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Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Carrier-Provided Computers For Electronically Filing Tariffs With the Interstate Commerce Commission

File: B-239903

Date: June 28, 1991

DIGEST

1. The ICC did not improperly augment its appropriations by allowing private carriers to install computer equipment at the ICC's headquarters. The computers are used to give both the public and ICC staff access to tariffs which are electronically filed by the carriers. The ICC has broad statutory authority to prescribe the form and manner in which carriers must file tariffs and make them available to the public. Requiring carriers to provide computer equipment to access electronic tariff information is within the ICC's authority. However, the ICC should adopt the controls necessary to reasonably assure that the equipment is used only to access the tariff information.

2. The ICC has satisfied the requirement in 40 U.S.C. § 303b that it charge carriers for the space used by the carrier's computer equipment placed within the ICC's headquarters. ICC already charges the carriers user fees under 31 U.S.C. § 9701. The record shows that the user fees compensate the ICC for the space used by the computers. GAO will not use section 303b to examine the nature of a fee established within the proper use of ICC's discretion under section 9701.

DECISION

The General Counsel of the Interstate Commerce Commission (ICC) requested our opinion on whether the ICC's appropriations have been improperly augmented. The potential augmentation occurred when certain private carriers installed computer equipment at their own expense at the ICC's headquarters. The equipment was installed to give both the public and ICC staff access to the carriers' electronically filed rate tariffs.

For the reasons stated below, we conclude the ICC did not improperly augment its appropriations by accepting the equipment at the ICC's headquarters, and making the equipment available to access electronically filed rate tariffs.

However, the ICC should institute the controls necessary to reasonably assure that the equipment is used only to access the electronically filed tariffs, and not for unrelated automatic data processing purposes.

BACKGROUND

The ICC is an independent establishment of the United States which regulates rail and motor transportation carriers. 49 U.S.C. §§ 10301(a), 10501(a), 10521(a) (1988). Carriers must "publish and file" with the ICC tariffs containing their rates and information on the rules and practices which relate to those rates. 49 U.S.C. §§ 10761(a), 10762(a)(2). Carriers which file tariffs must also "keep them open for public inspection." 49 U.S.C. § 10762(a)(2). In addition, the ICC may "prescribe the form and manner of publishing, filing, and keeping tariffs open for public inspection." 49 U.S.C. § 10762(b)(1).

Prior to November 1989, carriers filed all tariffs with the ICC on paper. In both fiscal years 1988 and 1989, these tariffs amounted to millions of pages of material. During 1989, the ICC amended its rules to allow carriers to file tariffs electronically. Electronically filed tariffs are placed by the carriers into computer libraries accessible by the ICC and the public.

One section of the ICC's amended rules provides that

"Tariffs filed other than in paper form shall:

(1) be compatible with existing ICC technology and facilities available for the receipt, storage and use of tariffs; or

(2) carriers or their agents shall provide the necessary implementing equipment, facilities and programs to the ICC for use by its staff and the public at no cost."

49 C.F.R. § 1313.4(c) (1990). Several rail carriers have made arrangements to file their tariffs electronically. In compliance with 49 C.F.R. 1314.4(c), these carriers have chosen to install several computer terminals and dedicated telephone lines at the ICC's headquarters. The terminals are located in the room that is used to archive paper tariff filings, and have been used both by ICC staff and the general public. The ICC has asked for our opinion on whether this arrangement improperly augments its appropriations.

DISCUSSION

The general theory of "augmentation" is a corollary to the constitutional requirement that "[n]o money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law" U.S. Const., Art. I, sec. 9. The theory seeks to assure that the executive branch limits its expenditures to appropriations it receives. The control over executive action inherent in passing limited appropriations would be severely eroded if agencies could "augment" the funds they are appropriated. See, e.g. 63 Comp. Gen. 459, 460-461 (1984).

The ICC cites our decisions at 42 Comp. Gen. 650 (1963), overruled on other grounds, 51 Comp. Gen. 506 (1972) and 63 Comp. Gen. 459 to support its position that there is not an augmentation in this case. These cases involved offers from private parties to supply services to an agency. In 42 Comp. Gen. 650, a private organization offered to install coin operated audio devices at the National Zoo to provide visitors information about exhibits. In 63 Comp. Gen. 459, a private promoter offered the Federal Communications Commission free display space at a communications industry convention to obtain the "drawing power" that an FCC display would provide. We reached differing results in those cases, and the ICC argues that a comparison of those cases to the issues presented here leads to the conclusion that the ICC may accept the carrier-provided computer equipment.

We feel that the facts in this case and those cited by the ICC are so distinct that comparing them does not properly frame the issues before us. The private parties in those cases were not being regulated by the agencies that they were offering to provide services to. In fact, those parties were not under any statutory obligation to deal with the agencies in any way. Thus, those cases presented augmentation questions isolated from any statutory authority of the agency which might have authorized acceptance of the services offered. In contrast, the issue here is whether the ICC's statutory authority to prescribe the form and manner in which tariffs are filed permits the ICC to require electronic tariff filers to install, at no cost to the ICC, computer equipment necessary to access the tariffs without unlawfully augmenting its appropriation.^{1/}

^{1/} The ICC receives an annual appropriation to finance the necessary expenses of fulfilling its statutory responsibilities. E.g. Pub. L. No. 101-516, 104 Stat. 2155 (1990). Those responsibilities include reviewing tariffs filed by carriers. 49 U.S.C. § 10762(e). The augmentation theory might be viewed as requiring the ICC to finance all

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Our analysis begins with the clear proposition that carriers are responsible for keeping their tariffs open to the public. 49 U.S.C. § 10762(a)(2). In promulgating the new tariff regulations, the ICC specifically relied upon its authority to prescribe the manner in which carriers will keep filed tariffs "open for public inspection". 5 I.C.C 2d 279, 281 (1989). The U.S. Supreme Court has referred to tariff public notice requirements as

"a continuing act enjoined upon the carrier, while the tariff remains operative, as a means of affording special facilities to the public for ascertaining the rates in force thereunder."

United States v. Miller, 223 U.S. 599, 604 (1912) (emphasis supplied). Thus, providing public access to tariffs is clearly the carriers' responsibility. Since the ICC is not responsible for providing the public with access to tariffs, its appropriation would not be expected to bear the cost of providing that access. In this regard, the ICC points out that the costs of processing tariffs and storing them in the ICC's public reading room are paid by the carriers through fees charged for filing tariffs. Therefore, the ICC's appropriation is not augmented when carriers fulfill their statutory duties by providing computers for public access to electronically filed tariffs.

The ICC argues that the carriers also have a similar responsibility to give the ICC staff access to electronically filed tariffs. The ICC asserts that 49 U.S.C. 10762(b)(1), requires the carriers to file their tariffs with the ICC in a "decipherable format." Since the computer equipment provided by the carriers is necessary to "decipher" the tariffs, the ICC argues that carriers are required to provide the computers as part of their responsibilities to file tariffs with the ICC. The ICC argues that the equipment provided by the carriers to access electronically filed tariffs does not augment ICC's appropriation any more than the paper on which paper tariffs are filed.

We agree that the ICC may require carriers who wish to file their tariffs electronically to provide the ICC staff with the means to access and review the tariffs. We view such a requirement as a reasonable exercise of the ICC's authority to prescribe the form and manner in which carriers must file

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aspects of its tariff review functions, including gaining access to electronically filed tariffs, from those appropriations.

their tariffs. 49 U.S.C. § 10762(b)(1). Accessing tariff information through carrier-provided equipment is functionally the same as viewing a paper tariff appropriately printed and mailed to the ICC at a carrier's expense. Both methods give the ICC staff access to the tariffs without direct cost to the ICC's appropriations. Accordingly, we will not consider the ICC's appropriation to be augmented by accepting carrier-provided equipment which ICC employees use to access rate tariffs.

However, we are less sanguine about the potential for carrier-provided equipment to be used for purposes other than accessing electronically filed tariffs. The equipment provided to the ICC appears to be relatively standard personal computers with modems and printers. 5 I.C.C. 2d at 284. This is general office equipment which could be used by the ICC for various purposes, such as word processing. If so used, the Commission would gain additional data processing capability through its regulatory powers rather than its appropriations. In order to prevent this type of augmentation, the ICC should institute the controls necessary to reasonably assure that the carrier-provided equipment is used only to access electronically filed tariffs.

Finally, we agree with the ICC's conclusion that it need not charge carriers a specific rental charge for the space occupied by carrier-provided equipment at ICC headquarters. Generally, 40 U.S.C. § 303b requires that property of the United States only be leased for a monetary consideration. We have interpreted that provision to require agencies to assess a charge against parties who are granted a special use of a government facility which is not afforded to the general public, e.g., 42 Comp. Gen. 650, 653 (1963), and to require agencies to limit the charges to strictly monetary consideration, e.g., 41 Comp. Gen. 217 (1962). The ICC argues that the fees currently charged to tariff filers sufficiently meet the requirement of section 303b.

The ICC charges carriers user fees for filing tariffs under 31 U.S.C. § 9701. The record indicates that these fees already reimburse the ICC for the space occupied by carrier-provided the equipment. In B-162986, May 1, 1968, we declined to use section 303b as a means to examine the nature of an agency's fee structure adopted under another authority. We stated that the fee structure used was a matter for agency consideration. Id. The ICC is charging the carriers a reasonable monetary

consideration for the facilities being used. As in B-162986,
we will not extend the application of section 303b to object
to the nature of the fee ICC imposes on the carriers.

for Milton L. Fowler
Comptroller General
of the United States