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DECISION

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

FILE: B-188647 DATE: December 28, 1977

MATTER OF: Trans Country Van Lines, Inc.

DIGEST:

1. 49 U.S.C. 66 (1970) provides that claims for the payment of transportation charges must be received in GAO (now GSA) within three years from (1) accrual of cause of action; (2) payment; (3) refund; (4) deduction, whichever is later. This also limits Government's right to deduct overcharges to three years. Deduction from carrier's account after more than three years from payment date is in error.

2. Since deduction was not authorized it is a nullity and sequence of events are treated as if deduction had not been made.

3. Following rationale of T.I.M.E. Freight, Inc. v. United States, 302 F. Supp. 573 (1969), carrier had three years from date of payment to file claim for the full amount of its charges.

4. Whether a shipment is interstate or intrastate is a factual determination based primarily on intent of the shipper and record does not indicate this intent.

Trans Country Van Lines, Inc. (Trans Country), requests a review of the General Services Administration (GSA) claim settlement of November 19, 1976. GSA partially allowed Trans Country's claim for $1,047.98 in the amount of $77.50; the balance was disallowed. The review is being made under the provisions of 49 U.S.C. 66(b) (Supp. V, 1975), and 4 C.F.R. 53.3 (1976).

A shipment of electrical instruments originating at Van Nuys, California, was transported on December 13, 1969, under Government bill of lading (GBL) No. F-0554274 to Norfolk, Virginia, with a delivery at Mare Island, Vallejo, California, of 2,470 pounds, and with a subsequent pickup at Mare Island of 4,823 pounds.

Trans Country contends that it is not time barred from filing a claim at this time by the provisions of 49 U.S.C. 66 (1970), because it was originally paid its transportation charges in 1970; a claim was filed in 1972, and additional claims have been filed to date. Trans Country further contends that the stopoff at Mare Island to unload 2,470 pounds of the 5,118 pounds which originated at Van Nuys, California, is by its nature intrastate traffic. Therefore, Trans Country states that the tariff basis used by GSA in its audit is incorrect because its tender specifically states that the rates would not apply on intrastate movements. And because the rates are inapplicable, the rates in Trans Country's commercial tariff No. 43 would apply.

Under section 322 of the Transportation Act of 1940, as amended by Public Law 85-762, 49 U.S.C. 66 (1970), every claim for the payment of transportation charges cognizable by the General Accounting Office (now GSA) is barred unless such claim is received in the General Accounting Office within three years (not including time of war) from the date of:

(1) accrual of the cause of action, or

(2) payment of the charges for the transportation, or

(3) subsequent refund for overpayment of such charges, or

(4) deduction made pursuant to that section, whichever is later.

In order to determine if the claim is in fact time barred, the sequence of events that occurred in the case is as follows:

Date	Event	Amount
3/13/70	Payment date of carrier's original bill No. 36018	$4,130.10
4/19/72	Issue date of Notice of Overcharge Form 1003 by GAO	891.10
5/3/72	Trans Country claim received in GAO	769.50

Date	Event	Amount
2/27/73	Certificate of Settlement (TK-943337)	$ 171.22
2/27/73	Certificate of Settlement (TK-947559)	719.88
4/16/73	U.S. Army Finance Center finalized setoff of preceding amounts. (This date is beyond the 3-year statutory period for deduction)	891.10
12/7/73	Statement of Settlement of Claim (T-342) issued-carrier allowed on its supplemental bill 36018, dated July 18, 1973	171.22
6/24/74	Trans Country revised claim received	970.48
7/18/74	TCD-GAO denied claim in its entirety	0.00
6/14/76	Trans Country revised claim received ($970.48 plus $77.50)	1,047.98
11/19/76	Statement of Settlement of Claim, carrier allowed partial amount	77.50

The statute of limitations not only affects claims for transportation charges against the United States but it also affects its right to deduct overcharges paid by it more than three years previously. 46 Comp. Gen. 436, 437 (1966). Thus, the Government was in error when it deducted $891.10 from the carrier's account on April 16, 1973, more than three years from the payment date of March 13, 1970. Accordingly, Trans Country is due a refund of $891.10, less the settlements of December 7, 1973, and November 29, 1976, for $171.22 and $77.50, respectively, or $642.38.

Since the deduction was not authorized, it is a nullity. Bowles v. Indianapolis Ry., 64 F. Supp. 865, 870 (D. Ind. 1946); Gotshall v. Taylor, 196 So.2d 479, 481 (Ct. App. Fla. 1967). Thus, we would look at the sequence of events as if

the deduction had not occurred, and we would consider the payment date of March 13, 1970, as the date from which the three year limitation period would run. 52 Comp. Gen. 713 (1973).

Trans Country did file a timely claim when it requested $769.50 on May 5, 1972, approximately two years after the date of payment. However, in T.I.M.E. Freight, Inc. v. United States, 302 F. Supp. 573 (1969), the United States District Court for the Northern District of Texas, construing 49 U.S.C. 304a(7), a jurisdictional statute likewise containing language similar to that found in 49 U.S.C. 66, held that a motor carrier's cause of action for recovery of the full amount of its charges continues for a period of three years after date of payment of its charges and that its failure to file an action within those three years precludes recovery for any amounts over and above the amount paid by the Government. Thus, under the rationale of the T.I.M.E. case, Trans Country had three years from the date of payment on March 13, 1970, or until March 13, 1973, to file a claim for the full amount of its charges. Trans Country did file a claim for $769.50 on May 8, 1972, within the three year limit. However, Trans Country waited until June 24, 1974, before it revised its claim upward to $970.48. Since that date is more than three years beyond the date of payment, the most Trans Country can be allowed is $769.50. Any amount beyond that is in effect a new cause of action, and is time barred.

We note that Trans Country changed the basis for its claim on June 24, 1974. And in 39 Comp. Gen. 448 (1959), this Office held that review of a disallowance may be obtained within a reasonable period after its date, but a request not made within such a period or a supplemental bill claiming an amount due on a different basis constitutes a new claim and if not filed within the statutory period is barred.

Since we have determined that Trans Country is not time barred to the extent of its claim for $769.50, we must determine if the basis for its claim that the shipment was intrastate by nature is correct.

Part II of the Interstate Commerce Act defines interstate commerce at 49 U.S.C. 303(a)(10) (1970) as: "The term 'interstate commerce' means commerce between any place in a State and

any place in another State or between places in the same State through another State, whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, or water." And whether a shipment was at a given time interstate is a question of fact. Southern Pacific Company v. Arizona, 249 U.S. 472 (1919).

The record indicates that seven electrical instruments weighing 2,470 pounds were picked up as part of a 5,118 pound shipment originating at Van Nuys, California, and were in fact delivered at Mare Island, Vallejo, California. Thus pickup and delivery were made at points in the same state, which could be considered intrastate transportation. Pennsylvania R.R. v. United States, 242 F. Supp. 890 (E.D. Pa. 1965) aff'd American Trucking Association v. United States, 382 U.S. 372 (1966).

The fact that the GBL indicates that the truck was to be stopped for partial delivery and pickup in California with the final destination at Norfolk, Virginia, does not of itself determine the nature of the shipment. The Supreme Court held in Chicago, Milwaukee, & St. Paul Ry. v. Iowa, 233 U.S. 334 (1914), that whether commerce is interstate or intrastate must be determined by the essential character of the commerce and not by mere billing or forms of contract. The question is with respect to the nature of the actual movement in the particular case. The courts and the Interstate Commerce Commission have consistently held that the essential character of any type of commerce, be it interstate, foreign, or intrastate is governed by the fixed and persisting transportation intent of the shipper at the time of the shipment, and that such character is retained throughout the movement in the absence of an interruption of the continuity of the shipment. Baltimore & Ohio Southwestern R.R. v. Settle, 260 U.S. 166 (1922); J. W. Allen - Investigation of Operations and Practices, 126 M.C.C. 336 (1977); Motor Transportation Of Property Within Single State, 94 M.C.C. 541 (1964).

We are unable to determine from the record if the 2,470 pound shipment was intended by the shipper to continue in interstate or foreign commerce or if its continuity was to end at Mare Island. We note that the shipment of 2,470 pounds was

consigned to the Naval School Command, thus the shipment may have been intended for local training purposes. Under these circumstances that portion of the total weight shipped would be an intrastate shipment. The balance of the weight would constitute an interstate shipment because it originated in California and was delivered to Norfolk, Virginia.

We therefore have suggested that GSA further develop the record in order to determine the intent of the shipper as to the 2,470 pound shipment. If in fact the shipment was intrastate by nature, the transportation charges should be adjusted to reflect the charges based on the intrastate rate, not to exceed the amount claimed that is not time barred of $769.50.

Acting Comptroller General
of the United States