Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Canupp Trucking, Inc.

File: B-261127

Date: February 15, 1996

DIGEST

A guaranteed traffic solicitation issued by the Military Traffic Management Command (MTMC) specified that charges for local services are to be calculated on a "shipment" basis; however, the solicitation did not define the word "shipment." The carrier's interpretation of a "shipment" as consisting of the articles under each transportation control number (TCN) listed on an individual government bill of lading governs when the TCN method of billing is a reasonable interpretation of the contract, experienced and competent traffic officials of the government approved the TCN method of billing before the carrier submitted any bills, and the contractor billed on that basis without any objection by the government for more than 3 years after the contract began.

DECISION

The General Services Administration (GSA) requests a decision on the validity of the Notices of Overcharge[1] it issued against Canupp Trucking, Inc. (Canupp) at the request of the Navy Material Transportation Office (NAVMTO) for excess amounts paid to Canupp under note 12 to items 23-26 of its guaranteed traffic tender 600029. GSA also requests a decision concerning Canupp's claims under note 14 of items 23-26, where the issue is whether payment of these claims would duplicate payment for identical or overlapping services under note 12.

As discussed below, we conclude that Canupp's charges under note 12 are valid, but we deny Canupp's claims for additional amounts under note 14.

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[1]A Notice of Overcharge, GSA Form 7925, is a written statement sent by GSA to the carrier which notifies that it charged, and the government paid, too much money for a transportation service. The notice specifies, among other things, the amount paid to the carrier, the amount that the government should have paid, and the basis for GSA's calculation of the charge.

BACKGROUND

In its solicitation to the industry dated March 26, 1990, the Military Traffic Management Command (MTMC), on behalf of the Navy Material Transportation Office (NAVMTO), sought guaranteed traffic offers for the transportation of Freight All Kinds (FAK) commodities[2] between the following locations: the QUICKTRANS Terminal in Norfolk, Virginia; the Norfolk, Virginia Commercial Zone; the QUICKTRANS Terminal in Jacksonville, Florida; the carrier's terminal in Charleston, South Carolina; and the QUICKTRANS Terminal in Charleston, South Carolina.

Canupp submitted the winning proposal in its tender 600029. Canupp's tender 600029 contained all of the NAVMTO-directed terms, conditions and charges of the MTMC solicitation, and Canupp's proposed "per vehicle used" charges as specified in items 23-26 of the tender. Tender 600029 and the March 26, 1990, solicitation form the contract between Canupp and NAVMTO.

The excess charges and additional claims disputes between Canupp and NAVMTO depend on the definition of the word "shipment" found in notes 12 and 14 to items 23-26 of the tender. Note 12 provides for charges of $2.00 per hundred weight (cwt) for pickup and deliveries in the Charleston area, with a minimum charge of $25.00 per shipment. Note 12 further states that the charge includes "handling, consolidation, and break bulk." Note 14 requires the carrier to perform terminal services, including distribution and consolidation of shipments to include transloading of local Charleston pickups destined for other points. Note 14 also states that "the cost of this is as provided in NOTE 12."

In August 1990, shortly after the award but before presentation of the first billings, Canupp's representatives met with several NAVMTO representatives, including the NAVMTO division head and the contracting officer's technical representative, to review proper billing procedures. Specifically, Canupp sought guidance as to the meaning of the word "shipment" in note 12. The division head responded that each transportation control number (TCN)[3] on a GBL should be billed as a shipment.

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[2]These commodities were defined in this solicitation as all types of commodities except Classes A and B explosives, ammunition, fireworks, etc.; Class C explosives, ammunition or fireworks requiring a Department of Defense (DOD) transportation protective service; and Class C explosives, fireworks or ammunition in excess of 1,000 pounds.

[3]A transportation control number is a 17—position number assigned to control a shipment unit throughout the transportation cycle within the Defense Transportation System. See NAVMTO letter to GSA dated January 25, 1995 and

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Canupp billed on a TCN basis from August 1990 until late in 1993. According to Canupp, it billed 1,062 GBLs on a TCN basis before NAVMTO objected to this form of billing.

In November 1993, NAVMTO notified Canupp that the word "shipment" as used in note 12 should derive its meaning from item 1001 of MTMC's Freight Traffic Rules Publication (MFTRP) 1A, in that, for billing purposes, a single shipment should be tied to, or be equated with, a single GBL. Thus, NAVMTO concluded, Canupp should have computed its note 12 charges based on the total weight of the articles listed on each GBL and not based on the weight of the articles listed under each TCN.

In cooperation with NAVMTO, GSA conducted a postpayment audit of Canupp's bills, and it applied note 12 charges on a GBL basis. Canupp then asked GSA to reconsider. After reviewing Canupp's contentions, GSA asked us to resolve the dispute.

The difference between TCN and GBL billing can be considerable due to the rate of $2.00 per cwt and the $25.00 minimum charge per shipment specified in note 12. For example, on GBL No. C-8,141,261, a shipment from a shipping activity to the carrier's terminal made in 1992, Canupp billed 63 individual TCNs listed on the GBL at the minimum charge of $25.00 each, since the article or articles included under each of these 63 TCNs weighed less than the breakpoint weight of 1,250 lbs., and it also billed for two TCNs that weighed more than the breakpoint weight, for charges of $28.50 and $55.90, respectively, or a total charge of $1,659.40 on the GBL. Under NAVMTO's interpretation of a "shipment" as one GBL, the charge would be $286.40, based on a total GBL weight of 14,320 lbs.

NAVMTO argues that the MFTRP 1A definition of "shipment" is controlling here. Under that definition, a shipment is a quantity of freight tendered for transportation by one shipper at one point on 1 day, on one bill of lading, for delivery to one consignee at one destination. It notes that this definition is the one generally accepted in the industry and adopted in our decisions, citing B-197658, Aug. 25, 1980, and B-179944, Aug. 8, 1974.

In support of its position, Canupp argues that the usual definition of shipment does not apply to note 12 services since, in addition to pickup and delivery in the Charleston area, it was required to maintain a terminal and to perform terminal services for local pickups and deliveries, as described in notes 12 and 14. Canupp

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[3](...continued)
Reporting of Transportation Discrepancies in Shipments, Glossary 1, NAVSUPINST 4610.33C.

also stresses the fact that it sought confirmation from NAVMTO at the time of contracting as to the correct method of billing, and NAVMTO confirmed that the TCN method of billing was correct. It further states that the GAO decisions relied upon by NAVMTO for its interpretation of "shipment" involved an incorporation by reference of the National Motor Freight Classification, which incorporation by reference does not exist here. Finally, Canupp states that it would not have agreed to extend its tender until the fall of 1993, if it had known in advance that NAVMTO disagreed with the TCN method of billing.

MTMC supports Canupp's position. It does so on the basis that Canupp did seek clarification of the form of billing for note 12, the government drafted the contract, and the government had experienced and competent traffic managers approve TCN billing. MTMC states that a court would find for Canupp under these circumstances.

DISCUSSION OF NOTE 12 CHARGES

Generally, rules governing the construction of statutes also are applicable to the construction of contracts and tariffs. See Pillsbury Flour Mills Co. v. Great Northern Ry. Co., 25 F.2d 66, 68 (8th Cir. 1928). It is a rule of contract construction that unnatural or strained constructions should be avoided. Moreover, in deciding the meaning of any one provision of the contract all provisions of the contract should be considered. The interpretation that should prevail is the one that gives reasonable meaning to all provisions and does not render any part absurd, surplus or creates conflicts. If an ambiguity is found to exist that is not resolved by applying other rules of interpretation, it is construed against the drafter. See Southern Pac. Transp. Co. v. United States, 596 F.2d 461, 464-465 (Ct. Cl. 1979). Moreover, where an agreement involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other party, any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement. See RESTATEMENT (SECOND) CONTRACTS § 202(4) (1981).

Applying these rules of construction, we do not see how Canupp could be charged with actual or constructive knowledge of NAVMTO's interpretation of the word shipment in note 12, either from the terms of the contract or from NAVMTO's actions, before the present dispute arose. Item 15 of Canupp's tender specifically states that it is self-contained unless otherwise indicated (see, for example, item 39 that incorporates the solicitation). While the tender contains specific instances in which it incorporated the definitions of MFTRP 1A, see for example, items 40 (Signature and Tally Record Service) and 41 (DOD Constant Surveillance Service), there is no such incorporation in note 12. Further, as Canupp notes, the GAO decisions cited by NAVMTO for its definition of shipment, involved situations where the definition was incorporated by reference.

We recognize that there is a significant difference in the price charged for each of these movements, depending on whether the TCN billing method or the GBL billing method is used. Charges for the movement of the shipments (per GBL) will generally be higher if billed on the basis of TCNs rather than on GBLs. While the record does not permit us to measure the magnitude of these differences, it is apparent, particularly in view of acceptance of the TCN billing practice by NAVMTO for a significant period of time, that the charges based on TCN billings are not so high as to be clearly out of line. Thus, we cannot say that Canupp should have known that its definition of a shipment, and thus its billing method, was unreasonable. As GSA states in its submission, the agreements and understandings have to be considered to resolve this dispute.

Under this contract, Canupp billed a charge for local pickup and delivery service, as provided in note 12, and a line-haul charge to cover a consolidated truckload movement from the carrier's terminal to destination, as provided in items 23-26. As required by note 12, Canupp would pick up a load (shipment) from a Navy shipper moving on the basis of a single GBL, and consisting of numerous packages going to different destinations. When the vehicle returned to Canupp's terminal, it would sort packages in the load by destination. When a sufficient volume of cargo for a particular destination, or for destinations along the route where a stop off can be made, had accumulated, Canupp would load the cargo onto a truck. The load on a particular truck could involve several freight bills moving to several destinations under another GBL. The line-haul charges associated with different articles shipped to Canupp's terminal were billed under separate GBLs. The pickup-to-terminal GBLs involved many different TCN numbers, most with only one article per TCN, although some involved multiple articles per TCN. Articles under different TCNs usually had different ultimate destinations.

In these circumstances, there is little significance to the identity of the vehicle that picked up the cargo, the date of pick up, or how many pieces of cargo were on one bill of lading at origin. The pieces of cargo that the shipper included under each TCN could be considered the only recognizable unit of cargo that might otherwise have been included as the "shipment" if the transportation had occurred in common carriage. In so doing, the customary meaning of "shipment" as all pieces of cargo tendered to a carrier by one shipper at one place at one time for delivery to one consignee at one place on one bill of lading, loses significance. A definition that ties "shipment" to the TCN could be deemed appropriate.

In any event, before submitting any bills, Canupp sought guidance from, in MTMC's words, experienced and competent government traffic managers as to the proper method of billing under note 12. They informed Canupp that TCN billing was proper.

NAVMTO argues that its employees erroneously advised Canupp and that it is not bound by their unauthorized interpretation. An agency, however, is not entirely free to repudiate the statements of its representatives when they are entrusted by the agency to provide guidance to the contractor concerning the contract. The contractor is entitled to rely on their guidance. In Kraus v. United States, 366 F.2d 975, 981 (Ct. Cl. 1966), a government inspector agreed with the contractor's interpretation of the technical specifications. As here, the government later contended that this interpretation was incorrect. The court found that where contract language is ambiguous and the plaintiff's interpretation is reasonable, even if the inspector did not have authority to bind the government with his interpretation, his actions "constituted highly persuasive evidence of the reasonableness of plaintiff's interpretation."

As MTMC states, the facts here are even more compelling in favor of the contractor's position. Contrary to NAVTMO's contention, we believe it is bound to its employees' interpretation. Max Drill, Inc. v. United States, 427 F.2d 1233 (Ct. Cl. 1970). We find for Canupp on note 12.

ADDITIONAL CHARGES UNDER NOTE 14

The carrier also claims certain charges billed under note 14, relating to terminal services it provided. NAVMTO and GSA contend that Canupp cannot bill under both note 12 and note 14 because note 14 duplicated the charges for services in note 12.

It does not appear to us that separate additional services are provided for in note 14. Canupp interprets note 12 as the charges for pickup and delivery services in the Charleston area, and it interprets note 14 as the charges for the transloading of shipments, data capturing, rearrangement of articles for subsequent movement, and storage pending transportation. However, note 12 specifically states: "Charge includes handling, consolidation, and break bulk"; most of these services were performed at the carrier's terminal. While it may have been more appropriate to consolidate the content of notes 12 and 14, into one note, note 14 merely added detail about Canupp's duties in the Charleston area, particularly with respect to terminal services.

Read together, the import of notes 12 and 14 was that, in exchange for the charge in note 12, the carrier had to do what was necessary to assure that articles picked up in the Charleston area would be segregated by destination at its terminal and then combined with articles from other shippers going to the same destination. The only activity that does not appear to be covered specifically by the terminology "handling, consolidation, and break bulk" is storage, but this service was necessarily implied by the nature of the carrier's duties under the contract. As NAVMTO states, the language in the last sentence of note 14, "the cost of this is provided in

Note 12," clearly suggests that note 12 and note 14 involved the same service at one charge.

Accordingly, we deny Canupp's claim for additional amounts under note 14.

/s/ Lowell Dodge
for Robert P. Murphy
General Counsel