

M. Hipple



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Consolidated Freightways - Air Freight Tender

File: B-236618

Date: March 14, 1991

DIGEST

Alternation of rates, where the shipper treats a shipment as if it weighs more than it actually does in order to take advantage of a lower charge for the higher weight, is not proper where it is not provided for in terms of the parties' agreement, and there is no legal basis to read it into the agreement.

DECISION

Consolidated Freightways, Inc., requests our review of a setoff made by the General Services Administration (GSA) to recover \$16 in alleged overcharges assessed in connection with payment on a Government Bill of Lading (GBL).^{1/} We find GSA's setoff to be improper.

Background

The rate publication applicable to the traffic in issue is Consolidated's Air Freight Tender 262 for "second day freight all kinds" service. Consolidated offered Tender 262 in response to a solicitation issued April 6, 1987, by the Military Traffic Management Command. The solicitation was intended to obtain competitive offers to satisfy recurring traffic requirements from three origins, including the Naval Supply Center in Norfolk, Virginia, to designated points in the continental United States and Canada.

The solicitation, in Item 42, required competing carriers to submit rates and charges for weights from 1 to 99 pounds, and per hundred pounds for weights between 100 and 2,000 pounds. Item 42b further divided the 1 to 99 pound range into a series

^{1/} GBL S-8,070,135 and associated airbills 262-369682 and 262-372073. The record provided by GSA indicates that additional air bills are involved and that the total amount of overcharges is \$218.

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of weight categories: 1-5 pounds, 6-10 pounds, 11-25 pounds, 26-50 pounds, 51-70 pounds and 71-99 pounds. Item 42d is structured similarly but involves categories of weights at 100 pounds and higher: 100-199 pounds, 200-299 pounds, etc.

The shipments involved here weighed a total of 70 pounds and were rated by GSA as one shipment.^{2/} Although the rate offered by Consolidated in the 51-70 pound category was \$47, GSA noted that Consolidated's offered rate for shipments in the 100-199 pound category was only \$31 per hundred pounds. In calculating the overall charge for the shipment, GSA relied on "alternation," a standard practice generally allowed and provided for in the rate publications of various types of carriers in the motor transportation industry. Alternation permits treating a shipment as if it weighed more than it actually did to take advantage of a lower rate corresponding to the selected higher weight. GSA therefore treated the shipment as if it weighed 100 pounds in order to take advantage of the \$31 rate.

Consolidated professes to be unaware of the practice on which GSA relied, and complains that GSA's action conflicts with the clear language and structure of the solicitation. Consolidated argues that the solicitation was very clear that shipments in weight increments from 1 to 99 pounds would be paid for one way, and larger shipments another way. Consolidated says that it specializes in moving freight in excess of 100 pounds, and that higher rates for lighter shipments essentially reflect surcharges for the additional handling and pallet position problems they create, as incentives to consolidate shipment.

GSA admits that, unlike the usual tariff or tender, neither the solicitation nor Consolidated's tender included such an alternation provision. (The solicitation prescribed the form and terms of any responses.) GSA nevertheless defends its action because an alternation provision was not purposefully omitted; as a general rule contracts are construed so as to give the shipper the benefit of the lowest applicable rate; and to the extent carrier's tender is ambiguous, the ambiguity should be resolved against the carrier.

Analysis and Conclusion

Initially, and notwithstanding Consolidated's profession that it is unaware of the practice in the air freight industry, we

^{2/} Item 40a of Tender 262 provided that the aggregate weight of all shipments to the same consignee tendered on the same day would be billed at the applicable rate for the total weight of such shipments.

note that Consolidated's own service guide describes the practice in a list of "General Rules" contained in tariffs. Further, item 38 of Tender 262 is entitled "Nonalternation of Rates and Charges," and provides:

"On shipments covered by this tender alternation with other rates and charges is not permissible. The only rates and charges permitted on shipments covered by this tender are the rates and charges shown herein."

While it appears that item 38 applies only to alternation with rates and charges in other publications (as opposed to within a document itself), the provision is a clear indication that the practice is a recognized one for carrier movements.

As to the propriety of using alternation here, we have recognized alternation even when not expressly provided for in a tender if there at least is some reference in the tender to another publication that incorporates the practice. See, for example, Milne Truck Lines, Inc., 62 Comp. Gen. 29 (1982). Tender 262 is described in Item 18 as being self-contained, and except for a circular that is not involved in this discussion, no other tenders or tariffs apply. As stated above, there was no explicit provision in the solicitation, and there consequently is no explicit provision in Tender 262, allowing a shipper to make use of a higher weight set out in the tender if lower overall charges would result. The only mention of alternation is in item 38 which, as stated above, evidently only concerns alternation with other rate publications. We also note that Consolidated's service guide cautions that a particular shipment is subject to the applicable tariff's rules, and the guide is not referenced at all in Tender 262.^{3/}

Further, when the various provisions of the parties' agreement are construed together so as to give effect to all of them, it appears that there is no option to pay for shipments of 1-99 pounds falling within a particular weight category at other than the rate expressly associated with that weight. Item 34 of the solicitation (and thus of the tender), Instructions to Complete Rate Items, states that rates and charges for shipments weighing between 1 and 99 pounds "will be submitted on a per shipment basis," and those 100 pounds and more are to be submitted on a per hundred-pound basis. Selection of the primary carrier would be based on the lowest cost, responsive tender for shipments weighing 1-99 pounds and shipments of

^{3/} Item 140(2) of MTMC Freight Traffic Rules Publication No. Is another example of a publication containing an alternation provision.

100-2,000 (and more) pounds. We think the exclusivity of the two categories is apparent.

Also, under Item 37 of the solicitation (and tender), shipments that fall between rate categories (for example, a shipment of 70.5 pounds, which falls between the 51-70 category and the 71-99 category) "will be charged at the next highest weight category" (in the example, 71-99 pounds). This language is both mandatory and exclusive, suggesting that no other rate will apply.

Finally, we think Consolidated has given a credible reason for offering higher prices for shipments under 100 pounds: to encourage larger shipments in order to avoid the labor costs attendant to handling small ones. On its face, the solicitation's structure clearly invited that type of pricing scheme. In the absence of an included or referenced caution to offerors that they in effect could not charge a lower price to move heavier loads, it would be inconsistent with the basis on which offers were invited to depart from Tender 262's express structure and alternate between the per-shipment charges and the cents-per-hundredweight charges.

In sum, while the omission of an alternation provision from the solicitation and Tender 262 may have been inadvertent on the government's part, we see no legal basis to read such a provision into the tender. Moreover, the only reasonable reading of the actual language of the parties' agreement supports Consolidated's charges. Accordingly, GSA's setoff action is overruled.

for 
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