

DECISION

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

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FILE: B-212991**DATE:** November 28, 1983**MATTER OF:** General Services Administration--
Request for Advance Decision; JAMAR
Trucking**DIGEST:**

1. Burden of showing that a new company is not a mere continuation of an old company is on the company seeking to avoid liability for the debts of the old company.
2. Direct recovery from new company is proper where record establishes that the new company is either identical to the predecessor company or, at most, a continuation of the activities and interests of the old company.
3. Where a carrier transports goods without proper operating authority, carrier can be paid quantum meruit based on the usual or going rates of other authorized carriers for the same services.

The General Services Administration (GSA) requests an advance decision concerning the propriety of payment of \$1,553.34 in freight charges to Jeffery T. Tate/JAMAR Trucking (JAMAR-2), for transportation services provided to the government under government bill of lading (GBL) No. M-4,868,713. The request arises because there is a James W. Tate/JAMAR Trucking (JAMAR-1) which had previously filed for bankruptcy and which is indebted to the government for transportation overcharges in the amount of \$2,720.55.

JAMAR-2 picked up a shipment of freight all kinds in Memphis, Tennessee, on March 29, 1983, and delivered it in Minot, North Dakota, on April 1, 1983. ICC tender 0025, the rate authority cited on the GBL, was issued by JAMAR-2 on January 1, 1983, effective March 1, 1983. This tender was issued under operating authority MC 1493988 and was executed by "J.W. Tate, Traffic Manager." When JAMAR-2 presented its claim for transportation charges to the United States Army Finance and Accounting Center (USAFAC) for payment, USAFAC declined payment since a "JAMAR

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Trucking" at the same address appeared on a "holdup list" because it had filed for bankruptcy. USAFAC then submitted the claim to GSA for disposition.

GSA has provided a record which contains the following information. On September 23, 1982, the Interstate Commerce Commission (ICC) obtained a permanent injunction in a United States District Court enjoining "James W. Tate doing business as Jamar Trucking, his agents, employees and representatives, and all persons, firms, companies and corporations and their respective officers, agents, servants, employees and representatives in active concert or participation with him," from "in any manner or by any device in his own name or in any trade, fictitious or corporate name, directly or indirectly, transporting or holding himself out to transport . . . property . . . in interstate . . . commerce." Shortly thereafter, on November 18, 1982, James W. Tate and Mary Tate, doing business as JAMAR Trucking, filed a petition for bankruptcy in a United States Bankruptcy Court.

Because of this bankruptcy petition, GSA filed a proof of claim with the bankruptcy court listing \$2,720.55 in transportation overcharges due the government by JAMAR-1 and acknowledging the billing in question as an allowable claim by JAMAR-1 against the government for \$1,553.34.

The trustee in bankruptcy has advised GSA that, to his knowledge, the company in bankruptcy conducted no business after the November 18, 1982, filing date; therefore, he does not consider this item to be part of the bankruptcy proceedings for which Jeffery T. Tate has requested payment from GSA. In view of the doubtful nature of the claim, GSA has requested an advance decision from our Office.

In our view, the transportation charges due should be applied to the bankrupt, James W. Tate, doing business as JAMAR Trucking, that is, to JAMAR-1.

The record provided by GSA includes three tenders issued by JAMAR-1 on March 20, 1981, prior to the bankruptcy filing. These tenders are signed by both James W. Tate and Jeffery T. Tate, in different parts, each stating to be the company "owner." JAMAR-2's tender 0025, under which the billed amount was calculated, cites the same ICC operating authority MC 1493988 that was granted to JAMAR-1. GSA advises that this operating authority

continues to be enjoined and there is no evidence that Jeffery T. Tate has obtained any independent operating authority either under his own name or under the trade name of JAMAR Trucking. Under these circumstances, we find that JAMAR-2 is either the same legal entity as JAMAR-1, or is merely a continuation of that entity.

This conclusion is based on the totality of the circumstances, namely, that JAMAR-2 is operating in interstate commerce under the JAMAR-1 operating authority, at the same business address, and issuing tenders under the signature of "J.W. Tate." Moreover, Jeffery T. Tate had previously signed tenders in the stated capacity of "owner" of JAMAR-1. Thus, it appears that there is no meaningful distinction between the composition and activities of the two companies.

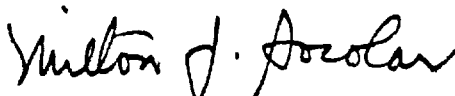
However, even if, as Jeffery T. Tate contends, the two companies are not identical, the burden of showing that a new company is not a mere continuation or reorganization of an old company rests on the company seeking to avoid liability for debts of the old company, and direct recovery of debts of an old company from a new company is permissible where the latter is, in essence, a continuation of the activities and interests of the old company. Express Airways, Inc., B-191129, September 8, 1978. Here, Jeffery T. Tate does not contend that he purchased the assets of JAMAR-1, which could possibly result in a finding of nonliability for JAMAR-1 debts if there was no de facto merger of the two companies. See Mayflower Corporation et al., 61 Comp. Gen. 526 (1982). Rather, Jeffery T. Tate contends, alternately, that after JAMAR-1 ceased operations, he subsequently commenced business using the name because he was "proud" of it because it consisted of his parents' names, or that he "started up JAMAR Trucking after it was closed down for 3 months because of all freight bills and delivery receipts which had opportunity to use saving the initial cost and layout expense for the printers."

In our view, Jeffery T. Tate's own contentions tend to substantiate the evidence of intermingling of the operations of the two companies rather than to establish the contrary. In any event, for the reasons above which we cited as establishing that both JAMAR Trucking companies constituted the same legal entity, we find that, at most,

JAMAR-2 is a mere continuation of JAMAR-1. Under these circumstances, we believe that GSA properly filed a proof of claim with the bankruptcy court indicating that the claim of JAMAR-2 should be treated as an asset of JAMAR-1 and should be offset by the debt of JAMAR-1.

In view of this finding, we will address GSA's further question regarding the proper amount due for the transportation services. Because of the above-quoted ICC restraining order, JAMAR-2 was operating in interstate commerce without the required operating authority at the time it performed the transportation services for the government. We have held that the contract of carriage is unenforceable when a carrier does not have proper operating authority, but the carrier is entitled to recover on a quantum meruit basis for its services because the shipper received the benefit of these services. This quantum meruit payment should be based not on the affected carrier's tender, but on the usual or going rates of authorized carriers, that is, the lowest rates available to the government for the same or similar services. District Containerized Express, B-188229, May 4, 1977.

GSA has indicated that lower rates than those under the JAMAR-2 tender were in effect for shipment of the commodity in question between the same points. Accordingly, GSA should determine the lowest available government rate and amend its proof of claim to reflect this as the amount owed by the government to JAMAR-1 for transportation services.

for 
Comptroller General
of the United States