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Dwight J. McCann.

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DWIGHT J. McCANN.

JANUARY 21, 1870.—Laid on the table and ordered to be printed.

Mr. W. B. WASHBURN, from the Committee of Claims, made the following

R E P O R T .

The Committee of Claims, to whom was referred the evidence in the claim of Dwight J. McCann, 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, as follows: 40 tons 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 100 pounds for each 100 miles of transportation; 40 tons at the Winnebago agency, 20 tons at the Omaha agency, and 25 tons at the Pawnee agency, at the rate of \$1 45 per 100 pounds per 100 miles, to be transported in good, well-covered wagons to the points mentioned, as the agent may direct. The claimant was to receive and transport the goods immediately upon their arrival at Omaha, and to perform the service with all proper expedition. The agent of the bureau who should superintend the loading at Omaha had a right to reject any wagon or team which he should consider unfit for the performance of the service.

The Commissioner's advertisement for proposals, dated January 27, 1866, stated that "the goods to be delivered at Great Salt Lake City and intermediate points must be transported by mules, those delivered elsewhere by oxen." This provision was not inserted in the contract, nor is the advertisement, by special terms, made a part of the contract.

On the 23d of May following the claimant received from the agent at Omaha, and dispatched for Fort Laramie, 50,000 pounds of these goods by mule teams, and presented a train of 23 ox wagons to convey the balance. The superintendent objected to this means of transportation, for the reason that Fort Laramie was considered an intermediate point between Omaha and Great Salt Lake City, to be supplied by mule teams and not cattle transportation; that the goods and provisions were required at the post by the 15th of June to meet the exigencies of a treaty to be proposed at that time, and because the subsistence on hand would then be exhausted, while bands of Indians, numbering from 1,500 to 2,000, present without rations, would tend to defeat the prospects of a treaty and invite actual danger to the commissioners and officers of the government. To avert these evils mule teams were demanded, which would reach the post in twenty-two days, while ox trains required thirty-five. The claimant replied that Fort Laramie was not an "inter-

mediate point," and insisted that the terms of his contract provided for ox teams. The superintendent telegraphed to the Commissioner in Washington for instructions, and was answered, "send the goods the quickest possible way."

Under these circumstances the balance of the transportation for Fort Laramie was taken from the claimant, and given to other parties at the same rate of pay, though the current price had then fallen to \$1 per hundred.

The claimant now charges the United States with the violation of the contract as follows:

For the rate of pay as per contract.....	\$13,642 20
For detention of train, sixteen days, returning from Omaha to Nebraska City, at \$5 per day, per wagon.....	1,840 00
For ferry charges over the Platte River	30 00
	<hr/>
	15,512 20
The claimant credits the current rate and actual cost of transportation at that time	8,580 00
	<hr/>
And asks an appropriation for the balance	6,932 20
as the measure of damages to which he is entitled.	

This claim was brought before the late Commissioner of Indian Affairs, and was considered favorably on the basis here presented. It was referred by him to the late Secretary of the Interior for a favorable decision, but that officer held that it was not properly within that class of accounts to be audited by executive officers and paid on their certificate, as the measure of damages depended wholly upon the consideration of certain disputed questions of fact between the government and the claimant—questions to be settled only by the legislative or the judicial authority. Of these questions, the principal one is, whether or not Fort Laramie was to be regarded as an "intermediate point," *within the meaning of the contract*, between Omaha and Great Salt Lake City.

The Commissioner who made the contract, and the superintendent who directed its execution, were of the opinion that it was. The claimant held otherwise; but his assumption rests wholly upon the explanation to be drawn from the advertisement for proposals, and not from the contract itself. Ought the claimant's interpretation to be received against the understanding of those who acted for the government? Had it been designed to exclude Fort Laramie, the claimant had ample opportunity, as well as motive, to have stipulated expressly to that effect, instead of agreeing, in these words, that "the right is reserved to the agent, who shall superintend the loading at Omaha, to reject any wagon or team which he shall consider unfit for the performance of the service." It seems clear that ox teams were unfit, because of the absolute necessity for quicker dispatch than an ox train was capable of making.

The claimant submits the statements of Isaac Coe and of A. Caldwell, of Colorado Territory, that Fort Laramie is not an intermediate point, as claimed. That is their opinion. They were "freighters," engaged in like business with the claimant, and having themselves used the route of the South Fork of the Platte River, they exclude, in their judgment, the route on the North Fork, on which Fort Laramie is situated, from all consideration. The government had excluded neither. Both routes were used to go to Salt Lake City—the northern one for its better roadway, and its supply of water and grazing in the dry seasons—

The southern route, shorter, though not quicker, was becoming more general from its proximity to the Pacific Railroad. Fort Laramie, in fact, was an *intermediate point between Omaha and Great Salt Lake City*, on the North Fork of the Platte River.

The claimant submits the further statement of Thomas Murphy, a superintendent of Indian affairs, explaining the contract as follows :

"In the fall of 1865, I addressed a letter to the Commissioner of Indian Affairs on the subject of transportation overland of Indian annuity goods, in which I recommended that the goods for Salt Lake City and intermediate points (meaning Salt Lake and Fort Bridger) should be sent by mule teams, on account of remoteness of these points from the Missouri River, and that the goods for all other points should be transported by oxen."

The witness states that the Commissioner adopted his recommendation, and this testimony is relied upon to settle the controversy in favor of the claimant. While this witness claims to have been the author of the words "intermediate points," and that they were intended to include Fort Bridger only, it is submitted that he cannot have such an arbitrary and exclusive use of the language. They were not the words to convey his avowed meaning. Fort Bridger was a point to be called by its designation and name, and not by the phrase of "intermediate points," to the exclusion of every other fort or point between Omaha and Salt Lake City. This testimony does not lack the peculiar force of impeaching itself. The reason for recommending mule teams "on account of the remoteness of the points from the Missouri River," applies also to Fort Laramie, and was the consideration which influenced the government agents in rejecting the claimant's means of transportation.

Whether or not, then, the contract is construed as the claimant insists, it seems to be more doubtful if it has been violated as claimed; and if the claimant has not got the law of the government in this transaction, he does not appear to have the equity.

The demands of the government were reasonable, and its necessities were urgent. The claimant had due notice. Since he had taken the contract, his profits had increased from natural causes thirty-four per cent. He could, therefore, well afford to provide the transportation required, and look to the government for satisfaction if his rights should be invaded.

The committee ask to be discharged from the further consideration of this claim, recommending the following :

Resolved, That the claim of Dwight J. McCann be rejected.