

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

CRUISE LOGISTICS, LLC, dba	)	No. 64938-8-I
FREIGHTCO LOGISTICS; TRANSVILLE,	)	
LLC; SEATTLE LOGISTICS, INC.; and	)	
CHARLOTTE LOGISTICS, LLC,	)	DIVISION ONE
	)	
Appellants,	)	UNPUBLISHED OPINION
	)	
v.	)	
	)	
TRANSFAIR NORTH AMERICA	)	
INTERNATIONAL FREIGHT SERVICES.,	)	
INC., and TRANSGROUP EXPRESS,	)	
INC.,	)	
	)	
Respondents.	)	FILED: September 12, 2011
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Appelwick, J. — FreightCo is a collection of independent contractors that each had a contract with Transgroup for transportation services. FreightCo sued Transgroup for breach of contract and was awarded \$145,515.80 in monetary damages. FreightCo appeals, arguing that the trial court erred by allowing Transgroup to retain revenues held to cover charges incurred by FreightCo from a third-party vendor or carrier and for which the third-party had failed to bill. Transgroup is liable for those charges and is entitled to temporarily retain those revenues as protection against the possibility that they would be billed in the future. However, should the outstanding liability be extinguished other than by payment, the remaining funds are “net revenue” owed to FreightCo under the contract’s plain terms. The trial court erred to the extent that it allowed Transgroup to retain this revenue indefinitely. We reverse and remand.

**FACTS**

Transfair North America International Freight Services Inc. and Transgroup Express Inc., (collectively, "Transgroup") are freight forwarding and logistics companies. Transgroup operates primarily through a network of independent contractors referred to as "ICOs". When Transgroup contracts with the ICOs, it agrees to license its trade name and provide accounting and collections services for ICOs. FreightCo is the collective name of the appellants in this case, all of which were ICOs in Transgroup's system.<sup>1</sup> FreightCo joined the Transgroup system in 1999 and terminated its contract with Transgroup effective October 11, 2006.

FreightCo filed a suit against Transgroup. The case was tried as a bench trial. Most of the claims asserted by FreightCo were either abandoned or dismissed before trial. The court issued findings of fact and conclusions of law, ordering Transgroup to turn over \$92,155.88 to FreightCo, which it had been holding in bad debt reserve. Following FreightCo's motion for clarification or reconsideration and Transgroup's response to that motion, the trial court modified its findings of fact and conclusions of law to correct a mathematical calculation: "After adjusting . . . the net reserves [sic] held by Transgroup on behalf of FreightCo is \$145,515.80 as reflected on the attached Exhibit B. . . . Transgroup is obligated to pay to FreightCo the \$145,515.80 it is holding in reserves [sic]." The trial court entered judgment in that amount. Despite obtaining the increased judgment, FreightCo timely appealed, claiming that it should have been entitled to additional funds that Transgroup was holding to satisfy outstanding accounts payable.

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<sup>1</sup> FreightCo includes: Cruise Logistics LLC, dba Freightco Logistics; Transville LLC; Seattle Logistics LLC; and Charlotte Logistics LLC.

## ANALYSIS

The relationship between Transgroup and the various FreightCo ICOs was governed by several contracts that were identical in relevant part and will accordingly be referred to collectively as the “contract.” In the normal course of the business relationship, the ICOs secured business with customers that needed to move freight from point A to point B. Transgroup’s brand name and clout helped the ICO’s to secure that business, and Transgroup provided logistics and accounting services. The ICOs arranged to transport the goods via truck, plane, ship, etc., with third-party carriers or vendors. Those carriers/vendors then billed Transgroup for the services and Transgroup paid them. Transgroup next collected the amount due from the customer and used that money to reimburse itself for the amount it had already paid out to carriers/vendors. Transgroup also deducted the fee for its services. The remaining amount, defined as the “ICO’s net revenue portion,” was profit paid to the ICO. Under this process, Transgroup had some financial exposure, since it sometimes paid carrier/vendor invoices before it had collected the gross revenue from the customer. It also paid the ICOs their net revenue before the customer invoice was due. Because of this financial exposure, Transgroup’s form contract contained certain protections. For example, the ICOs were required to establish a bad-debt reserve account as a means to reimburse Transgroup in the event that a customer did not pay. Transgroup could also offset its liability against the revenue due to the ICOs if there were any unexpected charges or expenses.

The contract dealt comprehensively with all revenue and expenses. Under its terms, Transgroup was required to pay the ICO’s net revenue, which was defined as

the gross revenue received from a shipment of freight less the carrier/vendor charges necessary to move the freight and less Transgroup's contractual fee:

All revenue billed by [an] ICO on a TRANSGROUP bill of lading within a seven (7) day period, recapped, and received at TRANSGROUP's office on Wednesday of each week will be processed for payment and ICO's net revenue portion will be mailed by Friday of the same week. ICO net revenue shall be revenue after TRANSGROUP service fees, all carrier costs, destination charges, direct insurance costs and any other third party direct cost of the shipment.

To determine the net revenue, the parties engaged in two processes known as "recapping" and "variances."

Recapping was the process by which the ICO identified the expected revenue to be received from a customer, as well as the carrier and vendor costs that were expected to be incurred from moving the freight. Based on the ICO's recap, Transgroup withheld enough money to pay the carrier/vendor costs.

Variances (also referred to as "differences") were calculated by Transgroup after it has received the various invoices from vendors and carriers, and compared those against the ICO's expected costs listed in the recap. When the invoiced vendor/carrier costs differed from the ICO's recap, it resulted in a variance. The variance was presented to the ICO, which could dispute the variance if it believed the vendor charges were in error. A variance could be either positive or negative, depending on whether the vendor's invoice was greater or less than what was recapped. The variance was either charged to FreightCo (if the invoice was greater than the recap) or would be paid to them as an increase in the net revenue (if the invoice was less than the recap).

The ICO's net revenue under the contract was thus calculated as the gross

revenue, as paid from the customer, minus Transgroup's contractual fee, and minus the vendor/carrier costs, as determined through the recapping and variance processes.

Transgroup's service charge was provided for in the contract. That fee was either 11 percent of the ICO's total gross billed revenue or 30 percent of the net revenue of each shipment.<sup>2, 3</sup>

FreightCo limits the focus of its appeal to the trial court's conclusion of law 3. It does not challenge or dispute any of the trial court's findings of fact. The findings of fact are thus verities on appeal. State v. Levy, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006). Here, findings of fact 21-29 provide a good overview of what a "giveback" is:

21. Givebacks are vendor charges incurred by an ICO on certain shipments but which for some reason do not get billed by the vendor to Transgroup. These charges are identified on the ICO's weekly recap and it is expected that the vendor will eventually invoice Transgroup for such charges. Accordingly, Transgroup holds back enough of the revenue from the particular shipments to pay for those unbilled charges. If the vendor does not bill the charges in the next calendar year, Transgroup will "give back" these unbilled amounts to the ICO the following year.<sup>[4]</sup>

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<sup>2</sup> While the mathematical calculation of Transgroup's fee and an ICO's net revenue will be different depending on which type of contract applies, the legal analysis is the same for the purposes of this appeal. For clarity, this opinion assumes applicability of the first type of contract, whereby Transgroup's fee is 11 percent of the gross revenue, and FreightCo's net revenue is more easily calculated as the remaining 89 percent of the gross revenue, minus any billed third-party costs.

<sup>3</sup> Exhibits 12 through 22 are contracts between Transgroup and the various FreightCo entities. Five of those contracts, exhibits 12, 16, 19, 21, and 22, provide: "TRANSGROUP service charge shall be eleven percent (11%) of ICO's *total gross billed revenue* as described above." (Emphasis added.) The other five contracts, Exhibits 13, 14, 15, 17, 18, and 20, provide: "[TRANSGROUP] service charge shall be thirty percent (30) of *net revenue* of each shipment. Net revenue shall be revenue after all carrier costs, destination charges, direct insurance costs and agent payables." (Emphasis added.)

<sup>4</sup> While the parties use the term "giveback" and rely on Transgroup's informal practice of returning such unbilled money to ICOs annually, it is not technically necessary to address or apply that term, since the contract's terms plainly provide for how the unbilled money should be apportioned between Transgroup and its ICOs,

22. Transgroup takes a risk in returning givebacks to the ICO because Transgroup remains liable for the unbilled vendor expense for up to six years or even longer depending on the particular statute of limitations

23. The ICOs are aware that if Transgroup is billed by the vendor after Transgroup has distributed the givebacks to the ICO, Transgroup has the right to recoup the charges from the ICO.

24. Givebacks are not addressed or even mentioned in the parties' contracts.

25. Transgroup has developed the procedure of paying the ICO's givebacks at the end of the second year following the unbilled charge.

26. The procedure changes, however, when an ICO terminates its contract with Transgroup.

27. When an ICO leaves Transgroup, Transgroup no longer pays givebacks to the ICO.

28. Vendors who do not bill Transgroup for services have at least six years to realize their omission and demand payment from Transgroup. Thus, when an ICO terminates, Transgroup retains the givebacks in reserve to protect against future billings from vendors. If Transgroup did not retain the givebacks and a vendor demanded payment from Transgroup after the ICO was no longer with Transgroup, Transgroup would be stuck paying the bill with no ability to collect that expense from the ICO.

29. FreightCo was aware of Transgroup's policy regarding givebacks during the parties' contractual relationship.

FreightCo does not dispute these findings of fact, but argues that the findings do not support the trial court's ultimate legal conclusion that Transgroup may keep the givebacks, rather than return them to FreightCo.

Washington applies the objective manifestation theory of contracts, giving the

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without ever using the word giveback.

words of a contract their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent. Hearst Commc'ns, Inc. v. Seattle Times Co., 154 Wn.2d 493, 503-04, 115 P.3d 262 (2005). Where, as here, interpretation does not depend on the use of extrinsic evidence, interpretation of a contract provision is a question of law reviewed de novo. State v. R.J. Reynolds Tobacco Co., 151 Wn. App. 775, 783, 211 P.3d 448 (2009), review denied, 168 Wn.2d 1026, 228 P.3d 18 (2010).

The parties agree that the plain language of the contract resolves this issue, and we need not interpret the contract or consider any extrinsic evidence. The dispute arises around how to properly characterize the funds not claimed by the creditors and whether or not they should be treated as revenue under the contract.

The trial court correctly found that, "Transgroup remains liable for the unbilled vendor expense for up to six years or even longer depending on the particular statute of limitations." Transgroup kept this money as protection against its outstanding liability. Accordingly, the trial court's conclusion of law three was at least partially correct: "Transgroup is not obligated to pay any 'givebacks' to FreightCo." Transgroup agrees with this legal conclusion, and asserts that it is plainly supported by the findings of fact. So long as a vendor may eventually submit a bill, Transgroup is not obligated to pay givebacks to an ICO that *remains* with Transgroup, let alone one that has departed. Transgroup's payment of givebacks on an annual basis has been voluntary over the course of dealing with its ICOs. As Transgroup points out, it was willing to employ this giveback practice so long as an ICO remained with Transgroup and remained financially sound, "because it presented no risk to Transgroup: when the

vendor ultimately billed Transgroup for its services, Transgroup could pay the bill and charge that bill against the ICO's ongoing revenue."

But, while the trial court's conclusion is partially sound, it paints an incomplete picture and stops before giving effect to the entirety of the contract's language. This is because the trial court did not expressly address what should happen to the funds held by Transgroup in the event that a third party vendor/carrier *never* bills for charges identified on a revenue recap. After the statute of limitations has expired and a vendor has lost the ability to assert a claim on that money, it no longer counts as a third-party cost that Transgroup may deduct from the total gross revenue in calculating the ICO's net revenue.<sup>5</sup> Instead, that money becomes a part of the net revenue payable to FreightCo, as defined by the plain language of the contract. As the contract provides, "*All revenue billed by ICO on a TRANSGROUP bill . . . will be processed for payment and ICO's net revenue portion . . . shall be revenue after [deducting] TRANSGROUP service fees . . . and any [third party charges].*" (Emphasis added.) FreightCo argues, in essence, that givebacks come under this broad definition of "all revenue" and should accordingly be distributed to the ICO's as part of the net revenue, once they no longer count as third party costs.

An example may be useful in understanding how such unbilled and unexpected "profit" should be treated under the contract.<sup>6</sup> Suppose Company X has agreed to pay

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<sup>5</sup> The parties focus on the expiration of the statute of limitations, but the same result would apply to any equivalent circumstance, whereby the third-party definitively loses its ability to assert a claim for money it was owed.

<sup>6</sup> Transgroup provides a slightly more complex example of a typical business transaction, which is helpful in understanding the mechanics of the recapping, variance, and giveback processes. Unfortunately, its example fails to address what should happen to accrued accounts payable for which an invoice has not been



FreightCo \$100,000 to transport goods. FreightCo, in turn, will contract with a third-party carrier, a trucking company, to move the goods for \$80,000. To properly calculate what FreightCo's net revenue will be, we first subtract Transgroup's service fee. If it is the first type of Transgroup's contract, the "TRANSGROUP['s] service charge shall be eleven percent (11%) of [the] ICO's total gross billed revenue." Thus, Transgroup's service charge here would be \$11,000. Next, Transgroup would subtract the third-party cost of the shipment, \$80,000, to pay the trucking company. Transgroup would hold back \$80,000 with the expectation that the trucking company would submit its invoice. Ultimately, FreightCo's net revenue would be:  $\$100,000 - \$11,000 - \$80,000 = \$9,000$ . But, suppose the trucking company never follows through with a bill. When six years have passed, the statute of limitations will have expired and the trucking company will no longer have a right to bill for the \$80,000. Accordingly, that money would no longer count as a third-party carrier cost. When Transgroup calculates the net revenue owed to FreightCo, that calculation would now look like this:  $\$100,000 - \$11,000 = \$89,000$ . If the \$80,000 carrier cost is never incurred, that money was still received from the customer as part of the gross revenue, and it would, in turn, become part of FreightCo's net revenue, under the contract's plain terms.<sup>7</sup>

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received, after the statute of limitations has lapsed and those funds become net revenue.

<sup>7</sup> This calculation would be different under the second type of contract, where Transgroup's fee must be calculated as a percentage of FreightCo's net revenue, rather than as a percentage of the gross revenue. Under this type of contract, Transgroup's service fee is 30 percent of the net revenue. The service fee is the only amount Transgroup is to be paid under the contract.

If the third-party trucking company submitted its invoice as expected, the calculated net revenue would be  $\$100,000 - \$80,000 = \$20,000$ . Transgroup's service charge would be 30 percent of the \$20,000 net revenue, or \$6,000. That would leave \$14,000 for FreightCo as the ICO's net revenue portion. And, if the third-party trucking

At the crux of the parties' dispute is the fact that the money held over by Transgroup in these circumstances is not net revenue at the time it is held over, but it *becomes* net revenue, in the event that it goes unbilled and unclaimed beyond the statute of limitations. Once it becomes net revenue, as contemplated by the contract, it is owed to the ICO.<sup>8</sup> In the realm of variances, the contract makes clear that if a third-party's actual invoice is larger or smaller than the recapped amount, the ICO's net revenue will be correspondingly smaller or larger. Under the contract, if Transgroup had paid too much net revenue, by virtue of underestimating an account payable, it could withhold difference from a future net revenue payment. If the account payable was less than expected, the variance could be credited to FreightCo, by adding it to future payments of net revenue.<sup>9</sup>

Revenue that Transgroup holds for unbilled accounts payable, just like money left as a variance when an account payable is less than expected, is not owned by Transgroup. Transgroup only has a right to its proscribed service fee, which does not change. The annual reconciliation of givebacks was used throughout the contract period. We see no reason that an annual accounting and reconciliation of the funds

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company did not submit an invoice, all \$100,000 of the gross billed revenue would be net revenue of the shipment. Transgroup's service charge would be 30 percent of \$100,000, or \$30,000, leaving \$70,000 as FreightCo's net revenue portion.

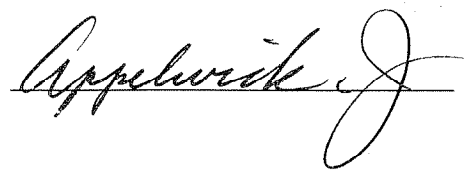
<sup>8</sup> As explained above, under the first type of contract, all of the net revenue would become FreightCo's net revenue portion. Under the second type of contract, 30 percent of the net revenue would remain with Transgroup as its fee, but 70 percent of the net revenue would become FreightCo's net revenue portion.

<sup>9</sup> In the trial court's findings of fact, it stated: "If the variance results in additional money to be paid to the ICO (if, for example, the vendor cost was less than estimated), Transgroup pays the ICO the difference. If it results in money owed by the ICO to Transgroup (if the actual vendor cost exceeds the estimate), Transgroup can be reimbursed for the difference from the reserves or revenue owed to the ICO."

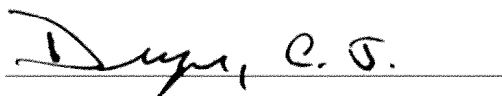
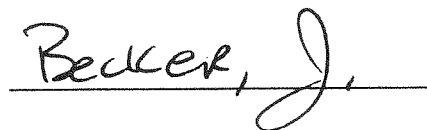
held for accrued accounts payable should not continue despite termination of the contracts.

We hold that the trial court was correct in its legal conclusion that Transgroup, rather than FreightCo, is entitled to possession of the disputed revenues. However, Transgroup is not entitled to ownership of these funds. To the extent that its conclusion can be read to grant Transgroup the right to retain those funds indefinitely, the trial court erred. Transgroup holds the disputed funds in constructive trust for FreightCo, subject only to the valid claims of the third-party creditors identified pursuant to the contracts, and only so long as the individual claims for which the funds were reserved remain valid. Transgroup remains contractually obligated to make timely payment of funds no longer subject to valid claims of third-party creditors to FreightCo. Consistent with the course of dealing during the contract, Transgroup should account to FreightCo at least annually so long as any of the disputed revenues remain in their possession.

We reverse in part and remand for proceedings consistent with this opinion.

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WE CONCUR:

A handwritten signature in cursive script, appearing to read "Dwyer, C. S.", written over a horizontal line.A handwritten signature in cursive script, appearing to read "Becker, J.", written over a horizontal line.