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

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

VALLEY OIL
TRANSPORTATION, INC.,

Plaintiff and Appellant,

vs.

UNION PACIFIC RAILROAD
COMPANY, a Delaware
corporation,

Defendant and Appellee.

Case No. 20010163-CA

(Priority Category 15)

REPLY BRIEF OF APPELLANT
VALLEY OIL TRANSPORTATION, INC.

ON APPEAL FROM THE THIRD DISTRICT COURT

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U.S. District Court
Salt Lake City, Utah
Paul J. ...
Clerk of the Court

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ARGUMENT

I. The Trial Court Improperly Weighed Evidence and Inferences to Decide Disputed Factual Issues.

Union Pacific argues “the undisputed facts reveal that Union Pacific is absolved from responsibility” for its disclosure of Valley’s confidential rail rate. Appellee Br. p. 20 - 21. That argument fails because that “absolution” is based on the trial court’s conclusion that Valley “failed to provide defendant [Union Pacific] with accurate billing instructions as required by the Rail Contract.” R. 459 - 460. Whether billing instructions were accurate is a key disputed fact, which the trial court improperly resolved on summary judgment:

In reviewing a summary judgment, this court must liberally construe the evidence and all inferences that may be reasonably drawn from the evidence in favor of the party opposing the motion. The trial court must not weigh evidence or assess credibility in a summary judgment. In short, a court should not make findings of fact in a summary judgment other than a restatement of the undisputed facts stated in favor of the nonmoving party.

Dubois v. Grand Central, 872 P.2d 1073, 1076 (Utah App. 1994) (internal citations and quotation marks omitted).

Here, the undisputed facts, evidence and inferences showed the billing instructions were, in fact, accurate. The bill of lading and fax forms, which the parties mutually developed, noted where bills were to be sent. Union Pacific argues it could follow the billing instructions in the Hazardous Waste Manifests. But it was disputed whether the Manifest was a billing instruction at all under the Rail Contract. Thus, whether billing instructions were accurate for the Rail Contract is a contested fact. Moreover, it is

disputed whether a failure to provide accurate billing instructions, even if true, could “excuse” Union Pacific’s disclosure of the Rail Contract’s confidential rate to a third party.

A. The Uncontested Facts, Evidence and Inferences Show That Whether Valley Failed to Provide Accurate Billing Instructions is a Disputed Fact.

The trial court’s finding that Valley failed to provide accurate billing instructions was not a fact at all, but rather an improperly drawn conclusion. It was uncontested that Valley and Union Pacific mutually developed the billing/shipping “System,” which was used to ship and bill under the Rail Contract. Prior to beginning shipments, Valley had faxed proposed drafts of bill of lading forms “to Union Pacific until a final form was decided upon.”¹ R. 329 (Affidavit of Tom Pritchett). The Rail Contract required shipments to be accompanied by a “bill of lading and/or billing instructions referencing this Agreement’s number.” R. 10. Union Pacific and Valley jointly designed the bill of lading format. Under this System, Valley always sent the same bill of lading form an fax cover sheet. Both of which clearly denoted Valley’s address for billing.

Federal law and the Rail Contract itself also required the Uniform Hazardous Waste Manifests, which were prepared on a one Manifest per truckload basis. Each railcar could hold several truckloads. For each rail shipment, Valley provided Union Pacific with the rail bill of lading and the fax cover sheet. Valley also provided the federally required

¹Thus, Union Pacific is incorrect when at page 21 of its brief it states “ it is important to understand that when Valley was designing its bill of lading, any assistance Union Pacific provided was done over the telephone.” The form was mutually developed and Union Pacific had drafts that were mutually decided upon.

Manifests, which were prepared by another company.

Union Pacific helped develop the System and received precisely the billing instructions it helped develop and asked for. Over the course of several months, during which about 160 railcars² were shipped, Valley always presented Union Pacific with those same billing and shipping documents, which included the bill of lading for the railcars and one Manifest for each truckload. Union Pacific followed the format the parties mutually developed and properly billed Valley for each of those railcars. If the billing instructions in the mutually developed bill of lading were not accurate, Union Pacific would not have billed properly. The inference, indeed the inescapable conclusion, is that those billing instructions were proper and accurate.

Those instructions never changed, but on the “161st railcar,” Union Pacific began billing a third party, Laidlaw. In doing so, it disclosed the previously confidential rate. Union Pacific now asserts it could use an instruction prepared by Laidlaw, that was contained in the Manifests, rather than Valley’s billing address set forth in the bill of lading and fax cover sheet forms that Union Pacific helped develop. These undisputed facts show a material factual issue. Under all the circumstances, which billing instructions were proper or accurate? Valley points to the bills of lading and fax cover sheets the parties mutually developed and used for 160 railcars. Union Pacific points to the Manifests which referred to truckloads, not railcars.

²Referred to hereafter as the “first 160 railcars.”

Union Pacific repeatedly asserts as “fact” that the Hazardous Waste Manifests were the only documents that contained instructions on where to bill. *E.g.* Appellee Br. p.p. 10, 18, 20. Redundance, however, does not make it true and this is a contested fact. The Manifests are a special creation of federal law. The pertinent regulations simply do not say Manifests are billing instructions, indeed no authority says they are. 49 C.F.R. §§ 172.202 - 172.205. But Union Pacific’s general assertion is of little value. The proper inquiry is whether the Manifests are billing instructions *under the Rail Contract*. They cannot be, for the Manifests *never* refer to the Rail Contract at all. Under the Rail Contract, billing instructions that are not bills of lading must refer to that Contract’s number to invoke its terms.³ The Manifests never referred to that number, and, therefore, it is disputed factually whether the Manifests could be billing instructions for the Rail Contract at all.

Yet, in its Affidavit of Cy Gruenloh, Union Pacific asserts “if the billing of lading contains no [billing] instructions but the Manifest does, Union Pacific will follow the instructions in the Manifest.” R. 238. That statement is clearly incorrect here. First, the mutually developed bill of lading did contain billing instructions as evidenced by the first 160 railcars. Union Pacific apparently would have this Court believe it just got lucky on the billing the first 160 times in a row , but that is not an inference to which it is entitled. Second, if the bill of lading did not contain billing instructions as Union Pacific claims,

³There is an ambiguity in the Rail Contract about whether bills of lading had to refer to the contract number, which is addressed later. It is clear, however, that “billing instructions” had to refer to the Rail Contract by number to invoke its terms. R. 10.

then Union Pacific *did not* follow instructions in the Manifest. That is probably because the Rail Contract required billing instructions to refer to that Contract's number, which the Manifests never did. The logical inference to which Valley is entitled is that the bill of lading always contained accurate billing instructions under the Rail Contract.

This ties into another important fact; The Gruenloh affidavit never mentions confidential rail contracts at all. It does not say that Union Pacific can disclose a confidential rate based on billing instructions in *truck* Manifests that do not refer to the Rail Contract number. The Gruenloh Affidavit simply does not address the material facts at issue here. *See e.g. Harper v. Summit County*, 963 P.2d 768,775 (Utah App. 1998) (where affidavit only testified to the authorship but not the truthfulness of a document, the affidavit could only be considered as to authorship on summary judgment). Furthermore, what the Gruenloh affidavit refers to is akin to an industry standard or practice, or at least Union Pacific's practice. That evidence conflicts with the parties' course of dealing, showing what the parties actually did. Those disputes are for the jury. *Shurtleff v. Jay Tuft and Co.*, 622 P.2d 1168, 1171 (Utah 1980).

The above facts and inferences cut against summary judgment, but the trial court did not view other inferences properly either. The parties themselves evidenced their understanding of that System and its relation to the Rail Contract over many months during which the first 160 railcars were shipped. During that time, Valley sent the same documents every time, but Union Pacific never questioned, objected, or commented about the bills of lading or Manifests. Rather, it billed Valley per the Contract at the address set

forth in the bill of lading. If the billing instructions were not accurate, why didn't Union Pacific seek clarification? The reasonable inference is that it did not need to because Valley had *always* provided accurate billing instructions. See *Bullfrog Marina, Inc. v. Lentz*, 28 Utah 2d 261, 501 P.2d 266, 271(1972) ("trial court did not err in accepting the method . . . used by the parties prior to the controversy"). And when confronted with its error in sending confidential rate billing to a third party, why did Union Pacific respond that it had "screwed up" or words to that effect? R. 332. The inferences are clear, billing instructions were accurate and Union Pacific just did not follow them on the 161st railcar.

In short, the trial court was faced with numerous facts and inferences showing that the billing instructions Valley provided were accurate. It was faced with the first 160 railcars billed one way, and with subsequent shipments Union Pacific billed another way. The trial court decided a disputed fact when it found Valley failed to give accurate billing instructions. It weighed conflicting evidence and ignored contrary facts and inferences in the process. That was in error.

B. A Failure to Provide Accurate Billing Instructions Does Not Excuse Union Pacific to Disclose Valley's Confidential Rate.

Even assuming *arguendo* Valley failed to provide Union Pacific with accurate billing instructions, it does not follow that Union Pacific is thereby excused to divulge the Rail Contract's confidential rates. The trial court erred in making such a finding. There has to be something more, otherwise every time any shipper made some mistake, the confidentiality of the agreement would become meaningless. Union Pacific argues it could

rely on the Manifests for billing, but the question is much narrower. That is, are the Manifests billing instructions *under the Rail Contract*?

The answer is no, because the Manifests did not invoke the Rail Contract at all. Its billing provision is clear on that issue: *billing instructions*, if used, must “referenc[e] this Agreement’s number.” R. 10. Otherwise, shipments are not made under the Rail Contract. *Id.* The Manifests never referenced that number and so its “billing instructions” never allowed billing under the Contract, much less Union Pacific’s disclosure of its confidential rate to a third party.

When the billing instructions do not reference the Rail Contract’s number, Union Pacific is left to apply its regular public tariff. Although it failed to follow its own form contract, Union Pacific knows this for it argues the point itself:

[without reference to the Rail Contract’s number] there is no way to properly verify in the manner required by the Contract that any of these shipments identified in the billing notices were made under and pursuant to the Rail Contract, as opposed to a published tariff rate.

R. 150 (Union Pacific’s Memorandum in Support of Motion for Summary Judgment, emphasis in original). Union Pacific could not rely on the Manifests as billing instructions and was left to apply its published tariff.

That is precisely the point. Without reference to the Contract number, the Manifests do not invoke the Rail Contract or its confidential rate at all. There must be something more to allow Union Pacific’s disclosure, but there is not. Nowhere does the Manifest say “bill at the rate set in this Contract” or “disclose the terms of Contract number

ICC - UP - C-33895 to a third party" or anything of the sort. Thus, the Manifests could never have permitted disclosure of that numbered Rail Contract's terms. Nor is there any separate document authorizing Union Pacific's disclosure. Factually, lack of accurate billing instructions (even if true) did not excuse Union Pacific to disclose the Rail Contract's confidential rate.

C. As a Matter of law, Union Pacific Was not Excused to Disclose the Confidential Rail Rate.

The trial court ruled that Union Pacific was "excused" because Valley failed to provide accurate billing instructions. But as a legal conclusion that is incorrect. "The law is well settled that a material breach by one party to a contract excuses further performance by the nonbreaching party." *Anderson v. Doms*, 984 P.2d 392, 397 (Utah App. 2000) *cert. denied* 994 P.2d 1271 (citations omitted). Thus, the trial court decided that a failure to provide accurate billing instructions was a material breach. There was, however, no evidence that such a failure was a material breach. Nor could there be, for otherwise Valley materially breached continually during the first 160 railcars, yet without a single comment or complaint by Union Pacific.

Such a factual finding is improper. It requires a weighing of evidence because "what constitutes a material breach is a question of fact." *Coalville City v. Lundgren* 930 P.2d 1206, 1209 (Utah App. 1997) (citing *Olympus Hills Shopping Ctr., Ltd. v. Smith's Food & Drug Ctrs., Inc.*, 889 P.2d 445, 458 (Utah App. 1994)). That is improper at summary judgment.

Union Pacific relies on the case *WM. B. Hughes Produce Co. v. Pulley*, 47 Utah 544, 155 P. 337 (1916), for the proposition that a plaintiff cannot prevail for breach of contract where the plaintiff caused that breach. Appellee Br. p. 20. While that is a fairly self evident concept, that is not this case, nor is it what *Hughes* stands for. And even if it did, it cuts against Union Pacific, because Union Pacific helped devise the very System it now claims is inadequate and, thus, it induced any breach.

Hughes has apparently never since been cited by Utah's appellate courts for anything. That is probably because *Hughes* is nothing more than a material breach case. There the plaintiff failed to provide the potato sacks necessary for shipment as it was contractually obligated to. The court determined that was not an insignificant breach. In other words, the breach was material. Moreover, it appears *Hughes* did not involve deciding the materiality of the breach at summary judgment. The case refers to "evidence" and the trial court issued findings of fact and conclusions of law. *Hughes*, 155 P.2d at 338 (Utah 1916). In any event, *Hughes* does not stand for the proposition that the materiality of a breach can be decided on summary judgment. It says the opposite:

Courts should, however, be very careful not to excuse parties from their obligations by substituting their own judgment for that of the parties with respect to what constitutes a material stipulation in a contract. When courts once enter into that realm, they will find it somewhat difficult to say just where to pause.

Hughes, 155 P. at 339. *Hughes* does not aid Union Pacific's position.

The trial court erred. Failure to provide accurate billing instructions was not a material breach and, therefore, the trial court could not conclude that Union Pacific was

excused from honoring the Rail Contract's confidentiality provision. Furthermore, the question of material breach and failure to provide accurate billing instructions are factual questions that must be determined by weighing the evidence. Finally, the Manifests could not authorize the disclosure of the Rail Contract's confidential rate because the Manifests *never* referred to the Rail Contract by number. Thus, the Manifests could not authorize disclosure of anything about that Contract.

II. The Trial Court's Summary Factual Conclusions are Improper.

In *Platts v. Parents Helping Parents*, 947 P.2d 658, 663 (Utah 1997), the Utah Supreme Court noted the trial court must "set out an adequate basis of undisputed facts to justify its grant of summary judgment." In that case, the defendant, "Turnabout" filed for summary judgment of dismissal, arguing it was a "health care provider" and the plaintiff had failed to follow procedures necessary for jurisdiction. The trial court "summarily concluded that Turnabout was a health care provider" and dismissed. *Platts*, 947 P.2d at 659 (Utah 1997). On appeal, the Utah Court of Appeals reversed holding Turnabout was not a health care provider as a matter of law. *Platts v. Parents Helping Parents*, 897 P.2d 1228 (Utah App. 1995). The Utah Supreme Court disagreed that this could be decided as a matter of law and reversed the Court of Appeals. *Platts*, 947 P.2d 658, 663 (Utah 1997). That Court also took issue with the lack of basis on which the trial court granted summary judgment and how an appellate court could review the matter:

It is unclear what undisputed facts the trial court relied upon in its grant of summary judgment wherein it concluded that Turnabout was a "health care provider." Without an adequate basis of undisputed facts, summary judgment is inappropriate. Without an

adequate indication as to the undisputed facts that were applied to the law, it is impossible to determine on appeal whether the trial court erred in its application of the law to those facts. *Therefore, the court of appeals should have remanded the matter to the trial court to set out an adequate basis of undisputed facts to justify its grant of summary judgment or, if necessary, to hold further proceedings to make adequate factual determinations.*

Platts v. Parents Helping Parents, 947 P.2d at 663 (Utah 1997) (emphasis added).

Here the trial court did not refer to or even allude to which undisputed facts it relied on in summarily concluding Valley failed to provide accurate billing instructions. Without such a footing though, summary judgment cannot issue and this Court cannot determine the basis on which the trial court could rule that Union Pacific was excused from its breach. This court must, therefore, reverse and remand.

III. Union Pacific Cannot Rely on the Parol Evidence Rule and the Trial Court Erred by Failing to Address that Rule at all.

A. The Parol Evidence Rule Applies to Integrated Contracts And The Rail Contract is Not an Integrated Contract.

Union Pacific argues, as it did below, that parol evidence is not admissible to show the meaning of the Rail Contract. Appellee Brief p. 13 - 14; R. 405 - 406. It misconstrues that rule's application, however, citing largely to older cases from other jurisdictions. More importantly, the trial court erred because it failed to address the parol evidence rule at all. *See* R. 459 - 460.

“The parol evidence rule has a very narrow application. Simply stated, the rule operates, in the absence of fraud or other invalidating causes, to exclude evidence of contemporaneous conversations, representations, or statements offered for the purpose of

varying or adding to the terms of an integrated contract.” *Hall v. Process Instruments and Control, Inc.* 890 P.2d 1024, 1206 (Utah 1995); *see Eie v. St. Benedict's Hospital*, 638 P.2d 1190, 1194 (Utah 1981) (“foregoing general rule applies only to integrated contracts”). An integrated contract is one where the writing represents the “final and complete expression of the agreement” of the parties. *Webb v. R.O.A. General, Inc.*, 804 P.2d 547, 551 (Utah App. 1991) (internal citation omitted). Thus, it is insufficient that the that contractual language is clear and unambiguous; The Rail Contract must be complete and final. *Webb*, 804 P.2d at 551 (Utah App. 1991).

The Rail Contract, however, contained no integration clause and was not an integrated contract. Rather, it specifically contemplated further actions, instructions and agreements by the parties. One must necessarily look outside the Rail Contract itself to the “bills of lading and/or billing instructions.” R. 10 (Rail Contract Billing provision). Indeed, Union Pacific has consistently argued, and still does, that the Rail Contract was not final and complete but rather that “*each shipment was governed by its own contract* which contained, or should have contained, its own billing instructions.” Appellee Br. p. 14 (emphasis added). Thus, even Union Pacific does not claim the Rail Contract is integrated .

Moreover, the parol evidence rule relates to matters prior to or contemporaneous with the written agreement. It does not apply to *subsequent* agreements, acts or arrangements. *Stanger v. Sentinel Sec. Life Ins. Co.*, 669 P.2d 1201, 1205 (Utah 1983); *see FMA Financial Corp. v. Hansen Dairy, Inc.* 617 P.2d 327, 329 (Utah 1980) (parol evidence rule “does not preclude evidence as to collateral matters relating to the contract

or its performance). Such subsequent agreements, acts or arrangements are largely the types of evidence at issue. Thus, for example, the rule has no bearing on evidence of course of conduct.

Union Pacific's misapplication aside, the trial court erred in failing to address the rule at all. Whenever a litigant seeks to apply the parol evidence rule, "the court must determine *as a question of fact* whether the parties did in fact adopt a particular writing or writings as the final and complete expression of their bargain." *Bullfrog Marina, Inc. v. Lentz*, 28 Utah 2d 261, 270, 501 P.2d 266 (1972) (emphasis added). Determining whether the Rail Contract is integrated is a threshold determination the trial court never addressed:

The trial court must first determine if the contract is integrated, i.e., an agreement "where the parties thereto adopt a writing or writings as the final and complete expression of the agreement. An integration is the writing or writings so adopted." Extrinsic, relevant evidence is admissible to prove integration.

Webb v. R.O.A. General, Inc., 804 P.2d 547, 551, (Utah App. 1991) (quoting *Eie v. St. Benedict's Hospital*, 638 P.2d 1190, 1194 (Utah 1981) (quoting Restatement, Contracts § 228)); see *Hall v. Process Instruments and Control, Inc.*, 866 P.2d 604, 605, (Utah App. 1993) *aff'd*, 890 P.2d 1027 (1995) (at trial, plaintiff was permitted to use parol evidence to establish whether the contract was integrated).

The trial court ignored the integration issue completely, simply making a factual determination that Valley failed to provide accurate billing instructions. R. 459 - 460. To conclude this, the trial court improperly weighed disputed facts. *Supra*. But it also failed to determine factually whether the Rail Contract was integrated. In failing to do so, it

erred. *Webb*, 804 P.2d 547 (Utah App. 1991).

B. Parol Evidence is Admissible Because the Rail Contract was Also Ambiguous.

Application of the Parol Evidence Rule presents a two step inquiry: “If the court finds the agreement is integrated, then parol evidence may be admitted only if the court makes a subsequent determination that the language of the agreement is ambiguous.” *Hall v. Process Instruments and Control, Inc.*, 890 P.2d 1024, 1027 (Utah 1995). “When determining whether a contract is ambiguous, any relevant evidence must be considered.” *Ward v. Intermountain Farmers Ass’n*, 907 P.2d 264, 268 (Utah 1995) (citations omitted); *Moon v. Moon*, 973 P.2d 431, 435 (Utah App. 1999) (adopting and quoting *Ward*). As with the integration issue, the trial court completely failed to address ambiguity in the Rail Contract. R. 459 - 460.

The Rail Contract was facially ambiguous regarding what was required under its billing provision for the confidential rate to be applied. It provided 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, and containing the appropriate Standard Transportation Commodity Code. In the event of conflict between the terms of this Agreement and conditions contained on the bill of lading and/or billing instructions, the terms of this Agreement shall govern.

R. 10 (emphasis added). Union Pacific argues otherwise, but this emphasized language is susceptible to at least two interpretations and the extrinsic evidence supports that. Under *Ward*, the trial court must consider all extrinsic evidence. After it has done so, if “the interpretations contended for are reasonably supported by the language of the contract, then

extrinsic evidence is admissible to clarify the ambiguous terms.” *Ward*, 907 P.2d at 268 (Utah 1995).

The first interpretation is that bills of lading are treated differently than billing instructions: *Billing instructions* had to refer to the Rail Contract number, but *bills of lading* did not have to. Shipments would be made under the Rail Contract if “accompanied by a bill of lading” regardless of whether that bill referenced the Contract number. Also, the words “and/or” may be conjunctive or disjunctive. This meant *billing instructions* may be optional, but if used, billing instructions had to refer to the Rail Contract’s number.

The second interpretation is that bills of lading *and* billing instructions both had to refer to the Rail Contract’s number. Thus, the trial court was faced with ambiguity about whether bills of lading necessarily had to refer the Rail Contract’s number to be proper. Because of the “and/or” language, it was also questionable whether billing instructions were optional if a bill of lading was provided.

The trial court had these facial ambiguities before it and also uncontested facts evidencing the first interpretation as the correct one. That is, the parties specifically designed and used a bill of lading that *did not* refer to the Rail Contract’s number. For the first 160 railcars, Union Pacific properly billed Valley under the Rail Contract and any billing instructions in the Manifests were disregarded. Properly so, for the Manifests were required by federal law and their “billing instructions” did not refer railcars or the Rail Contract’s number as required.

The trial court simply erred in failing to address the Rail Contract’s ambiguity and in

ruling that Valley failed to provide accurate billing instructions. *Hall*, 890 P.2d 1024 (Utah 1995); *Lentz*, 501 P.2d 266 (Utah 1972).

C. If “Each Shipment was Governed by its Own Contract,” Course of Dealing Evidence is Not Only Admissible, it is Highly Persuasive.

Union Pacific also argues that course of dealing evidence is inapplicable because “each shipment was governed by its own contract which contained, or should have contained, its own billing instructions.” Appellee Br. p. 14. Union Pacific offers no logical or legal explanation for this, but simply urges that course of dealing evidence is somehow irrelevant because Valley had “continuing power to modify its shipping instructions for each shipment.” *Id.*

There is no legal support for this argument and Union Pacific offers none. Indeed, the parol evidence rule does not preclude evidence of subsequent agreements and arrangements. *Stanger v. Sentinel Sec. Life Ins. Co.*, 669 P.2d 1201, 1205 (Utah 1983). More importantly though, Union Pacific’s logic is flawed and here the opposite conclusion follows. Such evidence is highly probative, relevant and admissible. Utah R. Evid. 401 and 402.

If each shipment was under a separate contract, the parties’ conduct shows their understanding of each of those contracts. And if each of the contracts was identical and the parties’ conduct was identical, the parties’ course of conduct clearly establishes what the intent of those contracts was. That is exactly this case and it is irrelevant that Valley had the power to modify its shipping or billing instructions, because it never did so. The

instructions never changed and were always the same for the first 160 railcars shipped, without question, comment or objection by Union Pacific. Those “instructions” were delineated by the very System Union Pacific helped devise. Thus, the parties’ course of dealing evidence shows exactly what their contract, or contracts, meant.

Utah Courts have long held that such a “practical construction” of the parties is persuasive and powerful evidence of the parties’ intent. As far back as 1899, in *Woodward v. Edmunds*, 20 Utah 118, 57 P. 848 (1899), the Utah Supreme Court noted in its case syllabus that “[w]here there is ambiguity in a contract, a practical construction given it by the parties before controversy arose should be adopted by the court.” More recently in *Eie v. St. Benedict's Hospital*, 638 P.2d 1190, 1195 (Utah 1981) the Utah Supreme Court noted that even where a contract is “arguably clear on its face, where the parties demonstrate by their actions that to them the contract meant something quite different, the intent of the parties will be enforced.” See *Cheney v. Rucker*, 14 Utah 2d 205, 381 P.2d 86, 91 (1963) (“the practical construction [given by] the parties themselves is entitled to great, if not controlling, influence”).

That is precisely the situation here. The parties themselves showed their practical construction over the span of 160 railcars - before this controversy arose.⁴ That practical construction is an undisputed fact and highly probative. The trial court either ignored it or

⁴At p. 14 of its brief, Union Pacific alludes to fact that Valley changed its instructions after Union Pacific’s breach. That, however, is not evidence in this case but rather just one of several necessary protective reactions to Union Pacific’s acts. See Utah R. Evid. 407, precluding evidence of subsequent remedial measures.

improperly weighed and discounted it to grant summary judgment.

IV. The Trial Court Never Addressed the Trade Secret Issue.

Union Pacific's final argument is that it could not have misappropriated the Valley's trade secret because Valley ostensibly consented, either expressly or impliedly, to Union Pacific's disclosure of the confidential rate to a third party. The trial court, however, never ruled or opined on that issue, but rather dismissed the case entirely. As noted previously, without an adequate recital of the underlying undisputed facts, this Court cannot "determine . . . whether the trial court erred in its application of the law to those facts. *Platts v. Parent Helping Parents*, 947 P.2d 658, 663 (Utah 1997). The trial court did not set forth undisputed facts showing Valley ever consented to anything. Therefore, the trial court erred in dismissing the trade secret claim in the manner it did.

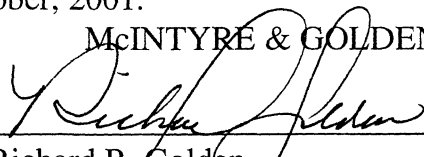
CONCLUSION

The order granting summary judgment must be reversed. The trial court improperly weighed evidence and inferences in concluding that Valley failed to provide accurate billing instructions. Ample inferences and undisputed facts showed just the contrary. Furthermore, nothing factually or legally supported the trial court's conclusion that such a failure, even if true, excused Union Pacific to disclose the confidential rail rate. The Manifests, on which Union Pacific relied as billing instructions did not in any way refer to the Rail Contract and, therefore did not invoke its terms or rates. And legally, such a failure was not material and Union Pacific was not excused by a prior material breach. The Order granting summary judgment does state what undisputed facts the trial court relied on

and so this Court cannot determine whether the trial court erred in its application of the law to those facts. The trial court also erred in applying the parol evidence rule. In fact, it cannot be determined if it applied it all, for there is no factual determination regarding integration or ambiguity in the Rail Contract. The trial court must consider all relevant evidence on those matters. Finally, the trial court never addressed Valley's trade secret claim at all. There is no undisputed fact that Valley consented in any way to any disclosure of its trade secret.

Respectfully submitted this 29th day of October, 2001.

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CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of October , 2001, I caused two true, correct and complete copies of the foregoing Reply Brief of Appellant Valley Oil Transportation, Inc., to be hand delivered to the following:

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