



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Tri-State Motor Transit Company—Reconsideration

File: B-253293.2; B-254374.2; B-254375.2; B-254381.2

Date: November 16, 1995

DIGEST

A shipment of mortar cartridges containing smoke producing white phosphorus, a commodity that met the definition of "chemical ammunition" under the Department of Transportation's (DOT) Hazardous Materials Regulations in Title 49, Code of Federal Regulations (C.F.R.), at 49 C.F.R. (1990) Section 173.53(r), also met the definition of "chemical ammunition" for purposes of rates and charges under the Military Traffic Management Command's Freight Traffic Rules Publication 1A. Similarly, "special fireworks," which met the definition of "chemical ammunition" under the Hazardous Materials Regulations, also met that definition for purposes of rates and charges.

DECISION

Tri-State Motor Transit Company (Tri-State) requests reconsideration of our decision Tri-State Motor Transit Company, B-253293 *et al.*, Dec. 10, 1993.¹ There, we held that shipments of certain hazardous materials transported by Tri-State were not "chemical ammunition" for the purpose of applying higher minimum weights to the shipments, in accordance with Note 3 of item 325 and Note 3 of item 327 of the Military Traffic Management Command's (MTMC) Freight Traffic Rules Publication No. 1A (MFTRP 1A).

We have fully reviewed the issues again, including the information submitted on reconsideration, and we now believe that the term "chemical ammunition," as used in Note 3 of items 325 and 327, includes the items involved here. Therefore, we reverse our prior decision.

¹Recent correspondence from Tri-State indicates that this reconsideration would dispose of the issues in its claims under our file B-260648. Tri-State's attorney also requested that our reconsideration include B-256870 that involves the same issues. Accordingly, we will consider this reconsideration to be dispositive of the claims in B-260648 and the reconsideration of B-256870, and we will not issue separate decisions involving these two files.

BACKGROUND

Each Note 3 of items 325 and 327, provides that higher minimum weights (resulting in higher charges) are applicable "when shipper provides additional descriptive information in conjunction with the hazardous material description entry on the GBL [government bill of lading], which identifies chemical ammunition with incendiary charges or white phosphorus"

Examples of the hazardous material involved in the shipments in this controversy are (1) smoke-producing mortar cartridges that were described on the GBL as: "CARTRIDGE 81MM, SMOKE, WHITE PHOSPHORUS, M375A3;" and (2) incendiary grenades used primarily to provide a source of intense heat to destroy equipment described on the GBL as: "FIREWORKS, SPECIAL-CLASS B EXPLOSIVE - CAT3 - (Grenade, Hand, Incendiary, AN-M14)." The mortar cartridges were classified as "ammunition for cannon with smoke projectile." The grenades were classified as "special fireworks." The controversy is whether, for purposes of each Note 3, these GBLs contained "additional descriptive information" indicating that the shipments consisted of chemical ammunition with incendiary charges or white phosphorus.

Tri-State's argument has been that the Department of Transportation's (DOT) Hazardous Materials Regulations (especially Parts 172, 173 and 177 of Title 49 of the Code of Federal Regulations (C.F.R.), as they existed prior to 1991), are the basis for determining whether the 1990 shipments in issue should have been classified as "chemical ammunition." At the time of the shipments in question, 49 C.F.R. § 173.53(r), under the heading "Class A Explosives; Definitions," defined "chemical ammunition" as including "all kinds of explosive chemical projectiles . . . loaded with toxic, tear, or other gas, smoke or incendiary agent" Thus, Tri-State argued, the term "chemical ammunition," by definition, included any explosive or ammunition containing as a filler white phosphorus (a recognized smoke agent), incendiary or other agent named in 49 C.F.R. § 173.53(r).

In our prior decision, we agreed with Tri-State that the DOT regulations "are relevant in interpreting the term 'chemical ammunition' in Note 3 of items 325 and 327," since item 5 of MFTRP 1A specifically incorporates the American Trucking Association's (ATA) Hazardous Materials Tariff, and the tariff is based on the DOT Hazardous Materials Regulations. We concluded, however, that because the items transported were described as "ammunition for cannon with smoke projectiles" (including smoke and incendiary projectiles) or "special fireworks," neither of these items fell within the definition of "chemical ammunition" in section 173.53(r).²

²Class A material involves detonating or other items posing maximum hazards; Class B material is material posing flammable hazards. See 49 C.F.R. § 173.52.

RECONSIDERATION

Tri-State has submitted a letter dated October 17, 1994, from the Associate Administrator for Hazardous Materials Safety, Research and Special Programs Administration, DOT.³ The Associate Administrator states that commodities classified as "Ammunition for Cannon with Smoke Projectile, WP, Class A explosive" and "Fireworks, Special, Incendiary Charge, Class B explosive," met the definition of "chemical ammunition containing incendiary charges or white phosphorus" as provided in footnote 3 of 49 C.F.R. § 177.848(f), the Segregation and Separation Chart of Hazardous Materials. Footnote 3 requires that both Class A and B explosives must not be loaded or stored with chemical ammunition containing incendiary charges or white phosphorus. Tri-State has also submitted a letter dated August 30, 1994, from the Chief, Regulations Development, Office of Hazardous Materials Standards to the same effect.

MTMC and General Services Administration (GSA) argue in response that while the definition of the term "chemical ammunition" offered by the DOT officials is relevant for purposes of regulating health and safety matters associated with the transport of hazardous material, that definition is not relevant for the resolution of rate disputes. Instead, they argue, rate disputes are resolved by examining rate publications, such as the National Motor Freight Classification (NMFC), and Interstate Commerce Commission (ICC) decisions. They argue that the items in question were properly described on the GBLs as explosives other than chemical ammunition.

We agree with GSA and MTMC that the logical places to look for a definition of the term chemical ammunition for rate purposes would be in a rate publication or in an ICC decision. Unfortunately, the term is not specifically defined in MFTRP 1A; nor is the term listed as a commodity in the NMFC. Also, after searching through ICC decisions and other regulations in the C.F.R., MTMC has been unable to find a pertinent definition of chemical ammunition in those materials.

The only relevant definition of chemical ammunition in a rate publication is to be found in the ATA Tariff, which is incorporated into MFTRP 1A, and which is based on the DOT Hazardous Materials Regulations. There is no indication in MFTRP 1A that the incorporation of the ATA Tariff is merely for the limited purpose of regulating health and safety matters associated with the transport of hazardous materials and not for rate purposes. Therefore, as we previously concluded, the definition of chemical ammunition as used in each Note 3, must be interpreted based on the DOT Hazardous Materials Regulations.

³This Office is responsible for drafting the Hazardous Materials Regulations.

MTMC further argues that, in any event, the term chemical ammunition, as used in each Note 3, evolved not from the definition contained in section 173.53(r), but from its understanding of that term as used in footnote 3 of section 177.848(f). MTMC argues that section 173.53(r) provides a definition of chemical ammunition for Class A explosives only, while section 177.848 applies to all hazardous materials. According to MTMC, to find the definition of chemical ammunition as used in footnote 3, one must look at the Hazardous Materials Table in 49 C.F.R. § 172.101, which lists the hazardous material descriptions and proper shipping names of all hazardous materials. All listings of "Ammunition, chemical" in this table involve Poison A or Poison B, or an irritating material. MTMC also calls attention to a letter Tri-State received from the Headquarters, U.S. Army Armament, Munitions and Chemical Command, Rock Island, Illinois, which states that "we define chemical ammunition as ammunition containing toxic chemical agents."

MTMC's argument is not persuasive. Admittedly, as the Chief, Regulations Development, DOT Office of Hazardous Materials Standards, acknowledges in his August 30 letter to Tri-State, the entries in the Hazardous Materials Table might cause confusion since, as MTMC points out, the Table only lists the proper shipping name "chemical ammunition" to items that contain toxic materials. However, as he points out, none of these listed entries contains white phosphorus and, thus, none would require special handling under footnote 3 of the Segregation and Separation Chart.

Nor has MTMC or GSA identified examples of ammunition containing toxic agents that also include an incendiary or a white phosphorus element. In other words, while MTMC and GSA have argued that the items shipped here were not covered by each Note 3, they have not given examples of the types of items that, in their opinion, are covered. It thus appears to us that if the MTMC and GSA version of the term chemical ammunition were adopted, each Note 3 would apply to very few, if any, shipments of hazardous materials.⁴ It would not be reasonable to interpret each Note 3, so as to render it practically meaningless. See Southern Pac. Transp. Co. v. United States, 596 F. 2d 461, 464-465 (Ct. Cl. 1979). We conclude, therefore, that the term chemical ammunition, as used in each Note 3, includes items other than those specifically listed in the Hazardous Materials Table at 49 C.F.R. § 172.101 as "chemical ammunition." Specifically, the term includes items of the type described in section 173.53(r).

⁴We have been informally advised by a cognizant official in DOT's Research and Special Programs Administration that he is unaware of any weapon system that employs white phosphorus to disburse a toxic or irritating agent and that it is rare to use an incendiary to disburse such agents.

We will reverse a decision of our Office when it is shown that our decision was based on an error of fact or of law. Eck Miller Transportation Corporation, B-245385; B-247385.2, May 20, 1992. Our prior decision was based on a conclusion of law that the items in question were not chemical ammunition. The information and arguments submitted on reconsideration show that this conclusion was in error and that the definition of "chemical ammunition" includes the items shipped here.

Accordingly, we conclude that each Note 3 of items 325 and 327 of MFTRP 1A should have been applied to the items shipped here. GSA's settlements are reversed.

Robert P. Murphy
General Counsel