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R. Heitzman

Transp.

**DECISION**



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

FILE: D-190739

DATE: March 30, 1978

MATTER OF: True Transport, Inc.

**DIGEST:**

1. Whether rates from Section 22 quotations apply to Government shipments is question of fact.
2. Section 22 quotations apply to Government if direct and entire benefit of the rates accrues solely to Government and the Government bears the transportation costs.
3. The circumstances of the particular transportation determine whether the requirements of Section 22 have been met.
4. Rates in Section 22 quotations apply to Foreign Military Sales shipments. Present proof that Government did not receive direct and entire benefit of the rates and that Government did not bear the transportation costs.
5. Past experience of this Office indicates that transportation charges on FMS shipments are not always reimbursed or fully reimbursed.
6. Burden of proof is on carrier to prove validity of its transportation charges and record does not indicate carrier has met that burden of proof.

True Transport Inc. (True), in a letter dated November 17, 1977, requests the Comptroller General of the United States to review the General Services Administration (GSA) action in disallowing its claim for \$3,546.09 on a settlement certificate dated November 11, 1977 (GSA claim No. TK-007039). See section 201(3) of the General Accounting Office Act of 1974, 49 U.S.C. 66(b) (Supp. V, 1975). Under regulations implementing section 201(3) of the Act, the disallowance of a claim constitutes a reviewable settlement action 4 C.F.R. 53.1(b) (2) and 53.2 (1977); True's letter complies with the criteria for requests for review of that action. 4 C.F.R. 53.3 (1977).

The record relied on by GSA shows that during February 1974 True transported 12 shipments of electrical cable from the Tobyhanna Army Depot at Tobyhanna, Pennsylvania, consigned to the Transportation Office, Military Ocean Terminal, Bayonne, New Jersey, c/o Maher Terminal, Berth 80/84, Port Elizabeth, New Jersey. The 12 shipments

were part of a consignment totaling 49 shipments which were transported by True between the same points.) Each shipment was described in part on the covering Government bill of lading (GBL) as "FREIGHT ALL KINDS," was routed "TRUE TRANSPORT, INC.:...C/O ZIM LINES," and contained 23 pallets of the electrical cable loaded and sealed in a 40-foot container by the shipper.

The "MARKS" section of each GBL contains a substantially similar annotation reading: "VOYAGE A0954, BKG 2529 VESSEL ZIM GENOVA M/F: FMS CASE VWJ EXPORT." The "TARIFF OR SPECIAL RATE AUTHORITIES" section of the GBL refers to "ICC #8, POSITIONING CONTAINER MAC 10 ITEM 264." The GBL shows that the appropriation chargeable is "21X4991.0620P1620536-039," and that the charges were to be billed to the U. S. Army Finance Center.

True collected from the U. S. Army Finance Center freight charges of \$286.47 on each of the 12 shipments. Payment from appropriated funds was made on April 15, 1974. The charges are based on "ICC #8," the special rate authority referred to on each GBL. "ICC #8" is True's Government Rate Quotation I.C.C. No. 8 (GRT No. 8) which provides lower rates for the use of the Government. GRT No. 8 was filed by True under Section 22 of the Interstate Commerce Act, 49 U.S.C. 22 (1970), which permits carriers to offer reduced preferential rates to the United States for shipping its freight. GRT No. 8 was issued by True to apply on shipments of "FREIGHT ALL KINDS" in containers or trailers transported by True between New Jersey and New York piers and interior points, including Tobyhanna, Pennsylvania. It also incorporated by reference a placement charge contained in a tariff. Item 10 of GRT No. 8 reads in part:

"I am \* \* \* authorized to and do hereby offer on a continuing basis to the United States Government \* \* \* pursuant to section 22 of the Interstate Commerce Act \* \* \* the transportation services herein described subject to the terms and conditions herein stated, the property to which rates herein apply must be shipped by or for the Government (I) on Government bills of lading. . ."

GSA, after auditing the freight charges on the 12 shipments, notified True on September 1975 of an overcharge of \$118.11 on seven of the 12 shipments. Each overcharge was based in part on the lack of proof that the shipper requested the placement charge incorporated by reference into GRT No. 8. In the absence of refund and in accordance with 49 U.S.C. 66(a) (Supp. V, 1975) the seven overcharges were collected by deduction on November 1, 1976.

True then filed a claim on the 12 shipments for a total of \$2,832.86 with the U. S. Army Finance Center. It was received there on September 13, 1977. The claim was transferred to GSA where True amended it to \$3,546.09. The amount claimed represents the difference on the 12 shipments between freight charges originally collected, based on True's section 22 quotation, GRT No. 8, and those based on True's commercial tariff, Middle Atlantic Conference Class Tariff 500.

The claim on each of the 12 shipments is supported by a True freight bill containing among other things the statement: "BALANCE DUE BILL FOR SHIPMENT MOVING ON / True's reference to the shipment--7 SECTION 22, NOT APPLICABLE, SUBJECT TO MAC TARIFF RATES"; a copy of the freight waybill copy of the covering GBL; and a copy of Zim Container Service's dock receipt. The dock receipt shows that Zim received a container with the mark "FMS CASE VWJ" from True, that the exporter is the Government of Israel and that the carrying vessel "ZIM GENOVA" is an Israeli-flag vessel.

GSA disallowed the claim because "There is no evidence of record here to indicate that Section 22 rates are inapplicable, nor are we aware of any authoritative source that prescribed, as a matter of principle, that Section 22 of the Interstate Commerce Act does not apply to foreign military sales."

True with its request for review enclosed a copy of a bulletin issued by the American Trucking Association, Inc., which advises in part that "The Department of Defense has now advised all DOD procurement and transportation elements that Section 22 rates should not be applied to shipments of FMS material." (Emphasis in original) No other evidence or argument is presented by True as to why the GSA action is believed erroneous on this claim nor does True specify any factual, technical or legal basis for its contention that "Section 22 rates should not be applied to shipments of FMS material."

We note first that True's claims on five of the GBLs are barred by the 3-year limitation on the filing of claims in 49 U.S.C. 66(a): the freight charges on GBLs H-4432333, 334, 335, 339 and 342 were paid to True on April 15, 1974, and its claims for additional charges on those GBLs were received by the U. S. Army Finance Center on September 13, 1977, more than three years after the date of payment.

We also note that in any event True's recovery on the claims on the other seven GBLs (Nos. H-4432319 through H-4432326) would be limited on each GBL to \$118.11, the amount of each overcharge collected by

deduction in November 1976. We understand that GSA in its audit and claims settlement functions follows the rule in T.I.M.E. Freight, Inc. v. United States, 302 F. Supp. 573 (N.D. Texas 1969), which limits recovery to the amount improperly deducted within three years from the date of the filing of the claim.

We now turn to the question whether GSA was correct in disallowing True's claim for additional freight charges on the seven shipments not barred by the statute of limitations.

GSA's regulations concerning claims against the United States relating to transportation services are explicit with respect to the burden of proof. As published in 41 C.F.R. 101-41.603.3, they read:

"(a) A claim is settled on the basis of the contract of carriage as evidenced by the bill of lading, transportation request, or other contractual agreement; the payment record; reports and information available to GSA and/or to the agency out of whose activities the transaction arose; and the written and documentary record submitted by the claimant. Oral presentations supplementing the written record are not acceptable.

(b) Settlements are founded on a determination of the legal liability of the United States under the factual situation disclosed by the record. The burden is on the claimant to establish the liability of the United States and the claimant's right to payment. Clear and detailed documentation by the claimant is essential to the claim settlement; bare assertions or conclusions are not acceptable."

In our review of GSA claims settlements we also must rely on the written record and, in the absence of clear or convincing contrary evidence, we will accept as correct the facts set forth in GSA's administrative report. The carrier seeking review has the burden of affirmatively proving its case. B-189100, December 27, 1977, 57 Comp. Gen. \_\_\_\_\_.

Section 22 of the Interstate Commerce Act, as amended, 49 U.S.C. 22 (1970), made applicable to motor carriers by section 217 of the Act, 49 U.S.C. 317 (1970), provides in part that

"Nothing in this chapter shall prevent the carriage, storage or handling of property free or at reduced rates for the United States...."

In Interpretation of Government Rate Tariff For Eastern Central Motor Carriers Association, Inc., 323 I.C.C. 347, 350 (1964), the Interstate Commerce Commission (ICC) concluded

"that section 22 quotations are applicable on transportation services which are performed for the government so long as the direct and entire benefit of the special rates accrues solely to the government. Whether it does so accrue is a question of fact.

The circumstances of the particular transportation determine whether the requirements of section 22 have been met. For example, when a government bill of lading is issued, the fact is established that the transportation is performed for the government and that the full cost is borne by the government giving it the entire benefit of any reduced rate.... Thus, use of a government bill of lading assures the carrier that the section 22 rates will advantage only the government."

And in Southern Pacific Transportation Company v. United States, 505 F.2d 1252, 1256 (Ct. Cl. 1974), the Court of Claims makes clear that the circumstances of the particular transportation are the facts that determine as a question of law whether section 22 applies.

This Office has long held that tenders like True's GRT No. 8 made to the United States by a carrier under Section 22 of the Interstate Commerce Act is a continuing unilateral offer to perform transportation services at named ratings or rates subject to the terms and conditions named therein. 53 Comp. Gen. 443, 449 (1973); 51 Comp. Gen. 724, 726 (1972). The offer ripens into an agreement or contract when accepted by the Government by making any shipment or settlement under its terms. 37 Comp. Gen. 753, 754 (1958).

The record indicates that all the shipments were Foreign Military Sales (FMS) shipments. And under the provisions of the FMS program the United States is performing a reimbursable service for the FMS customer and as such transportation charges are supposed to be reimbursed to the United States. See Department of Defense Instruction 2110.12, sec. V-B1b (August 19, 1970). Section 22 rates are proper only where the Government pays the charges or directly and completely reimburses the party which initially bears the freight charges. Thus, the core qualification for the section 22 privilege is that the Government directly bear the transportation cost and obtain the benefit of the reduced rate. Southern Pacific Transportation Company v. United States, supra, P. 1255.

As indicated above, all of the shipments moved on a Government bill of lading, the transportation services were performed solely for the Department of the Army and the Government paid the freight charges through the U. S. Army Finance Center, Indianapolis, Indiana. In fact True originally filed its claim for additional freight charges with the Army Finance Center. The Government bills of lading were audited by GSA after payment under the provisions of 49 U.S.C. 66 (Supp. V, 1975), and in several cases deductions were made by the Government from monies due True. Thus, there is no doubt in this case that the Army received the direct and entire benefit of the transportation services furnished by True and therefor the shipments were for the account of the United States Government.

The subject transportation services were furnished the Army to enable the Army to carry out its mission in the management and administration of the FMS program and thus the Government received the benefit of such transportation services. Also, since the purpose of the Foreign Military Sales Act seems to be the maintaining of international peace and security, it seems that FMS sales likewise would be a benefit to the United States. See 22 U.S.C. 2754 (1970). What benefit the Government received would vary with each case. See 25 Op. Att'y. Gen. 408 (1903), wherein it was held that the Government received the benefit of a reduced rate on materials and machinery used by it, or by parties contracting with it for work on canal and irrigation projects.

The record fails to indicate if, in fact, a foreign Government or anyone else reimbursed the Government its transportation charges. And as previously stated whether the special rate accrues solely to the Government is a question of fact. Southern Pacific Transportation Company, supra, p. 1256.

True has failed to produce any evidence to indicate to GSA that the United States has been reimbursed its transportation charges for the shipments; that the United States did not receive the benefit of the reduced rate; that the shipments did not move at a reduced rate for the Government; that the published tariff rate is the applicable rate here rather than the Section 22 Quotation.

The burden of proof in this case may be difficult for True to sustain. The past experience of this Office indicates that the United States has not been fully recovering its transportation costs on FMS shipments. See Report to the Secretary of Defense entitled, Improvements Are Needed To Fully Recover Transportation And Other Delivery Costs Under The Foreign Military Sales Program, LCD-77-210, B-165731, August 19, 1977. The report found that the Department of Defense (DOD)

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has absorbed millions of dollars of transportation and handling costs which should have been recovered from customers under the FMS program. The report recommended that DOD modify its procedures and bill customers for actual transportation and handling charges.

In our opinion, there are no facts in the record presented to GSA nor in True's review request which establish that the United States did not receive the entire and direct benefit of the special rate. Indeed, the present record overwhelmingly supports the opposite conclusion. The most important fact is that the shipments moved on GBLs (see 323 I.C.C. 347, supra); the GBLs refer to "ICC #8," a Section 22 quotation which applied to shipments moving on GBLs; and the GBLs show that the transportation charges were to be paid (and in fact were paid) from appropriated funds and there is no indication that any of the transportation charges were reimbursed to the Government. This falls far short of proof that the United States did not get the direct and entire benefit of the special rates, proof that is required by the GSA regulations relating to transportation claims.

Nor has True met its burden of affirmatively proving that the GSA settlement was incorrect. The American Trucking Associations, Inc., bulletin submitted with the True review request merely states what apparently is DOD policy on the prospective application of rates on FMS shipments and indicates the method for procurement of transportation services for FMS shipments in the future and bears no relationship to the shipments under consideration.

As indicated above, we are aware of the Foreign Military Sales Act (now the Arms Export Control Act), 22 U.S.C. 2751 (1970) and of the fact that under the provisions of the FMS program when a GBL is used the United States is performing a reimbursable service for the FMS customer. However, there is no evidence in the present record which shows that any of the transportation charges were reimbursed to the United States. In the face of the prima facie case established by the present record indicating that the United States did in fact receive the direct and entire benefit of the rates in GRT No. 8, the Section 22 quotation, the lack of that evidence defeats True's entitlement to the claimed higher commercial charges.

Except as to the part of the claim that is barred, GSA's action in disallowing True's claim was correct and is sustained.

Deputy

  
Comptroller General  
of the United States