IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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INGRAM BARGE COMPANY,

OPINION AND ORDER

Plaintiff,

04-C-881-C

v.

DAIRYLAND POWER COOPERATIVE,

Defendant.

- -

Plaintiff Ingram Barge Company entered into an agreement with defendant Dairyland Power Cooperative whereby plaintiff would transport coal on the Mississippi River by barge to two Wisconsin power plants owned by defendant. Plaintiff began transporting coal to the plants in March 2004. In October of that year, as the season for barge travel on the Mississippi River was nearing a close, plaintiff failed to provide barges sufficient to transport 120,000 tons of the coal offered for transportation. As a result, defendant was forced to enlist other carriers to transport the remaining coal at higher rates than those charged by plaintiff. Now plaintiff has filed this civil action under the Declaratory Judgment Act, 28 U.S.C. § 2201, requesting a declaration that it did not breach the parties' agreement by

refusing to provide all of the barges defendant needed in October 2004 and that it is not liable for any damages, including the costs defendant incurred by hiring other carriers. Defendant has asserted a counterclaim for damages, contending that plaintiff's refusal to transport all of the coal in October 2004 constituted a breach of the parties' agreement and that plaintiff is liable for the difference between the shipping costs defendant incurred to enlist the other carriers and the costs it would have incurred had plaintiff transported the coal. Because this action concerns a contract governing the transportation of goods over navigable waters, subject matter jurisdiction is present under the admiralty statute, 28 U.S.C. § 1333(1); Norfolk Southern Railway Co. v. Kirby, 125 S. Ct. 385, 393 (2004); Continental Casualty Co. v. Anderson Excavating & Wrecking Co., 189 F.3d 512, 517 (7th Cir. 1999); Thypin Steel Co. v. Asoma Corp., 215 F.3d 273, 277 (2d Cir. 2000).

(Although the parties contend that jurisdiction exists under the diversity statute, 28 U.S.C. § 1332, they have not provided the facts necessary to support this contention. Plaintiff proposes as a fact that it is a corporation organized under the laws of Tennessee with its principal place of business in Nashville, Tennessee. Defendant proposes as a fact that it is a cooperative association organized under Wisconsin law with its principal place of business in LaCrosse, Wisconsin. However, there is no indication that defendant is a corporation. Thus, its citizenship for diversity purposes is not determined by the location of its principal place of business or the state in which it was formed but rather by "the

citizenship of its owners, partners, or other principals." Meyerson v. Harrah's East Chicago Casino, 299 F.3d 616, 617 (7th Cir. 2002). Because defendant has not provided any information concerning the citizenship of its members, I cannot determine whether diversity jurisdiction exists. However, because jurisdiction exists under the admiralty statute, I will not require the parties to supplement their jurisdictional facts to support their assertion of diversity jurisdiction.)

This matter is before the court on plaintiff's motion for partial summary judgment. Plaintiff seeks a ruling limiting its damages in the event defendant prevails on its counterclaim at trial. For the reasons stated below, plaintiff's motion will be denied. Although the provision on which plaintiff relies to limit its damages is not superseded by a similar provision in another part of the contract, as defendant contends, plaintiff can invoke the provision only if it shows that defendant failed to provide its coal for shipment on a ratable basis.

From the parties' proposed findings of fact and the record, I find the following to be material and undisputed.

UNDISPUTED FACTS

Plaintiff Ingram Barge Company is a corporation organized under the laws of Tennessee with its principal place of business in Nashville, Tennessee. Defendant Dairyland

Power Cooperative is a membership cooperative organized under the laws of Wisconsin with its principal place of business in La Crosse, Wisconsin.

Defendant operates coal-fired electricity generation facilities in Genoa, Wisconsin and Alma, Wisconsin. Coal is supplied to these facilities through river barge transportation on the Mississippi and Ohio Rivers. Plaintiff provides barge transportation services on the Mississippi River. As a "carrier," plaintiff will accept items like coal into its barges for a "shipper," such as defendant, at a downstream part of the river system and deliver it to the shipper's off-loading destination point upstream on the river system. Because of winter weather conditions, the coal shipping season begins in late winter or early spring when the rivers are clear of ice and ends in the fall before ice limits barge traffic.

On September 28, 2003, defendant issued a request for proposals for transporting coal from transfer docks on the Mississippi and Ohio Rivers to its two Wisconsin plants. On October 9, 2003, plaintiff submitted a proposal in response to defendant's request. Discussions between the parties ensued and defendant decided to hire plaintiff to transport its coal. After defendant notified plaintiff that it had been selected, the parties began negotiating the terms of a written contract to govern the coal transportation. On December 2, 2003, plaintiff forwarded a draft agreement to defendant for review.

Thereafter, the parties exchanged additional drafts of an agreement. On February 5, 2004, plaintiff tendered defendant a written agreement consisting of two parts. On March

3, 2004, defendant tendered a revised version of the agreement to plaintiff that contained changes to Part II. In this revised agreement, defendant did not strike through or revise a section in Part II entitled "Ratability." On March 8, 2004, plaintiff tendered a revised version of Part II that accepted some of the changes proposed by defendant in its March 3 submission.

The parties never reached complete agreement regarding all of the terms of the contract. However, the parties agree that a contract was formed and that Part I of the contract contains the following sections:

> 4. Deliveries: The Shipping period is approximately 32 weeks per year; Carrier will begin deliveries as soon as the river is cleared of ice (approximately 3/15 to 4/01). The following cut-off dates for accepting last barge loadings in general will be adhered to by the Carrier for the Upper Mississippi River navigation season:
>
> | To: | | Genoa | Alma |
> |---|---|---|---|
> | From: | St. Louis | 10/15 | 10/10 |
> | | Lower Ohio | 10/10 | 10/10 |
>
> 8. Ratability: Shipper agrees to use its best efforts to deliver to Carrier all coal to be transported in any year in substantially equal monthly quantities and in approximately equal weekly quantities during the month, and Carrier agrees to accept such coal from Shipper when offered for transportation and deliver it to Shipper without undue delay . . .

In addition, the version of the written agreement claimed by each party to constitute the contract contains the following section in Part II:

> Ratability: Unless modified in Part I, Shipper shall ship in approximately equal monthly increments and approximately equal weekly increments within each month. Should the Shipper fail to ship ratably as described above, Carrier has the right to adjust its obligation to provide barges for the remainder of this Agreement. Barges not loaded ratably within a week or within a month cannot be carried forward to the following week or month, unless the Carrier agrees to do so. Further, Carrier will not be obligated to supply a number of barges in any one month that is greater than the actual number of barges shipped in the prior months under this Agreement.

Finally, both versions of the written agreement claimed by the parties to constitute the contract contain the following language in the preamble: "In the event of a conflict, the provisions of Part I shall prevail over those contained in Part II to the extent of such conflict."

Despite the lack of a formal agreement as to all of the terms of the contract, plaintiff began transporting coal for defendant in March 2004. The parties' agreement contemplated that plaintiff would ship a total of 1 to 1.6 million tons of coal in 2004. According to defendant's records, defendant loaded the following number of barges each month in 2004: March – 87; April – 111; May – 128; June – 117; July – 148; August – 78; September – 96; October – 95. Before October 2004, the largest number of barges loaded in one month was 148 in July 2004. In October 2004, defendant used 20 barges owned by carrier Brennan SCF and 60 barges owned by carrier ACBL in addition to 95 barges owned by plaintiff to transport coal.

OPINION

The parties have stipulated that the claims in this lawsuit are governed by Wisconsin law and applicable general maritime laws of the United States. Dkt. #26. Although they cite Wisconsin law in their briefs, the Supreme Court stated recently that "[w]hen a contract is a maritime one, and the dispute is not inherently local, federal law controls the contract interpretation." Norfolk Southern Railway, 125 S. Ct. at 392. The contract between the parties concerned coal shipments from different states to power plants in Wisconsin. The parties have not identified any overriding local interest at stake in this case that would require application of Wisconsin law. Moreover, as plaintiff notes in its brief, ratability clauses are common in barge contracts. Thus, the interest in securing a uniform interpretation of such clauses favors the application of federal maritime law.

Under federal common law, general rules of contract interpretation govern maritime contracts. See e.g., United States ex rel. Eastern Gulf, Inc. v. Metzger Towing, Inc., 910 F.2d 775, 779 (11th Cir. 1990); Licensed Practical Nurses, Technicians and Health Care Workers of New York v. Ulysses Cruises, Inc., 131 F. Supp. 2d 393, 399 (S.D.N.Y. 2000); Atlantic Dry Dock Corp. v. United States, 773 F. Supp. 335, 337-38 (M.D. Fla. 1991). These general rules are "the core principles of the common law of contract that are in force in most states." United States v. National Steel Corp., 75 F.3d 1146, 1150 (7th Cir. 1996). Pursuant to these general principles, a written contract

> must be read as a whole and every part interpreted with reference to the whole, with preference given to reasonable interpretations. Contract terms are to be given their ordinary meaning, and when the terms of a contract are clear, the intent of the parties must be ascertained from the contract itself. Whenever possible, the plain language of the contract should be considered first.

Flores v. American Seafoods Co., 335 F.3d 904, 910 (9th Cir. 2003) (quoting Klamath Water Users Protective Ass'n v. Patterson, 204 F.3d 1206, 1210 (9th Cir. 1999)). If the terms of the agreement are clear and unambiguous, they must be enforced as written. S & O Liquidating Partnership v. Commissioner of Internal Revenue, 291 F.3d 454, 459 (7th Cir. 2002).

In its counterclaim, defendant contends that plaintiff is liable for the costs defendant incurred to hire 80 barges (20 owned by carrier Brennan SCF and 60 owned by carrier ACBL) to transport the coal for which plaintiff did not supply barges in October 2004. In its motion for partial summary judgment, plaintiff seeks a declaration from this court that it will not be liable for the cost of all 80 extra barges enlisted by defendant in October 2004 if defendant proves that plaintiff breached the contract. Plaintiff's argument focuses on the last sentence of the ratability clause in Part II of the agreement which states that plaintiff "will not be obligated to supply a number of barges in any one month that is greater than the actual number of barges shipped in the prior months under this Agreement." According to plaintiff, this clause required it to supply only 148 barges in October 2004 because that

is the largest number of barges plaintiff had supplied in any prior month under the agreement. Therefore, if defendant prevails on its counterclaim, plaintiff contends that its liability should be limited to the cost of 53 of the 80 barges supplied by the other carriers in October 2004. Plaintiff derives this figure by subtracting the number of barges it supplied in October 2004 (95) from the highest number of barges it supplied in any month before October 2004 (148).

In response, defendant contends that a ruling limiting plaintiff's potential liability is inappropriate because (1) the ratability clause in Part I of the agreement supersedes completely the ratability clause in Part II; (2) the presence of two ratability clauses renders the agreement ambiguous; and (3) the ratability clause in Part II is ambiguous by itself. For ease of reference, I have set out the two provisions side by side.

Part I	Part II
Ratability: Shipper agrees to use its best efforts to deliver to Carrier all coal to be transported in any year in substantially equal monthly quantities and in approximately equal weekly quantities during the month, and Carrier agrees to accept such coal from Shipper when offered for transportation and deliver it to Shipper without undue delay . . .	Ratability: Unless modified in Part I, Shipper shall ship in approximately equal monthly increments and approximately equal weekly increments within each month. Should the Shipper fail to ship ratably as described above, Carrier has the right to adjust its obligation to provide barges for the remainder of this Agreement. Barges not loaded ratably within a week or within a month cannot be carried forward to the following week or month, unless the Carrier agrees to do so. Further, Carrier will not be obligated to supply a number of barges in any one month that is greater than the actual number of barges shipped in the prior months under this Agreement.

Defendant argues first that the ratability provision in Part I completely supersedes the ratability provision in Part II. First, it invokes the provision in the preamble which provides that the provisions of Part I prevail over the provisions in Part II to the extent they conflict. Defendant argues that the structure, language and tone of the two provisions are so inconsistent that it is unreasonable to construe the agreement so that language from each provision is operative. Specifically, defendant contends that the ratability provision in Part II is an "integrated structure which imposes a relatively high obligation on the Shipper, to the benefit of the Carrier." Dft.'s Br., dkt. #22, at 6. It uses mandatory language ("Shipper shall ship") to define defendant's obligation to provide approximately equal shipments of coal and sets out plaintiff's rights if defendant fails to ship ratably, one of which is to cap the number of barges it must supply during a given month. By contrast, the ratability provision in Part I requires defendant only to use its "best efforts" to ship ratably. So long as defendant uses its best efforts, plaintiff is obliged to accept and ship the coal made available by defendant, regardless whether it is a ratable amount. Moreover, defendant notes that nothing in Part I limits the number of barges plaintiff must provide in a given month. In short, defendant argues that "[a]pplying the last sentence of the Part II provision in the manner suggested by Ingram's motion is inconsistent with the much more flexible, 'best efforts' standard for ratability set out in the Part I provision." Id. at 7.

I disagree with defendant's contention that the Part I provision completely supersedes the Part II provision because I find no conflict between the language of the two provisions. Part I requires defendant to use its "best efforts" to deliver coal to plaintiff for shipment "in substantially equal monthly quantities and in approximately equal weekly quantities during the month." In return, plaintiff is obligated to accept the coal when offered for transportation and deliver it without undue delay. The provision in Part II lists the options available to plaintiff if defendant fails to provide coal for shipment in approximately equal weekly or monthly installments. If defendant fails to provide coal for shipment on a ratable basis, plaintiff may "adjust its obligation to provide barges" in two ways. First, it may refuse to carry forward to the next week or month barges not loaded ratably. Second, it may refuse to supply in one month a number of barges "that is greater than the actual number of barges shipped in the prior months under this Agreement." The mere fact that the clause in Part I obligates defendant only to use its best efforts to provide coal in substantially equal quantities while the clause in Part II lists plaintiff's rights in the event that defendant fails to ship ratably does not mean that the two clauses are irreconcilable.

Defendant's second argument is that the "unless modified in Part I" language at the beginning of the Part II provision indicates that the parties intended the Part I provision to supersede the Part II provision completely. As plaintiff notes, however, the most reasonable construction is that the Part I provision modifies only the first sentence of the Part II

provision, which concerns defendant's obligation to ship in approximately equal weekly and monthly quantities. Under this construction, defendant's obligation to ship in roughly equal increments is replaced by an obligation to use "best efforts" to ship in that manner. The Part I provision has no effect on the portions of the Part II provision concerning plaintiff's rights should defendant fail to ship ratably.

Defendant argues also that the parties intended the Part I provision to supersede the Part II provision completely because the Part I provision "appears to have been specifically prepared by [plaintiff] to address [defendant]'s particular needs" while the Part II provision is mere boilerplate. Dft.'s Br., dkt. #22, at 8. As a rule of contract interpretation, individually negotiated terms are given greater weight than standardized terms. Abraham v. Rockwell International Corp., 326 F.3d 1242, 1254 (2003) (citing Restatement (Second) of Contracts § 203(d) (1981)). However, contracts should be interpreted whenever possible in such a way as to give meaning and effect to all terms. Rumpke of Indiana, Inc. v. Cummins Engine Co., Inc., 107 F.3d 1235, 1243 (7th Cir. 1997) (citing Restatement (Second) § 203(a)). As explained above, it is possible to interpret the ratability provisions in a manner that gives each meaning and effect. Contra In re Arbitration Between Standard Tallow Corp. and Kil-Management A/S, 901 F. Supp. 147 (S.D.N.Y. 1995) (where arbitration clauses directly conflict, typewritten clause prevails over pre-printed clause). Because there is no conflict between the provisions, the fact that the Part II provision is a

standardized term is immaterial.

My conclusion that the two ratability provisions are not in conflict makes it unnecessary to consider defendant's second argument, that the contract is ambiguous because it contains two conflicting ratability provisions. Thus, I will move to defendant's final argument, which is that the last sentence of the Part II provision is ambiguous in itself. Plaintiff interprets the sentence to mean that it was not obliged to provide any more barges in October 2004 than it had provided during any single prior month under the agreement. Defendant contends that the sentence can be interpreted in other ways. For example, defendant states that the sentence could be interpreted to mean that plaintiff was required to provide a number of barges equal to the combined total of all barges it had provided up to that point during the course of the agreement. Under this interpretation, plaintiff was required to supply 764 barges in October 2004, not 148. This is an unreasonable interpretation of the Part II provision; defendant concedes as much by disclaiming the position "that [plaintiff] could have been required to provide such a large number of barges during October 2004." Dft.'s Br., dkt. #22, at 14. "Ambiguity exists if a provision is subject to *reasonable* alternative interpretations." Grun v. Pneumo Abex Corp., 163 F.3d 411, 420 (7th Cir. 1998) (emphasis added). Defendant provides no other reasonable interpretation of the provision. Therefore, I conclude that the last sentence of the Part II provision is not ambiguous.

My conclusions that the Part II provision is not ambiguous and that it remains a part of the parties' agreement does not mean that plaintiff's damages will be limited automatically to the cost of 53 barges instead of 80. By its plain language, the Part II provision limits plaintiff's ability to limit the number of barges it provides only after defendant fails to make coal available in approximately equal weekly or monthly installments. Therefore, in order to limit its damages, plaintiff will have to demonstrate first that defendant failed to make coal available for shipment on a ratable basis.

ORDER

IT IS ORDERED that plaintiff Ingram Barge Company's motion for partial summary judgment is DENIED.

Entered this 27th day of October, 2005.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge