

# DECISION



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

**FILE:** B-221075

**DATE:** May 13, 1986

**MATTER OF:** Retroactive Modification of Rate Tender

- DIGEST:**
1. A provision of a tender negotiated under the Military Traffic Management Command's Guaranteed Traffic program permits otherwise applicable rates to be used. This permits lower rates in the motor carrier's existing non-negotiated rate tender which are lower than the negotiated rates to be applied in the absence of evidence that special services were requested and performed on specific shipments.
  2. Rates applicable on the date that transportation services are performed are binding on the parties. In the absence of a benefit to the Government, the applicable tender may not be retroactively modified to nullify its application to a particular point of origin which would result in higher charges being due the carrier.

A carrier submitted supplemental claims to the General Services Administration (GSA) for payment for certain transportation services at higher rates quoted in one of the carrier's tenders.<sup>1/</sup> Based on the record before us, including GSA's administrative report and a report from the Military Traffic Management Command, we find that lower rates in another of the carrier's tenders apply to the service performed.

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<sup>1/</sup> A certifying officer, Michael D. Hipple, Director, Transportation Audit Division, General Services Administration, has asked for an advance decision on the question of whether he properly disallowed eight claims presented by a motor carrier for additional charges for transportation services performed for the Department of Defense.

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Facts

Between late November 1984 and January 1985 the Department of Defense issued Government Bills of Lading to Ryder/PIE Nationwide, Inc. (Ryder), for the transportation of eight shipments of "Freight All Kinds" from the Defense General Support Center, Richmond, Virginia (Bellbluff), to various destinations. The carrier billed and was paid charges derived from rates published in Ryder's rate Tender No. ICC-RYPI-78. Tender 78, which was effective July 5, 1983, offered rates for the transportation of "Freight All Kinds" between various points including Bellbluff. After payment the carrier presented supplemental bills in April 1985 to the GSA in the total amount of \$11,925.36, on the basis of higher rates published in Ryder's Tender NO. ICC RYPI-263.<sup>2/</sup> The higher rates in Tender 263, effective November 10, 1984, were the result of a Guaranteed Traffic program solicitation issued by the Military Traffic Management Command.

The GSA disallowed the claims pursuant to its authority to audit Government transportation bills. 31 U.S.C. § 3726 (1982). The basis for disallowance was a provision in Items 20g and 28 of Tender 263. Item 20g provides that the tender shall not apply where its charges exceed charges otherwise applicable for the same service. Item 28 provides that rates and charges in Tender 263 "alternate with rates in other tenders" when it results in lower cost to the Government. There is no dispute that the rates in Tender 78 were lower than those in Tender 263.

On September 10, 1985, Ryder again filed the claims with GSA using the same higher rates in Tender 263. To establish the inapplicability of the lower rates in Tender 78, Ryder produced Supplement 7 to that tender. Supplement 7 was not issued until August 30, 1985, or about 9 months after the transportation services were performed,

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<sup>2/</sup> GSA reports that there are claims of approximately \$250,000 affected by this issue, some of which involve RYPI-264, a tender that is similar in material respects to RYPI-263.

yet it purported to delete Bellbluff as an origin point retroactively to the effective date of Tender 263, November 10, 1984. The Military Traffic Management Command approved the retroactive modification.

GSA's view that Supplement 7 could not have the legal effect of nullifying the provisions allowing use of a lower rate in another tender is based on the general principle that the rate applicable at the time of movement binds the parties, and on the fact that Government officials have no authority to waive a contractual right without benefit to the Government. In support of its position GSA cites 37 Comp. Gen. 287 (1957). GSA contends that the lower rates in Tender 78 were applicable at the time of movement and, in the absence of consideration for the waiver of that contractual right, there was no authority to agree with the retroactive modification of Tender 78.

The Military Traffic Management Command contends that the modification was made to conform with the intentions of the parties under its Guaranteed Traffic program. They explain that under that program sealed rates are tendered in response to a solicitation. The tenders are publicly opened and evaluated and a carrier is selected on the basis of lowest overall cost and the ability to provide responsive, responsible service in a specific traffic lane. Ryder, as the low-cost carrier, received award of the exclusive right to handle traffic from Bellbluff to various destinations at fixed rates for a 12-month period.

The Military Traffic Management Command argues that it was necessary to modify Tender 78 because the provisions of Tender 263 allowing use of lower rates derived from other tenders were inconsistent with various other provisions of that tender which awarded exclusive traffic to Ryder. They conclude that Tender 78 was not "otherwise applicable" to shipments from Bellbluff because it does not offer the special services contemplated by Tender 263. They explain that carriers participating in the Guaranteed Traffic program are required to provide many services which carriers normally do not provide, and that they perform the services at rates that are less than those charged by other carriers. The extra services are provided at no extra charge even though they otherwise would result in extra charges. These services include providing more timely delivery,

maintaining firm rates, furnishing delivery receipts, and providing heater and refrigerator service.

Star World Wide Forwarders, B-190757, July 28, 1978, is cited by the Military Traffic Management Command as support for their contention that the agency can waive a tender provision even though the waiver has the effect of increasing rates.

#### Discussion

Clearly, the relevant issue is which rates, those in Tender 263 or 78, are applicable. That issue turns on whether the provisions in Tender 263 permitting use of lower rates from other tenders have legal effect and whether the retroactive cancellation of Tender 78's application to Bellbluff was effective.<sup>3/</sup>

Item 20g of Tender 263 reads:

"This tender shall not apply where charges for service provided under this tender exceed charges otherwise applicable for the same service. Receipt and acceptance of this tender by the Government shall not be considered as a guarantee to the carrier of a particular volume of traffic described in this tender."

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<sup>3/</sup> Since rate applicability is the relevant issue and the carrier has not alleged that it did not receive the traffic under the Guaranteed Traffic solicitation, we will not address a collateral question raised by GSA concerning the applicability of the Federal Acquisition Regulations. Where the Government Bill of Lading is the basic procurement document, the Federal Acquisition Regulations do not apply. See B-188513, April 10, 1978, and 49 U.S.C. § 10721 (1982). Ordinarily, a tender is a continuing offer and not a continuing contract obligating the carrier to provide the service. 39 Comp. Gen. 352 (1959).

Item 28 reads:

"Alternation of Rates and Charges

"Carrier agrees that rates and charges named in this tender will alternate with rates and charges published in carrier/Bureau tenders/tariff in which carrier is a participant, effective on the issue date of this tender, when such alternation results in lower cost to the Government. Provisions of Items 25 and 26 apply."<sup>4/</sup>

The Military Traffic Management Command contends that these items are inconsistent with several other tender provisions, namely, items 16, 23 (note 4), 26, 27, 29, and 40.

Item 16, entitled "Governing Publications," which states that no other tenders apply, relates to governing publications such as rules tariffs and tariffs which provide for special services. It means, simply, that if Tender 263 is applicable, there is no need to consult other tariffs for additional rules and conditions. The self-contained nature of the tender is not inconsistent with the possible application of another tender when it produces lower charges.

Note 4 of item 23 provides that the rates published in the tender are firm and cannot be increased for 12 months. Clearly this does not preclude application of lower charges.

Item 26 provides that the rates and charges "are firm for the term of this tender and may not be increased," and that this rule "supersedes that part of item 20 referring to tender amendments." Item 20e provides that the tender may be "canceled" by the carrier on written notice of not less

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<sup>4/</sup> Item 25 provides for application of lowest total charges; it states that the rates apply on shipments subject to transit time, and that the Government reserves the right to use another carrier where the primary carrier cannot provide expedited service. Item 26 states that the rates cannot be increased.

than 30 days, and cancellations or amendments may be made upon shorter notice by mutual agreement with the Government. Item 20g provides that there is no guarantee of tonnage. Reading items 26 and 20 together, it seems that, except to increase rates, the parties can amend or cancel the tender with specified notice. In any event we do not view these provisions as being inconsistent with the provisions which permit lower rates derived from other existing tenders to be applied.

Item 27 provides for negotiation of charges on services not specifically named in the tender. It contemplates negotiation before services are performed, and not later. This presumes that the tender is applicable, and does not exclude applying an alternate lower cost tender.

Item 29 reflects the carrier's agreement to meet certain truckload transit times. This provision and various other provisions, which indicate that the carrier will perform certain services not normally provided by motor carriers, do not present inconsistencies with the provisions permitting use of lower rates from other tenders. However, as discussed later, they raise the question of whether Tender 78 applies to a specific shipment if that tender and its governing publications did not offer certain services which were actually requested and performed.

Item 40 simply states that the tonnages shown in the tender are estimates and that certain shipments moving by other transportation modes have been excluded from the estimates. There appears to be no question that the carrier received the available tonnage, thus that is not at issue.

The Military Traffic Management Command argues that the provisions of Tender 263 are not similar to the provisions of Tender 78 to the extent that Tender 78 should not be considered "otherwise applicable." They point out that the Government may contract to pay higher rates than those assessed to the public generally if necessary to obtain services not available to the public. See Hilldrup Transfer & Storage Co., 58 Comp. Gen. 375 (1979). The argument seems to be that Tender 263 should be considered as offering services so different from those authorized by Tender 78 that Tender 78 should not be considered otherwise applicable. Tender 263 offers a single rate for transportation even

though certain extra cost services may be provided and it binds the carrier to certain terms not usually applicable. Nevertheless, Tender 263 does not specifically supersede other tenders; in fact, it specifically permits the use of other tenders offering lower rates. We cannot conclude, therefore, that Tender 78 may not be used for shipments otherwise covered by its terms. Further, GSA reports that there is nothing on the Government Bills of Lading or elsewhere in the record showing that the special services offered at no extra charge in Tender 263 were requested or performed on the shipments involved here. Further, if special services were actually requested and performed, they may be covered by tariffs governing Tender 78 at lower overall cost than Tender 263 provides. Whether Tender 78 and its governing publications offered lower rates for the same services as Tender 263 is a determination for GSA to make in the first instance. The carrier has the burden of showing that any special services billed for were requested and performed. Ultra Special Express, 54 Comp. Gen. 308 (1974); Trans Country Van Lines, Inc., 53 Comp. Gen. 603 (1974).

Since the clause in item 28 of Tender 263 was included in addition to the standard tender provision contained in item 20g, both of which provide for the use of lower rates, it seems clear that the parties intended to permit the use of lower rates in tenders other than Tender 263. Thus, we cannot find that the attempted retroactive modification of Tender 78 was to carry out the original intent of the parties under Tender 263.

Contrary to Military Traffic Management Command's contention, in Star World Wide Forwarders, supra, we did not hold that a Government agency may waive a contractual right. That decision held that since there was evidence that a new rate tender was intended to be an increase in rates, a former tender could not thereafter be used to apply lower rates. There, the increase in rates was accepted before the transportation services were performed and the only deviation authorized was from an agency procedure dealing with the method of filing tenders. Since in the present case it has not been shown that the Government received any benefit for the modification, and no officer or employee of the Government can waive, modify, or otherwise change contractual obligations without a compensatory benefit, that modification is not retroactively effective. See 40 Comp. Gen. 309, 311 (1960); and 37 Comp. Gen. 287, supra.

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Accordingly, we find that the Military Traffic Management Command did not have authority to accept the retroactive modification of Tender 78 as a means of nullifying its use as an alternative to Tender 263 which would have the effect of retroactively allowing Ryder the higher charges. On the basis of this record, the GSA properly disallowed the carrier's claims.

Guaranteed Traffic agreements with carriers may preclude the use of lower rates published in existing tenders, but the new agreement must provide that lower rates in other tenders will not be applicable. Cf. B-154967, December 21, 1964; and Puerto Rico Marine Management, 57 Comp. Gen. 584 (1978).

*for Melton J. Forster*  
Comptroller General  
of the United States