

2001

Valley Oil Transportation, Inc. v. Union Pacific Railroad Company : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

VALLEY OIL TRANSPORTATION, INC.,)	
)	
Plaintiff and Appellant,)	CASE NO. 20010163-CA
)	
vs.)	
)	
UNION PACIFIC RAILROAD COMPANY,)	PRIORITY NO. 15
a Delaware, corporation,)	
)	
Defendant and Appellee.)	

BRIEF OF APPELLEE

On Appeal from the Third Judicial District Court
of Salt Lake County, State of Utah
The Honorable J. Dennis Frederick, District Judge

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STATEMENT SHOWING JURISDICTION

Defendant agrees with plaintiff's "Jurisdictional Statement".

STATEMENT OF ISSUES

Was the trial court correct in deciding, as a matter of law, that plaintiff's failure to provide defendant with accurate billing instructions induced defendant to send billing notices to plaintiff's customer, thereby absolving defendant of any liability for allegedly disclosing confidential information?

STANDARD OF REVIEW

Defendant agrees with plaintiff's statement of the "Standard of Review."

DETERMINATIVE STATUTORY PROVISIONS

Defendant agrees with plaintiff that there are no determinative constitutional or statutory provisions.

STATEMENT OF THE CASE

Nature of the Case

Valley Oil Transportation, Inc. ("Valley") sued Union Pacific Railroad Company ("Union Pacific") in June 1998, alleging claims of: (1) breach of contract; and (2) trade secret misappropriation. Valley claims that Union Pacific breached a "Rail Transportation Contract" ("Rail Contract" or "Contract"), which Valley had with Union Pacific, when Union Pacific disclosed confidential rail rate information to one of Valley's customer's, Laidlaw Environmental Services ("Laidlaw").

On October 19, 1995, Valley had entered into a contract with Laidlaw to transport

hazardous waste to various disposal locations in the United States. On December 22, 1997, Valley entered into the Rail Contract with Union Pacific, whereby Union Pacific agreed to transport Laidlaw's hazardous waste under rates set forth in the Contract. According to the "Billing" clause in the Contract, for each shipment, Valley was to provide Union Pacific with a bill of lading and/or billing instructions referencing the contract number.

For each shipment, Valley faxed Union Pacific a bill of lading and shipping manifests ("Manifests"). Contained in the Manifests were specific instructions that "all billing" be sent to Laidlaw. No other billing instructions appeared anywhere else in the shipping documents and no other discussion of where the bills were to be sent took place between the two parties.

Once Union Pacific became aware of these billing instructions, it stopped billing Valley and started billing Laidlaw. Union Pacific sent a total of three billing notices to Laidlaw over a two month period before Valley contacted Union Pacific and advised that the bills should be sent to Valley. As it turned out, the billing instructions in the Manifests had been erroneously provided by Valley. As soon as this was brought to Union Pacific's attention, Union Pacific stopped billing Laidlaw.

According to a "Confidentiality" clause in the Contract, neither party could disclose the terms of the Contract without the written consent of the other party. Valley claims that when Union Pacific billed Laidlaw, Union Pacific breached this confidentiality clause because the bills included supporting confidential rate information contained in the Contract. However, Union Pacific would not have disclosed this information, were it not for the erroneous billing instructions contained in the Manifests which Valley faxed to Union

Pacific.

Therefore, it was appropriate for the trial court to rule, as a matter of law, that Valley's failure to provide accurate billing instructions caused Union Pacific to bill Laidlaw and that Union Pacific is thereby absolved of any liability for its alleged breach of the Rail Contract's "Confidentiality" provision.

Course of Proceedings and Disposition Below

Plaintiff's Complaint alleged: (1) a breach of contract; and (2) misappropriation of trade secrets. R. 1-19. In its Answer, defendant denied both allegations. R. 23-25.

Extensive discovery developed all of the pertinent information available. No relevant facts are genuinely disputed by either party. Defendant filed a Motion for Summary Judgment on December 6, 2000, arguing, *inter alia*, that plaintiff's Complaint should be dismissed because defendant's alleged breach of contract was induced by the inaccurate billing instructions provided by plaintiff. R. 138-140.

On December 19, 2000, plaintiff filed a Motion to Strike Paragraph Three of the affidavit of Cy Gruenloh, which stated that a Uniform Hazardous Waste Manifest was a "shipping paper" upon which a railroad may rely for shipping instructions concerning routing and billing. R.263-296; R.237-238. On December 20, 2000, plaintiff filed its Memorandum in Opposition to defendant's Motion for Summary Judgment. R. 300-394. On December 28, 2000, defendant filed its Memorandum in Opposition to plaintiff's Motion to Strike and its Reply Memorandum in Support of Motion for Summary Judgment. R. 397-400; R. 410-412.

On January 2, 2001, the trial court heard arguments on the motions. On plaintiff's

Motion to Strike, the court granted the motion to the extent that Mr. Gruenloh's observations expressed conclusions of law, but denied the motion to the extent that his observations expressed his understanding of the custom and practice of the shipping industry. The trial court granted defendant's Motion for Summary Judgment ruling, as a matter of law, that "plaintiff failed to provide defendant with accurate billing instructions as required by the rail contract and that such failure was the reason for defendant's sending of the billing notices to Laidlaw. . .excus[ing] defendant from any liability for its alleged breach of the Rail Contract's confidentiality provision". R. 459-460.

STATEMENT OF FACTS

1. On October 19, 1995, Valley's wholly owned subsidiary, Maple Oil Products, Inc. (hereinafter collectively referred to as "Valley"), entered into a contract with Laidlaw to transport hazardous wastes from the Tooele Army Depot to various disposal site destinations in the United States. R. 3 (Plaintiff's Complaint ¶ 14).

2. Laidlaw had previously entered into a contract with the federal government to remove and dispose of such wastes. Laidlaw in turn subcontracted with Valley to provide transportation services, including transportation by rail, in support of Laidlaw's obligations under the government contract. R. 3-4 (Plaintiff's Complaint ¶¶ 14-16); R. 163 (Fetting Depo. pp. 30-31); R. 185-186 (Pritchett Depo. pp. 20-23). The October 1995 contract between Valley and Laidlaw is entitled "Subcontract Agreement No. P30-21" (hereinafter "Subcontract"). Paragraph IV of the Subcontract sets forth the rates Valley agreed to charge Laidlaw for transporting the waste by rail to three anticipated destinations as follows:

- a. 2¢ per pound to Norris Environmental Services, Los Angeles, California;
- b. 2½¢ per pound to Clean Harbors, Chicago, Illinois; and
- c. 3¢ per pound to Empack, Inc., Deer Park, Texas.

In agreeing to these rates Laidlaw guaranteed Valley a minimum of weight of 160,000 pounds per shipment. R. 179 - 180 (Exhibit 1 to Fetting Depo).

3. On December 22, 1997, Valley entered into the Rail Contract, No. ICC-UP-C-33895, with Union Pacific whereby Union Pacific agreed to transport Valley's hazardous waste shipments going to Houston, Texas for a price of \$3,360.00 per railcar. The Rail Contract was to expire by its own terms on December 22, 1998. R. 9-17 (Exhibit 1 to Plaintiff's Complaint).

4. The Rail Contract contained a "Billing Provision" which specified that "Shipments shipped by customer under this Agreement shall be accompanied by a bill of lading and/or billing instructions referencing this Agreement's number, . . ." R. 10 (Exhibit 1 to Plaintiff's Complaint).

5. The Rail Contract contained a "Confidentiality" provision which specified that: "No party may disclose any of the terms of this agreement to any non-party without the prior written consent of the other parties . . ." R. 12 (Exhibit 1 to Plaintiff's Complaint).

6. When Valley was preparing the form of its bill of lading, at Valley's request Union Pacific provided assistance to Valley over the telephone concerning the format of the bill of lading and how to send it to Union Pacific. R. 192-194 (Pritchett Depo. pp. 48-54). However, no discussion ever took place concerning what the bill of lading should reflect

about where Union Pacific should send the freight bills. R. 196 (Pritchett Depo. p. 63). Valley did not identify itself in the bill of lading as the party to be billed because Valley assumed that Union Pacific would bill Valley on the basis that Valley had been identified in the bill of lading as the consignor. R. 196 (Pritchett Depo. p. 63).

7. Whenever there was to be a shipment, Valley would fax the following documents to Union Pacific:

- a. the Fax Cover Sheet, with the name of Maple Oil on the top;
- b. the Bill of Lading, which provided shipping instructions and identified the uniform hazardous waste manifest documents accompanying each railcar; and
- c. the Uniform Hazardous Wastes Manifest ("Manifest"), which under federal law, must be created for each truck load of hazardous waste.

R. 222 - 227 (Exhibit 1 to Thompson Depo.); R.248-262 (Exhibit 2 to Gruenloh Aff.); R. 192 193 (Pritchett Depo. pp. 48-49).

8. None of the above documents ever referenced the Rail Contract number, as required by the Contract's billing provision.

9. Each and every Manifest which Valley faxed to Union Pacific contained the following billing instructions in Block 15, under the heading "Special Handling Instructions and Additional Information":

Laidlaw is the contractor for this facility's waste. Please route all billing and correspondence to: P. O. Box 140, Saukville, WI 53080 [Laidlaw's address].

(Emphasis added). R. 224 - 227 (Exhibit 1 to Thompson Depo.); R.250-262 (Exhibit 2 to Gruenloh Aff.)

10. The Manifest was the only document Valley faxed to Union Pacific which contained instructions as to where Union Pacific should send its freight bills. R. 238 - 239 (Gruenloh Aff. ¶7).

11. A Manifest, like a bill of lading, is legally considered to be a “shipping paper”. R. 273 (49 CFR § 172.205(h)). When transporting hazardous waste a common carrier railroad may rely on a Manifest for shipping and billing instructions. R. 237-238 (Gruenloh Aff. ¶ 3). When the bill of lading does not contain billing instructions, but the Manifest does, Union Pacific follows the billing instructions contained in the Manifest. R.238 (Gruenloh Aff. ¶ 6).

12. Although the billing instructions in Block 15 of the Manifest had been inserted by Laidlaw so that Valley would know to bill Laidlaw, Union Pacific had no knowledge or reason to know of the business relationship Valley had with Laidlaw. R.166 (Fetting Depo. p.43); R. 239 (Gruenloh Aff. ¶ 9). In fact, Union Pacific was unaware that these were Laidlaw’s instructions to Valley only.

13. On February 10, 1998, Valley faxed shipping papers (bill of lading and Manifests) with instructions covering the movement of three rail cars to Deer Park, Texas. R. 238-239 (Gruenloh Aff. ¶ 7).

14. In response to the billing instructions contained in the Manifests, Union Pacific sent three “Past Due Notices” for freight charges to Laidlaw. These notices were dated

May 3, 1998, June 7, 1998, and July 5, 1998, and included an amount due of \$3,360 and the shipping rate basis for such charge. R. 232 - 236 (Exhibit 3 to Thompson Depo.). This is the alleged confidential rate information which Valley claims Union Pacific improperly disclosed.

15. Prior to February 10, 1998, without any billing instructions set forth in the bill of lading, and not having noticed the billing instructions in Block 15 of the Manifests, Union Pacific had been billing Valley based upon its status as the consignor, shipper or customer generating the shipments. R. 238 - 239 (Gruenloh Aff. ¶¶ 7-8).

16. It is common practice for Union Pacific to bill the consignor of a shipment without written instructions to do so. It is also not unusual for the consignor to instruct the Railroad to send freight bills to a third party, such as Laidlaw. R. 238 (Gruenloh Aff. ¶5).

17. Upon discovering that Union Pacific had sent billing notices to Laidlaw based upon the instructions in the Manifests, Valley modified its bill of lading to include specific instructions in the bill of lading that the freight bills should be sent to Valley. R. 199 (Pritchett Depo. pp. 75-76).

18. At the time Union Pacific sent the notices to Laidlaw, it had no knowledge or reason to know that Valley had the Subcontract with Laidlaw, that Valley's profit under the Subcontract was tied to the transportation rates being charged by Union Pacific, or that disclosure of such rate information to Laidlaw, particularly with Valley's permission, would cause damage to Valley. R. 239 (Gruenloh Aff. ¶9).

19. While Laidlaw used the rate information contained in Union Pacific's billing

notices to assist in negotiating a lower rail transportation rate with Valley, Laidlaw had determined as early as the Fall of 1997 that the Subcontract with Valley needed to be terminated or amended because of excessive shipping costs. These excessive costs were the result of Valley billing Laidlaw at a substantially higher rate than allowed in the Contract. R. 158, 164-165 (Fetting Depo. 10-11, 36-38).

20. An example of Laidlaw's disagreement with Valley's billing practices under the Subcontract appears in the Laidlaw documents attached as Exhibit 1, Enclosure 1 to the Fetting Deposition. The documents refer to a shipment containing 135,260 pounds of hazardous waste moving to Norris in Los Angeles, California. The applicable Subcontract rate was the 160,000 pound minimum multiplied by 2¢ per pound for a total bill of \$3,200. However, Valley billed Laidlaw \$4,783, which is more than 150% of the specified contract rate. R. 176 (Exhibit 1 to Fetting Depo.).

21. Laidlaw had concluded that it needed to cut costs by either lowering the rates which Valley was charging or by moving its transloading operation (the operation of transloading the waste from truck to rail) from Valley's rail siding in Murray to Laidlaw's own facility at Clive, Utah. R. 158-159, 165 (Fetting Depo. 10-13, 38-40).

SUMMARY OF ARGUMENTS

The Rail Contract between Valley and Union Pacific clearly required that Valley provide Union Pacific with accurate billing instructions for each shipment of hazardous waste that Union Pacific was to transport. Valley failed to comply with this provision when it faxed Union Pacific Manifests with erroneous instructions that "all billing" be routed to

Laidlaw. Since the billing provision of the Rail Contract is clear and unambiguous, the parole evidence rule precludes Valley from introducing any extrinsic evidence, such as prior course of dealing, to contradict or vary the terms of this provision. Course of dealing or any other extrinsic evidence would not be relevant anyway because each shipment was governed by its own contract, pursuant to the terms of the Rail Contract.

The Manifests which Valley provided to Union Pacific were legal shipping documents which Valley and Union Pacific could rely on for billing instructions. Valley does not dispute that the Manifests were shipping documents. It is common practice for shipping documents to specifically identify the party who is to be billed. It was therefore appropriate for Union Pacific to follow the instructions on the Manifests and bill Laidlaw accordingly.

Despite Valley's claims to the contrary, the billing instructions which Valley faxed to Laidlaw were clearly consistent with the Rail Contract's "Confidentiality" provision because the billing instructions specifically stated that "all billing" was to be routed to Laidlaw. Therefore, when Union Pacific billed Laidlaw, it did so on the basis that Valley had provided "prior written consent" to the disclosure, as required by the "Confidentiality" provision.

Finally, Valley should have directed Union Pacific to bill Valley and ignore the billing instructions on the manifests. Valley's failure to provide Union Pacific with accurate billing instructions, as required by the Rail Contract, was the sole reason Union Pacific billed Laidlaw and disclosed confidential rate information. Therefore, any alleged breach of contract on Union Pacific's part was excused by Valley's breach of contract.

ARGUMENT

I. THE UNDISPUTED FACTS REVEAL THAT THE CONTRACT'S BILLING PROVISION WAS PLAIN AND UNAMBIGUOUS; THAT PAROLE EVIDENCE CANNOT BE USED TO VARY THE BILLING PROVISION'S PLAIN MEANING; AND THAT THE PLAINTIFF'S BILLING INSTRUCTIONS WERE CONSISTENT WITH THE BILLING PROVISION

A. The Contract's requirement that Plaintiff Provide Defendant with Accurate Billing Instructions was Plain and Unambiguous

The "Billing" provision of the Rail Contract, requiring the inclusion of billing instructions, reads as follows:

Shipments shipped by Customer under this agreement shall be accompanied by a bill of lading and/or billing instructions referencing this Agreement's Number.

R.10. (Emphasis added).

The Customer referred to in this provision is Valley. While Valley claims that the language in this provision is ambiguous, it is evident from even a cursory reading that the language is clear and unambiguous. There are only two possible interpretations of this sentence: (1) each shipment must be accompanied by a bill of lading and billing instructions referencing the Agreement's Number; or (2) each shipment must be accompanied by a bill of lading or billing instructions referencing this Agreement's Number. Whether the Agreement Number refers to the bill of lading, the billing instructions, or both, is irrelevant.

If the first interpretation is used (and it is likely this is the interpretation the parties would have intended), then Valley was required to provide Union Pacific with a bill of lading

and billing instructions for each shipment. Of course the term “billing instructions” must be taken to mean “accurate billing instructions”. Otherwise the term is meaningless. Valley failed to provide Union Pacific with accurate billing instructions when it faxed its bill of lading and Manifests containing instructions which knew, or reasonably should have known, were incorrect. Nowhere in any of the shipping documents did Valley provide accurate billing instructions or indicate that Union Pacific was to disregard the billing instructions that were being provided. Therefore, under this first interpretation, Valley breached the billing provision of the Rail Contract.

If the second - more strained - interpretation of the billing provision is used, Valley could provide Union Pacific with either a bill of lading or billing instructions. However, the term “billing instructions” must again be taken to mean “accurate billing instructions”. Under this interpretation, if Valley had provided a bill of lading and no billing instructions, then conceivably it could have been in compliance with the Contract, and Union Pacific likely would have continued to bill Valley as the consignor. However, Valley chose to provide Union Pacific with a bill of lading and billing instructions (contained in the Manifests) advising Union Pacific to bill Laidlaw. Having elected to provide billing instructions, Valley was obligated under the Contract to ensure that the instructions were accurate. Therefore, under this second interpretation, Valley was still in breach of the Contract by failing to provide Union Pacific with accurate billing instructions.

Rather than put forward any evidence that the Rail Contract’s billing provision was ambiguous, Valley has provided a plethora of case law dealing with ambiguity in contracts.

However, none of the case law provided is relevant. No amount of case law can change the fact that the Rail Contract clearly and unambiguously required that Valley provide Union Pacific with accurate billing instructions, and that Valley failed to comply with this requirement.

B. The Parole Evidence Rule Precludes Valley's Use of Extrinsic Evidence to Vary The Unambiguous Terms of The Contract

The general rule denying the admissibility of parole evidence to vary written contracts is applicable to the contractual provisions contained in a shipping contract. Central R.R. v. Hasselkuls, 17 S.E. 838 (Ga. 1893) (bill of lading accepted by railroad must be looked to as final repository and sole evidence of the contract of carriage). Where the language has ordinary meaning, or is plain and unambiguous, parole evidence is not admissible for the purpose of showing the meaning of the contract. Extrinsic evidence cannot be used to contradict the clear terms of a written agreement or to create an ambiguity where none otherwise exists. Plateau Mining Co. v. Utah Division of State Lands, 802 P.2d 720 (Utah 1990); ITT Corp. v. LTX Corp., 926 F.2d 1258 (1st Cir. 1991). Such rule applies regardless of the subsequent acts or declarations of the parties. Where the language is plain and unambiguous, evidence of course of dealing or practical construction put upon the words by the acts or declarations of the parties is not admissible to supply an interpretation of the document. Woods v. Bromley, 241 P.2d 1103 (Nev. 1952); In re: Davidson's Trust Estate, 47 A.2d 145 (Pa. 1946); 29A Am. Jur.2d, Evidence § 1100.

The only language providing any billing instructions is clear and unequivocal: "route

all billing” to Laidlaw (emphasis provided). R. 250 - 262. Thus, parole evidence regarding the parties’ informal understanding and/or course of conduct which is in contradiction of this unambiguous instruction is not admissible. In any event, no “course of dealing” had been established since each shipment was governed by its own contract which contained, or should have contained, its own billing instructions. There can be “no course of dealing” where the consignor has the continuing power to modify its shipping instructions for each shipment, including instructions regarding where to send the freight bills. In this regard please see the shipping papers attached to the Thompson Deposition (R. 249) which contain space for Valley to insert “Special Instructions” and “Switch Billing” instructions for each new shipment. This would have been the logical place for Valley to insert the correct billing instructions and/or explain that the instructions in the manifests did not apply to Union Pacific. And, in fact, once Valley became aware that Union Pacific was billing Laidlaw based upon the erroneous billing instructions contained in the Manifests, Valley modified the instructions on its bill of lading, specifically stating that Valley was the party to be billed.

C. The Billing Instructions in the Manifests were Consistent with the Contract’s “Billing” Provision

Valley claims that the billing instructions contained in the Manifest conflicted with the “Confidentiality” provision of the Contract. In its brief Valley refers to the second part of the Billing Provision which provides that:

in the event of a conflict between the terms of th[e] agreement and conditions contained on the bill of lading and/or billing instructions, the terms of the Agreement shall govern.

R.10.

The Manifests which Valley provided to Union Pacific contained specific and unambiguous billing instructions that “all billing” be routed to Laidlaw. These instructions were clearly consistent with the Contract’s “Confidentiality” provision because, from Union Pacific’s perspective, Valley had unequivocally consented to Union Pacific’s disclosure of the confidential rail rate information when it directed that the freight bills be sent to Laidlaw. Union Pacific did not have a duty to second guess Valley’s intent in light of such explicit billing instructions.

II. THE MANIFESTS WHICH VALLEY FAXED TO UNION PACIFIC WERE LEGAL SHIPPING DOCUMENTS WHICH UNION PACIFIC COULD RELY ON FOR BILLING INSTRUCTIONS

Valley denies that the Manifest which it provided to Union Pacific could have been used for billing instructions because: (1) the Manifests were not prepared by Valley; (2) neither Valley nor Laidlaw intended the Manifests to contain billing instructions to be used by Union Pacific; (3) Union Pacific and Valley intended the billing to be as per the Contract; and (4) the Manifests themselves were not billing documents. Brief of Appellant p. 14. However, the undisputed facts and law reveal that the Manifest was both a shipping and a billing document and could be reasonably relied upon by Union Pacific for billing instructions.

A. That the Manifests were not Prepared by Valley is Unimportant

The fact that the Manifests were prepared by Laidlaw is irrelevant for the purposes of determining whether the Manifests were billing documents upon which Union Pacific could

rely. This argument would only make sense if the Manifests had been sent directly from Laidlaw to Union Pacific, or if Union Pacific had otherwise been made aware that the Manifests had not been prepared by Valley. However, the bill of lading and Manifests were faxed directly from Valley to Union Pacific without explanation. Prior to, or at the time of faxing the shipping documents, Valley had an opportunity to ensure that Union Pacific did not follow the erroneous billing instructions on the Manifests. Valley could have advised Union Pacific to disregard the billing instructions or provided Union Pacific with correct billing instructions, as required by the Rail Contract. Valley did neither. Therefore, it was reasonable for Union Pacific to assume that the billing instructions on the Manifests were accurate and generated, or at least approved, by Valley.

B. The Intent of the Parties is Irrelevant when the Language of Contract is Plain and Unambiguous

That neither Laidlaw nor Valley intended the Manifest to be used as a billing document is also unimportant because neither party ever conveyed this intent to Union Pacific. From Union Pacific's perspective, the plain language of Block 15 in the Manifest indicated that the Manifest was being used as a billing document and that all billing was to be routed to Laidlaw. Valley's intent is not admissible when the language of a contract, as in this case, is clear and unequivocal, and where such intent was never conveyed to Union Pacific.

C. Valley and Union Pacific Intended to Bill as per the Contract

Union Pacific is in agreement with Valley that the parties intended to bill as per the Contract. The billing provision of the Contract required that the shipper provide accurate

billing instructions. Valley failed to comply with this provision. From Union Pacific's perspective, providing billing instructions in the Manifests, for each shipment of hazardous waste, was consistent with the billing provision of the Contract. Therefore, it was reasonable for Union Pacific to rely on the billing instructions contained in the Manifest.

D. The Undisputed Facts and Law Reveal that the Manifests were both Shipping and Billing Documents

Valley has offered the testimony of its General Manager, Tom Pritchett, as evidence that the Manifests could not be considered as billing documents. R. 331 (Pritchett Aff. ¶ 11). It is not important that Mr. Pritchett may not personally have considered the Manifests to be billing documents. What is important is that the undisputed facts and law show that Manifests legally may be considered, and in fact are considered, "shipping paper[s]" (R. 273 (49 CFR § 172.205(h))) upon which a railroad may rely for shipping and billing instructions. R. 237-238 (Gruenloh Aff. ¶ 3). It is common practice for such "shipping papers" to identify the party responsible for paying the freight bill. Also, it is not unusual for a shipper to give the Railroad instructions to send the freight bill to a third party. R. 238 (Gruenloh Aff. ¶ 5). In the absence of any billing instructions in the bill of lading, it was reasonable for Union Pacific to follow the only billing instructions provided which were contained in the Manifests. R. 238 (Gruenloh Aff. ¶ 6). In fact, under the language of the billing provision of the Rail Contract, Union Pacific had a affirmative duty to adhere to the Manifests' billing instructions. R. 238 (Gruenloh Aff. ¶ 7). Therefore, Union Pacific could reasonably conclude, based on the language of the Rail Contract and the billing instructions contained in the Manifests, that the Manifests were billing documents.

III. UNION PACIFIC DID NOT BREACH THE CONFIDENTIALITY CLAUSE OF THE RAIL CONTRACT WHEN IT DISCLOSED RATE INFORMATION TO LAIDLAW, BECAUSE THE BILLING INSTRUCTIONS VALLEY FAXED TO UNION PACIFIC CONSTITUTED “PRIOR WRITTEN CONSENT” TO THIS DISCLOSURE, AND THESE BILLING INSTRUCTIONS WERE CONSISTENT WITH THE “NOTICES” PROVISION OF THE CONTRACT

A. Union Pacific Did Not Breach the Confidentiality Provision of the Contract When it Disclosed Confidential Rate Information to Laidlaw

The Confidentiality provision of the Rail Contract states in part:

No party may disclose any of the terms of this Agreement to any non-party without the prior written consent of the other parties. . .

R. 12. Valley alleges that Union Pacific breached this provision when it sent billing notices containing confidential rate information to Laidlaw. However, all the Manifests Valley sent to Union Pacific contained instructions that “all billing” be sent to Laidlaw. Therefore, it was reasonable for Union Pacific to conclude that such explicit billing instructions given for each shipment clearly constituted “prior written consent” under the Contract. If Valley did not want Union Pacific to follow these billing instructions, it should have advised Union Pacific accordingly or provided accurate billing instructions.

Valley states that the trial court incorrectly concluded that the Manifest’s billing instructions constituted the requisite “consent” to disclose rate information under the Contract because the Manifest was not the only shipping document which Valley sent to Union Pacific. Valley claims that the trial court attached too much weight to the Manifest and not enough weight to the other documents. Brief of Appellant p. 20 of Valley’s. However, the Manifest was the only document which addressed where the freight bills should be sent. The other

documents, including the bill of lading where billing instructions are normally contained, were silent on this matter. Therefore, the trial court correctly concluded that the Manifests' specific billing instructions constituted "consent" to disclose the confidential rate information to Laidlaw.

B. Valley Complied with the "Notices" Provision of the Contract When it Faxed the Billing Instructions to Union Pacific

Valley claims that any consent to disclose its confidential rate information had to be sent to Union Pacific in a manner consistent with the Contract's "Notices" Provision. Brief of Appellant p. 23. The "Notices" provision states that:

any notices given by any party under this Agreement shall be in writing, and shall be effective upon delivery to the applicable party by hand, by wire or other electronic device, or by U.S. Certified Mail, Return Receipt Requested, addressed in accordance with the following:

To: UP UNION PACIFIC RAILROAD COMPANY
1416 DODGE STREET
OMAHA, NE 68179

R.11. (Emphasis added).

Assuming, that the Contract did require that all notices, including billing instructions, be sent to Union Pacific in a manner consistent with the "Notices" provision, Valley complied with this provision when it faxed the billing instructions to Union Pacific. Valley incorrectly interprets the "Notices" provision to mean that all notices had to be mailed to Union Pacific. Under the language of the "Notices" provision, "notices. . .shall be effective upon delivery to the applicable party by hand, by wire or other electronic device". (Emphasis added). Presumably "other electronic device" includes a facsimile. Therefore, Valley complied with

the “Notices Provision” of the Contract when it faxed billing instructions to Union Pacific, advising Union Pacific to send all bills to Laidlaw.

IV. THE UNDISPUTED FACTS REVEAL THAT UNION PACIFIC IS ABSOLVED FROM ANY LIABILITY UNDER THE CONTRACT BECAUSE UNION PACIFIC’S ALLEGED BREACH OF CONTRACT WAS INDUCED BY VALLEY’S BREACH OF CONTRACT

A plaintiff cannot prevail in an action for a breach of contract, for which breach that plaintiff is responsible. Hughes Produce Co. v. Pulley, 155 P. 337, 339 (Utah 1916). In Hughes, the plaintiff sued the defendant for breach of contract after the defendant failed to provide plaintiff with a certain quantity of potatoes. However, under a provision of the Contract the plaintiff was required to provide the defendant with sacks for these potatoes. The plaintiff failed to provide the sacks and consequently the defendant was unable to deliver the potatoes to the plaintiff. The court concluded that it could not “excuse the plaintiff from furnishing the sacks while [enforcing] the obligation of the defendant to deliver the potatoes”. Id. at 339.

In this case Valley failed to comply with the billing provision of the Contract, which required that Valley provide Union Pacific with accurate billing instructions. It is undisputed that the only billing instructions which Valley provided to Union Pacific were contained in the Manifests that had been faxed to Union Pacific. These instructions clearly stated that “all billing” was to be sent to Laidlaw. Union Pacific complied with these instructions and billed Laidlaw. Had Valley not breached the Contract by providing erroneous billing instructions, Union Pacific would not have billed Laidlaw. The only reason Union Pacific billed Laidlaw was because of the faulty and inaccurate shipping papers provided by Valley which led Union

Pacific to believe that the freight bills should be sent to Laidlaw. Had Valley inserted correct instruction in the bills of lading and/or advised Union Pacific to disregard the instructions in the Manifests, Laidlaw would never have been billed. Therefore, Union Pacific should not be held liable for any damages Valley may have suffered from Union Pacific's disclosure of confidential information when it was Valley's actions which caused the alleged breach of contract by Union Pacific.

Valley claims that because of "Union Pacific's knowledge and involvement in setting up the Bill of Lading/Manifest System", that this somehow absolved Valley of its obligation under the Contract to provide Union Pacific with accurate billing instructions. Brief of Appellant p. 16. However, it is important to understand that when Valley was designing its bill of lading, any assistance Union Pacific provided was done over the telephone and did not address the issue of billing instructions, i.e. whether and where to insert instructions directing where Union Pacific should send the freight bills. R. 192-194, 196 (Pritchett Depo. pp. 48-54, 63). That there was no discussion of billing at the time makes sense in light of the fact that the Contract already required that Valley provide Union Pacific with accurate billing instructions each time there was to be a shipment.

V. UNION PACIFIC DID NOT MISAPPROPRIATE VALLEY'S "TRADE SECRET"

Although not addressed in Valley's brief, Valley alleged in its complaint that Union Pacific misappropriated its "trade secret" (the confidential rail rate Union Pacific was charging Valley under the Rail Contract) in violation of the Uniform Trade Secrets Act, UCA § 13-24-1 *et seq.* (the "Act"), when it sent the billing notices containing the rail rate to Laidlaw. However,

under the plain language of the Act, there is no “misappropriation” where the disclosure of the trade secret is made with the owner’s “express or implied consent” (§ 13-24-2(2)(d)), or where there is no “duty to maintain its secrecy or limit its use.” (§ 13-24-2(b)(ii)(D)).

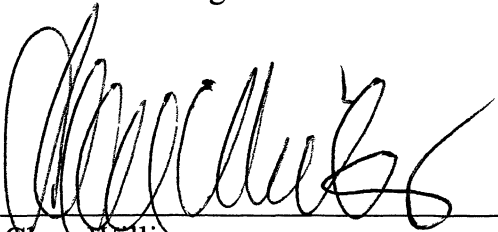
As set forth above, Valley provided Union Pacific with shipping papers containing specific written instructions to bill Laidlaw, and as a direct consequence of such instructions Union Pacific sent the billing notices to Laidlaw. Such clear and uncontradicted instructions contained in official shipping papers received repeatedly and directly from Valley constitutes Valley’s express or at least implied consent for Union Pacific to disclose the rate information to Laidlaw. As provided by the Rail Contract, having received such consent, Union Pacific was no longer under any “duty to maintain its secrecy.” Therefore, Valley’s claim for misappropriation of a trade secret is misguided.

CONCLUSION

In its brief, Valley has failed to focus on the facts which are clearly determinative in resolving this case. Instead, Valley has introduced several “red herrings” in an attempt to raise issues of fact. However, there are no material facts which are genuinely in dispute. It is undisputed that the Rail Contract’s language was clear and unambiguous and required that Valley provide Union Pacific with accurate billing instructions. It is also undisputed that Valley failed to provide accurate billing instructions, and that in the absence of any other directions to the contrary, Union Pacific could reasonably rely on these instructions to bill Laidlaw. The trial court correctly ruled, as a matter of law, that Valley’s erroneous and misleading actions discharged Union Pacific from liability for claims of breach of contract and violation of the

Uniform Trade Secrets Act. Valley has not presented any facts or law to indicate that the trial court's ruling was inappropriate. Therefore, the trial court's ruling should be affirmed.

DATED this 29th day of August, 2001.



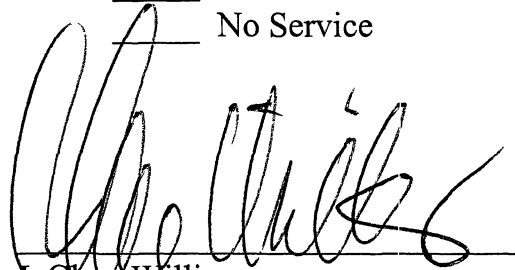
J. Clare Williams

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of August, 2001, a true, correct and complete copy of the foregoing was delivered upon the following attorneys in the following manner indicated below:

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☐ U.S. Mail
☐ Hand Delivered
☐ Overnight
☐ Facsimile
☒ No Service



J. Clare Williams