The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: United Carriers, Inc.--Special Equipment Charges and Lowest Applicable Rates

File: B-229309

Date: June 21, 1988

DIGEST

1. Where notations on the Government Bill of Lading showed that standard equipment was ordered by the shipper but special equipment was furnished by the carrier, the carrier may offer evidence to show that government shipping agents ordered the special equipment. However, to refute the bill of lading notations the evidence must clearly show that the notations were mistaken. Since it did not, the General Services Administration's (GSA) actions in recovering overcharges from the carrier for the special equipment are sustained.

2. General equitable considerations concerning the interpretation of government contracts do not affect a carrier's obligation under the Interstate Commerce Act, 49 U.S.C. § 10101 et seq. (1982), to collect only the applicable charges shown in the carrier's tender or tariff filed with the Interstate Commerce Commission. Where the carrier files two tenders, both of which are in effect and contain applicable rates for the same shipments, the government is entitled to use the lower rates. Therefore, there is no basis to reverse GSA's collection of overcharges, which was based on alternation provisions in both tenders giving the government the benefit of the lower rates.

3. The General Accounting Office allows payment for transportation charges on a quantum meruit basis only where there is no valid transportation contract or applicable tariff or tender which dictates the proper amount due. In a case where neither condition obtains payment on a quantum meruit basis would be inappropriate; the lowest applicable charges must be collected.

4. The General Accounting Office has no jurisdiction under 50 U.S.C. § 1431 to reform executive agency transportation contracts to facilitate national defense.

DECISION

United Carriers, Inc. (United), requests our review under 31 U.S.C. § 3726 (1982) of numerous audit actions taken by the General Services Administration (GSA) which resulted in substantial amounts being deducted from monies otherwise due the carrier based on GSA's determinations that United charged the government for transportation services it did not order and used rates for the services ordered that were not the lowest applicable rates. We sustain GSA's audit actions.

BACKGROUND

After the United States Government paid United for transporting numerous Freight All Kinds shipments (apparently all for the Department of Defense) under special rate tenders offered to the government as permitted in 49 U.S.C. § 10721 (1982), GSA determined in its rate audit that United collected overcharges on at least 132 shipments, which GSA deducted from monies otherwise due the carrier on unrelated bills in the absence of voluntary refund. GSA's overcharge determinations involved two issues: (1) whether the government ordered special equipment (generally, trailers longer than 40 feet), for which there was a 15-cent-per-mile additional charge, and (2) whether lower applicable rates published in a different United tender than the one used by the carrier should be used as the charge basis for the shipments.1/

SPECIAL EQUIPMENT ISSUE

GSA initially determined that the government did not order special equipment because the notations on the Government Bills of Lading (GBL), the transportation contracts between United and the government, indicated that standard equipment--40-foot trailers--was ordered. United replied that government shippers in each instance ordered special equipment and that the GBL notations indicating standard equipment were mistaken. United offered copies of its dispatch sheets which referred to special equipment. A United official elaborated in a letter of June 1, 1987, addressed to GSA:

1/ The carrier states that of the 132 shipments involved, 89 involve the issue of tender applicability, 16 involve the special equipment issue, and 27 involve both issues.

"When charges based on special equipment are at issue, United Carriers relies on its dispatch records to show that special equipment was ordered. The standard practice is for the government agency or government contractor to place requests for transportation by phone. At that time, the kind of equipment required is designated and duly noted on the dispatch sheet of United Carriers. The dispatch sheets are prepared at the time the call is received based on the information received over the phone from the person requesting service on behalf of the government. These records are prepared in the usual course of business and are maintained in our files.

"Where equipment charges are at issue the dispatch sheets show that oversized equipment was ordered and that the equipment charges were correctly billed. I do not know the reason why the request for oversized equipment is not shown on the government bills of lading, but it is my experience that the person who prepared the bill of lading is not the same person who orders equipment and is unaware that special equipment has been ordered."

United also contends that since special equipment was furnished, and since GSA does not deny that it was required to transport the shipment, the carrier is entitled to recover on a quantum meruit basis.

We agree, as United points out, that the presumption of correctness of notations on the GBLs that the government ordered no special equipment is not conclusive. 53 Comp. Gen. 868 (1974). We have accepted documents made in the regular course of a carrier's business as evidence of material facts, and these documents and other evidence have been accepted to rebut the GBL notations and establish a different contract of carriage than shown on the GBL. See Terminal Transport Company, Inc., 44 Comp. Gen. 799 (1965); Navajo Freight Lines, Inc., B-186603, Dec. 22, 1976. However, we do not find that the evidence referred to by the carrier clearly shows that the government ordered special equipment.

Copies of dispatch sheets in the record do not specify whether the notations "45" (which we assume refer to 45-foot trailers) were entered as a result of requests made by the government shipping agents, or as a result of the dispatcher's unilateral choice of equipment for the carrier's convenience, or as a result of the dispatcher's estimate of

what the particular shipment may have required. The carrier's letter of June 1, 1987, does not clarify the situation. It refers to "the kind of equipment required" rather than the kind of equipment ordered, as if the dispatcher may have been transforming a routine request for pick-up into an order for special equipment. Under these circumstances, particularly in the absence of any evidence from the shipping agencies regarding the order of special equipment, the presumption of correctness of the GBL notations prevails. Unless United clearly shows that the government ordered special equipment by presenting additional probative evidence that GSA is unable to refute, we are required to uphold GSA's audit actions because the tender's special equipment charge does not apply without an order by the shipping agencies. See Trans Country Van Lines, Inc., 53 Comp. Gen. 603 (1974); 51 Comp. Gen. 208 (1971).

As to the argument that higher charges should be allowed on a quantum meruit basis, our cases allow payment for transportation services on such a basis only when there is no valid transportation contract or applicable tariff or tender which, by statute, dictates the proper amount due. In this case there is a valid transportation contract and an applicable tender; the question is which of the services offered in the applicable tender the carrier is entitled to charge for. Therefore, payment on a quantum meruit basis would be inappropriate; only the applicable tender charges may be reimbursed. Accordingly, GSA actions concerning the special equipment issue are sustained.

LOWEST APPLICABLE RATE ISSUE

Two United tenders, No. ICC 100 and 106, were in effect when United transported the relevant shipments. Tender 100 contained lower rates for those shipments than Tender 106. GSA applied Tender 100's lower rates in its audit determinations based on an alternation provision in paragraph 20.g of both tenders, stating that:

> "This tender shall not apply where charges for service provided under this tender exceed charges otherwise applicable for the same service."

United offers four reasons why the lower rates in Tender 100 should not be applied. The first reason is that it made a clerical mistake when it issued Tender 106 by not including a provision in it expressly cancelling Tender 100 that was so obvious, or patent, that the government shipping agents knew that the mistake was made. The second reason is that since, in United's view, both tenders are identical except

for the generally higher rates in Tender 106, application of the alternation provision would defeat the intention to apply the higher rates subsequently offered in Tender 106 and render them void in their inception if the earlier, filed rates in Tender 100 were applied.

The third reason United offers is that the alternation provision should not apply where two tenders are involved, as in this case, but alternation should only apply if one tender is alternated with a commercial tariff containing rates offered to the public generally. Finally, the carrier argues that the Comptroller General has authority to reform the GBL transportation contract under 50 U.S.C. § 1431 giving effect to United's intention to cancel Tender 100 when it issued Tender 106. United cites Paragon Energy Corp. v. United States, 645 F.2d 966, 971 (Cl. Ct. 1981).

Carriers are required by the Interstate Commerce Act, 49 U.S.C. § 10101 et seq. (1982), to collect only the applicable charges shown in tariffs or tenders filed with the Interstate Commerce Commission. See Interpretation of Government Rate Tariff for Eastern Central Motor Carriers Assn. Inc., 323 I.C.C. 347, 352 (1964). Where there are conflicting applicable rates, as there are in this case, the shipper is entitled to the lower. This is true regardless of the equities even though a carrier does not intend that the lower of the conflicting rates apply and even though they are the result of a mistaken tariff publication. Metropolitan Metals, Inc. v. Pennsylvania R. Co., 314 I.C.C. 737 (1961). The first reason United gives for avoiding the lower applicable rate tender is a general rule of government contracting providing for equitable relief from a mistaken, burdensome contract. That general rule is contrary to the particular state of the law concerning interstate transportation contracts just cited and is inapposite here. Although a carrier may appropriately argue equitable reasons why an applicable rate should not be the basis of a transportation contract because the rate is unreasonable, those equitable reasons can be presented to the Interstate Commerce Commission only, which has primary jurisdiction over the reasonableness of rates. United States v. Western Pac. R. Co., 352 U.S. 59 (1956). Otherwise, the carrier is obliged by law to collect the rate shown in the lowest, applicable tariff or tender. This was the basis of GSA's audit actions. See Middlewest Motor Freight Bureau v. United States, 433 F.2d 212, 238 (8th Cir. 1970), cert. denied, 402 U.S. 999 (1971).

Although United properly notes that some principles of contract construction apply to interpreting rate tenders,

its second reason for not applying the lowest applicable rate tender--that a subsequently filed rate tender should not be interpreted to be void at its inception because of an applicable tender filed initially--does not apply in this case. United contends that Tender 106, containing the higher rates, was issued after Tender 100 and intended to supersede Tender 100. GSA, on the other hand, has furnished us copies of the two tenders and established that Tender 100 was issued after Tender 106. We also note that the two tenders were not identical. Besides containing different rates than Tender 100, as well as other distinctions, Tender 106 applied from fewer origin points than Tender 100, which essentially applied between all points in the United States. Therefore, there is no factual basis to conclude that Tender 106 was void at its inception or impliedly cancelled the lower rates in Tender 100.

Concerning United's third reason for not applying Tender 100--that Tender 106's alternation provision can only be used in connection with another commercial tariff offering rates to the general public--United has referred to no authority holding that one tender's alternation provision cannot be used in connection with another tender. Also, the language of the tender's alternation provision, as quoted above, certainly indicates no such limitation. We recently gave effect to an alternation provision similar to Tender 106's, holding that the alteration provision in one tender allowed the use of lower, applicable rates in another tender. Retroactive Modification of Rate Tender, 65 Comp. Gen. 563 (1986). See also, Von Der Ahe Van Lines, Inc., B-190610, June 13, 1978, and Starflight, Inc., B-210740, Sept. 27, 1983, which held that where a carrier offers applicable rates in two separate tenders, the government is entitled to the lower of the two rates.

The last of the carrier's reasons for not applying Tender 100 is the authority under 50 U.S.C. § 1431 (1982) to reform a contract on the basis of equitable considerations to facilitate the national defense. We held in British, Dutch and Italian Claims for Fuel and Services for U.S. Navy Vessels, B-225673, et al., Nov. 6, 1987, 67 Comp. Gen. ___, that GAO has no jurisdiction under that section and that any reformation made thereunder would not be subject to our review. Therefore, if reformation is appropriate under section 1431 to facilitate the national defense, and we offer no opinion on that subject, it must be obtained from the agencies with which United made its contracts of carriage.

Accordingly, we conclude that GSA properly used Tender 100, which contains the lowest, applicable rates. Therefore, GSA's actions in that regard are sustained.

for Comptroller General
of the United States