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DECISION

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

FILE: B-195482 DATE: October 16, 1979

MATTER OF: Baggett Transportation Company

DIGEST:

1. Source of freight rates and charges on original carrier bills presented to Government for payment before audit, not determinative of Government's obligations at law.

2. Government's liability directly to carrier for payment of freight charges for transportation of Foreign Military Sales (FMS) shipments under Government bill of lading (GBL) contracts, presumes benefit of Section 22 rates accrues to United States. True Transport, Inc., B-190739, March 30, 1978.

3. Where two published charges (tariff and tender) are equally applicable to same FMS shipments, Government entitled to lower tender rates.

Baggett Transportation Company (Baggett) requests review of action taken by the General Services Administration (GSA) in which $18,142.98 was deducted from other monies due the carrier. See 49 U.S.C. 66(b) (1976) and 4 C.F.R. 53 (1978).

GSA states that Baggett transported 71 Foreign Military Sales (FMS) shipments from various Government depots to numerous other points within the United States, for export. See the Arms Export Control Act, 22 U.S.C. 2751 (1976). The Government paid the carrier's bills upon presentation, as required by 49 U.S.C. 66(a). GSA's audit determined that Baggett collected overcharges on all of its bills. Deductions were made to recover the overcharges collected for transporting 30 shipments of explosives, ammunition and other hazardous articles, while similar action to recover $17,429.07 collected on the other 41 shipments is being withheld pending disposition of this review.

Each shipment moved on a Government bill of lading (GBL) between July and December 1977. Baggett applied commercial tariff rates, billed the Government on that basis, and was paid. Following our decision of March 30, 1978, B-190739, to True Transport, Inc., GSA determined that lower rates contained in Baggett's Section 22 Quotations were applicable. 49 U.S.C. 22. We cannot agree with Baggett's contention that the facts here are materially distinguishable from the facts in the True Transport case.

In the True Transport case GSA's report showed that the shipments were transported on GBLs, that the services were performed solely for the United States, that the carrier billed the Government for its services, and that the carrier was paid by the Government. On that record we found that the lower rates contained in True Transport's Section 22 Quotations were applicable to those shipments because the United States received the entire benefit of the transportation services; we generally sustained GSA's action, holding that True had failed to carry its burden of producing clear and convincing contrary evidence that would prove that the Government did not bear the cost and receive the entire benefit of the lower rates.

True's contention, that under the implementation of the FMS program by the Department of Defense (DOD), the United States was merely performing a reimbursable service for FMS customers, was considered in the light of a 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, which found that FMS customers were not fully reimbursing the United States for transportation and handling costs. Further, we noted that a bulletin issued by the American Trucking Associations, Inc. (ATA), dated July 7, 1977, and referred to by True, simply published what purported to be DOD's policy that Section 22 rates were not applicable to FMS shipments. That Bulletin, No. 155, reflected DOD's intructions to its components to annotate the face of GBLs with the term, "FMS shipment," or similar words that would suggest DOD's policy that Section 22 rates were not applicable.

Baggett presents several arguments for its assertion that the True Transport decision does not apply to the FMS shipments handled by Baggett.

Baggett represents as a material distinction from the True Transport case the fact that Baggett originally billed the Government on the basis of the higher rates contained in its commercial tariffs, whereas True had billed the Government on the basis of the lower Section 22 rates. We do not agree with Baggett's assessment of the materiality of this distinction. The source of rates (tariff or tender) and charges used by a carrier on its original bills presented to the Government does not determine the Government's obligation for payment at law. Whether derived from a Section 22 tender (as in True Transport) or from a tariff (as here), the material facts in both cases are that the carrier billed the United States for its services and was paid from appropriated funds. Baggett, as True, looked to the Government for payment, which it was entitled to do under the terms of the GBL. And appropriated funds are utilized in FMS procurements. See Procurements Involving Foreign Military Sales, 58 Comp. Gen. 81 (1978), 78-2 CPD 349.

Baggett's argument that the Arms Export Control Act, 22 U.S.C. 2751, requires foreign governments to reimburse the United States for all contract costs was raised by True. In the light of our Report No. LCD-77-210, we considered it insufficient evidence to establish that the United States did not receive the entire and direct benefit of the special rates.

The next three grounds relate to conduct by DOD.

Reference is made by Baggett to annotations made by DOD in the issuance of three representative GBLs, which allegedly are indicative of DOD's intention that Section 22 rates were not applicable. In the "MARKS" section of GBL No. M-6004281 is the annotation, "FMS CASE NO: ULJ"; the annotation "M/F: FMS CASE NO. WNL" appears on continuation sheet 2 of GBL No. K-3030325. We fail to see where these annotations are any different from the one in True Transport.

This is the annotation on the third GBL, No. M-6005908:

"FOREIGN MILITARY SALES SHIPMENT
SECTION 22 DOES NOT APPLY"

Although literally different, the annotation is not materially different from the one in True Transport because it simply reflects the opinion of the Acting General Counsel of DOD, which is expressed in a letter dated March 4, 1977, to Mr. Paul Dembling, then General Counsel to the Comptroller General of the United States. Indeed, Baggett presents a copy of that letter as Exhibit "C". We believe that DOD's Acting General Counsel's opinion that FMS customers receive the benefit of reduced rates is based on the assumption that the foreign customers do, in fact, reimburse the United States. That assumption, which is false, in view of the findings in our Report No. LCD-77-210, became the fabric of a policy memorandum, dated March 31, 1977, from the Deputy Assistant Secretary of Defense (Supply, Maintenance & Services) to DOD components, and the foundation for the above-referenced ATA Bulletin No. 155.

Baggett contends that it was deprived by DOD of FMS shipments for about 45 days until it published in its commercial tariff provisions for accessorial services then in its Section 22 Quotations. GSA states that it has not verified the accuracy of this contention. Since DOD's policy does not control the applicability of rates, the relevancy of the contention is doubtful; nonetheless, we note that ATA's Bulletin No. 155 recommended that its member carriers consider amending their tariffs to provide for protective services. On this record, the inference that Baggett amended its tariffs at its agent's suggestion weighs heavier than the bare assertion that DOD caused the amendment, which resulted in a loss of business.

Fundamental to our resolution of this request for review is the well-established rule that where two published charges are equally applicable to the same shipment, the lower will be applied. See United States v. Gulf Refining Co., 268 U.S. 542, 546 (1925);

United States v. Strickland Transportation Co., 200 F.2d 234, 235 (5th Cir. 1953); Western Grain Co. v. St. Louis-San Francisco Ry., 56 F.2d 160, 161 (5th Cir. 1932).

In this case, as in True Transport, GSA performed its function under 49 U.S.C. 66(a) of auditing paid freight bills to determine whether the rates and charges thereon were consistent with law and the facts. By virtue of 49 U.S.C. 66(a), GSA has the duty to audit and see that recovery is made of that part of a payment to a carrier which is considered an overcharge or which is not supported by evidence establishing a proper obligation of the United States. See United States v. New York, N.H. & H.R.R., 355 U.S. 253 (1957).

Complete analysis of Baggett's request for review requires consideration of one additional comment. Baggett states that:

> "The first sentence in paragraph three of Exhibit 'A' is something that we have not been made privy to and if such a communication exists, it is in direct conflict with Exhibit 'C' and its attachments."

Exhibit "A" is a copy of GSA's letter of July 9, 1979, rejecting Baggett's protest to the issuance of Notices of Overcharge. The referenced sentence states:

> "The facts as communicated to this Office by the Department of Defense (which is in the best position to know) are that prior to May 1, 1978, the direct and entire benefit of transportation applicable to Foreign Military Sales accrued to the Government."

The paragraph goes on to state:

> "Inasmuch as the shipments under consideration here moved prior to May 1, 1978, and are therefore

subject to Section 22 Quotation rates, the overcharges are considered correct and proper."

The communication referred to is a letter, dated March 21, 1979, from the Office of the Assistant Secretary of Defense (Comptroller) to the Comptroller General of the United States, stating that DOD has been recouping the actual costs of transportation from FMS customers since May 1, 1978. This substantially undercuts the assumption that prior to May 1, 1978, the United States was being reimbursed from FMS customers for the payment of freight charges on shipments transported prior to that date.

We find Baggett to be in the same predicament as True. It has failed to carry its burden of proving that the United States did not incur the cost and would not obtain the economic benefit of lower Section 22 rates.

GSA's deduction action is sustained.

Milton J. Socolar

For The Comptroller General
of the United States