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DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-200939 DATE: May 29, 1981

MATTER OF: American Farm Lines

DIGEST:

1. Statement in one section of rule in carrier's rate tender, ICC No. 345, that Condition 5 of Government bill of lading (GBL) is sufficient to release shipments to specified value unless higher valuation is stated on GBL constitutes carrier's offer to transport certain commodities at rates therein despite failure of Government's agents to insert declared valuation in form specified by rule; Condition 5 states that shipment is made at restricted or limited valuation unless otherwise indicated on GBL.

2. In absence of statement referring to Condition 5 from other sections of rule which contain similar requirement for declaration of value in specified form, tender is not applicable to shipments where Government fails to annotate GBLS.

3. Change of language in Condition 5 (now among terms and Conditions in 41 C.F.R. § 101-41.302-3(e) governing GBLs) which clarified application to tenders and other agreements as well as tariffs, does not affect validity of holdings in 53 Comp. Gen. 747 (1974) and 38 Comp. Gen. 768 (1959); "tariff" includes "tender" within meaning of Condition 5. 48 Comp. Gen. 335 (1968).

[Request for Review of GSA Audit Action]

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American Farm Lines, Inc. (AFL), under 31 U.S.C. 244 (Supp. III, 1979), requests review of General Services Administration (GSA) audit action disallowing 73 AFL claims for additional transportation charges, totaling $321,018.81. The shipments moved on Government bills of lading (GBL) between various points covered by AFL Interstate Commerce Commission Tender No. 345 (Tender 345) during 1978. The carrier's original bills, which were based on rates in Tender 345, were paid upon presentation beginning in 1978; however AFL submitted supplemental bills for the additional transportation charges in 1980 on the theory that Tender 345 was inapplicable.

The issue of whether the tender is applicable arises because the Government failed to declare a released value on each GBL. AFL contends that item 30 requires that as a condition precedent to the application of Tender 345 rates the shipper must declare the released value in a notation of specified form; therefore, the lower rates and charges of the tender do not apply since the Government did not comply with the notation requirements of item 30. GSA contends that the charges as originally billed are correct and reflect the actual contract between the parties. The agency believes that item 30 is ambiguous and should be construed against AFL, the drafter, to give the Government the benefit of the lower rates. Resolution of the issue requires interpretation of item 30.

Tenders are considered the same as any other offer made by a party seeking to form a contract and their interpretation is subject to traditional rules of contract law. Union Pacific R.R. v. United States, 434 F.2d 1341, 1345 (Ct. Cl. 1970); Illinois Central Railroad, 44 Comp. Gen. 419, 420 (1965).

Traditional rules of contract law specify that "absent highly unusual circumstances, the parties to a contract should be able to rely on their contract's express lan - guage," Artisan Electronics Corporation v. United States, 499 F.2d 606, 611 (Ct. Cl. 1974). We find no special circumstances in this case, and believe the plain meaning of the words and terms of the contract are clear.

Tender 345 is in the nature of a released valuation quotation in that item 30 provides that applicability of the various rates and valuation charges therein depend upon the declared or agreed value of the commodity shipped. The item is subdivided into three pertinent sections--(A), (B) and (C)--according to commodities and the declared or agreed value.

Each section contains a requirement that the value be declared on the bill of lading by notation in a specified form. Sections (B) and (C) contain lists of specified commodities. Section (B) applies to passenger vehicles and trucks, while section (C) applies to commodities which because of size, weight or structure require specialized equipment, such as rockets, missiles and sonar equipment. Section (A) applies generally to commodities not listed in other sections. Section (A) is materially different from the other sections in that it contains a provision which states in effect that on shipments moving under GBLs, Condition 5 applies to release the shipment without a declaration to a value not exceeding $5,000 per ton of 2,000 pounds unless a higher valuation is declared. Generally, Condition 5 relieves the Government of a requirement to declare value as a condition to application of the lowest available rates.

AFL cites Secretary of Defense, 38 Comp. Gen. 768 (1959) and O. K. Trucking Company, 53 Comp. Gen. 747 (1974), to support its position that Condition 5 of the GBL does not relieve the Government from the tender's notation requirements. The cited decisions concern the effect of Condition 5 (as it then appeared on the reverse side of the GBL) in relieving the Government of declaring value on the GBL. These decisions held that Condition 5 does not satisfy a specific tariff and/or tender requirement for a notation of released valuation where none is inserted by the shipper. GSA asserts that the decisions are distinguishable on several bases or that they should be overruled.

GSA presents no basis for overruling the decisions, and while we conclude that they are inapposite as to shipments transported under section (A), in the absence of a provision similar to that included in Section (A), the decisions are pertinent to sections (B) and (C).

The thrust of GSA's argument is that the released valuation provision governing the GBL contracts in this case contains different language than Condition 5, as considered in the cited decisions. Reference is to the terms and conditions governing GBLs now in 41 C.F.R. § 101-41.302-3 (1980). Among them, in subsection 101-41.302-3(e), is a revised version of "Condition 5", which reads as follows:

> "The shipment is made at the restricted or limited valuation specified in the tariff or classification or established pursuant to section 22 of the Interstate Commerce Act, as amended (49 U.S.C. 22), or to another equivalent contract, arrangement, or exemption from regulation at or under which the lowest rate is available, unless otherwise indicated on the face of the GBL." (the underlined language was added subsequent to the decisions cited by AFL)

GSA presents no evidence that this change in language by adding reference to section 22 quotations affects the validity of the principle applied in the cited decisions that Condition 5 does not satisfy the requirement to annotate a GBL with a released valuation statement when specifically required as a condition to application of a tender. Nor have we found anything in our review of the history of the regulations to support that view.

The change of language has no affect on the annotation under sections (B) and (C) because in Georgia Highway Express, Inc., 48 Comp. Gen. 335 (1968) we held that the term "tariff" as used in Condition 5 of the GBL was not restricted to "tariffs," but also extended to section 22 quotations. In that case the quotation required no specific form of notation of released valuation on the bill of lading to obtain the reduced rates. Therefore, Condition 5 was applied to obtain the lowest rate. In the decisions cited by AFL we specifically found that Condition 5 did not control where a tender was involved, not because the language of Condition 5 did not extend to tenders, but because the tender required a declaration of released valuation as a condition of contract formation.

However, the cited decisions have no relevance to section (A). Even though the section contains a general requirement for a notation in specified form, the section contains a specific reference to Condition 5 and express language relieving the shipper of the requirement where the shipment is transported on a GBL.

Based on the foregoing, we believe that with regard to shipments under sections (B) and (C), where the Government failed to annotate the GBL in the form specified, AFL could properly bill the higher rates. However, for shipments under section (A), we believe AFL agreed, in the absence of a released value annotation to permit a released value of $5,000.00 per ton of 2,000 pounds.

GSA also refers to language found in section (C) which states that if the GBL is not properly annotated, the shipment will not be accepted for transportation. GSA reasons that AFL waived the annotation requirement by accepting the shipment. We disagree. We have consistently followed the principle that tariff rules cannot be waived. 56 Comp. Gen. 757 (1977), 52 Comp. Gen. 575 (1973), 45 Comp. Gen. 384 (1966). In view of the fact that an applicable tariff was in effect at the time these shipments moved, it is reasonable to interpret the provision to mean that the shipments would not be accepted for transportation under Tender 345. Further, to subscribe to the narrow, literal interpretation advocated by GSA would impute illegality inasmuch as the carrier has a legal obligation to transport. 13 Am. Jur. 2d § 148 et seq., Carriers; 49 U.S.C. §§ 303(14), 316 (1976).

Even assuming arguendo that the annotation requirement in section (C) was waived, it does not necessarily follow that Tender 345 rates would be applicable. Furthermore, with regard to section (C), since the Government did not insert a declared or agreed value on the GBL, and section (C) offers two rate bases, it is uncertain which of the alternate rates shown apply if Tender 345 applies.

GSA presents several other contentions, which relate to the parties' intentions; the agency points to three separate circumstances. First, it urges the materiality of a factual distinction in The Secretary of Defense, 38 Comp. Gen. supra. There the tariff rate was the intended billing rate, whereas here, nothwithstanding the language of sections (B) and (C), AFL and the Government intended and thus agreed that the released valuation rates of Tender

345 would apply. It also refers to AFL's response to two Government loss and damage claims for the full value of damaged property, which also involved Tender 345 shipments. AFL's president argued that Tender 345's released valuation provisions were applicable despite the fact that there were no annotations on the GBLs, the argument GSA makes here. GSA also notes that the section on the GBL for Tariff Or Special Rate Authorities referenced Tender 345.

In our view, AFL's failure to initially bill the higher tariff rates does not bind AFL irrevocably to the originally billed rates. Billing is not a persuasive indication of intent. We point out that 31 U.S.C. 244, and GSA's regulations, 41 C.F.R. § 101-41.601 et. seq. (1980), provide a right to carriers to file transportation claims against the United States. The definition of "claim" includes "requests by claimants for amounts not included in the original billing." 41 C.F.R. § 101-41.601, supra. The statute and regulations further state that generally the claim must be received by GSA within 3 years of the latest of the following dates: (1) accrual of the cause of action thereon; (2) payment of the bill; (3) subsequent refund for overpayment; and (4) deduction pursuant to 49 U.S.C. 66. See 31 U.S.C. § 244 and 41 C.F.R. § 101-41.602(b) (1980). Thus, the law specifically provides for the filing of claims for additional monies owed if the carrier can establish the Government's liability. We conclude that AFL's failure to file claims for the higher rates in the original bills does not necessarily show AFL's intent to be bound to the lower rate.

As to AFL's allegedly inconsistent positions, GSA concedes in its report that the two bills presented involving loss and damage claims have not been submitted by the carrier in its request for review and that it has no record of receiving supplementary billing for those shipments. However, we believe the Government, not the carrier, has been inconsistent. The carrier initially billed and was paid at Tender 345 released valuation rates. Nevertheless, the Government initially asserted that the carrier was liable for full value on loss and damage, notwithstanding Tender 345 released valuation provisions. The carrier simply argued that having been paid under Tender 345, its liability was limited in these cases.

In any event, even if the carrier did submit supplemental bills relating to the same two shipments in which

it had advocated applicability of Tender 345 as the basis for settling the Government's claims there is no legal basis to withhold the proper amount of charges. In Global Van Lines, Inc. v. United States, 456 F.2d 717 (Ct. Cl. 1972), the court, in rejecting the Government's argument that the carrier was estopped from seeking additional charges, made it clear that the carrier was entitled to a judicial determination of proper charges. And in Akers Motor Lines, Inc. v. Lady Cornell Comb Co., Inc., 203 F. Supp. 156 (D. Mass. 1962), the court held that the carrier not only has the right, but the duty to recover proper charges for services performed. That case, which involved a shipment resulting in damage, clearly indicates the distinction between the carrier's right to proper charges and the shipper's entitlement to recover damages caused by the carrier's negligence. In our view, a loss and damage settlement is not determinative of the issue of applicable rates, and after the properly applicable tender is identified, a loss and damage claim should be settled in accordance with the tender.

Insertion of the words "Tender 345" on the GBL, while providing some indication of the parties' intent, is not conclusive as to the agreement since GSA, GAO or the courts may determine applicable rates and proper transportation charges. We have held that sources of freight rates and charges on original carrier bills presented to the Government for payment before audit are not necessarily determinative of the Government's obligations at law. See Navajo Freight Lines, Inc., 57 Comp. Gen. 649 (1978); Baggett Transportation Company, B-195482, October 16, 1979, reconsideration January 17, 1980; True Transport, Inc., B-190739, March 30, 1978.

With regard to the question of intent, we note that Department of Defense Regulations, under which these shipments were made, provide explicit instructions that GBL's be annotated to show that the shipment is to be transported under the lowest released value rates offered and that the annotation comply with the offer's requirements, Defense Supply Acquisition Regulations 4500.3 paragraph 214049(b) (1969). Thus, it appears that the Government has, by its own regulations, acknowledged and agreed to the rules of applicability set forth in Tender 345.

Therefore, we cannot agree with GSA that AFL intended its Tender 345 to apply to these cases other than by compliance with the express terms of the tender.

GSA also states that AFL failed to properly designate by symbol or reference mark the changes in item 30 to denote increases in rates which are evidenced by its supplementary bills. GSA argues that since the tender provided for use of such abbreviations and reference marks, AFL had a duty to use them correctly. However, even assuming GSA's allegation is correct, the failure to indicate the increases properly by symbol or reference mark would not affect the validity or applicability of the item and rate, if otherwise proper. See Virginia State Corp. Comm. v. N & W Ry., 222 ICC 111, 118 (1937); Carnation Co. v. C & S Ry., 186 ICC 278, 279 (1932); New Era Milling Co. v. St. L. & S.F. R.R., 50 ICC 207, 210 (1918).

GSA's audit action was incorrect, and a re-audit should be made consistent with this decision.

GSA alleges that AFL may have incorrectly classified the commodities in the various shipments, erroneously placing them under sections (B) and (C), instead of section (A), but its report suggests that commodity classification was excluded from consideration in taking the settlement action, pending our review of the rate applicability issue. Therefore, the commodity-classification issue is outside the scope of this review. However, if, after GSA re-audits the claims consistent with this decision and takes final action on the classification basis, AFL can again request our review.

Milton J. Socolar

Acting Comptroller General
of the United States