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The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Yowell Transportation Services, Inc. - Exclusive-Use-of-Vehicle Charges

File: B-225014

Date: September 30, 1987

DIGEST

The General Services Administration (GSA) disallowed a carrier's supplemental bill for exclusive-use-of-vehicle charges on grounds that the carrier's exclusive-use rule was inconsistent with other provisions in its rate and rules tenders, and the ambiguity thus created should be construed against the carrier. Where, however, a reasonable construction of the provisions conforms to the carrier's intent and the shipper's understanding the provisions are not considered ambiguous. Thus, the exclusive-use charge is applicable and it was improper for GSA to disallow the carrier's claim.

DECISION

Yowell Transportation Services, Inc. (Yowell) asks the Comptroller General to review action taken by the General Services Administration (GSA) under 31 U.S.C. § 3726, in its settlement of a transportation claim. The carrier had been paid its original transportation charges, but GSA disallowed the carrier's supplemental bill for additional exclusive-use charges. We conclude that it was improper for GSA to disallow the carrier's claim.

BACKGROUND

In February 1986, Yowell transported a 2,700-pound shipment described on Government Bill of Lading No. S-9003057 as "ELECTRICAL INSTRUMENTS, NOI," for the Department of the Navy, 2,615 miles from Silver Spring, Maryland, to San Diego, California. The shipper requested and Yowell provided exclusive use of an air-ride, padded van in performing the transportation services.

The carrier originally billed and collected charges of $2,745, which were computed by applying a per 100-pound mileage rate to a constructive weight of 10,000 pounds. These were derived from Yowell's Rate Tender 13, as governed by Rules Tender 14. GSA disallowed Yowell's supplemental

bill for exclusive-use-of-vehicle charges of $2,353.50. These were derived from Rule 27 of Rules Tender 14.1/

There is no dispute that exclusive-use service was requested and performed. GSA disallowed the additional exclusive-use charges on the theory that the carrier's intentions, concerning their applicability, were ambiguous, and since ambiguous, carrier-drafted tenders are construed against the carrier, GSA concluded that the charges already paid were the only applicable charges.

Yowell's supplemental claim for exclusive-use charges was derived from the mileage rate (which is unrelated to weight) in Rule 27 of Rules Tender 14, as amended by supplement 6, effective January 10, 1986, which states that:

> "shipments accorded exclusive use of vehicle service will be rated at an additional charge of $.90 per tariff mile per vehicle used."

In GSA's opinion the ambiguity appears in the form of inconsistency between Rule 27, Tender 14, supplement 6 (Yowell's supplemental claim basis) and other tender supplements, notably supplement 5 to Tender 14 and supplement 3 to Rate Tender 13, which GSA emphasizes, were all in effect at the time of transportation.

Supplement 3 of Rate Tender 13 was the basis for Yowell's original charges and the only basis that GSA recognizes as applicable. It consists of per 100-pound mileage transportation rates which are applied to a constructive weight of 10,000 pounds for exclusive-use service on shipments, as here, weighing less than 10,000 pounds. GSA points out that one of the express purposes of supplement 3, when first issued in May 1984, was to set maximum charges for exclusive-use service.

Supplement 5 of Rules Tender 14, effective January 15, 1985, also contained exclusive-use provisions. Rule 27, which offered exclusive-use service upon shipper request, referred to Rule 30 for the actual mileage rates which were subject to a minimum weight of 15,000 pounds.

1/ GSA disallowed the claim in a settlement certificate of May 22, 1986.

To underline the alleged inconsistency between Rule 27 of supplement 6 and Rules 27 and 30 of supplement 5, GSA points out that block 2D of supplement 6 stated that supplements 5 and 6 contained all changes. GSA infers from this that all the provisions in both supplements, necessarily, are cumulative, particularly since all the noted supplements were concurrently in effect. GSA argues that the cumulative effect of all the supplements was to reflect a general trend toward reduction of the carrier's overall charges.

GSA also suggests that the Military Traffic Management Command (MTMC) may have been misled by a customary supplement format into accepting supplement 6, Tender 14, without reading its various substantive provisions, especially Rule 27. Previously, Yowell had noted the general purposes and specified the major changes on page 1 of each supplement, while page 1 of supplement 6 did not highlight the specific change in Rule 27, assessing the additional exclusive-use charges. GSA points out that when MTMC, Eastern Area, eventually noted the exclusive-use change in supplement 6, the agency ceased releasing traffic to Yowell until the carrier again changed its tender. Yowell argues that from MTMC's traffic embargo flows the inference that MTMC considered the exclusive-use charges in Rule 27 to be applicable during the period that supplement 6 was in effect, which included the shipment in issue.2/

There appears to be no dispute over some material facts. Tender 13 is a rate tender offering, basically, line-haul service at mileage rates for the transportation of electrical instruments. By its express terms and those of its pertinent supplements the rate tender is governed by Rules Tender 14, which, generally, contains the terms and conditions, along with some charges, for the performance of accessorial transportation-related services, such as exclusive-use-of-vehicle service.

DISCUSSION

We find that GSA's premises for the theory of ambiguous carrier intent, concerning applicability of the additional exclusive-use charges, are tenuous. It is clearly implied that supplement 6, Tender 14, Rule 27 was published as a

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2/ According to papers subsequently submitted by Yowell, at least 33 other shipments may have been involved during the effectiveness of Rule 27.

substitute for all previously-published exclusive-use provisions. This conclusion is based on the facts that traffic under Rate Tender 13 was expressly governed by the rules in Tender 14 relating to accessorial services, and that line-haul transportation is a distinct service from the provisions of exclusive-use-of-vehicle service. Applicability, apparently, was assumed by MTMC when it embargoed traffic from Yowell from April 9 through the end of April 1986.

A carrier may by reference incorporate into a government rate tender, accessorial or additional transportation-related services and charges published in other tariffs. See Wells Cargo, Inc., 54 Comp. Gen. 610 (1975). As GSA points out, where there is doubt concerning the meaning of a tender, it is generally resolved against the carrier that drafted it. This rule of construction was noted by the court in a case cited by GSA, Penn Central Co. v. General Mills, Inc., 439 F.2d 1338, 1341 (8th Cir. 1971). The rule is not applicable, however, where it would ignore a permissible, reasonable construction which conforms to the objective intentions of the framer and accords with the practical application given by shippers and carriers alike. National Van Lines, Inc. v. United States, 355 F.2d 326, 333 (7th Cir. 1966). See also E. L. Murphy Trucking Co., 56 Comp. Gen. 529 (1977). We conclude, after reading both Tenders 13 and 14 together, that they offer a reasonable construction which conforms to the original intent of the carrier and accords with the practical application of the parties.

Supplement 6, Rules Tender 14, introduced a new basis for applying exclusive-use charges. Rule 27, supplement 6 substituted a mileage per-vehicle basis for the mileage and weight basis previously published in supplement 5 of Tender 14 and supplement 3 of Tender 13. The patent inconsistency between new Rule 27 and the previous exclusive-use provisions clearly implies the intent to replace the previous provisions with a new Rule 27. To narrowly interpret the concurrent effectiveness of three tender supplements and to view the fact that supplements 5 and 6 of Tender 14 expressly contained all changes, to mean that all substantive provisions continuously remain in effect (thereby creating inconsistencies, as urged here by GSA) overlooks the obvious operation of these tender supplements to also revise, substitute, and delete previously-published provisions, as well as add new ones.

We are cited to no rule of interpretation or precedent for viewing a general trend in carrier supplements, to reduce

overall charges, as a substitute for specific tender provisions, in effect at the time of movement, providing for separate line-haul and exclusive-use charges.3/ The fact that the carrier may have deviated from its own practice of highlighting substantive supplement changes did not prevent MTMC from reading all their substantive provisions before accepting the supplements for filing.

Supplement 6, Tender 14, which governed the offer under Tender 13 to transport electrical instruments for the government, was in effect on February 6, 1986, and when the Navy tendered the shipment to Yowell on that date, the offer ripened into an agreement to pay for the additional exclusive-use services that the shipper requested. Compare B-177354, June 21, 1973.

Accordingly, the additional 90 cents per-vehicle-mile charges for exclusive-use service is allowed.

for Harry R. Van Cleve
Comptroller General
of the United States

3/ As noted in the text, it appears that some supplements actually added new charges for the performance of some accessorial services.