



**INTERNATIONAL
FUEL TAX
ASSOCIATION, INC.**

Manages

The International Fuel Tax Agreement

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**IN THE MATTER OF THE JURISDICTION OF NEVADA AND
THE JURISDICTION OF PENNSYLVANIA
BEFORE THE IFTA DISPUTE RESOLUTION COMMITTEE
DOCKET NO. IF200803-001NV**

FINDINGS ON COMPLAINT

BY A MAJORITY OF THE DISPUTE RESOLUTION COMMITTEE:

The IFTA Articles of Agreement provides that the IFTA Dispute Resolution Process may be used to resolve compliance disputes between member jurisdictions.¹ Per the IFTA Dispute Resolution Process, the IFTA Dispute Resolution Committee (DRC) has the authority to hear a dispute and issue Findings on Complaint.²

All references to the IFTA Articles of Agreement, the IFTA Procedures Manual and the IFTA Audit Manual are references to said documents in effect at the time the audit referenced herein were conducted.

Statement of the Case

On March 3, 2008, the Jurisdiction of Nevada (“Complainant”) filed a Complaint of Non-Compliance against the Jurisdiction of Pennsylvania (“Respondent”). On April 28, 2008, Respondent filed its Answers to the Complaint, denying all allegations of Non-Compliance. Both parties were given until August 29, 2008 to file a supplemental Brief. Nevada filed its supplemental Brief on August 29, 2008. Pennsylvania did not file a supplemental Brief. The DRC conducted a full-day hearing on this matter in Tempe, Arizona on October 21, 2008.

(Foot Note 1) See IFTA Articles of Agreement, Section R1555.100.005.

(Foot Note 2) See IFTA Dispute Resolution Process, Sections I.B.12 and II.B.10.

Issues

Complainant stated the issues in its Complaint as follows:

- a) Nevada requested a determination that reasonable cause existed for a re-audit of the licensee.
- b) Nevada requested a determination that Pennsylvania is out of compliance with the IFTA governing documents.
- c) Nevada requested that relief be granted from Pennsylvania in the amount of \$156,526.29 which was paid under protest on August 8, 2007.

Facts

The fact the Respondent performed an audit on FedEx Ground Package System, Inc. ("FedEx") ending in 2006 is not in dispute. The audit covered the period October 1, 2001 through December 31, 2005. On August 3, 2006, Complainant and four other jurisdictions (Colorado, Iowa, Nebraska and Utah) notified Respondent of their intent to conduct a re-audit of FedEx (Complainant Document #'s 1-9). Complainant's request was based on the contention that the audit methodology and sampling used by the Respondent to calculate the adjustments to Nevada's distance and fuel was flawed.

The Complainant requested the re-audit citing IFTA Articles of Agreement R1360.100 – .300 as authority to conduct the re-audit.

The IFTA Articles of Agreement, Section R1360, provides:

- .100** A member jurisdiction may re-examine a base jurisdiction's audit findings if the member jurisdiction reviews the audit work papers and, within 45 days of receipt of the audit findings by the member jurisdiction, notifies the base jurisdiction of any errors found during such review and of its intention to conduct the re-examination. Such re-examination by a member jurisdiction must be based exclusively on the audit sample period utilized by the base jurisdiction in conducting its audit.

- .200 A member jurisdiction may re-audit a licensee if said member jurisdiction notifies the base jurisdiction and the licensee of reasonable cause for the re-audit.
- .300 The re-audit or re-examination by a member jurisdiction must be performed in cooperation with the base jurisdiction. An adjustment to original audit findings as a result of such re-audit or re-examination must be reconciled with the original audit findings issued by the base jurisdiction. New audit findings shall be issued by the base jurisdiction. A member jurisdiction conducting a re-audit or re-examination shall pay its own expenses.

During August 2006 Pennsylvania provided Nevada with its response to the re-audit issue raised by Nevada and other jurisdictions. Pennsylvania stated its position that it believes reasonable cause did not exist for a re-audit (Respondent Document #'s 7-12).

On October 12, 2006, Nevada raised a concern regarding the large margin of error percentage that Pennsylvania calculated for Nevada's distance adjustments in the audit, indicating the margin of error was based on a very small percentage of the licensee's reported travel in Nevada (Respondent Document #15).

On November 22, 2006, after analyzing and researching Nevada's October 12, 2006 questions regarding Pennsylvania's MPG adjustments and margin of error calculations for the first and second strata of the audit, Pennsylvania e-mailed Nevada its response stating that Pennsylvania stands behind its audit results because it found no audit errors and considers the matter closed (Respondent Document #47).

During January 4-9, 2007 at the IFTA/IRP Workshop, Pennsylvania staff found out that Nevada did not receive Pennsylvania's November 22, 2006 e-mail and therefore, resent the e-mail. On January 17, 2007, Nevada received Pennsylvania's e-mail which stated that Pennsylvania stands behind its audit results and stated that it was Pennsylvania's position that it did not believe that Nevada had the authority to unilaterally force a re-audit absent agreement between both parties that reasonable cause existed. Pennsylvania's e-mail expressly stated that Pennsylvania "considers this matter closed." (Complainant Document #'s 64-65).

On February 28, 2007, Pennsylvania informed Nevada that “we would be interested in knowing how the Board may define ‘reasonable cause’ and would have no objection to placing this matter before the Board for its Annual Meeting in July”. Pennsylvania also forwarded to Nevada an e-mail from the Executive Director of IFTA, Inc. indicating the issue might best be resolved through a Consensus Board Interpretation (CBI) (Respondent Document #'s 89-90).

On March 14, 2007, Nevada informs Pennsylvania it will seek clarification of Sections R1310, R1360.200 and R1360.300 of the IFTA Articles of Agreement. On March 15, 2007, Nevada e-mails Pennsylvania a copy of the CBI request which was also mailed to IFTA, Inc. under a cover letter dated March 15, 2007 (Complainant Document #'s 79-87).

At the IFTA Annual Business Meeting in July 2007, member jurisdictions fail to pass the CBI interpretation of Sections R1310, R1360.200, and R1360.300 of the IFTA Articles of Agreement as proposed by Nevada. As the CBI failed, a definition of reasonable cause was not approved by the membership.

On August 8, 2007, Nevada again sent Pennsylvania a letter requesting a re-audit of the licensee and noting in the letter that Nevada’s payment of \$131,928.33 to Pennsylvania was made under protest. The request for re-audit is now a one jurisdiction matter as Iowa, Utah, Nebraska and Colorado are no longer parties to the re-audit request (Complainant Document #'s 88-92).

On September 24, 2007 and October 10, 2007, Nevada requested a copy of the statute of limitation waiver from Pennsylvania for the period 10/01/01 through 4/30/02, which was outside the four year audit period (Complainant Document # 's 95, 96 and 98).

On October 11, 2007, Pennsylvania replied to Nevada’s request for the records retention waiver from Pennsylvania, stating that Pennsylvania had not obtained a waiver. Nevada

asked why the waiver was not executed for the periods outside the records retention period. Pennsylvania informed Nevada that a waiver was not requested because it was not required. The audit was conducted and the assessment was issued within the Pennsylvania statutory limitations and that Nevada never requested that Pennsylvania seek a waiver from the licensee throughout the two year dispute (Complainant Document #'s 97-99).

On February 28, 2008, Nevada filed a complaint with the DRC alleging that Pennsylvania is not in compliance with the IFTA governing documents (See Complaint).

General Discussion

A guiding principle of the International Fuel Tax Agreement is that jurisdictions will work together to administer and collect motor fuels use taxes and audit the activity of its licensees to support that cooperative effort.

The IFTA Articles of Agreement, Section R140 provides in part:

It is the purpose of this Agreement to enable participating jurisdictions to act cooperatively and provide mutual assistance in the administration and collection of motor fuels use taxes.

The IFTA governing documents are equally binding on each member jurisdiction and must be considered as a whole in the administration of the Agreement. While the Agreement provides general guidelines of administration, it also envisions a broader responsibility in cooperative application of the guiding principle in all matters including audits.

The IFTA Audit Manual, Section A420.200 provides:

Auditors must conduct audits giving each member jurisdiction equal consideration.

The IFTA Audit Manual, Section A510, provides, in part:

Acceptable audit standards provide that several procedures may be employed. However, it is necessary that each audit reflect adequate information necessary to satisfy the commissioners of the various member jurisdictions.

The parties in this dispute failed to cooperate with one another in the early stages of this matter and soon became adversaries as opposed to partners. IFTA is founded on the principle of cooperation and representation of each jurisdiction's rights and interests. The Agreement encourages cooperation and is written to allow for flexibility and sound judgment.

It is critical that the interests of all jurisdictions be considered whenever a jurisdiction operates under the IFTA governing documents. Failure to do so undermines the basic concept of trust which is required for the cooperative agreement to continue to function effectively and to serve the motor carrier industry.

The IFTA Articles of Agreement, Section R1360.100 provides:

- .100** A member jurisdiction may re-examine a base jurisdiction's audit findings if the member jurisdiction reviews the audit work papers and, within 45 days of receipt of the audit findings by the member jurisdiction, notifies the base jurisdiction of any errors found during such review and of its intention to conduct the re-examination. Such re-examination by a member jurisdiction must be based exclusively on the audit sample period utilized by the base jurisdiction in conducting its audit.

Based on testimony at the October 21, 2008 hearing, it appeared to the DRC that the Complainant may have misunderstood the provisions for re-examination pursuant to Section R1360.100 of the IFTA Articles of Agreement. The apparent misunderstanding is demonstrated by the Complainant's statement found on page 10 of the document used for their presentation at the October 21, 2008 hearing. The Complainant's presentation notes: "R1360.100 provides for "Re-examination" when errors occur within the audit sample used." Section R1360.100 provides for a re-examination to be based on the audit sample period (emphasis added), not merely the audit sample as alleged by the Complainant.

Additional testimony from the Respondent disclosed that the licensee's records for the sample periods used in the audit are still available. The DRC strongly encourages the Complainant and Respondent to act cooperatively to conduct a re-examination of the data used to calculate Nevada's distance adjustments in the first stratum of the audit in accordance with Sections R1360.100 and R1360.300 of the IFTA Articles of Agreement.

Throughout the presentation of documents and the testimony given at the October 21, 2008 hearing, there was much discussion relative to the issue of "reasonable cause". Testimony was given that indicated there was no change in the licensee's operations from the prior audit. Documentation presented to the DRC provided sufficient evidence to question the development and application of Nevada's distance error rates. To illustrate, the result of the prior audit of the licensee revealed a distance error rate of -2.5% for the jurisdiction of Nevada. During the audit in question, which covered the period of October 2001 through December 2005, a change in recordkeeping methodology resulted in the audit being separated into two strata as follows: October 1, 2001 through June 30, 2004 and July 1, 2004 through December 31, 2005. A sample quarter was drawn from each of these periods. The sample for the first period resulted in a distance error rate of -23.02% for the jurisdiction of Nevada while the sample for the second period resulted in a distance error rate of -3.41% for the jurisdiction of Nevada. The disparity of the three error rates (-2.5%, -23.02% and -3.41%) demonstrated that reasonable cause did exist to merit further examination of Nevada's distance adjustments that resulted from the Pennsylvania audit of FedEx.

It should be noted that FedEx cooperated in this audit and is not a party to the dispute.

Issues Discussion

Issue A) Nevada requested a determination that reasonable cause existed for a re-audit of the licensee.

The IFTA Articles of Agreement, Section R1360.200 provides:

.200 A member jurisdiction may re-audit a licensee if said member jurisdiction notifies the base jurisdiction and the licensee of reasonable cause for the re-audit.

Complainant requested a re-audit in letters dated August 3, 2006 (Complainant Exhibit #1); January 26, 2007 (Complainant Exhibit #14); March 1, 2007 (Complainant Exhibit #15); August 8, 2007 (Complainant Exhibit #18) and September 24, 2007 (Complainant

Exhibit #20). Respondent's response to these letters was an e-mail dated November 22, 2006 (footnote 3), which stated its position that "reasonable cause" did not exist for requesting the re-audit (Respondent Document #47) and a letter dated February 28, 2007 (Respondent Document #89).

The authority to determine "reasonable cause" is not addressed in the IFTA governing documents. Because the Complainant and Respondent could not resolve this issue, the DRC has evaluated all documents submitted and the testimony given during the October 21, 2008 hearing and has determined that the Complainant did show there was a material level of doubt regarding the Nevada distance adjustments that were calculated by the Respondent in the FedEx audit. Therefore, the Complainant demonstrated that "reasonable cause" did exist for a re-audit of the licensee and the re-audit should have been allowed by the Respondent. Once again, the DRC suggests that the parties consider the re-examination approach as an alternative to a re-audit.

Issue B) Nevada requested a determination that Pennsylvania is out of compliance with the IFTA governing documents.

The IFTA Articles of Agreement, Section R1360, provides:

.200 A member jurisdiction may re-audit a licensee if said member jurisdiction notifies the base jurisdiction and the licensee of reasonable cause for the re-audit.

.300 The re-audit or re-examination by a member jurisdiction must be performed in cooperation with the base jurisdiction. An adjustment to original audit findings as a result of such re-audit or re-examination must be reconciled with the original audit

findings issued by the base jurisdiction. New audit findings shall be issued by the base jurisdiction. A member jurisdiction conducting a re-audit or re-examination shall pay its own expenses.

The DRC has determined the Complainant did have reasonable cause to conduct the re-audit. Even though the Complainant notified both the Respondent and the licensee that it had reasonable cause to conduct a re-audit, the Respondent did not allow the re-audit to be conducted. Therefore, the Respondent is not in compliance with Sections R1360.200 and R1360.300 of the IFTA Articles of Agreement.

(Foot Note 3) Due to an incorrect e-mail address, the e-mail letter dated November 22, 2006 was not received by the Complainant until January 17, 2007. See Complainant Document #'s 64 and 65.

Issue C) Nevada requested that relief be granted from Pennsylvania in the amount of \$156,526.29 which was paid under protest on August 8, 2007.

There are no provisions in the IFTA governing documents that would allow the DRC to grant Nevada's request for this type of monetary relief.

Findings

THE DRC HEREBY FINDS:

As to issue A):

The Complainant demonstrated that "reasonable cause" did exist for a re-audit of the licensee and the re-audit should have been allowed by the Respondent.

Note: Since the DRC has found the Complainant had "reasonable cause" to conduct the re-audit, the Respondent's request for reimbursement of costs associated with this matter will not be addressed by the DRC.

As to issue B):

Since the Complainant notified both the Respondent and the licensee that it had reasonable cause to conduct a re-audit but was denied the opportunity for a re-audit by the Respondent, the Respondent is not in compliance with Sections R1360.200 and R1360.300 of the IFTA Articles of Agreement.

As to Issue C)

There are no provisions in the IFTA governing documents that would allow the DRC to grant this type of monetary relief to the Complainant.

IT IS HEREBY ORDERED that the Respondent cooperate fully with the Complainant in conducting a re-audit of the licensee. Such re-audit shall be commenced no later than sixty (60) days from receipt of this Order. The re-audit shall be completed no later than one year from receipt of this order. This order shall be set aside if it is appealed to the IFTA Board of Trustees and the appeal is accepted by the Board or a settlement is reached and the Complaint is withdrawn. Under provisions of the Dispute Resolution Process, a jurisdiction that does not comply with a decision of the DRC is subject to the penalties set forth in Section III of that Process.

ISSUED THIS 19TH DAY OF DECEMBER, 2008.

FOR THE MAJORITY:

Edward King
Chair

Rick LaRose
Vice Chair

Patricia Platt

Kirk Davenport

Donna Earle

Gary A. Frohlick

Jan Skouby

George Higdon

Rodney Richard

Leanne Tsai

DISSENTING: (BY OPINION)

Dar Walters

IN THE MATTER OF THE JURISDICTION OF NEVADA AND
THE JURISDICTION OF PENNSYLVANIA
BEFORE THE IFTA DISPUTE RESOLUTION COMMITTEE
DOCKET NO. IF200803—001NV

DISSENTING OPINION TO FINDINGS ON COMPLAINT

Under the IFTA Dispute Resolution Process, the IFTA Dispute Resolution Committee (DRC) has the authority to hear a dispute and issue Findings on Complaint. (1) Any Findings issued by the DRC must be approved by a majority of the DRC. (2) The Dispute Resolution Process further states: “If a committee member dissents to the Findings, a written dissent may be drafted by such member and included as part of the Findings issued”. (3) The Statement of the Case found in the Findings on Complaint issued by the DRC as a majority opinion is hereby incorporated by reference.

Dissenting Opinion

The dissenting opinion agrees with the Statement of the Case, Issues, Facts and Findings as stated in the majority opinion’s Findings on Complaint. The dissenting opinion deviates from the majority opinion when it comes to the Order as stated in the last paragraph on page 9 of the Findings on Complaint. The dissenting opinion believes the majority opinion’s Order to grant a re-audit to the Complainant is not the appropriate resolution of this dispute between the jurisdictions of Nevada and Pennsylvania.

The dissenting opinion provides three (3) reasons why granting the Complainant a re-audit is not the appropriate resolution to this dispute. First, the audit in dispute has been closed for over two (2) years. The Respondent’s licensee fully cooperated with the Respondent during the audit; provided records and documentation as requested by the Respondent; accepted the audit result in good faith and paid the audit liability in full to close the audit. Even if the Respondent’s law allowed the ‘closed’ audit to be re-opened, it would not be fair, nor equitable, nor consistent with the licensee / jurisdiction partnership concept of IFTA, to subject the Respondent’s licensee to a re-audit, because of an untimely dispute between two jurisdictions. (It took twenty-seven (27) months for

the Complainant to get a determination regarding its request to conduct a re-audit of the Respondent's licensee) Also, the licensee is not a party to this dispute. Therefore, the licensee should be held harmless and should not be a victim of this dispute between the Complainant and Respondent, which was caused by some questionable distance adjustments in an audit that was conducted by the Respondent.

Second, the Pennsylvania Statute of Limitations has expired for the first stratum of the audit in question. Therefore, this audit period is closed and not available for a re-audit by the Complainant and Respondent. A statute of limitation waiver was not executed by the Respondent, so the licensee is not required to participate in the re-audit granted by the majority opinion's Order. It is the dissenting opinion that Section R1360.100 - .300 of the IFTA Articles of Agreement does not grant a jurisdiction the authority to conduct a re-audit when the base jurisdiction's statute of limitations has expired for the audit period in question. Therefore, the Complainant and Respondent are barred from conducting a re-audit of the Respondent's licensee as directed in the majority opinion's Order.

Finally, the Nevada Statute of Limitations which would have allowed the Complainant to participate in a re-audit of the Respondent's licensee has expired. Therefore, it is the dissenting opinion that the Complainant is barred from joining the Respondent to conduct the re-audit as directed by the majority opinion's Order.

The majority opinion determined that the Complainant demonstrated that reasonable cause did exist for a re-audit or re-examination of the licensee's documentation and records. The majority opinion also determined that the re-audit or re-determination should have been allowed by the Respondent. The majority opinion further determined that the Complainant notified both the Respondent and its licensee that the Complainant had reasonable cause to conduct a re-audit or re-examination, but was denied that opportunity by the Respondent. Therefore, the Respondent is not in compliance with the IFTA Articles of Agreement, Section R1360.100 - .300. It is the dissenting opinion that since the Complainant demonstrated that reasonable cause did exist for a re-audit or re-

examination of the licensee, but the Complainant was denied that opportunity by the Respondent, and it was determined the Respondent is out of compliance with the IFTA Articles of Agreement, the Complainant is entitled to some relief from the original \$156,526.29 bill the Complainant received from the Respondent as a result of the licensee's audit. The dissenting opinion provides the following alternative Order for the IFTA Board of Trustees (Board) to consider, in the event either the Complainant or Respondent appeals the majority opinion to the Board.

IT IS HEREBY ORDERED that the Respondent choose and implement either Option A or Option B which follows, to resolve this dispute before the DRC.

Option A: The Respondent shall treat the Nevada distance adjustments that caused the -23.02% margin of error rate for the Complainant for the first stratum of the licensee's audit (October 1, 2001 through June 30, 2004), as isolated events and not extrapolate the Complainant's distance adjustments to the licensee's entire fleet for the first stratum of the audit. The Respondent shall use the -3.41% margin of error rate that was not disputed by the Complainant, for the second stratum of the audit (July 1, 2004 through December 31, 2005). The Respondent shall re-calculate the adjustments to Nevada distance for the first stratum of the disputed audit using the criteria listed above; reconcile the results of the re-calculation with the \$156,526.29 bill issued by the Respondent and the \$131,928.33 payment the Complainant made to the Respondent under protest; and forward any balance due as a result of the overpayment, to the Complainant via the IFTA transmittal process.

Option B: The Respondent shall use the -3.41% margin of error rate that was not disputed by the Complainant, to calculate the Nevada distance adjustments for both the first and second stratum of the licensee's audit. The Respondent shall re-calculate the adjustments to Nevada distance for the first stratum of the disputed audit using the - 3.41% margin of error rate; reconcile the results of the re-calculation with the \$156,526.29 bill issued by the Respondent and the \$131,928.33 payment the Complainant made to the Respondent under protest; and forward any balance due as a result of the overpayment, to the Complainant via the IFTA transmittal process.

The Respondent shall select one of the options provided in this Order; re-calculate the Complainant's distance adjustments for the first stratum of the licensee's audit; and forward any balance due the Complainant because of its overpayment, no later than

ninety (90) days from the receipt of this Order, unless the parties reach a settlement and the Complainant withdraws its complaint.

The Respondent shall hold harmless its licensee when implementing this Order. The licensee accepted the Respondent's audit result; paid its audit liability in good faith to close the audit; and is not a party to this dispute.

The Respondent shall also hold harmless all jurisdictions that were included in the licensee's audit, but were not a party to this dispute. These jurisdictions accepted its tax deficiency or credit in good faith and shall not be harmed by the Respondent's recalculation of the Complainant's distance adjustments for the first stratum of the audit in question. The Respondent is barred from implementing the customary netting of funds that occurs when the audit result is processed and funds are netted among the participating jurisdictions. Any re-distribution of funds resulting from this Order will be limited to the Respondent and Complainant.

Under provisions of the Dispute Resolution Process, a jurisdiction that does not comply with a decision of the IFTA Board of Trustees is subject to the penalties set forth in Section III of that Process.

In conclusion, the dissenting opinion strongly disagrees with the majority opinion's Order to grant the Complainant a re-audit as stated on page 9 of the Findings on Complainant. Given the audit in question is closed; it took twenty-seven (27) months for the Complainant to get a determination regarding its request to conduct a re-audit of the Respondent's licensee; the expiration of the Pennsylvania Statute of Limitations bars the re-audit from being conducted; the expiration of the Nevada Statute of Limitations prohibits the Complainant from participating in the re-audit, the majority opinion's Order which directs the Respondent and Complainant to conduct a re-audit of the Respondent's licensee is not the appropriate resolution to this dispute. Since the Complainant was successful in demonstrating to the DRC that reasonable cause did exist for a re-audit or re-examination of the licensee, and the DRC found the Respondent out of compliance

with the IFTA Articles of Agreement, the Complainant is entitled to some relief from the \$131,928.33 payment that was paid to the Respondent under protest. The dissenting opinion provides for such relief in the event one of the parties to the dispute appeals the majority opinion to the Board.

ISSUED THIS 19th DAY OF DECEMBER 2008.

Dar Walters

Foot note #1 – See IFTA Dispute Resolution Process, Sections I.B.12 and II.B.14

Foot note #2 – See IFTA Dispute Resolution Process, Section II.B.14

Foot note #3 – See IFTA Dispute Resolution Process, Section II.B.14