UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION NO. 84-263

CONSOLIDATED RAIL CORPORATION, PLAINTIFF,

VS: **MEMORANDUM OPINION**

WILLIAM D. WITTEN COAL COMPANY; AND
LECKIE FUELS, INC. DEFENDANTS.

* * * * * * * * * * *

This action is pending on cross-motions of all parties for summary judgments. The plaintiff is seeking to recover a sum of money from the defendants for demurrage on five carloads of coal, acceptance of which had been refused by consignee. The defendants have cross-claimed against each other. Each defendant admits the jurisdictional allegations.

William D. Witten Coal Company is a sole proprietorship, owned and managed by William D. Witten. The proprietorship is the owner and operator of a coal loading ramp and siding at Offutt, Kentucky. William D. Witten is also the sole stockholder and the managing officer of Lynn Coal Company, Inc.

Prior to August 10, 1983, the defendants, Witten and Leckie, entered into an arrangement by telephone for 10 carloads of coal of certain required specifications to be shipped to the Medical Center, Cleveland, Ohio. A document dated August 10, 1983, signed on behalf of Leckie, addressed to Lynn Coal Company, Inc., c/o Wm. D. Witten Coal Company, was forwarded to defendant Witten. (Marsh Ex. 2). This document was designated as "Purchase Confirmation" on the first page and on the second page contained what was identified as "General Terms and Conditions of Purchase of LECKIE FUEL, INC."

The pertinent provisions of this purchase confirmation are:

"1. (1.1) The terms and conditions set forth herein are intended by LECKIE FUEL, INC. (hereinafter the "Buyer") to confirm its offer to purchase and shall constitute a final, complete and exclusive statement of the agreement between the Buyer and Seller, ...

". . . . .

"2. (2.2) Commencement of performance by the Seller shall be an acknowledgment and acceptance by the Seller of all Terms and Conditions set forth herein whether or not the Seller shall have first received this Purchase Order.

". . . . .

"7. (7.1) Means and routes of transport shall be at the Buyer's option. Whenever transportation is supplied by the buyer or procured for the benefit of the Buyer, the Seller shall have such transportation loaded within the specified legal or customary loading time. The Seller shall be responsible for all costs and damages arising from delays in loading and demurrage charges or other charges for delay."

Pursuant to this arrangement 10 carloads of coal were acquired by Witten from Lynn Coal Company, Inc., loaded over Witten's ramp and siding and shipped to the consignee in the latter part of August and/or the early part of September. The waybills for each car designated William D. Witten Coal Company as the shipper, that the coal was "shipped account of Leckie Fuels", that the consignee was Medical Center Company, Cleveland, Ohio, and further provided at direction of Witten, the consignor, that "the carrier shall not make delivery of this shipment without payment of freight and all other lawful charges". The consignee apparently paid the freight on the five cars of coal it accepted.

In order to ensure that the coal complied with the specifications of the Medical Center, Leckie secured and paid for an analysis of the coal at the time it was loaded into the cars for shipment.

Leckie paid Witten 80 percent of the price of the coal during the week following shipment with remaining 20 percent to be paid on the 20th of the month which followed the shipment. Leckie was paid for the coal accepted by the consignee. Leckie's profit, compensation or commission, was the difference in what Leckie paid Witten and what Leckie received from the consignee.

The consignee, Medical Center, rejected five of the cars of coal for failing to meet the required specifications. Leckie admits the rejection was proper. Subsequently, Leckie reconsigned and disposed of the rejected coal to Republic Steel at another location at a greatly reduced price. Republic Steel apparently paid the freight charges on this coal. Leckie paid the reconsignment charges and advised plaintiff that Witten was responsible for the demurrage. By order dated December 4, 1984, at a preliminary conference, the Court granted summary judgment to the plaintiff for the amount of damages for demurrage in the sum of $7,000. The issue of liability therefor was passed.

The issues are:

1. Whether the Defendant Leckie served only as a broker, arranging for the sale of the coal by Witten to the Medical Center, or did Leckie become the owner of the coal by outright purchase from Witten and then resold it to the Medical Center.

2. Whether Witten, as shipper designated on waybill, was liable for the demurrage.

3. If Leckie became the owner of the coal was Leckie liable for the demurrage.

4. If it is determined that Leckie, as owner, is liable, whether Leckie can recover from Witten, by way of indemnity, such a sum, if any, adjudged and recovered from Leckie by the plaintiff.

5. If it is determined that Witten, as shipper, is liable whether Witten can recover from Leckie, by way of indemnity, such sum, if any, adjudged and recovered from Witten by the plaintiff.

The Supreme Court in Southern Pacific Transportation Co. v. Commercial Metal Co., 456 U.S. 336 (1982) noted that the waybill or bills of lading was the transportation contract between the shipper-consignor and the carrier, saying:

> "Since 1919, the ICC has prescribed a uniform bill of lading for use on all interstate domestic shipments of freight by rail . . . . . The bill of lading is the basic transportation contract between the shipper-consignor and the carrier; its terms and conditions bind the shipper and all connecting carriers. . . . . . 'Each (term) has in effect the force of a statute, of which all affected must take notice'. . . . . Unless the bill provides to the contrary, the consignor remains primarily liable for the freight charges. When the ICC first promulgated the uniform bill of lading, it stated:

'The consignor, being the one with whom the contract of transportation is made, is originally liable for the carrier's charges and unless he is specifically exempted by the provisions of the bill of lading, or unless the goods are received and transported under such circumstances as to clearly indicate an exemption for him, the carrier is entitled to look to the consignor for his charges.'

This rule has not changed over time. Recently, the ICC again observed that the consignor's liability 'is governed by the bill of lading contract between the parties and mut be decided by interpreting that contract.' . . . . ." (emphasis added -- Id. at 342-343).

Even though it should be determined that Leckie purchased the coal from Witten or Lynn Coal Company at point of loading and became the owner thereof, it is obvious that Witten, by contract as shipper-consignor, became obligated to plaintiff for all charges, including the demurrage on such coal that was properly rejected by the consignee. (The waybill provided that coal was not to be delivered without payment of freight and all other lawful charges--the five cars in question were not delivered and consignee paid only the charges on the five cars accepted.) There is no issue of the fact that the five cars were properly rejected by the consignee. There being also no issue of fact that Witten was the shipper-consignor, this defendant is obligated to the plaintiff in the sum of $7,000 for demurrage charges under the terms of the transportation contract which "has in effect the force of statute" as noted in Southern Transportation Company, supra.

In considering the issue of liability, if any, on the part of defendant, Leckie Fuel, Inc., this defendant claims that it acted only as a broker in this transaction. Defendant Witten contends that Leckie became the owner of the coal at loading point under the terms of the purchase confirmation document.

While there are apparently many different kinds of brokers, as generally defined in Black's Law Dictionary, 5th Ed., a broker is:

"An agent employed to make bargains and contracts for a compensation. . . . . . A middleman or negotiator between parties. A person dealing with another for sale of property. A person whose business it is to bring buyer and seller together. Term extends to almost every branch of business, to realty as well as personalty. One who is engaged for others, on a commission, to negotiate contracts relative to property."

A general definition of Brokers in 12 Am. Jur. 2d, p. 772, Sec. 1, reads:

> ". . . . . a broker is an agent who, for a commission or brokerage fee, bargains or carries on negotiations in behalf of his principal as an itermediary between the latter and third persons in transacting business relative to the acquisition of contractual rights, or to the sale or purchase of any form of property, real or personal, the custody of which is not entrusted to him for the purpose of discharging his agency."

An examination of the "Purchase Confirmation", furnished by Leckie to Witten, discloses that it has all the earmarks of characteristics of an offer or proposal to purchase by Leckie which was accepted by Witten upon the commencement of performance by the loading of the coal into the cars resulting in the consumation of the contract or purchase of coal (par. 2.2-Marc. Ex. 2). It is also noted that the document provided for payment of a price per ton, and fixed terms of payment. Leckie, in fact, paid 80 percent of the purchase price within the next week after shipment with balance of 20 percent payable by the 20th of month following shipment. Leckie in turn sold the coal on a per ton basis to the Medical Center who made payment directly to Leckie. Leckie's profit, called its commission by Leckie, was the difference in these two amounts.

It is further noted that upon the rejection, the carrier notified Leckie rather than Witten, the shipper, who in turn advised Witten sometime later. It was Leckie, apparently without consulting Witten on these particular details, who negotiated and finalized the sale to Republic Steel and authorized the reconsignment of the coal.

There also appears in evidence Marsh Exhibits 5 and 6, two documents dated September 20, 1983, identified as "payment record on coal purchased from Leckie Fuel, Inc., upon coal shipped to the Medical Center at Cleveland, Ohio". Tr. of Evid. p. 23.

An analysis of the evidence, including the documents, supports Witten's contention of transfer of ownership of the coal to Leckie. The terminology of the Purchase Confirmation document is that of an offer to buy which became a contract of purchase upon the acceptance by the acts of Witten.

The pertinent part of Title 49 U.S.C. Subsection 10744 provides:

> "(a) (2) When the consignee is liable only for rates billed at the time of delivery under paragraph (1) of this subsection, the shipper or consignor,

or, if the property is reconsigned or diverted, the beneficial owner, is liable for those additional rates regardless of the bill of lading or contract under which the property was transported . . . . . "

Here, under the terms of the transportation contract, the consignee is not liable for any charges on the coal it properly rejected for failing to meet its required specifications. Pursuant to the above provisions of the Act, with the rejected coal having been reconsigned and diverted to Republic Steel, Leckie, as the beneficial owner, is liable to the plaintiff for the additional rates including the demurrage.

The defendant, Witten, having asserted and received the benefits of the contract resulting from and acceptance under the terms of the Purchase Confirmation document, it must also be prepared to meet its obligation thereunder. One, having accepted the benefits of a contract, cannot deny its obligations thereunder. As noted above, under Paragraph 7 of the document, Witten, as the seller, agreed to be responsible and obligated for the payment of any demurrage charges made against this coal. So applying ths provision of the contract, and as between the two defendants on their cross-claims against each other, Leckie is entitled to recover from Witten any money it is required to pay to the plaintiff for demurrage charges on the coal in question.

The plaintiff also seeks to recover interest on the amount of the demurrage from September 27, 1983, the date of the rejection of the coal by the consignee. Witten contests the right to recover interest in that he was not the shipper as in the case of Illinois Railroad Co. v. Texas Eastern Transmission Corporation, 551 F.2d 943, (5th Cir. 1977) which held that prejudgment interest was to be assessed against the shipper. Despite Witten's protestation, all of the bills of lading or waybills disclose that he was the shipper of this coal from his coal loading facilities.

Accordingly, and it appearing that there is no issue as to any material facts herein, the plaintiff is entitled to a summary judgment against both defendants, jointly and severally, and the defendant, Leckie, is entitled to a summary judgment against defendant

Witten, on its cross-claim for recovery, by way of indemnity, for any sums that Leckie is required to pay the plaintiff herein.

ORDERED this 28th day of February, 1985.

G. Wix Unthank
G. WIX UNTHANK, JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION NO. 84-263

CONSOLIDATED RAIL CORPORATION PLAINTIFF

VS: JUDGMENT

WILLIAM D. WITTEN COAL COMPANY
AND LECKIE FUEL, INC., DEFENDANTS

* * * * * *

In accordance with the Memorandum Opinion and Findings entered herewith,

IT IS ORDERED AND ADJUDGED:

1. That the Plaintiff's Motion for Summary Judgment against each of the defendants is GRANTED.

2. That the respective motions of the defendants and each of them for summary judgments against the plaintiffs are DENIED.

3. That the Motion of the Defendant, Leckie Fuel, Inc., for Summary Judgment on its cross-claim against the Defendant, William D. Witten Coal Company is GRANTED.

4. That the Motion of the Defendant, William D. Witten Coal Company, for Summary Judgment on its cross-claim against the Defendant, Leckie Fuel, Inc., is DENIED.

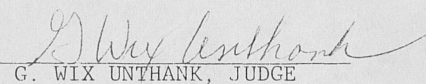
5. That the Plaintiff, Consolidated Rail Corporation, is awarded and shall recover from the Defendants, William D. Witten Coal Company and Leckie Fuel, Inc., jointly and severally the amount of $7,000.00 together with interest thereon at the rate of _____ per cent per annum from September 27, 1983 until paid and for its costs herein.

6. That the Defendant, Leckie Fuel, Inc., shall recover from the Defendant, William D. Witten Coal Company by way of indemnity such a sum of money that Leckie Fuel, Inc., if any, is required to pay to the plaintiff hereunder together with interest at the legal rate in effect at the time of payment and its costs.

7. That the cross-claim of Defendant, William D. Witten Coal Company, against the Defendant, Leckie Fuel, Inc., is DISMISSED.

8. That this action is STRICKEN from the docket.

This 28th day of February, 1985.



G. WIX UNTHANK, JUDGE