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DECISION



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

FILE: B-205368

DATE: June 15, 1982

MATTER OF: American Farm Lines, Inc.

DIGEST:

Where tender offers Government lower rates for a Freight-all-kinds (FAK), mixed shipment, but states that the truckload FAK rates will not apply to contraband such as radioactive materials, GSA may apply truckload FAK rates to noncontraband portion of shipment and use other applicable less than truckload rates for the contraband. The National Motor Freight Classification Rule 645, which governs tender applicable here, does not prohibit GSA's application of the tender FAK rates under these circumstances.

American Farm Lines, Inc. (AFL), requests review of the General Services Administration's (GSA) determination that AFL overcharged the United States \$846.90 under Government bill of lading (GBL) S-1,042,121. The shipment was a truckload (TL) quantity consisting of a consolidation of less than truckload (LTL) quantities of different articles, including two cartons of radioactive material weighing 114 pounds. In its audit, GSA considered the shipment as two separate shipments. It applied an LTL class rate to the radioactive material, and a TL Freight all kinds (FAK) rate under AFL Tender 266 to the other articles. The FAK rate could not be applied to the entire shipment because item 140 of the tender expressly stated that the FAK rates therein would not apply to radioactive material, among others.

AFL objects to this audit basis. AFL contends that the lower TL FAK rate is not applicable because the tender is governed by the National Motor Freight Classification (NMFC), which includes the TL mixing rule, Rule 645. Section 3 of this rule provides for dividing shipments into TL and LTL shipments for rate purposes where it results in lower charges; however, by the section 3 language, it is subject to section 1, which prohibits the use of FAK rates on mixed shipments.

The parties agree that for calculating the proper rate, because of the contraband, the shipment must be divided into two shipments. They disagree as to whether the FAK TL rate or a higher TL class rate is applicable to the noncontraband articles.

AFL's Tender 266 clearly provides that the tender is governed by the NMFC. This language has been interpreted to mean that NMFC rules such as Rule 645 govern shipments under the tender. See B-166192, December 9, 1969; Union Pacific R.R. Co. v. United States, 434 F.2d 1341 (Ct. Cl. 1970); Ford Motor Co. v. McNamara Motor Express Inc., 305 ICC 49, 50 (1958); Globe-Weinicke Co. v. Alton R. Co., 264 ICC 577 (1946). Thus, Rule 645 is applicable to the shipment. However, in our view, although the Rule 645 mixing rule governs, GSA's audit action is correct.

As pointed out by GSA, Tender 266 does not expressly prohibit application of FAK rates to noncontraband articles in a mixed shipment and application of a different tariff to the contraband. It simply provides that the rates will not apply to the contraband articles.

Rule 645 provides as follows:

"ITEM 645

MIXED SHIPMENTS - TL OR VOL

"Sec. 1. Unless otherwise provided and except as to livestock, a number of articles for which the same or different volume or truckload rates, classes or minimum weights are provided, constituting a mixed volume or mixed truckload shipment, will be charged at the highest straight volume or truckload rate or class (not specific mixture 'all freight' 'freight all kinds' or 'all commodity' rates or classes) and the highest straight volume or truckload minimum weight that would be applicable to any article in the shipment if that quantity of each article in the mixed shipment were tendered as a straight volume or straight truckload shipment.

"Sec. 2. Subject to the provisions of Sec. 1, when the aggregate charge on the shipment is made lower by considering the articles as if they were divided into two or more separate volume or truckload shipments, the shipment will be charged for accordingly.

"Sec. 3. Subject to the provisions of Sec. 1, when the aggregate charge on the shipment is less on the basis of the volume or truckload rate and volume or truckload minimum weight (or actual or authorized estimated weight if in excess of the volume or truckload minimum weight) for one or more of the articles and on the basis of the less than truckload rate or rates on the actual or authorized estimated weight of the other article or articles, the shipment will be charged for accordingly." (Emphasis added.)

Rule 645 provides alternative methods of computing the lowest charges on a mixed shipment. Section 1 provides in substance that charges on articles constituting a mixed TL shipment shall be collected at the highest volume or TL rate or class and highest volume or TL minimum weight applicable to any of the articles contained in the shipment. Section 2 provides that where lower charges result by treating the mixture as two separate TL shipments, such charges are applicable. Section 3 allows calculation of charges by treating some articles as constituting an LTL shipment and applying LTL rates, and using a TL rate for the rest of the shipment. See Rate Structure Inv. Part 5 Furniture, 177 ICC 5, 13 (1931), and Western Traffic Conf., Inc. v. A.T. & S.F. Ry. Co., 291 ICC 427 (1954).

AFL points to the phrase in section 1 that prohibits use of FAK rates as the highest TL rate on the entire shipment and argues that since sections 2 and 3 are subject to section 1, FAK rates may not be used under those sections either. AFL's interpretation of the interplay of the three sections of Rule 645 is not supported by the ICC's interpretation of the general mixing rule indicating that the three sections are alternative means of determining the lowest charges for the shipment. See Rate Structure Inv. Part 5 Furniture, supra; Western Traffic Conf., Inc. v. A.T. & S.F. Ry. Co., supra.

Here, GSA did not use section 1 and did not apply the FAK rate to the contraband, but used section 3 of Rule 645, an alternative to section 1, because it resulted in lower charges by applying the TL FAK rate, according to its terms, only to those articles covered by the TL FAK tender and applying the higher LTL rate to the LTL quantity of contraband. In using section 3 of Rule 645, the integrity of the classification and the tender was preserved, and GSA acted consistent with applicable case law. See Union Pacific R.R. Co., supra; Great Northern Ry. v. United States, 312 F.2d 901 (Ct. Cl. 1962).

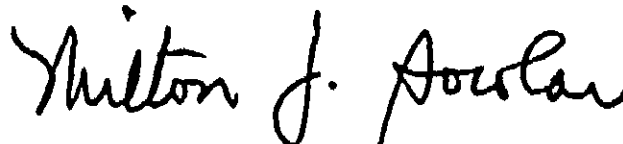
In the absence of an express provision making Tender 266 inapplicable to the noncontraband articles, these above-cited decisions permit the use of the TL FAK rates on all but the contraband articles, and we do not find that this determination conflicts with Rule 645.

As a final matter, AFL refers to a settlement reached in 1978 between the Government and the carrier in American Farm Lines v. United States, Court of Claims No. 183-78. AFL points out that GSA agreed to AFL's view as to the application of Rule 645. However, paragraph 2 of the Memorandum of Negotiations states:

"Each party hereto has asserted and continues to assert the validity of its various claims and defenses. In settlement of all such claims and defenses, and without admitting the validity or invalidity of any particular issue, the parties agreed, subject to the approval of the Attorney General, as follows: * * *."

This settlement applied to claims under that case and on shipments moving through December 31, 1977. The parties reserved their rights concerning future claims. Therefore, this case is a new matter not controlled by the 1978 agreement.

GSA's audit action is sustained.



Acting Comptroller General
of the United States