffered in the loss of his property, we are of the opinion that, under the exceptional circumstances of this case, the Government should make that loss good. It should be borne in mind, moreover, that during most of the time covered by the depredations complained of, there were peculiar and pressing reasons why mail communication should be kept up between the Mississippi Valley and the Pacific States and Territories. Our country was engaged in what at times seemed almost a hopeless struggle for the preservation of its existence, a struggle, wherein not only the cession of Southern States became, so far as in their power to accomplish it, a fixed fact, but wherein the establishment of a Pacific confederacy was to many minds a more than probable consummation. Surrounded by these circumstances, with a hostile foe to both man and civilization scattered along the whole length of this route, it would have been sheer madness upon the part of any contractor to have attempted, in the absence of protection from the Federal Government, to continue to transport the United States mails across this almost trackless realm; and to presume that the Post-Office Department and the Government of the United States ever intended such a thing would be to suppose them capable of expecting impossibilities at the hands of their contractors, a thing unworthy of the private citizen, much more so that of a just and generous government. The fact that protection was in part given is in harmony with the idea just expressed, that the Government understood it to be its duty to give protection. The importance, there-

fore, of maintaining this line of communication across our continent during this critical period of our nation's history, coupled with the fact of the utter impossibility to maintain it after Indian hostilities commenced, except either by a body-guard furnished by the Government or by an enormous sacrifice upon the part of the contractor, would seem to imply an equitable obligation of the strongest possible character upon the part of the Government to make just compensation for losses sustained by the contractor by reason of a failure to furnish full and adequate protection.

While, as has been said, the principle is not involved in this case, it may be said, in passing, that the obligation and duty of protecting citizens of the United States in their passage through Territories infested by hostile tribes of savages, or settling permanently in said Territories, have been frequently conceded by the Government. Congress has, year after year, appropriated public money and kept an army in the field, or ready to take the field for this purpose. Acts of indemnity by the Government for losses by private citizens, and by citizens engaged in the Government service, by depredations of hostile Indians, have been very frequent. In the case of Magraw, mail-contractor from July, A. D. 1854, to August, A. D. 1856, on route from Independence, Mo., to Salt Lake, (almost this identical route,) the Government gave him, by special enactment, \$17,750, for losses in stock, stations, and supplies, through Indian depredations during the two years he was engaged in transporting the United States mails on said route. As early as A. D. 1836, Saltmarsh, Avery & Co., mail-contractors in Georgia and Alabama, lost their property by the Creek Indians. The Government, by special enactment, paid them for their losses \$9,779, (see Statutes at Large, vol. 6, p. 882.) In the case of Livingston, Kinkead & Co., merchants, of Salt Lake City, one of the firm *not in the Government employ* but traveling on the business of the firm as a passenger merely in one of Magraw's coaches, had in his possession \$10,000 in coin; the Indians attacked the coach and robbed the passengers; among other things they robbed this passenger of the \$10,000. The Government, by special act of Congress, paid this amount to the firm to reimburse them for the loss. The case just quoted is an instance where the Government recognized its obligation to protect the property of a passenger on a mail-coach by reimbursing him for a loss resulting from a failure to protect him, which is carrying the doctrine of protection much farther than is claimed by the memorialist in this instance. Another case somewhat analogous is that of Moses D. Hogan, (Statutes at Large, vol. 10, p. 843.) Hogan contracted to deliver a certain number of cattle for the Government service at Fort Sterling. The Indians stole and carried away a portion of the cattle; and Congress, by a special enactment, indemnified Hogan for the loss. Numerous other precedents might be quoted to show that Congress has frequently recognized the existence of an obligation on the part of the Government, under exceptional and hard cases, to indemnify Government contractors for losses sustained by reason of Indian depredations.

Your committee, therefore, on both principle and precedent, feel constrained, under the peculiar and exceptional circumstances presented by this case, to recognize the existence of an obligation on the part of the Government to indemnify the memorialist for whatever loss he sustained through no fault of his own, by reason of Indian depredations, while engaged in transporting said United States mail over said overland route between the Missouri River and Salt Lake, between the — day of September, A. D. 1861, and November 13, A. D. 1866. But your committee are not willing that the value and amount of prop-

erty taken, or the loss suffered by the memorialist, should be determined on *ex-parte* affidavits alone; but, believing that it is a case wherein the rights of the Government can only be properly protected by an exercise of the privilege of cross-examination, and by a thorough investigation in a court of competent jurisdiction, wherein the Government shall be represented by counsel, and wherein not only the right of cross-examining the claimant's witnesses, but also to call witnesses of its own, shall exist, your committee decline to grant the prayer of memorialist, and refuse to recommend a direct appropriation; but, for the reasons herein stated, would refer the claims of memorialist to the Court of Claims for adjustment; and for such purpose report back the accompanying bill, and recommend its passage, with, however, the distinct statement that nothing herein stated shall be regarded as a rule or precedent, fixing the liability of the Government to mail-contractors in any case wherein the peculiar circumstances of this case as herein presented are absent.

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