

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

FILED

01/20/2022

Clerk of the
Appellate Courts

**MILAN SUPPLY CHAIN SOLUTIONS INC. F/K/A MILAN EXPRESS INC.
v. NAVISTAR INC. ET AL.**

**Circuit Court for Madison County
No. C-14-285**

No. W2018-00084-SC-R11-CV

ORDER

On August 2, 2021, this Court filed an opinion affirming the judgment of the Court of Appeals and taxing costs to the appellant, Milan Supply Chain Solutions, Inc. (“Milan”). Mandate issued on August 16, 2021. On August 27, 2021, the appellees, Navistar, Inc. and Volunteer International, Inc. (collectively “Navistar”), filed a Statement of Recoverable Costs with the Clerk of this Court pursuant to Tenn. R. App. P. 40 (“Rule 40”), which, in relevant part, provides:

(c) Recoverable Costs on Appeal. *Recoverable costs on appeal include the cost of preparing and transmitting the record, the cost of a transcript of the evidence or proceedings, the cost of producing necessary copies of briefs and the record, the premiums paid for bonds to preserve rights pending appeal, and any other fees of the appellate court or clerk.*

(d) Party’s Statement of Recoverable Costs; Objections. If a party has not been assessed costs on appeal under section (a) of this rule, that party may file with the appropriate appellate court a Party’s Statement of Recoverable Costs in order to recover costs on appeal pursuant to section (c) of this rule. The party shall file the Party’s Statement of Recoverable Costs no later than 15 days after the issuance of the mandate; the Party’s Statement of Recoverable Costs may not be filed before the issuance of the mandate. The party against whom costs have been assessed under section (a) shall be liable for such costs. If the court assesses costs against both the appellant and appellee, the parties shall bear their own costs and may not recover any costs on appeal under section (c) of this rule. Any party shall have 15 days after the filing of the Party’s Statement of Recoverable Costs to file any objections with the appellate court clerk.

....

(f) Resolution of Objections to Party’s Statement of Recoverable Costs.

If objections are timely filed to the Party’s Statement of Recoverable Costs, the appellate court clerk shall consider all of the documents filed relative to the Party’s Statement of Recoverable Costs and issue a clerk’s report in which the clerk shall approve and/or disapprove such costs in whole or in part as being authorized and/or not authorized by law. Any party may file an objection to the clerk’s decision with the appropriate appellate court within 10 days of the filing of the clerk’s report.

Tenn. R. App. P. 40 (c), (d), & (f) (emphases added.) The parties agreed that Navistar should recover costs totaling \$141,283.44, which included taxes and clerks’ fees for appeal, cost of transcripts, cost of producing necessary copies of briefs, and *bond premiums*. However, on September 10, 2021, Milan objected to two items of costs Navistar claimed: (1) \$16,268.67 for the cost of making a digitalized copy of the record; and (2) \$1,368,135.81 for an “Issuance Fee,” several “Participation Fees,” and several “Fronting Fees” (hereinafter “bond fees”) that Navistar paid to secure a supersedeas bond for a stay pending appeal.

As provided in Tenn. R. App. P. 40(f), the Clerk of this Court issued a Report and disapproved the costs to which Milan objected. As to the \$1,368,135.81 claimed costs for bond fees, the Clerk explained that Tenn. R. App. P. 40(c) lists only bond premiums as recoverable costs of appeal and does not authorize the recovery of other fees associated with obtaining a bond.

As permitted by Tenn. R. App. P. 40(f), Navistar filed in this Court an objection to the Clerk’s Report. Navistar challenges only the Clerk’s disapproval of the \$1,368,135.81 claimed costs for bond fees. Milan submitted a letter in response to the objection, noting that Tenn. R. App. P. 40 does not authorize the filing of a response to Navistar’s objection and asking the Court for an opportunity to file a response should the Court be favorably inclined toward Navistar’s objection. This Court allowed Milan an opportunity to file a response, which Milan submitted on December 6, 2021, and we also allowed Navistar to file a reply to Milan’s response, which Navistar submitted on December 13, 2021.

Upon due consideration of the entire record in this matter relating to Navistar’s Statement of Recoverable Costs on Appeal under Tenn. R. App. P. 40, we conclude that Navistar’s objection to the Clerk’s Report is well-taken.

As Navistar correctly points out “includes, but is not limited to” and “including but not limited to” are terms of enlargement not of restriction. Lovlace v. Copley, 418 S.W.3d

1, 18 (Tenn. 2013) (citing cases). Even the word “including” used alone or in conjunction with a list of items has been viewed as a term of enlargement, not one of restriction. Id. And the word “includes,” when used in statutory provisions that define terms by stating “that [the term] ‘includes’ specific items,” has been construed as illustrative not exclusive. Id. (citing State v. Marshall, 319 S.W.3d 558, 561 (Tenn. 2010)); see also Gragg v. Gragg, 12 S.W.3d 412, 415 (Tenn. 2000). That the word “includes” was intended to function in Tenn. R. App. P. 40(c) as an illustrative term of enlargement, rather than an exclusive term of restriction, is reinforced by the Advisory Commission Comment, which states: “This subdivision [Tenn. R. App. P. 40(c)] makes costs taxable based on the principle that *all items of cost expended in the prosecution of a proceeding should be recoverable by the successful party.*” Advisory Comm’n Comment, Tenn. R. App. P. 40(c) (emphasis added).

For all these reasons, Navistar’s objection to the Clerk’s Report is SUSTAINED and Navistar’s claim for bond fees totaling \$1,368.135.81 is APPROVED.

It is so ORDERED.

PER CURIAM