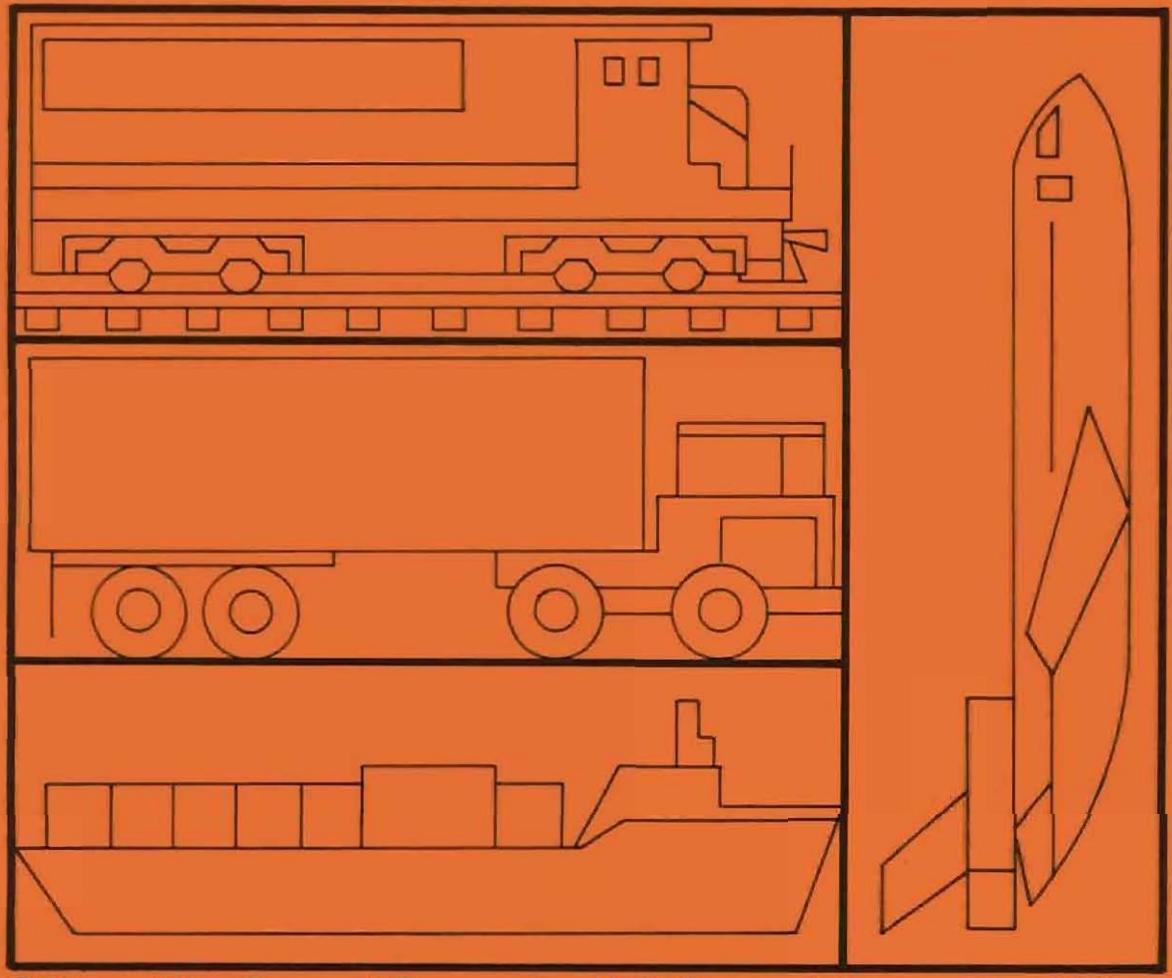


Transportation Law Manual



Office of the General Counsel • U.S. General Accounting Office

TRANSPORTATION LAW MANUAL

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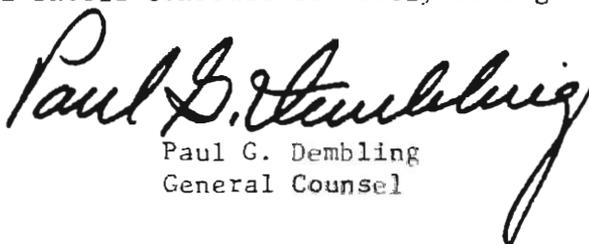
FOREWORD

Since the original issuance in January 1970 of the Transportation Manual by the Office of the General Counsel, United States General Accounting Office, there have been many new laws and major changes in old laws pertaining to the field of transportation.

This manual contains legal information relating to Federal expenditures for domestic and foreign freight and passenger transportation services furnished for the account of the United States. It contains statutory authority, court case precedents, administrative regulations and digests of decisions of the Comptroller General of the United States.

Originally it was prepared primarily for internal use of General Accounting Office personnel. However, because it may be of assistance to those handling transportation matters, we are making it available to other Government officers and employees.

Inasmuch as changes in laws and regulations are frequently made, those using the Manual should consider it merely as a guide.


Paul G. Dembling
General Counsel

January 1978

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CHAPTER 1

ADVANCE PAYMENT STATUTE

Section 3648, Revised Statutes, 31 U.S.C. 529, provides, in pertinent part, as follows:

"No advance of public money shall be made in any case unless authorized by the appropriation concerned or other law. And in all cases of contracts for the performance of any service, or the delivery of articles or any description, for the use of the United States, payment shall not exceed the value of the service rendered, or of the articles delivered prior to such payment. * * *"

Various statutory provisions have been enacted permitting exceptions to the rule against advanced payments. For example, see The Transportation Payment Act of 1972, Pub. L. 92-550, approved October 25, 1972, which states the conditions under which transportation payments are exempt, and see 10 U.S.C. 2307 (1970) which provides that under certain conditions the head of any Defense agency (named in section 2303 of that title) can make advance payments and 41 U.S.C. 255 (1970) which grants the same authority to the heads of executive agencies. See B-155253-O.M. of September 7, 1965, and B-158487, April 4, 1966.

Decisions Rendered Prior to Enactment of Pub. L. 92-550

Prepayment of Freight Charges Prohibited

31 U.S.C. 529 has been held generally to prohibit the prepayment to carriers of freight charges in advance of the rendition of the service. 30 Comp. Gen. 348 (1951).

Currency Differential Savings

A 3-percent currency differential savings on shipments between Canada and the United States is not for consideration in the evaluation of bids where the invitation provides for f.o.b. origin delivery under a Government bill of lading (GBL) prescribing payment at destination - prepayment of transportation charges being prohibited by 31 U.S.C. 529 - and the invitation contains no provision for the prepayment of transportation charges by the contractor or subcontractor. However, the currency differential is for application to shipments of Government-furnished property shipped from the United States to the plant of a Canadian contractor under a GBL requiring payment of transportation charges at the Canadian destination in Canadian funds. 46 Comp. Gen. 123 (1966).

80% Payment Provision in MSTs Shipping Contracts

There may be some question whether a contractual provision providing for the payment of 80 percent of freight after sailing of the vessel from the port of loading is valid where Government freight is involved because of 31 U.S.C. 529, prohibiting the advance payment of public funds unless authorized by the appropriation concerned or by other law. That question was considered, but not decided, by the Second Circuit Court of Appeals in Alcoa Steamship Co. v. United States, 175 F.2d 661, 663 (2nd Cir. 1949), and by the Supreme Court in its decision in the same case, 338 U.S. 421, 425 (footnote) (1949), both courts finding it unnecessary in the situation there involved to pass upon the question. 43 Comp. Gen. 788, 790 (1964). But in United States v. Waterman S.S. Corp., 397 F.2d 577 (5th Cir. 1968), the 80 percent payment was determined not to constitute earned freight which the carrier was entitled to retain where the cargo was not delivered because of the sinking of the vessel.

Judicial Holdings Re 31 U.S.C. 529

"No case has been cited holding payments unlawful by virtue of 31 U.S.C. 529 and the Supreme Court in Alcoa Steamship Co. v. United States, 338 U.S. 421, 425 (footnote) (1949), expressly reserved ruling on this point. Nor has any case been cited which construes the language of that statute and resolves the questions that may properly be raised as to its application; e.g., value to whom? Measured when, by what standard, and by whom? Under all the facts presented here, this Court is not constrained to hold the payment unlawful solely by reason of this statute." United States v. American Trading Co. of San Francisco, 138 F. Supp. 536, 541-542 (D.C. Cal. 1956).

Imprest Funds

Advance payment of transportation charges on small shipments from imprest funds would be contrary to advance payment prohibition in 31 U.S.C. 529. B-136352-O.M., August 21, 1958.

Prepayment of Freight Charges of \$10 or Less

Prepayment by Veterans Administration of freight charges in cash of \$10 or less in U. S. currency, to Philippine Air Lines for shipments of small packages of Government property, like claims folders and supplies, between provinces of Philippines would contravene advance payment prohibition in 31 U.S.C. 529. B-129549, September 12, 1960.

Procurement on F.O.B. Origin Basis

Where materials or articles are procured on an f.o.b. origin basis, which means that they are Government property from the time of shipment, it would appear improper in view of 31 U.S.C. 529 to pay the transportation charges in advance of delivery at destination either to the carrier or to the contractor. B-116329-O.M., August 2, 1956.

Common Law Rule

At common law, a carrier does not earn and is not entitled to freight unless it completely performs its contract by delivering the goods to the consignee at destination. See Christie, et al. v. Davis Coal & Coke Co., 95 F. 837 (D.C.S.D. N.Y. 1899). The same rule is brought forward in 31 U.S.C. 529. 30 Comp. Gen. 348 (1951).

Fast Payment Procedure

Payment to a supplier under the Fast Payment Procedure is not an advance payment in violation of 31 U.S.C. 529 because payment is not made until after title to the supplies vests in the Government upon delivery to a post office, common carrier or delivery to the Government if shipped by other means, the postage or freight is prepaid by the shipper, and that such payment procedures are regarded as an exercise of the authority of the heads of agencies under 10 U.S.C. 2307 (1970) and 41 U.S.C. 255 (1970). B-155253-O.M., September 7, 1965.

Short Form Government Bill of Lading

Under this procedure, where freight charges not exceeding \$100 per shipment are paid only to the origin carrier named in the bill of lading and cannot be waived to any other carrier, and carriers cannot present bills for payment sooner than 15 days after the date of shipment, certifying officers will accept the 15-day period as presumptive evidence that the services ordered have been furnished and payment will not be considered in violation of 31 U.S.C. 529. B-144429-O.M., December 27, 1960.

Ocean Shipments For Civil and Defense Agencies

Under this procedure, where the ocean carriers agree that the bills of lading will be subject to the terms of the Government bill of lading and they may not submit their bills for ocean transportation for payment until the vessel has arrived at the destination port or 30 days after the cargo has been loaded aboard the vessel at the origin port, whichever is earlier, delivery will be presumed and payments will not be considered to be a violation of 31 U.S.C. 529. See B-150556, June 16, 1967; B-150556, May 17, 1968.

Intermodal Shipments of Unaccompanied Baggage

Under this procedure, which is not considered to be a violation of 31 U.S.C. 529, forwarders of unaccompanied baggage shipments from overseas stations may submit their bills for payment 30 days after the goods are tendered to the carrier at origin provided the bills are supported by (1) the original Government bills of lading or properly executed certificates in lieu (which do not include the consignee's acknowledgement of receipt); (2) copies of the origin or delivering carriers' freight bills with or without the consignee's signatures thereon; and provided they are accompanied by the carriers' certified statements that (a) the shipments were delivered in good order and condition; and (b) that they agree to refund the freight charges if the property was not delivered or was delivered damaged. B-162058-O.M., dated September 15, 1967.

GAO Regulation v. Advance Payment Statute (31 U.S.C. 529)

Although it is believed that Court of Appeals unjustifiably relied on 31 U.S.C. 529 without recognition of the 10 U.S.C. 2307 and 41 U.S.C. 255 provisions authorizing advance payments, and that its construction of a 1954 GAO regulation (authorizing advance payment of line-haul charges on household goods placed in temporary storage) as being incorporated into GBL and so modifying its terms as to entitle carrier to retain payment where serviceman's household effects were destroyed in storage would be reversed by Supreme Court, petition for writ of certiorari is not recommended in view of decision's limited effect and of possibility of clarifying GAO regulation. United Van Lines v. United States, 448 F.2d 1190 (D.C. Cir. 1971); B-159829, Aug. 31, 1971.

Decisions Rendered After Enactment of Pub. L. 92-550

Procedure to Overcome Delayed Payment

Carrier seeks speeding up of payment of Government bills to period of 30 days after billing. One recent study recommendation was that appropriate legislation be enacted to exempt transportation payments from scope of statute prohibiting advance payments--31 U.S.C. 529. Pub. L. 92-550 allows carrier or forwarder to be paid in advance of completion of services provided that carrier has issued usual ticket, receipt, B/L, or equivalent document. Implementing regulations will speed up certification and payment of transportation bills. B-182952, Feb. 27, 1975.

Advance Payment of Freight Transportation Charges from Imprest Funds

Circular letter of Jan. 7, 1974, to heads of departments and agencies concerned advance payment of freight transportation charges from imprest funds. Secretary of Treasury and Comptroller General issued joint standards for payment of charges Nov. 5, 1975 (now 4 C.F.R. 56). Authority is granted to each agency that utilizes discretionary authority outlined in circular letter of May 6, 1971 (B-163758) to use commercial procedure for certain types small shipments, with advance cash payment from imprest funds at origin or destination. Use of cash is optional and is implemented only upon mutual agreement between agency and carrier or forwarder involved. B-163758, Jan. 7, 1974.

Transportation Payment Act of 1972, Pub. L. 92-550

The Transportation Payment Act of 1972, Pub. L. 92-550, added a new paragraph to 49 U.S.C. 66 which exempts transportation payments from the scope of 31 U.S.C. 529. It reads as follows:

Advance Payment

(b) Pursuant to regulation prescribed by the head of a Government agency or his designee and in conformity with such standards as shall be promulgated jointly by the Secretary of the Treasury and the Comptroller General of the United States, bills for passenger or freight transportation services to be furnished the United States by any carrier or forwarder may be paid in advance of completion of the services, without regard to section 529 of Title 31: Provided, That such carrier or forwarder has issued the usual ticket, receipt, bill of lading, or equivalent document covering the service involved, subject to later recovery by deduction or otherwise of any payments made for any services not received as ordered by the United States.

This paragraph specifies that carriers may be paid in advance of completion of the services without regard to 31 U.S.C. 529 but qualifies or restricts such payments in that they may be made (1) only pursuant to the regulations prescribed by the agency head and (2) in conformity with the joint standards issued by the Secretary of the Treasury and the Comptroller General.

The joint standards are published in 4 C.F.R. 56 (1977).

The General Services Administration has published regulations in 41 C.F.R. 101-41.402 (1977). Under these regulations, the payment of charges in advance of completion of service is limited to:

(a) Passenger transportation services procured through the use of cash as set forth in 41 C.F.R. 101-41.203-2 (1977); and

(b) Freight transportation services procured through the use of commercial forms and documents as set forth in 41 C.F.R. 101-41.304-2 (1977).

Thus GSA's regulations require the use of Government bills of lading for shipments of property where charges will exceed \$100 and the GBL requires the carrier to certify that the shipment has been delivered. Where the transportation charges will be \$100 or less, commercial forms may be used and payments made in advance. Similarly, passenger transportation of \$100 or less may be procured without using a Government transportation request. As one can see, Pub. L. 92-550 permitted only limited exceptions to the rule against advanced payments.

CHAPTER 2

ASSIGNMENT OF TRANSPORTATION CLAIMS

The so-called anti-assignment statutes are 31 U.S.C. 203 (1970), and 41 U.S.C. 15 (1970). Section 203, 31 U.S.C., is a general anti-assignment statute, applying to all claims without classification, and reads in pertinent part:

"All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, except as hereinafter provided, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof."

Section 15, 41 U.S.C., is limited to contracts and interests under them. It provides in part that no contract or order shall be transferred by the party to whom the contract or order is given to any other party and that any such transfer shall cause the annulment of the contract or order transferred, so far as the United States is concerned.

These laws provide that the restrictions on assignment do not apply where the moneys due or to become due from the Government, under a contract providing for payments aggregating \$1,000 or more, are assigned to a bank, trust company or other financial institution, and where certain procedural steps are complied with. They also provide that any contract of the Department of Defense, the General Services Administration, the Atomic Energy Commission (or any other agency designated by the President), may, in times of war or national emergency, provide that payments to be made to the assignee shall not be subject to reduction or setoff.

Regulations pertaining to the billing of freight transportation services furnished for the account of the United States were formerly published at 4 C.F.R. Part 52. However, the transportation audit function was transferred from this Office to the General Services Administration under the provisions of the General Accounting Office Act of 1974, Pub. L. No. 93-604, approved January 2, 1975. GSA has published in its Federal Property Management Regulations Temporary G-23, October 9, 1975 (see 41 C.F.R. 101-41.000 et seq.), section

101-41.303-3 of which provides the terms and conditions governing acceptance and use of U. S. Government bills of lading. The regulations relate to the anti-assignment statute in that only the last carrier or forwarder in privity with the contract of carriage as evidenced by the bill of lading may bill for the transportation charges; or a participating carrier or forwarder in privity with the contract of carriage as evidenced by the bill of lading, when submitted with a waiver accomplished by the last carrier. In addition, an agent of the carrier or forwarder must submit a bill in the name of the principal in order to be paid.

Purpose of the anti-assignment statutes

The regulations are more than mere guidance for the paying agencies; they implement the anti-assignment statutes. The courts have declared the purposes of 31 U.S.C. 203 to be: (1) that the Government might not be harassed by multiplying the number of persons with whom it had to deal, (2) to prevent possible multiple payment of claims, (3) to make unnecessary the investigation of alleged assignments, powers of attorney and other authorizations, (4) to enable the Government to deal only with the original contractor (claimant), and (5) to save to the United States defenses which it has to claims by an assignor by way of setoff and counter-claim which might not be applicable to an assignee. United States v. Shannon, 342 U.S.C. 288 (1952); United States v. Aetna Casualty and Surety Co., 338 U.S. 366 (1949).

Government Bill of Lading

A Government bill of lading constitutes a contract for transportation of the goods involved and where the amount due thereunder is \$1,000 or more comes within the authority in 31 U.S.C. 203 and 41 U.S.C. 15 to assign moneys due or to become due "under a contract providing for payments aggregating \$1,000 or more." 21 Comp. Gen. 265 (1941); 43 Comp. Gen. 138 (1963).

Freight Charges

Where a carrier has assigned to a bank all moneys due for freight on the outward voyage of a vessel, and the Government bills of lading representing numerous shipments on the vessel constitute the only contract for the transportation, the assignment may be recognized, under 31 U.S.C. 203 and 41 U.S.C. 15, as authorizing payment in the name of the assignee only with respect to each such bill of lading which involves a payment of \$1,000 or more, but where the amount involved is less than \$1,000, payment should be made in the name of the transportation company and the check mailed in care of the assignee. 21 Comp. Gen. 265 (1941).

Aggregating \$1,000 or More

Where an indefinite-quantity master contract with a particular carrier for hauling services would obligate the Government to order services for which payments would aggregate at least \$1,000 during a given period, although each individual service would be covered by a separate bill of lading which might involve a payment, of less than \$1,000, payments under the contract are assignable pursuant to 31 U.S.C. 203 and 41 U.S.C. 15 as "aggregating \$1,000 or more." 23 Comp. Gen. 989 (1944).

Master Contract

Where payments for hauling services under a master contract with a particular carrier are assigned pursuant to 31 U.S.C. 203 and 41 U.S.C. 15, the bill of lading and voucher covering each individual hauling service should indicate that payments thereon are to be made to the designated assignee, with appropriate reference being made to the master contract. 23 Comp. Gen. 989 (1944).

Blanket Waiver

Payments to carrier who acted variously as pick-up, intermediate or destination carrier on completed transportation contracts, but where original bills of lading were surrendered with blanket waiver of rights to collect charges due, would not be practical or proper since on record then before it GAO was unable to determine carrier's collection rights against Government. Blanket waiver purporting to transfer collection rights on all Government bills of lading issued in name of a particular carrier is not regarded as a proper transfer of interest in the transactions. B-163757, March 28, 1968.

Agent Not in Privity With Contract

Carrier A is not entitled to payment where records indicate that carrier A was in fact acting as an agent for carrier B, and that carrier A was not in privity with the contract between the United States and carrier B. Since carrier A is an agent to receive payment the bill must be submitted in the name of the principal. B-180217, May 8, 1974; B-185014, December 30, 1975.

Delivering Carrier

Carrier's claim for freight charges is denied where carrier was the originating carrier and evidence indicates that billing carrier was the delivering or last carrier. The delivering carrier is entitled to

receive payment for the transportation service as provided by Condition 1 on the back of the Government bill of lading. The delivering carrier submitted its bill for the entire service from origin to destination supported by the original Government bill of lading, and payment was made in accordance with the payment regulations in 4 C.F.R. 52.38(a)(3). This payment effectively discharged the Government's obligation on the contract. B-173754, November 3, 1971; B-178036, August 22, 1973.

Payment to a Factor

Payment of transportation charges to a factor is disallowed when barred by the Assignment of Claims Act, 31 U.S.C. 203 (1970) where payment was made of loss and damage claim under the Military Personnel and Civilian Employees Claims Act, and the amount exceeds the transportation charges. B-182755, June 27, 1975. And this Office cannot accept loss and damage claims from a factor or agent authorized to collect freight charges for carrier's account because the authority to represent the carrier is questionable as to loss and damage unless a power of attorney is executed (4 C.F.R. 31.2, 31.3 (1976)). The regulations are more than mere guidance for the paying agencies because they implement the so-called anti-assignment statutes. B-186587, July 7, 1976.

Fraud Perpetrated by Assignor - Government's Liability

Since under the Assignment of Claims Act of 1940, as amended, the Government is not an insurer as to fraudulent schemes devised by an assignor against an assignee, nor is the Government required to involve an assignee in matters of contract administration, a claim for the amount of fictitious invoices presented by the assignee of a drayage company performing services for the Government, which were retrieved by the assignor prior to payment, may not be honored as the record presents no grounds to impute negligence to or assert estoppel against the Government, but instead raises doubt as to the validity of the assignee's claim. 50 Comp. Gen. 434 (1970).

Transfer of Claims - Foreign Currency

Airlines proposed use of a foreign air carrier as its agent for collecting Indian rupee Government Transportation Requests violates the anti-assignment statute, 31 U.S.C. 203 (1970). The Act has been held to include all specific assignments in whatever form, of any claim against the United States under a statute or treaty, whether to

be presented to one of the executive departments, or to be prosecuted in the Court of Claims; and to make every such assignment void. Ball v. Halsell, 161 U.S. 72, 78 (1896). The prohibition extends to assignment of vouchers. Harris v. United States 27 Ct. Cl. 177 (1892). B-182416-O.M., December 13, 1974.

CHAPTER 3

BILLS OF LADING

Normally the transportation of goods is initiated by the giving of a bill of lading or a shipping receipt by a carrier to a shipper containing the terms and conditions on which the goods are carried, although the issuance of a bill of lading is not essential in order to create a contractual relationship between shipper and carrier since under the common law the contract of affreightment may be oral as well as written.

Goods transported in interstate commerce are governed by the Federal Bills of Lading Act, 49 U.S.C. 81-124 (1970). The bills of lading may be negotiable (order bill of lading) or non-negotiable (straight bill of lading) and are commercial bills of lading as distinguished from the U. S. Government Bill of Lading.

The standard form Government bill of lading was first prescribed for use in 1907 upon instructions of President Theodore Roosevelt (Treasury Department Circular No. 62, October 29, 1907, 14 Comp. Dec. 967). The Government bill of lading--like the commercial straight bill of lading--serves as a contract of carriage and as a receipt for the goods and is non-negotiable. The original copy of the standard form presented with the public voucher (Standard Form 1113) serves as a freight bill for use in the collection of transportation charges. In addition, it contains information needed by Government shipping and accounting officers, such as the contract authority for shipment and the appropriation chargeable.

The Government bill of lading continued down through the years without any significant changes. However, this Office always has recognized the necessity for improved freight billing practices. A study and analysis in this area was conducted under the sponsorship of the Joint Financial Management Improvement Program. Through coordination with various agencies, a report titled "Joint Agency Transportation Study" was issued in December 1969. One of the recommendations of this study was that appropriate legislation be enacted to exempt transportation payments from the scope of the statute prohibiting advance payment, 31 U.S.C. 529 (1970). The result of this recommendation was the enactment of the "Transportation Payment Act of 1972," Pub. L. No. 92-550, sec. 1(b), 49 U.S.C. 66(c) (Supp. V 1975). Section 1(b) allows the carrier or forwarder, subject to agency regulations and joint standards issued by the Secretary of the Treasury and the Comptroller General, to be paid in advance of completion of

the services provided, of course, that the carrier has issued the usual ticket, receipt, bill of lading, or equivalent document. Moreover, the carrier or forwarder no longer has to obtain an accomplished consignee's certificate of delivery on the original Government bill of lading to receive payment. And another significant change was the elimination of the Short Form Government Bill of Lading.

The General Accounting Office Act of 1974, Public Law 93-604, 88 Stat. 1959 (January 2, 1975) mandated, among other things, that the transportation audit function be transferred from the General Accounting Office to the General Services Administration. It was determined that the prescribing of standard forms and procedures pertaining to payments for transportation services furnished for the account of the United States was closely related to the audit of such payments and adjustment of claims, so that it would be unnecessary for this function to be performed in the General Accounting Office. 4 C.F.R. 51.2 (1976). Thus, GSA has published in its Federal Property Management Regulations, Temporary Regulation G-23, October 9, 1975, terms and conditions governing acceptance and use of Government bills of lading. (101-41.302-3). The regulations will be permanently codified in Title 41, C.F.R., Public Contracts and Property Management. The new Government bill of lading, unlike the old Government bill of lading, incorporates by reference the regulations published in Title 41, Part 101, C.F.R., into the bill of lading contract. The old bill of lading form listed the conditions separately on the reverse side. There is also an instruction as to the use of American-flag carriers for U. S. Government financed carriage of personal property and freight.

Clean Bill of Lading

A "clean bill of lading" is one which contains nothing in the margin qualifying the words of the bill itself. The phrase "clean bill of lading," as applied to shipments by railroad, has been explained as differing from one bearing the notation "shipper's load and count," a phrase meaning that the shipper had weighed the car or counted the shipment and that the railroad company had not. See 49 U.S.C. 101 (1970). When a bill of lading is annotated with a legend indicating "shipper's load and count" by the carrier's representative, the burden is on the shipper to show proper and correct loading. In the absence of evidence such as a loading tally sheet or affidavit of the shipper's employee as to the number of cases loaded or other documentation, a clean bill of lading does not fulfill this burden. B-185132, December 22, 1976.

Through Bill of Lading

A "through bill of lading" is one whereby the carrier agrees to transport the goods from the point of delivery to a designated point of destination, although such transportation extends over the line of a connecting carrier.

Bill of Lading Issuances

The Interstate Commerce Act provides that the initial carrier upon acceptance of property for interstate transportation must issue a receipt or bill of lading. 49 U.S.C. 20(11), 319, 1013 (1970).

Additional charges claimed by the delivering and billing carrier on the basis of a second freight movement of boxes found astray at the origin carrier's terminal because the Government prepared the bill of lading and incorrectly showed the quantity shipped as five boxes instead of 15 boxes properly was disallowed since pursuant to section 219 of the Interstate Commerce Act, 49 U.S.C. 319, the carrier and not the shipper is responsible for issuing an appropriate bill of lading, and the fact that the shipper prepared the bill of lading does not relieve the carrier of the duty of ensuring the bill of lading was correctly prepared. 52 Comp. Gen. 211 (1972); B-183259, November 11, 1975.

Bill of Lading Notation Requirement - Exclusive Use of Vehicle

Where the destination Canadian carrier refused to refund the overcharge occasioned by the erroneous application of exclusive use charges on a shipment of helium cylinders, and participating carriers are jointly and severally liable for the overcharge, the origin carrier properly was held liable and the overcharge recovered by setoff since the correction notice that added to the bill of lading the notation "authorized use of single truck load by the carrier is mandatory to expedite shipment" did not satisfy the tariff requirement for a notation to indicate the shipper requested exclusive use, and the omission of such a notation may not be waived. 52 Comp. Gen. 575 (1973); 53 Comp. Gen. 628 (1974); 54 Comp. Gen. 27 (1974).

Bill of Lading - Conflicting Provisions

A shipment of furniture was purchased f.o.b. destination and shipped on a commercial bill of lading prepared by the shipper and executed by the carrier as required by 49 U.S.C. 319. The bill of lading although marked "prepaid" also indicated delivery to the consignee

was without recourse on the consignor and the carrier should not make delivery without payment of freight and other lawful charges. Carrier's claim for freight charges may not be allowed since the inconsistent "no recourse" and "prepaid" clauses mean some payment was made by the consignor, and as the claim is not for supplemental freight charges, the Government's liability has not been established. 52 Comp. Gen. 851 (1973).

Condition Five

Condition 5 on the reverse of the bill of lading (now incorporated by reference into the C.F.R.) provides that the shipment is made at the restricted or limited valuation specified in the tariff or classification at or under which the lowest rate is available, unless otherwise indicated. If the applicable rate is a tariff rate, Condition 5 satisfies the bill of lading notation requirements that may be required by the released valuation provision of the tariff. However, if the applicable rate were a tender or quotation rate, Condition 5 does not satisfy the bill of lading notation requirements that may be required by the tender or quotation because rate quotations are continuing unilateral offers and it is an elementary principle of contract law that offers, to be accepted, must be accepted in the precise terms in which they are made. Any material variance in an offer constitutes a counter offer which requires acceptance by the offeror to become operative. Thus, and despite Condition 5, to take advantage of the released valuation provisions offered in rate quotations, the Government as offeree and shipper, must comply with the offer's requirements as to the notations to be placed on the bills of lading. 53 Comp. Gen. 747 (1974).

Bills of Lading-Description-Presumption of Correctness

Presumption of correctness of bill of lading description of articles is rebutted by administrative report supported by carrier's descriptive inventory lists. The presumption of correctness of a bill of lading description is not conclusive. The important fact is what actually moved-not what was billed. 53 Comp. Gen. 868 (1974).

Clear Delivery Receipt

Setoff of monies due carrier against Government claims for loss and damage neither noted on delivery receipt because of misunderstanding as to nature of goods nor on Government bill of lading when carrier received the goods was proper because a clear delivery receipt does not

prevent establishing by other evidence receipt of goods in damaged condition. The Government bill of lading with no exception is prima facie evidence that parts of the shipment open to inspection and visible were received by the carrier in good order, and damage done was to containers which were open to inspection and visible rather than to goods concealed inside containers. 54 Comp. Gen. 742 (1975).

Condition Seven

Condition 7 on the Government bill of lading (now incorporated by reference into the C.F.R.) constitutes a waiver of the limitation period in a commercial bill of lading regarding time within which notice of loss or damage or suit or claim regarding the same must be instituted. B-187627, January 14, 1977, 56 Comp. Gen. 264 (1977).

Claim against an air carrier for damage to a shipment moved on a Government bill of lading is not subject to notice requirements of the governing air tariff because the use of a Government bill of lading, which in Condition 7 contains a waiver of the usual notice requirements, is required by an air tariff. This creates an ambiguity over applicability of notice requirements, which is resolved in favor of the shipper. B-185038, April 5, 1976, 55 Comp. Gen. 958 (1976).

Bills of Lading-Cross Referenced

Question underlying rate applicability issue in settlement disallowing carrier's claim is whether three lots of cannisters should be viewed as one shipment or three separate shipments since none of the three Government bills of lading were cross-referenced. Subsequent correction notices signed by the carrier 14 months later signify that the carrier agreed to consider three lots as a volume shipment covered by several bills of lading, and volume rates are applicable. B-179944, August 8, 1974.

Bill of Lading-Accomplishment

The Government bill of lading becomes properly accomplished only when the consignee signs the consignee's certificate of delivery on the original bill of lading and surrenders the bill of lading to the last carrier. Alcoa S.S. Co. v. United States, 338 U.S. 421 (1949). But where the record contains evidence indicating that the shipment was made on such a Government bill of lading and was delivered; that the carrier's agent was frustrated by the consignee in its attempt to obtain the consignee's signature; and that a further attempt to rectify the matter was not forthcoming from the administrative office, in our opinion and under the circumstances, the carrier is entitled to payment of his lawful charges. B-179917-O.M., January 24, 1974.

Bills of Lading-Point of Origin

If sufficiently convincing evidence is presented, the point of origin shown on a Government bill of lading may be rebutted. B-186603, December 22, 1976.

Bills of Lading-Erroneously Issued

Employee was erroneously issued a Government bill of lading for movement of household goods and was reimbursed on an actual expense basis instead of under the commuted rate system as required by FTR para. 2-8.3c(4)(a) (May 1973). He is required to refund to the Government the amount paid in excess of what it would have cost the Government if the payment was made under the commuted rate system since issuance of the Government bill of lading was erroneous, and it is a well established rule that the Government is not liable for the unauthorized acts of its agents. B-183226, May 5, 1975.

CHAPTER 4

CARGO PREFERENCE LAWS

The most important cargo preference laws are 10 U.S.C. 2631 (also called the Cargo Preference Act of 1904 or the McCumber Amendment), 10 U.S.C. 2634, and sections 901(a), 901(b), and 901(c) of the Merchant Marine Act of 1936, 46 U.S.C. 1241(a), 1241(b) and 1241(c). Section 901(b) of the Merchant Marine Act is also called the 50/50 Cargo Preference Provision. The basic purpose of these laws is to promote a strong American Merchant Marine and to protect American shipping from foreign competition.

10 U.S.C. 2631

This act generally requires the use of vessels belonging to the United States or vessels of U. S. registry in the transportation by sea of defense supplies; it provides that if the President finds that the freight charged by vessels of U. S. registry is excessive or otherwise unreasonable, contracts for transportation may be made through use of foreign flag vessels and that the charges made for the transportation of defense supplies by the sea may not be higher than the charges made for transporting like goods for private persons.

Cost Considerations

The mandatory language of 10 U.S.C. 2631 clearly would seem to indicate that cost considerations cannot be used to avoid the statutory requirement that United States vessels be used except for cases where the freight charged by such vessels is excessive or otherwise unreasonable. 48 Comp. Gen. 429.

Exception

This section, which prohibits use of foreign vessels to transport American military cargo, is subject to implied exception that foreign ships can be used if American ships are not available, and the exception does not require finding by President himself rather than by other officials in executive department. Curran v. Laird, 420 F.2d 122, 136 (D.C. Cir. 1969)

Government-owned transport ships within national defense reserve fleet that are subject to requisition by United States are not "available" within meaning of exception to this section that foreign ships may be used to transport American military cargo if American ships are not available. Curran v. Laird, 420 F.2d 122, 136 (D. C. Cir. 1969)

barge by foreign-flag tug since tug is not supply item and language of act as well as court cases which distinguish between contracts of affreightment and contracts for towage services indicate preference granted U.S. vessels by 1904 Cargo Preference Act is limited to transportation by sea of military supplies under contracts of affreightment and preference does not extend to towage of empty vessels under ordinary towage contracts. Therefore payment under towage contract from appropriated funds was proper. 52 Comp. Gen. 327 (1972).

Use of Foreign Flag Vessels by Contractors

The Armed Services Procurement Regulations prohibit contractors from using other than U.S. flag vessels for the shipment of supplies, materials unless unavailable at fair and reasonable rates and unless they notify the contracting officer of the unavailability of U.S. flag vessels and secure his permission to use other vessels. A contractor's request to use foreign flag vessels should be timely and should be supported by evidence that he has offered the shipment to U.S. flag lines or that the contracting officer has checked with the Military Sea Transportation Service to confirm the alleged unavailability of U.S. flag vessels before authorizing the use of a foreign flag vessel. B-159313, December 8, 1966.

Privately-owned Automobiles

Privately-owned automobiles of military personnel are cargoes for the Government and are governed by 10 U.S.C. 2631 prohibiting payment of rates in excess of those charged private shippers for comparable cargo. United States Lines Co. v. United States, 223 F. Supp. 838 (1963 (D.C.S.D.N.Y.)), affirmed 324 F.2d 97 (2nd Cir. 1963).

Ceiling on Freight Charges

American steamship owners, in dealing with the Department of Defense for the transportation of its supplies by sea, are restricted to charges not higher than those made for transporting like goods for private persons. United States Lines Co. v. United States, 223 F. Supp. (1963 (D.C.S.D.N.Y.)), affirmed 324 F.2d 97 (2nd Cir. 1963).

10 U.S.C. 2634 and section 901(c) of the Merchant Marine Act of 1936, 46 U.S.C. 1241(c)

Under 10 U.S.C. 2634, when a member of an armed force is ordered to make a permanent change of station, one motor vehicle owned by him and for his personal use may be transported to his new station at the

Foreign Flag Feeder Ship Service

Where service is available in U. S. vessels for entire distance between ports of origin in U.S. and destination port overseas, and freight charges by those vessels are not excessive or otherwise unreasonable, to permit transportation by sea of containerized military supplies in U.S.-flag ship for major portion of voyage and in foreign-flag feeder ship for minor portion of voyage would violate prohibition in 1904 Cargo Preference Act and, therefore, appropriated funds may not be expended for transportation by sea of defense cargo in container-ship service provided by U.S. lines which use foreign-feeder ships for part of service. 49 Comp. Gen. 755 (1970).

Foreign Vessels of United States Registry

Carriage of military cargoes in foreign-built vessels entitled to registry in U.S., and engaged in foreign trades or trade with trust territories, is not precluded by basic cargo preference statutes--act of Apr. 28, 1904, as amended, and action of Aug. 26, 1954, as amended. Objectives of 1904 act--to aid U.S. shipping, to foster employment of U.S. seamen, and to promote the U.S. shipbuilding industry--do not exclude foreign-built vessels registered in U.S., as such vessels are considered vessels of U.S. and entitled to benefits and privileges appertaining to U.S. vessels, to extent participation is limited to foreign commerce and trust territories, and is not precluded by act of 1954, which insures that at least 50 percent of all Government cargo, whether military or civil will be transported in privately-owned "U.S.-flag commercial vessels," a term that is not limited to vessels built in U.S. 52 Comp. Gen. 809 (1973).

Trainship Service

The use of trainship service between the United States and Alaska to move military cargo in rail cars which are transferred without unloading to a foreign built and foreign registered ship for the ocean segment of the trip and which, after arrival at the Alaskan port, continue on tracks to destination under a single through bill of lading, is not the use of rail service but is transportation by sea on a foreign vessel in violation of 10 U.S.C. 2631. 43 Comp. Gen. 792 (1964).

Towage of Empty Barge

Prohibition in 10 U.S.C. 2631, Cargo Preference Act of 1904, as amended, to effect that "only vessels of U. S. or belonging to U. S. may be used in transportation by sea of supplies bought for Army, Navy, Air Force, or Marine Corps," does not apply to towage of empty

expense of the United States (1) on a vessel owned, leased, or chartered by the United States; (2) by privately-owned American shipping services; or (3) by foreign-flag shipping services if shipping services described in clause (1) and (2) are not reasonably available. This provision was amended in 1974 by Public Law 93-548, 88 Stat. 1743, to permit the Services to utilize surface transportation in combination with water transportation for the movement of privately owned vehicles, and to permit the Department of Defense to pay for the reshipment of privately owned vehicles mistakenly shipped to the wrong destination, since the Comptroller General had held in 45 Comp. Gen. 544 (1966) that the law previously did not permit the reshipment at Government expense.

The provisions of section 901(c) of the Merchant Marine Act of 1936, 46 U.S.C. 1241(c), state that notwithstanding any other provision of law, privately-owned American shipping services may be utilized for the transportation of motor vehicles owned by Government personnel whenever transportation of such vehicles at Government expense is otherwise authorized by law.

Land Transportation

Prior to the amendment of 10 U.S.C. 2634 by Public Law 93-548 in 1974, the land portion of sea-land transportation was not payable by the Government. 50 Comp. Gen. 615 (1971); B-174717, April 21, 1972; B-176087, February 5, 1973.

Cost of overland movement of privately-owned motor vehicles of members of uniformed services incident to their shipment overseas pursuant to 10 U.S.C. 2634 when member is ordered to make permanent change of station may be paid from appropriated funds where vehicles are placed in containers some distance from shipside, as this kind of service is within scope of sec. 2634 relating to use of "American shipping services." Also there is no objection to ocean carrier accepting containerized cargo at port from which it does not operate containership and transporting vehicle for its own convenience and at its own expense to another port from which it operates containership, where overall cost to Government is as if vehicle moved by water from port to which delivered. B-158097, March 12, 1971, 50 Comp. Gen. 615 (1971).

Under 10 U.S.C. 2634 when military member receives permanent change of station orders one motor vehicle owned by him and for his personal use may be transported to new station at Government expense on vessel owned, leased or chartered by U.S., or by privately-owned American shipping services and Joint Travel Regulations M11000-2 provide that shipment of motor vehicle by vessel does not include land

transportation to or from ports involved when incident to change in home ports. Thus, neither pertinent statute nor regulations contain provision for reimbursing officer who drives his vehicle while on leave to his new station, even though cost may have been less than shipment by vessel. See Comp. Gen. decisions cited, B-166239, April 15, 1969.

Effect of Enlargement of Authority

The authority under 10 U.S.C. 2634 was enlarged by 46 U.S.C. 1241(c) to permit the utilization of privately-owned American shipping services for the transportation of the vehicle. This enlargement, however, did not change the requirement that the shipment be otherwise authorized by law. B-155181, December 18, 1964.

At one time statutory authorizations for transportation of privately-owned vehicles (POVs) of members of Armed Forces, at Government expense, were limited to "vessel owned by US" or "Government-owned vessel." This was later broadened to include privately owned American shipping services or foreign-flag shipping services where Government vessels or American shipping services were unavailable. Nothing indicates that "shipping service" was meant to be anything more than ocean carrier service. After reconsideration, no basis is found for including that joint service (Alaska Hydro-Train and Alaska Railroad) was American shipping service. B-176087, February 5, 1973.

Term "privately owned American shipping services" as used in 10 U.S.C. 2634 authorizing overseas transportation at Government expense of privately-owned motor vehicle of member of armed force ordered to make permanent change of station is limited to vessels and Joint Travel Regulations may not be revised to include such transportation by air freight even if use of air freight is limited to a not to exceed the cost of shipment by vessel basis. 54 Comp. Gen. 756 (1975)

After Acquired Automobile

After member's arrival at new permanent station in Germany he signed purchase order for car to be shipped from U.S. Full purchase price, which included overseas shipping charges, was not to be paid until delivery to member in Germany. There is no obligation to ship that car at Government expense under 10 U.S.C. 2634 since at time of overseas shipment it was not member's privately owned vehicle as defined in 1 JTR, legal title was not to pass to him until payment of full price on delivery, and member had not yet come into possession of car. B-182413, July 3, 1975.

Leased Automobile

Member with motor vehicle under long-term lease is not entitled to shipment of leased vehicle overseas at Government expense since 10 U.S.C. 2634 and para. M11000-1, JTR, provide vehicle must be owned by member, and long-term lease is bailment agreement in which lessee is given possession, but lessor retains ownership. 53 C. G. 924 (1974)

Scope of Authority

Cost of overland movement of privately owned motor vehicles of members of uniformed services incident to their shipment overseas pursuant to 10 U.S.C. 2634 when member is ordered to make permanent change of station may be paid from appropriated funds where vehicles are placed in containers some distance from shipside, as this kind of service is within scope of sec. 2634 relating to use of "American shipping services." Also there is no objection to ocean carrier accepting containerized cargo at port from which it does not operate containership and transporting vehicle for its own convenience and at its own expense to another port from which it operates containership, where overall cost to Government is as if vehicle moved by water from port to which delivered. B-158097, March 12, 1971, 50 Comp. Gen. 615 (1971).

Shipment at Personal Expense

The cost of shipping a privately-owned foreign automobile purchased after May 7, 1961, by commercial vessel when port officials refused to accept it on the basis of the power of attorney issued to his agent by an Air Force officer reassigned to United States prior to delivery of the automobile, may not be reimbursed to the officer, because paragraph 5802, Air Force Manual 75-4A, prohibits shipment of foreign automobiles purchased overseas after May 7, 1961, via Government facilities, or reimbursement for shipment by commercial facilities at personal expense. 42 Comp. Gen. 660 (1963).

Port Service Charges

Under 10 U.S.C. 2634 (1964 ed.) accessorial or terminal or port service charges on privately-owned vehicles owned by members of the armed forces are payable by the Government. B-154811-O.M., September 12, 1966.

Use of Canadian Pacific Railroad Ferries

Under 10 U.S.C. 2634(a), Canadian Pacific Railroad ferries may be used for the transportation of the privately owned automobile of a service member permanently transferred from the Goose Bay area, Canada, to new duty station in the United States in absence of availability of American vessels, and if member must arrange for vehicle transportation, travel orders should authorize arrangement and his reimbursement voucher attest to nonavailability of U.S.-registered vessels. 53 Comp. Gen. 131 (1973).

Merchant Marine Act of 1936 46 U.S.C. 1241(b)

This act was passed primarily to assure that at least 50 percent of Government-sponsored cargoes are moved on privately-owned United States flag commercial vessels; it provides in pertinent part that, under regulations issued by the Secretary of Commerce:

" * * * the appropriate agency or agencies shall take such steps as may be necessary and practicable to assure that at least 50 percentum of the gross tonnage of such equipment, materials, or commodities (computed separately for dry bulk carriers, dry cargo liners, and tankers), which may be transported on ocean vessels shall be transported on privately owned United States-flag commercial vessels, to the extent such vessels are available at fair and reasonable rates for United States-flag commercial vessels,* * *"

Agricultural Relief Programs Subject to Cargo Preference Laws

Although sec. 203 of title II of Pub. L. 480 does not specifically require applicability of Cargo Preference Act to shipments of commodities furnished by U.S. for distribution through nonprofit voluntary agencies, Pub. L. 480's legislative history requires conclusion that cargo preference is mandatory on Agency for International Development shipments. It is clear that Congress, in sec. 102(a) of title I, insists on cargo preference, except to extent of freight charge differential, respecting sales even though foreign buyers pay ocean freight charges; cargo preference policy is believed to apply with even greater force to shipments under title II, where charges may be paid by U.S. B-171287-O.M., April 12, 1971.

Agricultural Relief Programs

Consistent with pertinent statutes and legislative histories of Pub. L. 480 and Cargo Preference Act, GAO decisions reflect view that ocean transportation of title II commodities is subject to cargo preference laws. Therefore, and irrespective of cost and excess foreign currency considerations, proposed Agency for International Development use of Indian-flag vessels, accepting payment in excess rupees to ship title II commodities is believed inconsistent with current maritime policy. Furthermore, since use of rupees may be considered as developing India's maritime industry, this would not accord with underlying Pub. L. 480 policy of encouraging use of funds for agricultural purposes. B-171287-O.M., April 12, 1971.

Since legislative histories of Pub. L. 480 and Cargo Preference Act indicate cargo preference provisions were intended to promote strong public policy to protect American merchant marine, and absent exercise of power granted President in sec. 633, to override sec. 901(b) of Cargo Preference Act, cargo preference provisions are concluded to be applicable to title II commodity shipments until Congress expresses contrary intent, nor can such applicability be avoided on ground that commodity title passes to nonprofit voluntary agencies since prior title in Commodity Credit Corporation is sufficient identification with Government procurement to justify conclusion of applicability. See Comp. Gen. decision cited. B-171287-O.M., April 12, 1971.

Foreign Built Vessels Registered in the United States

Carriage of military cargoes in foreign-built vessels entitled to registry in U.S., and engaged in foreign trades or trade with trust territories, is not precluded by basic cargo preference statutes--act of April 28, 1904, as amended, and act of August 26, 1954, as amended. Objectives of 1904 act--to aid U.S. shipping, to foster employment of U.S. seamen, and to promote the U.S. shipbuilding industry--do not exclude foreign-built vessels registered in U.S., as such vessels are considered vessels of U.S. and entitled to benefits and privileges appertaining to U.S. vessels, to extent participation is limited to foreign commerce and trust territories, and is not precluded by act of 1954, which insures that at least 50 percent of all Government cargo, whether military or civil, will be transported in privately owned "U.S.-flag commercial vessels," a term that is not limited to vessels built in U.S. 52 C.G. 809 (1973).

Great Lakes Carriers

Since the phrase "which may be transported on ocean vessels," in 46 U.S.C. 1241(b), should be construed as pertaining to all cargo movements by water in foreign commerce, the shipment on lake or St. Lawrence River ports for storage before ultimate exportation to overseas destinations comes within the phrase "which may be transported on ocean vessels" so that 50 percent of the cargo is required to be carried on United States flag commercial vessels. 39 Comp. Gen. 758 (1960).

Refusal to Allow Contractor to Use Foreign Vessel

The fact that at the time of issuance of an invitation which required shipment of coal to Korea on an American Flag Tramp vessel, the tonnage transported on foreign vessels was far in excess of that which had moved on American vessels made it mandatory, under 46 U.S.C. 1241(b), to require the use of American vessels, and refusal of the procuring agency to permit the contractor to use a foreign vessel may not be regarded as an arbitrary determination not in the interest of the United States. 37 Comp. Gen. 826 (1958).

Effect on Subsidized U.S. Flag Liners

The Congress must be assumed to have been aware of the fact that operating differential subsidy was being paid to privately-owned U.S. flag liners for voyages on which mixed commercial and Government cargo was then being carried. Despite the fact that section 901(b) could be expected and was intended to increase the amount of cargo carried by such U. S. flag liners, and for which foreign flags could not compete, nothing appears in the legislative history to indicate that there would be any diminution in or reduction of subsidy on this account. B-159245, October 14, 1966.

Reimbursement of Freight Charges

Fact that Government under this section elected to transship flour for Palestinian refugees on American flag ship rather than under a foreign flag at substantially reduced rates did not entitle Government to recover additional costs incurred in using an American flag vessel from foreign flag carrier whose default in duty to cargo forced Government to make transshipment arrangements where Government not under requirement to use American flag ship. Hellenic Lines, Ltd. v. United States, 512 F.2d 1196 (2nd Cir. 1975).

Trust Territory Procurements

We are of the opinion that the Buy American and the Cargo Preference Acts are not applicable to procurements by the Government of the Trust Territory of the Pacific Islands from commercial sources, even though Federally-granted funds in the annual appropriation of the Department of the Interior may be involved. B-152285, November 4, 1963.

Competitive Rates Lower than Fair and Reasonable Rates

Section 901(b) of the Merchant Marine Act of 1936, 46 U.S.C. 1241(b), was not intended to prevent agreement to carry Government-financed shipments at rates that are competitive with carrier's rates for commercial shippers even if such competitive rates are lower than rates shown to be fair and reasonable. United States v. Bloomfield Steamship Co., 359 F.2d 506 (5th Cir. 1966).

Separate Computation Requirement

Although the 50/50 cargo preference provisions in section 901(b) of the Merchant Marine Act, 1936, 46 U.S.C. 1241(b), do not preclude the carriage of grain and other free-flowing dry cargo on tanker-type vessels, which are interchangeable for both liquid bulk and dry cargoes, the separate computation requirement for dry bulk carriers, dry cargo liners, and tankers for determination of the share of American tonnage does not permit the classification of a tanker as a dry bulk carrier merely because of the character of the service to be performed at the time of shipment. 38 Comp. Gen. 229 (1958).

Title Acquired at Overseas Destination

Regardless of commercial nonfeasibility of bagging urea in Alaska and unwillingness of U.S.-flag vessels to handle bulk urea, Agency of International Development (AID), although it cannot use bulk urea, may not circumvent 50-percent gross tonnage American ocean vessel shipment requirement of Cargo Preference Act, 46 U.S.C. 1241(b), by taking ownership of bagged urea in Japan where bulk urea was shipped by foreign vessels for bagging then for transshipment by U.S.-flag vessels to cooperating countries since this would operate as device to evade purpose of act which covers shipment once it is identified with AID procurement, irrespective of place of bagging and for whatever reasons one particular place for bagging might be chosen. See 39 Comp. Gen. 758 cited. B-155185, November 17, 1969.

Lighter Aboard Ship Services

LASH (Lighter Aboard Ship) services to be performed partly with privately owned United States-flag commercial vessels and partly with a foreign-flag FLASH system to deliver certain Government-sponsored cargoes to port of Chittagong in Bangladesh contravenes the 1954 Cargo Preference Act because direct service to Chittagong is available by U.S.-flag breakbulk vessels and because special circumstances (here, geographic configuration of port precluding use of normal LASH unloading operations) cannot be used to circumvent the cargo preference laws. 55 Comp. Gen. 1097 (1976).

46 U.S.C. 1241(a)

This law is mandatory and provides for disallowance of travel expenses of Government officers and employees and of the carriage of their effects incurred through the use of foreign ships, in the absence of satisfactory proof of the necessity for use of the foreign ship; that is, generally, that American flag ships either were not available or could not perform the services. Also, comparable charges or economy alone does not justify the use of foreign vessels. B-142375, April 25, 1960; B-138269, January 17, 1959; B-145258-O.M., March 31, 1961; B-157782-O.M., November 29, 1965; 18 Comp. Gen. 858 (1939; 31 *id.* 351 (1952); B-180861, June 7, 1974; B-181635, November 17, 1975; B-171082, February 8, 1971; B-172644-O.M., June 25, 1971.

American Vessel Availability

Where employee was ready to travel July 15, 1969, and was unable to secure accommodations on United States Line and records shows another American-flag ship sailed on August 8, 1969, which was more than 15 days after employee was ready to sail, but there was no showing of availability of accommodations, claim for reimbursement of travel on foreign vessel is allowed as it may be concluded American vessel was not available within purview of Merchant Marine Act of 1936 (46 U.S.C. 1241). Also, medical director has certified travel on foreign-flag vessel was necessary in accordance with 6 FAM 133.2-3. B-170925-O.M., November 13, 1970.

Where United States flag vessels are not available at time and place of travel, section 901 of Merchant Marine Act of 1936 is not applicable. Accordingly, expenses for travel on foreign vessel by Government employee returning to Alaska from home leave may be reimbursed. B-171748, May 9, 1972.

Peace Corps Volunteers Not Covered By 46 U.S.C. 1241(a)

Peace Corps volunteers are not deemed to be "officers and employees of the United States" within the meaning of 46 U.S.C. 1241(a) so that there appears to be no statutory or other requirements that the travel and transportation of the personal effects of Peace Corps volunteers be by American flag vessels. B-162469-O.M., February 14, 1969.

Certification of Necessity For Use of Foreign Flag Vessel

Statement from an employee of the Military Sea Transportation Service (MSTS) is not an acceptable justification for use of a foreign flag vessel in transporting the household effects of an employee of the State Department. When it is necessary to use a foreign flag vessel, the carrier should obtain a signed justification from the Government agency making the shipment. Persons authorized by MSTS to sign those certifications may do so only if the shipment is made by a military agency. B-162083, January 14, 1969. See 4 C.F.R. 52.2 (1977).

On household goods' shipments (through door to door service) where foreign vessels were utilized without issuance of justification certificate, exceptions should be taken to entire payments if allowable portion of charges cannot be ascertained, since under 46 U.S.C. 1241(a), Comptroller General may not credit any allowance for shipping expenses on foreign ships absent satisfactory proof of necessity therefor, and in this type of case, administration determination respecting such necessity is accorded greatest possible weight. If, however, allowable charges are otherwise proper and can be separated from those covering ocean freight, they may be allowed on quantum meruit basis. See B-124435, December 21, 1956. B-173518-O.M., September 21, 1971.

Settlement certificate disallowing claims for ocean freight charges for transporting employees' automobiles by foreign vessel when record indicates that two U.S.-flag vessels were available within 6 and 12 days respectively after departure of foreign vessel, should state that absent issuance of certificate of necessity, there is no legal justification for avoiding requirements of 46 U.S.C. 1241(a) under circumstances where forwarder, with knowledge of statutory requirements, neglects to determine availability of U.S.-flag vessels and fails to produce any evidence to rebut presumption of availability. B-174496-O.M., December 8, 1971. Cf. B-169817-O.M., July 29, 1970.

Knowledge of Law By Carrier

Error in not using an American flag vessel was the fault of an inexperienced employee of the carrier's agent, although the claimant company and its agent were experienced in handling shipments of U.S. employees and were aware of the regulations concerning the use of American flag vessels, and cannot be viewed as establishing the necessity for use of a vessel of foreign registry. B-162894-O.M., December 8, 1967.

Shipment by carrier of Government employee's household effects from Washington, D. C., to France by foreign vessel rather than by available American-flag ship, in violation of 46 U.S.C. 1241(a), resulted from apparent oversight on part of forwarding agent and occurred without carrier's knowledge. Oversight on part of carrier or its agent does not satisfactorily prove necessity for use of foreign ship; however, upon presentation of properly supported invoices, consideration will be given to allowance of claim based on transportation charges incurred other than ocean freight charges on quantum meruit basis. B-179595, November 5, 1973.

Knowledge of Law By Foreign Carrier

Where neither the Norwegian ocean carrier nor its agent was apprised of the requirement that household effects of Government employees move on ships registered under the laws of the U.S., where the services were satisfactorily rendered in good faith under a bill of lading issued at the request of an agent of the U.S. having at least apparent authority to make such contracts, and where the charges do not exceed those which would have been incurred on an American flag vessel, allowance of the claim of the foreign carrier is approved. B-160123-O.M., October 27, 1966.

In matter of shipment of household effects of Maritime Administration employee from London to Spain, under less restrictive view of prohibition in section 901 of Merchant Marine Act against use of foreign-flag vessel, which was recently adopted with respect to foreign forwarder or carrier which was not informed, as here, of said prohibition by American contracting official involved, fact that forwarder used foreign-flag vessel does not inhibit allowance of its claim for freight charges. Furthermore, it has been learned informally that American flagship service was not available between two ports here involved. B-178803-O.M., July 9, 1973.

Claim for ocean freight charges on foreign flag vessel is disallowed because American ships were available and British freight forwarder was on notice of requirement that shipment must be made on American-flag ship. See Comp. Gen. decisions cited. B-183200-O.M., March 31, 1975.

Error of Carrier

Claim for cost of transporting household effects, etc., booked for carriage by American vessels, but which through freight forwarder's error and haste, were carried by Norwegian vessel after late delivery of cargo to pier prevented its loading on American vessel that night, should be disallowed absent evidence other U.S. flag vessels were not available within reasonable time of sailing date of Norwegian vessel used, since mere error by carrier is not legal justification for avoiding requirements of 46 U.S.C. 1241(a). B-169817-O.M., July 29, 1970.

Strike Preventing Availability of American Vessel

Concerning disallowance of employee's claim for travel reimbursement covering that portion of official travel performed on foreign vessel, where employee held reservations aboard SS "UNITED STATES" but was unable to use them because of maritime strike beginning June 16, 1965, and lasting for 75 days, claim may be allowed if otherwise correct, as under circumstances it is not considered that American vessel was available within meaning of 46 U.S.C. 1241, since likelihood of first-class accommodations for party of six being available on SS "UNITED STATES" for duration of strike would have been remote, and SS "CONSTITUTION" did not serve Southhampton and use of that vessel would have caused excessive extra cost and delay. See 31 Comp. Gen. 351 (1952). B-167776-O.M., October 15, 1969.

Ocean freight charges for shipment of employee's household effects to U.S. by French vessel should be disallowed under section 901, Merchant Marine Act of 1936, 46 U.S.C. 1241(a), since there is no showing that American-flag vessels available at that time could not have performed services required, and maritime strike provides no "necessity" within section 901 meaning, invocation of Taft-Hartley Act having caused ports to be operating normally. Furthermore, French forwarder knew of American vessel requirement, and recommendation of American Embassy at Paris that voucher be certified does not meet GAO regulation requirement. See Comp. Gen. decisions cited. B-179599-O.M., October 24, 1973.

Absence of Direct Service

Where employee shipped his effects on foreign flag vessel because American flag vessels did not operate between port nearest place where transportation of effects originated and port nearest actual destination, use of foreign flag vessel should not be objected to since there is sufficient necessity for use of foreign vessels when American ships do not operate directly between port serving place where transportation of effects originates and port serving actual destination, and foreign ships do so operate. See Comp. Gen. decisions cited. B-174584-O.M., April 21, 1972.

No objection need be taken to shipment of household goods on foreign vessel providing direct service between Manila, Philippines, and Bonn, Germany, where file indicates transshipment at East Coast CONUS port would be required in order to utilize American vessels. In such circumstances, it may be considered that American vessels were unavailable within meaning of 46 U.S.C. 1241(a). However, in accordance with terms of applicable military tender, difference (\$182.03) between American-flag rate on which through-Government bill of lading rate was predicated and lower foreign-vessel rate is for recovery. See Comp. Gen. decisions cited. B-178991-O.M., November 13, 1973.

Agency for International Development Discretionary Authority

Pursuant to authority contained in section 633 of Foreign Assistance Act, 1961, and Executive Order 11223, May 12, 1965, Agency for International Development has broad authority to determine condition under which travel and related expenses are to be allowed and GAO cannot object to exercise of discretion by appropriate officials in allowing employee to travel via foreign-flag vessel from Turkey to U.S. and return, paying for transportation with Turkish litre, obtained through sale of privately owned automobile and to claim reimbursement in U.S. dollars. B-173578-O.M., September 16, 1971.

Since household effects were owned by member of Agency for International Development, agency exempted by Executive order from requirements of section 901 of Merchant Marine Act, 1936, as amended, 46 U.S.C. 1241(a), relating to travel and shipment of personal effects by U.S.-flag vessels, claim for ocean transportation charges on such effects by foreign vessel may be allowed, if otherwise correct. Cf. B-177305-O.M., January 26, 1973; B-179988-O.M., December 19, 1973.

Ocean v. Non-Ocean Charges

Since section 901 of Merchant Marine Act of 1936, 46 U.S.C. 1241(a), is mandatory and precludes allowance of travel or shipping expenses through use of foreign ships, and since carrier did not prove necessity for use of foreign vessel, other U.S. vessels being available at time of shipment, exception should be taken to payment to shipper. Since shipper did not itemize charges so ocean freight could be determined, notice of overcharge for full amount of voucher should be issued. Only when shipper submits itemization showing non-ocean freight charges, may shipper be reimbursed on quantum meruit basis for the non-ocean cost. B-180270-O.M., February 4, 1974.

Where contractor shipped property on foreign flag vessel without contacting Dispatch Agent so advised by Transportation Services Request Authorization, Department of State refused to issue GBL for shipment, and American flag vessel was available, claim for \$396.44 including charges for transportation on foreign vessel should be disallowed under section 901 Merchant Marine Act making mandatory allowances of travel or shipping charges incurred through unnecessary use of foreign ships. Nevertheless, charges that would otherwise have been incurred if provable and correct are payable. See Comp. Gen. decisions cited. B-172644-O.M., June 25, 1971.

Spouse of Member

The female member of the Air Force may not be reimbursed for travel of husband to new permanent station overseas by foreign flag air carrier, since travel by aircraft of foreign registry is not reimbursable under the provisions of paragraph M4159-4(c) and subparagraphs M2150-1 and M7000-7 of the Joint Travel Regulations, which are restatements of the prohibition in section 901 of the Merchant Marine Act of 1936, 49 Stat. 2015, 46 U.S.C. 1241(a). B-180694, November 19, 1974.

CHAPTER 5

CARRIAGE OF GOODS BY SEA ACT

In 1936, the Congress passed the Carriage of Goods By Sea Act (COGSA), 46 U.S.C. 1300-1315, governing the liability of the carrier and the ship for loss of or injury to goods shipped to or from ports of the United States in foreign commerce. It superseded the act of February 13, 1893, 27 Stat. 445, 46 U.S.C. 190-196, commonly called the Harter Act, which continues to apply to carriage of goods by sea between ports of the United States or its possessions (coastwise or intercoastal carriage), unless the option in COGSA to apply that act is exercised, and to the time before loading and after discharge of the goods in foreign commerce.

The act states that every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade, shall have effect subject to the provisions of the act. Even though a bill of lading contains a clause paramount making it subject to some similar act, the proper law for application would be COGSA.

Loss and Damage - Ocean Shipments - Burden of Proof

Where the Government bill of lading, under which a Government-owned automobile was shipped overseas, indicates receipt of the automobile in good condition at origin by the carrier and delivery to the consignee at destination damaged, there is a presumption that the damage and pilferage occurred during transportation, and where this presumption is supported by inspection reports of the agent of the consignee and of the carrier and the only evidence offered by the carrier is a delivery record, which is not identified with the particular shipment and is not signed by either the agents of the consignee or the agents of the carrier, deduction from the carrier's freight bill on the shipment to cover the loss was proper. 37 Comp. Gen. 583 (1958).

Where COGSA applies the carrier of goods by sea is prima facie liable for the loss of cargo which is received by the carrier at the beginning of the voyage but which is outturned short at the end of the voyage unless the carrier can affirmatively show that the immediate cause of the loss was an excepted cause for which the law does not hold the carrier responsible. Since evidence presented by carrier merely showed that stevedores were careless in unloading bags of urea and that the urea which was outturned short was still on the ship in a wet, worthless state, such evidence did not establish as a matter of law that the carrier had brought itself within one of the exceptions of COGSA relieving it from its prima facie liability, and it was proper to deduct the value of the urea that was outturned short from the carrier's allowable claim for general average. B-163281, March 3, 1969.

Jurisdiction

Since a shipment moved from a port in the United States to a port in Puerto Rico--a U. S. possession--the Carriage of Goods by Sea Act is not applicable by its own force (46 U.S.C. 1312). See A. M. Collins & Co. v Panama R. Co., 197 F. 2d 893, certiorari denied 344 U.S. 875. B-141794-O.M., March 4, 1960; B-177605-O.M. January 23, 1973.

Application to Exempt Freight Forwarders

Exempt freight forwarders that the Government contracted with under through Government bills of lading to ship household goods from the United States to Germany used underlying ocean carriers which damaged the household goods at sea. The GBLs, subject to COGSA under section 1 of the Act, incorporated the rate tenders of the forwarders which provided that the forwarders' liability for loss and damage was as set forth in 49 U.S.C. 20(11). 49 U.S.C. 20(11) provides that the initial and destination carrier are liable to the holder of the bill of lading for the full actual loss or damage to a shipment regardless of which carrier actually caused the loss or damage but that " * * * if the loss, damage, or injury occurs while the property is in the custody of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water and by and under the laws and regulations applicable to transportation by water, and the liability of the initial or delivering carrier shall be the same as that of such carrier by water. * * *" Therefore, even though the loss or damage was done to the household goods by underlying ocean carriers, the exempt freight forwarders were held liable but only as provided by COGSA. B-166775-O.M., July 14, 1969.

Customary Unit of Freight

46 U.S.C. 1304(5) sets the carrier's maximum liability for loss and damage at \$500 per package, or in the case of goods not shipped in packages, at \$500 per customary unit of freight. In a case where COGSA was not applicable by its own force but was incorporated by reference into the carriers bill of lading covering a shipment of unboxed jeeps moving on wheels which were damaged in transit we looked to the definition of the word "package" in the carrier's bill of lading and held that the carrier's liability was limited to \$500 per package instead of \$500 per customary freight unit (here, one cubic foot). B-141794-O.M., March 4, 1960.

Valuation

On a shipment of Government-owned engines and generators combined which were damaged while being transported from the Philippines to New Orleans, Louisiana, since the shipping agency had declared no

greater valuation than \$500 per unit, the amount of \$500 per package or customary freight unit specified under 46 U.S.C. 1304(5) was the legal maximum liability on the part of the carrier. B-108185-O.M., April 8, 1952.

On a shipment of Government-owned electric equipment consisting of 74 packages loaded into one Flexi-Van which was stored on the deck of an ocean carrier but washed overboard while being transported from New York to Germany since the shipping agency had declared no greater valuation than \$500 per unit, the amount of \$500 per package for customary freight unit specified under section 4 of COGSA was the legal maximum liability on the part of the carrier, and it was not an unreasonable deviation which would void the maximum liability limitation to carry the Flexi-Van on the deck of the ocean carrier because the ocean carrier was a containership, specifically built, designed and constructed with the intention of carrying cargo in such a manner. B-177238, March 21, 1974. See also B-179608 November 8, 1974.

Provisions of COGSA Can Be Incorporated By Bill of Lading

Where ocean carrier's bill of lading covering a shipment that was not in foreign commerce incorporates COGSA, COGSA applies, and carrier is liable for the damage to a shipment of Government owned canned, dried nuts because it has not rebutted the Government's prima facie case showing delivery to the carrier in good condition and arrival at destination in damaged condition. 56 Comp. Gen. 264 (1977).

Setoff of COGSA Liability From Freight Charges Otherwise Due Carrier

Government agency may exercise its common law right of setoff, which is not extinguished by 49 U.S.C. 66 (Supp. V 1975), pertaining to overcharges, if prima facie case of carrier liability for loss or damages under COGSA is established. Setoff of liability may be exercised by the Government from freight charges otherwise due the carrier before liability is judicially established. 56 Comp. Gen. 264 (1977).

CHAPTER 6

FEDERAL AVIATION ACT

The Federal Aviation Act, as amended, 49 U.S.C. 1301-1542 (1970), is designed to continue the Civil Aeronautics Board (CAB) as an independent agency of the United States, to create a Federal Aviation Agency, to provide for the regulation and promotion of civil aviation in such a manner as to best foster its development and safety, and to provide for the safe and efficient use of airspace by both civil and military aircraft. In addition to the advancement and promotion of civil aeronautics, the CAB authority encompasses the issuance of permits to engage in interstate and foreign civil aviation, jurisdiction over tariffs, subsidy payments and other facets of air carrier economic regulation. However, the Federal Aviation Agency and all its functions, powers, and duties and all functions, powers, and duties of the Civil Aeronautics Board and of the chairman, members, offices and officers of the Board relating to the safety regulation of civil aeronautics and to aircraft accident investigation were transferred to and invested in the Secretary of Transportation by Public Law 89-670, 80 Stat. 931, approved October 15, 1966, which created the Department of Transportation. The Federal Aviation Agency is now known as the Federal Aviation Administration.

Under 49 U.S.C. 1371 (1970), no air carrier can engage in air transportation as defined in 49 U.S.C. 1301 (1970) unless the CAB has issued it a certificate of public convenience and necessity; under 49 U.S.C. 1372 (1970), no foreign air carrier can engage in foreign air transportation (common carrier air operations between United States and any place outside thereof) unless the CAB has issued it a permit. Carriers subject to the act are required under 49 U.S.C. 1373(a) (1970) to file with the CAB, and print, and keep open to inspection, tariffs showing all rates, fares and charges; and under 49 U.S.C. 1373(b)(1) (Supp. IV 1974) no carrier or ticket agent can charge or demand or collect or receive a greater or less or different compensation for air transportation than the rates, fares, and charges specified in its currently effective tariffs. Public Law 93-623, 88 Stat. 2105, approved January 3, 1975, added ticket agents to the scope of 49 U.S.C. 1373(b) (1).

Unlike the Interstate Commerce Act, there are no provisions in the Federal Aviation Act of 1958 for preferential rates for air transportation for the United States Government. Preferential rates for air transportation for the United States must be published in tariffs approved by the CAB, or be incorporated by the carrier into contracts or agreements in instances where the CAB has exempted the carrier from filing tariffs under authority in 49 U.S.C. 1386(b)(i) (1970). Unless so exempted all agreements or contracts between the Government as a shipper and air carriers must be filed with the CAB pursuant to 49 U.S.C. 1382 (1970).

Small Business Awards

In the absence of any evidence of a congressional intent that the definitions "air transportation" and "air carrier" in the Federal Aviation Act of 1958 are for application to similar words in section 634 of the Department of Defense Appropriation Act, 1959, which limits funds of the Military Air Transport Service for procurement of commercial air transportation service and requires the utilization of civil air carriers which qualify as small business concerns, the terms should be given their usual meaning; therefore, an award of an air service contract by Military Air Transport Service (now the Military Airlift Command) to an air carrier which qualifies as a small business concern would not be invalid even though the carrier does come within the limited definitions in the Federal Aviation Act of 1958. 38 Comp. Gen. 812 (1959).

Mail Rates

Where air carrier's payment of \$2,628,886 for mail transportation was based partly on determination that carrier had net profit of \$185,916 from CAM operations for Defense Department and GAO subsequently collected overcharges of \$64,350 on CAM operations, carrier's claim for additional amount for mail pay based on reconstruction of Civil Aeronautics Board's determination taking into consideration reduction of net profit from CAM operations should be disallowed since claim in effect involves increase of mail pay rate fixed by CAB and GAO has no authority to do this. B-155470-O.M., December 28, 1964.

Consolidation of Shipments

On consolidated shipments by motor carrier, air, then motor carrier, if motor carriers are acting as agents for the Government and will permit the air carrier to bill and collect the charges, the arrangement would not contravene present regulatory law, but if the motor carriers are acting as agents for air carrier, the surface transportation would be deemed to be services incidental to air transportation and the air carrier would have to file total charges for the entire service with the CAB, but if the motor carriers are acting as principals under joint service arrangement with air carrier, the entire service charges would have to be published in tariff filed with the ICC and the CAB. B-164365-O.M., June 4, 1968.

Guaranteed Loads

Where air carrier represented that it would transport cargo on a per flight basis in minimum available cabin loads (ACL) of 19.75 tons for 1st, 3rd and 4th contract quarters with 19 tons for 2nd and specified maximum ACL of 21 tons for all quarters, and after award offered ACL in excess of minimum which Government did not load because

cargo "bulked out" i.e., space in aircraft was filled and no more cargo could be loaded. under terms of the contract the Government has no obligation for weight without regard to cargo cubic displacement and is only liable for minimum ACL or actual weight, if cargo exceeded minimum ACL. Slick Corporation v. United States, 395 F. 2d 793 (1968).

Foreign Air Carrier Permit

Where a foreign air carrier possesses a permit issued under 49 U.S.C. 1372 it is required to observe tariff and other economic regulations prescribed by the Civil Aeronautics Board, and by doing business with the U.S., the carrier in effect agreed to the terms of 49 U.S.C. 66. B-153756-O.M., October 15, 1964.

No Tariff Rate on File

Where an air carrier utilizes the services of a motor carrier not named in the routing provisions of its tariff, it is guilty of furnishing a service for which it had no tariff rate lawfully on file with the CAB, in violation of 49 U.S.C. 1373 and the proper measure of compensation is the charge via the actual route of movement or that via any available tariff route whichever is lower. B-162840-O.M., February 26, 1968.

Exemption from Tariff Filing Requirement

The fact that a carrier has been exempt from the tariff filing requirement of 49 U.S.C. 1373, in connection with its contract military charter operations, does not change its status as a common carrier subject to regulation under the Federal Aviation Act of 1958. And as such a common carrier it is governed by the time limitations in 49 U.S.C. 66. B-160216-O.M., October 26, 1966.

Air Tariffs

Under 49 U.S.C. 1373, an air carrier is required to file tariffs and those tariffs are to be the sole standard for services to be rendered and charges to be assessed and collected. The tariff has the force and effect of a statute and any contract provision in conflict with it is unenforceable. B-157476-O.M., August 5, 1966.

Liability of International Air Freight Forwarder for Loss or Damage

The definition in the CAB's Economic Regulations for an international air freight forwarder is substantially similar to the definition of a surface freight forwarder in the Interstate Commerce Act, 49 U.S.C. 1002(a)(5), and, in the historical context, defines the type of freight forwarder who at common law was subjected to common carrier liability for the loss or damage to property entrusted to it for transportation. B-147623, September 11, 1962.

Indirect Air Carrier

An "air carrier" under 49 U.S.C. 1301(3), (10), (21)a, includes indirect air carriers, and means citizens who engage in air transportation or the carriage by aircraft of persons or property as a common carrier between two states of the United States. B-156656, May 19, 1965. Tishman & Lipp, Inc. v. Delta Air Lines, 413 F.2d 1401 (2nd Cir. 1969).

Government Liability - No-Show Agreement

Where contract between airline and government did not vary or deviate from rates, fares, and charges contained in tariff published by airline, but merely provided that reservations which were unused and uncanceled would have to be paid for, as though they had been used, at rates set forth in tariff, contract did not provide for new or different transportation rates, but only for a reservation system necessary to its efficacy, and was not inconsistent with provision of Federal Aviation Act requiring that every air carrier file tariffs showing all rates, fares, charges and other pertinent information, even though tariff was silent on no-show issue. Contract merely supplements tariff in a manner not inconsistent with provisions of tariff and did not impose unreasonable charge or penalty on government. Northwest Airlines Inc. v. United States, 444 F.2d 1097 (Ct. Cl. 1971).

Government Entitled To Rates Over Actual Route Of Movement

Where freight forwarder had no tariff that covered shipments from origin to destination, but did have air tariffs covering segments which were not part of the route of movement, Government was entitled to benefits of combination of the air freight and motor carrier rates in effect over the actual route of movement and forwarder was not entitled to charge under point-to-point tariffs for unused segments of the routes. Emery Air Freight Corporation v. United States, 499 F.2d 1255 (Ct. Cl. 1974).

Insertion Of Weight Limitation On Government Bill Of Lading

The bill of lading serves as a receipt for the goods tendered to the carrier and as a contract between the shipper and the carrier for the carriage of property. Under the contract of carriage, air carriers are required to collect transportation charges on the actual weight transported and at the rate published in their tariffs. 49 U.S.C. 1373 (1970). Surface carriers are subject to similar provisions. 49 U.S.C. 6(7), 317(b), 906(c) and 1005(c) (1970). Insertion of a weight limitation on the bill of lading thus cannot legally limit the transportation charges to be paid. B-181809-O.M., November 14, 1974.

Loss & Damage

The liability of air carriers for loss and damage to property is controlled by the Civil Aeronautics Act and the provisions of the air carriers tariffs until and unless rejected by the Civil Aeronautics Board. B-158994-O.M. June 24, 1966.

Loss & Damage - Actual v. Declared Value

Where carrier's tariff provisions provide that it is responsible for the total value declared at the time of shipment, and where the shipping documents contain a declared value of \$5,525, and where evidence shows that the actual value is the same as the declared value, the carrier is liable for the full amount. B-178569-O.M., August 6, 1973.

Loss And Damage - Improper Packing

Air carrier is liable for damages sustained to shipment of Government property notwithstanding contention of improper packing, since applicable tariff filed with CAB provides that acceptance of shipment constitutes prima facie evidence of proper packing and puts burden of proof on carrier to show absence of negligence. Issue of liability is determinable under provisions of tariff; common law rules and presumptions apply only when not in conflict with tariff. 55 Comp. Gen. 149 (1975).

Loss And Damage - Limitation Of Liability

Indirect air carrier (49 U.S.C. 1301(3)), must file tariff showing its rates, rules, etc., with the CAB. These tariffs are valid unless rejected by the CAB. (49 U.S.C. 1373(a)); Lichten v. Eastern Airlines, 189 F.2d 939 (2d Cir. 1951). The applicable valid tariff and the waybill constitute the contract of carriage. Rosch v. United Air Lines, 146 F. Supp. 266 (S.D. N.Y. 1956). Because both the applicable tariff and the waybill provide that the carrier will only be liable for fifty dollars for the value of a shipment in the event of loss, or fifty cents per pound if the shipment is over one hundred pounds, unless a greater value is declared, because fifty dollars was the value declared on the waybill, and because the charges for such a value were what apparently were borne by the administrative agency, fifty dollars is the full value of carrier's liability. And where there is complete loss of goods during carriage, no freight charges are due following rule applied in cases involving loss of goods during transport on land and on water. B-183261-O.M., May 14, 1975.

Loss And Damage - Notice Requirements

Claim against air carrier for damage to a shipment moved on Government bill of lading is not subject to notice requirements of governing air tariff because use of Government bill of lading--which in Condition 7

contains waiver of usual notice requirements--is required by air tariff and creates ambiguity over applicability of notice requirements which is resolved in favor of shipper. 55 Comp. Gen. 958 (1976).

Loss And Damage - Limitations Of Liability In Tariffs

Limitations of liability in tariffs required to be filed by air carriers with CAB are binding on passengers and shippers whether or not the limitations are embodied in the transportation documents. Since jewelry was not acceptable for shipments as baggage under airline tariff, loss of jewelry was subject to limitations of Air Freight Tariff Rules, which provided for no liability for loss of jewelry and which limited liability for loss of sample case to its declared value, which under rule was deemed to be 50 cents per pound but not less than \$50 unless a higher value was declared. Tishman & Lipp, Inv. v. Delta Air Lines, 413 F.2d 1401 (2nd Cir. 1969).

CHAPTER 7

FEDERAL PROPERTY AND ADMINISTRATIVE SERVICES ACT

The General Services Administration (GSA) was established by the Federal Property and Administrative Services Act of 1949, 63 Stat. 377. Section 201 of the Act, 40 U.S.C. 481, provides that the Administrator shall to the extent that he determines it is advantageous to the Government in terms of economy, efficiency, or service, "prescribe policies and methods of procurement and supply of personal property and nonpersonal services, including * * * transportation and traffic management * * *." However, the Secretary of Defense is authorized unless the President otherwise directs to exempt the Department of Defense from actions taken by the Administrator whenever the Secretary determines the exemption is in the best interests of national security. Under the authority of the Act there was established in GSA on July 1, 1955, the Transportation and Public Utilities Service (TPUS). On October 19, 1961, TPUS was reorganized and its name changed to Transportation and Communications Service (TCS). The new service includes the Office of Transportation.

The Office of Transportation is responsible, among other things, for the development of Government-wide policies and regulations governing the procurement and utilization of transportation; for assisting in the improvement of transportation and traffic practices of executive agencies, for arranging and conducting traffic management programs and for the training of executive agency transportation personnel. It is responsible also for the negotiation with carriers and carrier committees for fair and reasonable transportation rates, storage-in-transit agreements, and rules and regulations pertaining to volume movements of the civil agencies of the Government. It also lends assistance to the Bureau of the Budget in the development of regulations governing the travel and transportation of civilian employees of the Government, including the shipment of their household goods and personal effects. The General Services Administration works closely with the General Accounting Office on matters relating to freight and passenger traffic management, rate negotiations, and loss and damage problems.

Section 22 Quotation Procurement

Where GSA, under 40 U.S.C. 481(a), arranged for the transportation of 1,200,000 pounds of office furniture and equipment, solicited bids rather than tendering to carriers for transportation under their tariffs or section 22 rates, it was not a violation of any Interstate Commerce Commission regulations. The size and timing of the large move made necessary more comprehensive and formal arrangements than available under published and filed tariffs. The

arrangements made by GSA were not in violation of any regulations of the ICC. Section 22 arrangements are not conditioned on the use of GBLs; the reduced rate authority may be exercised when the transportation is furnished for or on behalf of the U. S. Authority under Section 22 has been useful in serving Government shipping needs in affording a desirable degree of flexibility and freedom of operation in the procurement of transportation services economically and efficiently. B-151627, July 19, 1963.

Department of Defense

Subject to the right of the Secretary of Defense to exempt the National Military Establishment in the interest of national security, the Administrator of General Services is authorized to prescribe policies and procurement methods under the provisions of 40 U.S.C. 481(a). B-39995, B-42702, B-108440, September 3, 1959.

Rates - Contracts Secured Competitively

Recommendations for proposed FP Fnew subpart, 1-19.7, respecting freight transportation services, include, among others: specific exclusion of sec. 22 from its scope; emphasis on advantage of recourse to sec. 22 arrangements where basic element is interstate transportation of limited description and charge bases; clarification of .702-2(c), which in present form might disqualify bidder where operating authority is not required by law; under .705-1(b) and 2(a)(3), consideration of alternatives which would encourage competition among qualified carriers of dangerous commodities, whenever consistent with law and safety regulations, by commingling commodities of small shipments. B-168481, Apr. 17, 1970.

GSA Authority - Procurement of Goods and Services

Federal Property and Administrative Services Act and regulations issued thereunder clearly manifest intent that GSA perform centralized procurement function for executive branch and that executive agencies may not independently procure common-use items designated by GSA except in certain limited circumstances. Although effective monitoring and enforcement is not provided for by existing regulations, in view of broad language contained in section 205(c) of act, recommendations of Hoover Commission, and President's comments on E.O. 11717, dated May 9, 1973, GAO believes Administrator may provide for surveying and auditing of executive agencies to determine compliance with GSA mandatory regulations. B-135791-O.M., Sept. 4, 1973.

CHAPTER 8

GENERAL AVERAGE

General average may be defined as the principle covering losses and expenditures which result from the sacrifice of any interest voluntarily made by a vessel's master, or other duly constituted authority, in time of real distress, for the common safety of vessel, cargo and freight, and which must be repaid proportionately by each.

On an ocean voyage there are three classes of interests usually concerned; namely, the interests in (1) the ship, (2) the cargo and (3) the freight on the cargo. A general average contribution is a contribution by the owners of those interests to make good the loss sustained by one of their number on account of sacrifices voluntarily made of part of the ship or cargo to save the residue and the lives of those on board from an impending peril or for extraordinary expenses necessarily incurred by one or more of the interests for the general benefit of all the interests embarked in the enterprise.

In Colinvaux's Carver on Carriage by Sea, 11th Ed., 1963, page 704, it is stated that the "fundamental principle upon which these contributions are enforced is one which has been recognized and acted upon by maritime peoples from very early times. It is known to be derived from the ancient law of Rhodes, being adopted into the Digest of Justinian, with an express recognition of its true origin."

It is independent of the contract of carriage but may be limited, qualified or even excluded in that contract. Usually, however, the parties stipulate in the contract of carriage that a particular code of rules for general average--The York-Antwerp rules, 1950--shall govern the amount to be paid.

Specialists in the complicated process of general average adjusting are called average adjusters. It is the practice of the shipowner, whose ship is involved in a general average loss, to appoint the adjuster, who will then take full charge of all matters pertaining to the adjustment.

Claims Settlement Jurisdiction

General average claims arising incident to shipments under Government or commercial bills of lading may be settled

administratively without referral to the General Accounting Office; however, if any such claims involve doubtful questions of law or fact they should be sent to the GAO. 39 Comp. Gen. 721 (1960). B-184651-O.M., August 27, 1975.

General average claims under Military Sea Transportation Service charter contracts which contain standard disputes clauses may be settled administratively concerning questions of facts, but where settlement requires resolution of legal questions not previously decided by the Comptroller General, or where the question of law has not been conclusively settled by the courts, the payment should not be made until the question of law is referred to the GAO for decision or, in lieu thereof, the claim may be forwarded for direct settlement after resolution of the disputed facts under the procedure in the disputes clause. 34 Comp. Gen. 676 (1955).

Insurance - Subrogation

Where supplies for the Government of the Philippine Islands and the Manila Railroad Co. were transported from the United States to the Philippine Islands on a U.S. Army transport, without charge and at the risk of the owners, the U.S. incurred no liability for a general average contribution to cover damages to the shipments resulting from fires aboard the vessel; and the underwriter, upon payment of the damages under policies of insurance carried by the owners, could have no valid claim against the U.S., by right of subrogation, for reimbursement of any part of such payments. 8 Comp. Gen. 289 (1928).

Amended or New Jason Clause

46 U.S.C. 1305 provides "nothing in this Act shall be held to prevent the insertion in a bill of lading of any lawful provision regarding general average." Where the bill of lading contained such a clause (so-called amended Jason clause) and the striking of a submerged object appears to have resulted from a mistake in navigation or management of the ship, the carrier or ship is not responsible under section 4(2)a of the Carriage of Goods by Sea Act, 46 U.S.C. 1304(2)a for the resultant damage so the carrier's claim against the Government for a general average contribution to repair the resultant damage should be allowed. B-156887, February 24, 1966.

Freight

Freight charges on Government cargo shipped under a Military Sea Transportation Service contract which permitted partial payment after sailing of the vessel from the port of loading but did not

contain language that could be construed as making prepaid freight fully earned upon loading, regardless of whether the cargo is delivered at destination, must be regarded as unearned and at the risk of the vessel operator; therefore, freight charges on cargo loaded on a vessel which suffers a general average incident should contribute in general average along with the cargo and the ship and the vessel operator is liable for that contribution. 43 Comp. Gen. 788 (1964).

Legal Services Procured by Vessel Owner

Legal services which are procured by a vessel owner and rendered for the general benefit of ship and cargo, including Government cargo, in the settlement of a salvage claim may be considered as a proper expense item for contribution by the Government under general average, notwithstanding the fact that the Government has its own legal staff. 36 Comp. Gen. 745 (1957).

The value of the legal services rendered by United States Government attorneys in the settlement of salvage claims for the general benefit of ship and cargo should be reflected as a general average expense for which the Government cargo interest will receive a credit while the other cargo interests will be made to contribute. 36 Comp. Gen. 745 (1957).

Legal Expenses

Preliminary legal expenses, incident to an unsuccessful suit by a shipowner or general average adjuster, for alleged negligence of a foreign pilotage authority causing the stranding of a vessel carrying Government cargo, are not expenses in saving the ship and cargo from the peril of the strand to be chargeable in general average; and, in the absence of an agreement which obligates the United States to participate in the costs of the suit, there is no authority for the United States to pay the legal expenses as a general average contribution. 40 Comp. Gen. 61 (1960).

Seaworthiness of Vessel

Where ocean carrier's claim for general average contribution from Government cargo arising from deviations into ports for boiler repairs was disallowed by AID on the basis that extensive repair work required to be made raises doubt as to whether due diligence was exercised by carrier to make vessel seaworthy, notwithstanding carrier allegation of crew negligence causing boiler repairs, claim should be allowed because once carrier shows COGSA applies, shows amended Jason clause in charter party, and brings forth evidence

establishing defense of error in management, found in section 4 of COGSA relieving the carrier or ship liability for loss or damage, the burden is on shipper to show that ship was unseaworthy and that the damage was caused by such unseaworthiness, and shipper did not rebut the general average statement tending to establish that damage to boiler resulted from crew negligence (an error in management) and not from want of due care to make vessel seaworthy. B-163281, July 24, 1968.

Peril of the Sea Loss

Claim of average adjuster for general average contribution by Government in connection with ship towing expense from port of refuge to destination on a shipment of wheat due to rudder and propeller damage, may be allowed under amended Jason clause incorporating Carriage of Goods By Sea Act which exempts charter party from "perils, dangers and accidents of the sea or other navigable waters," since evidence indicates that the damage of general average nature resulted from the vessel striking a submerged object during 2 days of heavy weather, vessel's log shows that navigational gear was in good order prior to sailing, and previous year survey reports found damaged gear in satisfactory condition. B-160951-O.M., March 27, 1967.

Claim of average adjuster for general average contribution by Government in connection with value of jettisoned boards and shores may be allowed under amended Jason clause incorporating COGSA which exempts time-charger in section 4 from "perils, dangers and accidents of the sea or other navigable waters," since evidence indicates that the damage of general average nature resulted from the extremely heavy weather that put the vessel bound from New Orleans, Louisiana, to Karachi, Pakistan, in great danger necessitating the jettisoning of the boards and shores stowed on the forward deck. B-158984-O.M., June 13, 1966.

Setoff of Loss and Damage Claim

Where Government allows to ocean carrier a general average claim for boiler repairs caused by crew negligence based on amended Jason clause incorporating COGSA, section 4 of which exempts the carrier or ship from responsibility of the boiler repairs, Government may recoup from general average payment its claim for shortage of cargo on same voyage since Government's shortage claim arose out of the same contract and was not caused by the exempted crew negligence that resulted in general average or any other exempted act in COGSA. B-163281, July 24, 1968.

CHAPTER 9

INTERNATIONAL TRANSPORTATION BY AIR

SUBCHAPTER I - SECTION 5 OF THE INTERNATIONAL AIR TRANSPORTATION FAIR COMPETITIVE PRACTICES ACT OF 1974 (FLY AMERICA ACT)

In 1975 the Congress passed the Fly America Act, Public Law 93-623 in order to correct a generally unfavorable United States international airline economic situation caused in part by certain unfair competitive practices by foreign-flag air carriers. The Act directed the Departments of State, Treasury, and Transportation, the Civil Aeronautics Board, and other departments or agencies to review and as far as possible eliminate their unfair competitive practices, requesting supplemental remedial legislation from Congress if necessary. However, in addition, section 5 of the Act, 49 U.S.C. 1517, requires that all Government-financed commercial air transportation of passengers and property to or from the United States and a place outside thereof and between places outside the United States be accomplished using American-flag air carriers (those holding certificates under section 401 of the Federal Aviation Act of 1958, 490 U.S.C. 1371 (1970)) "to the extent service by such carriers is available." It also requires the Comptroller General to disallow any expenditures from appropriated funds for payment of such air transportation to a foreign-flag air carrier "in the absence of satisfactory proof of the necessity therefor." Satisfactory proof of the necessity to use foreign flag service thus relates to the unavailability of service by American-flag air carriers.

Since there is nothing in the act itself or legislative history defining availability, the Comptroller General issued guidelines for implementation of Section 5 of the Act on June 17, 1975, revised March 12, 1976, which defined availability. 41 Fed. Reg. 14946 (1976). Generally, passenger or freight service by an American-flag air carrier is available if the carrier can perform the commercial foreign air transportation needed by the agency and if the service will accomplish the agency's mission. And the American-flag carrier is available even though foreign-flag service may be more convenient, preferred, cost less, or be reimbursable in excess foreign currency by the agency or traveler scheduling the travel. However, American-flag passenger service may be considered unavailable if it exceeds certain time constraints spelled out in the guidelines.

Availability of American Carriers

American-flag passenger service is considered unavailable if its schedule is responsible for a traveler arriving at destination at a time that makes it impossible for the traveler to get to his hotel accommodations and perform the necessary personal functions that would enable him to properly accomplish the agency's mission later on during the normal hours of business. 55 Comp. Gen. 52 (1975).

Personal Liability of Travelers

Travelers have been held personally liable when they erroneously scheduled themselves or when their agency's travel office erroneously scheduled them on foreign-flag air carriers when American-flag air carriers were available. B-186007, November 15, 1976; B-187506, May 5, 1977. They are liable for the loss of revenues by American-flag air carriers resulting from the traveler's improper use of or indirect travel by foreign-flag air carriers; this loss of revenues can be measured by an appropriate agency fare proration formula or by a mileage proration formula. 56 Comp. Gen. 209 (1977).

Use of Foreign Currencies

The general rule is that travelers may not, in order to pay for air transportation in excess foreign currency, select schedules using foreign-flag carriers where American-flag air carriers are available. B-184136, March 10, 1976. However, specific provisions in appropriation statutes that authorize only the use of foreign currencies for funding projects involving foreign travel are not impliedly modified by the Fly America Act; hence, Government-financed travelers may use foreign-flag carriers when American flag carriers which would otherwise be available to perform air transportation render themselves unavailable by refusing to accept as payment excess foreign currency. 55 Comp. Gen. 1355 (1976).

Selecting Between Flight Schedules

Consistent with the Fly American Guidelines, a traveler should use certificated service available at point of origin to furthest practicable interchange point on a usually traveled route. Where origin or interchange point of such route is not serviced by a certificated carrier, noncertificated service should be used to the nearest practicable interchange point to connect with certificated service. Travelers will not be held accountable for nonsubstantial differences in distances between points serviced by certificated carriers. The foregoing principles are not controlling where their application results in use of noncertificated service for actual travel between the United States and another continent. 55 Comp. Gen. 1230 (1976).

Per Diem Authorized to Use American Carriers

The Fly America Guidelines are addressed to air travel en route from origin airport to destination, i.e. elapsed travel time. They establish no policy regarding the initiation of travel or the timing of arrival, and provide no guidance in determining the length of time an employee should delay his departure at origin or remain idly at destination before commencing work to facilitate his use of American-flag air carriers. In part the question of the timing of travel is a matter of travel management for determination by the Department or agency involved inasmuch as determinations such as the employee's availability for travel and the urgency of the Department's or agency's need for his services are within its knowledge and control. However, GAO will authorize payment of per diem in order to use American-flag service for a total delay of 48 hours resulting from delay in initiation of travel, in en route travel, and additional time at destination before the employee can proceed with his assigned duties that is in excess of the per diem that would have been incurred in connection with the use of foreign-flag service. If total delay involves more than 48 hours per diem costs in excess of per diem that would be incurred in connection with use of foreign-flag service, American-flag service may be considered unavailable. 56 Comp. Gen. 216 (1977).

Hours of Travel

Where travel aboard American-flag air carriers commences or terminates between or spans the hours of midnight and 6 a.m., the traveler's reporting for duty may be delayed, or his arrival at destination may be accelerated, and he may be paid additional per diem to allow for an adequate period of rest at destination. If the per diem allowed for this "acclimatization rest" at destination when considered with all the other per diem for delay mentioned in the preceding paragraph is more than 48 hours in excess of the per diem that would be payable in connection with the traveler's use of foreign-flag air carriers, the American-flag air carriers scheduled at those hours may, nevertheless, be considered unavailable.

However, where the travel involves origin and destination points both of which are outside the United States and the only American-flag service commences or terminates between or spans the hours of midnight and 6 a.m. and foreign-flag service is available which does not require travel during those hours, the American-flag service may be considered unavailable. 56 Comp. Gen. 219 (1977); B-138942, May 19, 1977.

SUBCHAPTER II - WARSAW CONVENTION

The "Convention For the Unification of Certain Rules Relating to International Transportation by Air," referred to as the Warsaw Convention, is a treaty between the United States and other subscribing nations that established, among other standards, certain rules for air carrier liability in connection with international air transportation.

International transportation is defined in the convention as transportation between territories of countries subscribing to the treaty or originating and terminating in the territory of a subscribing country with an agreed stop in the territory of any other sovereign. It provides, in substance, that the air carrier shall be liable for damages sustained by (a) death or injury to the passengers; (b) destruction, loss, or damage to baggage or goods; and (c) loss resulting from delay in transportation of passengers, baggage, or merchandise.

If the carrier gives notice to the passengers that the transportation is subject to the rules therein and as to shipments of goods if the shipper executes an air waybill, the Convention provides for a limitation of the liability of the carrier for each passenger, for checked baggage and goods, and for objects which the passenger takes charge of himself. Article 26 provides that written notice of loss and damage to goods must be furnished carriers within 3 days from the date of receipt in the case of baggage and 7 days from the date of receipt in the case of goods (or 14 days as to delayed shipments). Article 29 provides that the right to damages shall be extinguished if suit is not brought within 2 years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the transportation stopped.

The Convention provides in Article 20(1) that liability cannot be escaped unless the carrier proves that it or its agent took all necessary measures to avoid the damage or that it was impossible to take such measures. However, this defense has been waived by the Montreal Agreement which was approved for the United States by the Civil Aeronautics Board, May 13, 1966, order E-23680, 31 Fed. Reg. 7302(1966). The Montreal Agreement waives limitations in the Warsaw Convention, increases liability to \$75,000 for each passenger, waives the defense the carrier might have had under Article 20(1) and provides for absolute liability if the transportation is international in scope and involves a location within the United States.

States which are parties to the Warsaw Convention are listed in Treaties in Force, a Department of State publication, issued to be effective on January 1st each year.

Convention Created No New Substantive Rights

The Warsaw Convention created no new substantive rights and all the rules there laid down were within the framework of existing legal rights and remedies. Wyman v. Pan American Airways, 43 N.Y.S. 2d 420 (1943).

Limitation of Liability

The French gold franc referred to in Article 22 of the Convention, which in the transportation of checked baggage and of goods limits carrier liability to 250 francs per kilogram, is a certain measure of gold of a certain purity now equivalent to about \$.066 per gold franc. Thus, 250 francs, the liability per kilogram of freight, would be \$16.50 or \$7.48 per pound. B-148426-O.M., May 10, 1962.

Convention Applies to International Air Freight Forwarders

Since international air freight forwarders are carriers in their dealings with their customers, we think that they are carriers under the Convention and that they are subject to the rights and liabilities laid down in the Convention. B-147623-O.M., May 29, 1962.

Article 29 Not Made Inoperative by GBL's Condition 7

Condition 7, on the back of the Government bill of lading, which provides that "In case of loss, damage or shrinkage in transit, the rules and conditions governing commercial shipments shall not apply as to periods within which notice thereof shall be given the carriers or to period within which claim therefor shall be made or suit instituted," does not operate as a waiver of the two-year limitation on suit in Article 29 of the Warsaw Convention. B-140492-O.M., November 3, 1959.

Collection by Setoff Prohibited

The unilateral withholding or a setoff by the United States of the amount of a claim for loss or damage on an international air shipment do not stop the running of the Article 29 time limitation nor do they constitute an effective collection of the claim because those actions are not substantially equivalent to the institution of the lawsuit prescribed by the treaty. Flying Tiger Line, Inc. v. United States, 170 F. Supp. 422 (1959).

Convention Applies to Voyage Charter Flights

The Warsaw Convention applies to international transportation under a contract of carriage on a "voyage" charter flights. Block v. Compagnie Nationale Air France, 386 F.2d 323 (1967).

Convention Applies to Flights Chartered by the United States

The Warsaw Convention applies to aircraft chartered by the United States (through the Military Airlift Command) for the international transportation of military cargo to military destinations. Merteus v. Flying Tiger Lines, Inc., 341 F.2d 851 (1965).

Purpose of the Warsaw Convention

The purpose of the Warsaw Convention was to limit international air-carrier's potential liability and to facilitate recovery by injured passengers. Warsaw Convention is part of the federal law of the United States and should be interpreted in light of and according to that law. The Warsaw Convention neither creates nor extinguishes any cause of action; the Convention is neutral with respect to the existence of a cause of action and merely conditions and limits any action which exists under otherwise applicable law. Husserl v. Swiss Air Transport Company, Ltd., 388 F. Supp. 1238 (S.D. N.Y. 1975).

Objective of the Warsaw Convention

Overall objective of the Warsaw Convention was to provide uniform rules relating to air transportation documents such as tickets, baggage checks and airway bills, and to limit an air carriers liability for an airplane accident. Evangelinos v. Trans World Airlines, Inc., 396 F. Supp. 95 (W.D. Pa. 1975).

Notice of Damage

Article 26 of the Convention provides that no action shall lie against the carrier unless a complaint is made in writing, as to damage to goods, within 7 days of receipt of the goods. Because the administrative office failed to timely file a notice of damage by the prescribed date, the carrier's claim for refund of the amount withheld should be allowed. B-174167-O.M., March 29, 1972. But, see Sofranski v. KLM Royal Dutch Airlines, 326 N.Y.S.2d 870 (Civ. Ct. N.Y. 1971), wherein the Court held that the Warsaw Convention requirement that claim for baggage damage must be made by written complaint within 3 days was not effective against a passenger where not brought home to him in advance.

Statute of Limitations - Warsaw Convention

Article 29 of the Convention provides in pertinent part: "(1) The right to damages shall be extinguished if an action is not brought within 2 years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the transportation stopped." Therefore, any right of action on a claim is extinguished if 2 years elapse from the date the cause of action accrued. Even if administrative deduction had been effected within the two-year period, it is not the equivalent of the lawsuit prescribed by Article 29. Flying Tiger Lines v. United States, 170 F. Supp. 422 (Ct. Cl. 1959); B-183698-O.M., July 1, 1975; B-185050-O.M., November 19, 1975. And the six-year statute of limitations in 28 U.S.C. 2415 (1970) does not abrogate holding in Flying Tiger Line, Inc., supra. 54 Comp. Gen. 633 (1975).

Notice to Passengers of Limitations Provisions of Warsaw Convention

Unless the carrier furnishes to the passenger a ticket or baggage check containing appropriate statement, carrier may not restrict its liability as circumscribed by Warsaw Convention articles. Passenger tickets and baggage checks which were combined in form of small printed booklets containing footnotes printed in microscopic type so as to render them unnoticeable, unreadable and virtually invisible, were insufficient to notify passengers that exclusion or limitation provisions of Warsaw Convention were applicable, and airline thus could not limit its liability under Convention. Lisi v. Alitalia-Linee Aeree Italiane, 370 F.2d 508 (2nd Cir. 1966), aff'd 390 U.S. 455 (1968), reh. den. 391 U.S. 929 (1968).

CHAPTER 10

INTERSTATE COMMERCE ACT

The Interstate Commerce Act, as amended, is designed to regulate, in interstate commerce, the business of for-hire carriers by water, highway and rail, including freight forwarders, pipe-lines, express and sleeping-car companies, or by combinations of those carriers, to establish just and reasonable fares, rates and charges and to provide for fair and impartial regulations of all modes of transportation subject to the provisions of the Act. 49 U.S.C. 1, 304, 902 and 1002 (1970). As to private carriers by motor vehicle, the act provides authority to regulate the hours of service of employees and standards of equipment. 49 U.S.C. 304(a)(3) (1970). Of particular importance is section 22 of the Act, 49 U.S.C. 22 (1970), which allows for-hire carriers to furnish the United States, State and municipal governments, etc., transportation free or at reduced charges and which is a separate subject in this Manual. Likewise separately treated are sections of the act setting time limits on legal actions to collect overcharges and undercharges.

Under 49 U.S.C. 6, 317(a), 906(a) and 1005(a) (1970), common carriers in interstate commerce, perhaps the largest form of for-hire carrier, are required to file with the Interstate Commerce Commission and print, and keep open to public inspection, tariffs showing all the rates, fares, routes and charges for transportation and for all services in connection therewith; under 49 U.S.C. 6(7), 317(b), 906(c) and 1004(c) (1970), no common carrier in interstate commerce can charge or demand or collect or receive a greater or less or different compensation for transportation than the rates, fares, and charges specified in their tariffs; and no such carrier can refund or remit in any manner or by any device directly or indirectly any portion of the rates, fares or charges so specified, except as provided in section 22 of the Act.

The Act provides that the freight rates and charges must be legal or applicable as well as lawful or reasonable. A legal charge is one which conforms to the carriers' tariffs required to be filed with the Interstate Commerce Commission; a lawful charge is one which is legal - because it is made in accordance with the filed tariffs - but which also withstands a challenge that it is not a just and reasonable charge as is required by the Act. The Commission has exclusive jurisdiction to determine the reasonableness of the tariff charges of regulated for-hire surface transportation companies.

Misrouted Shipment

In cases involving rail transportation, a conflict between the routing instruction and the rate named in a bill of lading imposes a duty upon the initial carrier to obtain further instructions or clarification of the conflicting information from the shipper. Failure to fulfill this responsibility may subject the initial carrier to a charge of misrouting and consequent liability. Union Saw Mill Company v. St. L. I. M. & S. Ry., 40 I.C.C. 661 (1916); Republic of France v. Missouri K. & T. Ry., 77 I.C.C. 383 (1923); St. Louis Cooperage Co. v. Baltimore & O. R.R., 161 I.C.C. 258 (1930). The Interstate Commerce Commission has held that motor carriers and railroads are subject to the same standard of reasonableness as to routing of shipments in interstate commerce. Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc., 302 I.C.C. 173 (1957); affirmed 371 U.S. 84 (1962). 43 Comp. Gen. 772 (1964); B-182176-O.M., February 18, 1975.

Waiver of Tariff Rules

The principle prohibiting the waiver of tariff rules is based on sections of the Interstate Commerce Act which forbid deviations from carrier's published tariffs. Thus, unless authorized under Section 22 of the Act, any such deviation is prohibited because it would effectively deprive shippers of the equality of treatment demanded by those sections. See Davis v. Cornwell, 364 U.S. 560 (1924). The Interstate Commerce Commission in Guss Blass v. Powell Bros. Truck Lines, 53 M.C.C. 603 (1951), citing the well-established principle that the rules in a tariff cannot be waived, held that the omission of a required bill of lading endorsement was a defect fatal to the application of transportation charges based on an exclusive use of vehicle rule even though exclusive use of vehicle service actually was requested and furnished. In these circumstances, the omission of the required bill of lading annotation, a defect which is not cured by later statements of shippers' intention, defeats the claim for charges for exclusive use even if they otherwise were properly payable. 52 Comp. Gen. 575, 579 (1973); 45 Comp. Gen. 384 (1966).

Availability of Equipment and Facilities

Under 49 U.S.C. 316(b) (1970) and the provisions of its certificate of authority, a common carrier by motor vehicle is required to make available adequate equipment and facilities at the points it is authorized to serve in its certificate of authority. Galveston Truck Line Corp. v. Ada Motor Lines, 73 M.C.C. 617, 626 (1957); 39 Comp. Gen. 352, 354 (1959).

Rates Higher than Normal Tariff

The maximum freight rates which can be demanded from the Government for transportation services furnished by common carriers are the rates specified in the carriers' tariffs regularly published and filed with the Interstate Commerce Commission and such rates must prevail over higher rates which are specified in special quotations offered by the carriers and filed by the Government. 35 Comp. Gen. 681 (1956). The Government, as other shippers, is entitled to the lowest published tariff rate applicable to its shipments, and agents of the Government are not authorized to contract for higher rates for similar services. Great Northern Ry. v. United States, 170 Ct. Cl. 188, 194 (1965); U.S. Lines Operations, Inc. v. United States, 99 Ct. Cl. 744 (1943), cert. den. 321 U.S. 775 (1944), B-184455-O.M., November 4, 1976.

Interstate Carrier (Rail-Water)

Under provision of Interstate Commerce Act providing that the Act shall not apply to transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly within one state and not shipped to or from a foreign country from or to any place in the United States, railroads were entitled to charge interstate rather than intrastate rates for banana shipments by rail which originated and terminated within one state regardless of whether bananas were brought into U.S. by private carriers or public carriers. Long Beach Banana Distributors, Inc. v. Atchison, T. & S.F. Ry., 407 F.2d 1173 (1969) cert. den. 396 U.S. 819 (1969). B-181155, October 14, 1975, and November 12, 1976.

Intrastate Carrier (Motor-Water)

A shipment of bananas transported by water from a foreign port to port in a state in the U.S. and there transported by motor common carrier from one point (port) in the state to another point in the same state was held by the Interstate Commerce Commission not to be moving in interstate or foreign commerce subject to economic regulation under part II of the Interstate Commerce Act. Allen-Investigation of Operations and Practices, 126 M.C.C. 336 (1977).

Intrastate Carrier

The United States Supreme Court held in Cincinnati, N.O. & T. P. Ry. v. Interstate Commerce Commission, 162 U.S. 184 (1896), that when an intrastate railroad enters into the carriage of interstate

freight by agreeing to receive the goods by virtue of interstate through bills of lading and to participate in through rates and charges, it thereby becomes part of a continuous line by an arrangement for the continuous carriage from one state to another and thus becomes amenable to 49 U.S.C. 1 et seq., and subject to the control of the Interstate Commerce Commission.

Liability of Initial Carrier

Where the origin carrier denies liability for damage to an intermodal shipment moving on a Government bill of lading from Puerto Rico to the United States on the basis that the destination carrier is liable, demand is proper on origin carrier since the applicable tender provided that the issuing carrier, who was also the origin carrier, assumed common carrier liability from origin to destination as provided for in the Interstate Commerce Act, 49 U.S.C. 29(11) (1970). B-185181-O.M., February 6, 1976; B-180415-O.M., April 18, 1974.

3-Year Statute of Limitations

The 3-year statute of limitations in Section 322 of the Transportation Act of 1940, 49 U.S.C. 66 (Supp. V, 1975), applies to MSC shipping and container agreements because an amendment to Section 322 expanded it to include all carriers and all contracts and agreements. A-24222, January 21, 1976.

And where an ocean carrier has issued a joint tender with a motor or rail carrier and the motor or rail carrier is subject to the 3-year statute of limitations under 49 U.S.C. 66, and that time has expired, the ocean carrier's claim for the applicable transportation charges is barred. B-183940, August 27, 1975, 55 Comp. Gen. 174 (1975).

Joint and Several Liability

Carriers who participate in joint through rates are jointly and severally liable for all the damages found by the Interstate Commerce Commission to have been sustained. Louisville & N. R.R. v. Sloss-Sheffield Co., 269 U.S. 217, 232 (1925). Provable violations of 49 U.S.C. 316(b) and (d) are torts for which all carriers involved are jointly and severally liable. 49 U.S.C. 316(j), and Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc., 371 U.S. 84 (1962). And when reparation is awarded on a through rate found unreasonable, the Interstate Commerce Commission's order runs collectively against the carriers that participated in the transportation. Atlantic Coast Line R.R. v. Smith Bros., Inc., 63 F.2d 747, 748 (5th Cir. 1933). Thus, the fact that one of the carriers might refuse to participate in an overpayment is a matter properly for settlement between the carriers. B-181623, August 5, 1975.

CHAPTER 11

LOSS AND DAMAGE

Loss and damage claims include many questions other than whether the carrier is liable for the loss and damage. These include questions concerning the measure of damages, the statute of limitations, whether the freight charges are earned, whether the goods must be accepted by the consignee, whether common carrier or warehouseman liability is involved. The law in this area is well settled and most of the problems are factual and turn upon the quantum of evidence.

The majority of loss and damage claims involving Government shipments are handled by the administrative offices and agencies and the only ones reported to the General Accounting Office are those of doubtful liability and those reported as uncollectible. 4 C.F.R. 105 (1977). In addition, the Federal Claims Collection Act of 1966, 31 U.S.C. 951-953 (1970), authorizes agencies to compromise any claim where the principal amount of the claim does not exceed \$20,000. 31 U.S.C. 952(b) (1970).

Common Law Rule

When the American Colonies inherited the common law of England, that body of principles included even then the rigid law governing the liability of common carriers. Thus, at common law, a common carrier is an insurer against the loss of, or damage to, property received by it for transportation. Secretary of Agriculture v. United States, 350 U.S. 162, 165-166, n. 9 (1956). There are five exceptions to this liability; namely, where the carrier can establish the loss or damage arose from (1) act of God, (2) public enemy (war), (3) inherent nature of the property, (4) act or fault of the shipper (improper packing, etc.) and (5) act or mandate of public authority.

The law governing the common carrier's liability for loss and damage to property delivered to it for transportation is an outgrowth of the law of bailments. In Practices of Motor Common Carriers of Household Goods, 124 M.C.C. 395, 412 (1976), the Interstate Commerce Commission referred to the 1703 case of Coggs v. Bernard, 2 Ld. Raym. 909, in which Lord Holt reviewed the whole field of bailments and laid down a number of rules which established varying standards of care applicable to the different types of bailments. These reflected a scale of degree of care due, ranging from the bailee who receives goods to keep for the use of the bailor, to whom he is liable only for gross neglect, to the common carrier for hire, who is chargeable with the highest degree of care. The carrier, said Lord Holt, "is bound to answer for the goods at all events."

This common law rule had its origin in what was supposed to be the commercial necessities of England at a time when Government (law and police) afforded imperfect protection to goods in transit, and when robberies were frequent. Not only robberies but carrier fraud and collusion with thieves and robbers dictated a necessity for the rule. The rule is continued today for different reasons. The immense increase of business, the valuable commodities shipped, and the large distances goods are transported have added to the opportunities and temptations of carriers to breach or neglect its trust. Even if there is no breach of trust, the practical problems occurring when goods are delivered at destination in a damaged condition require the retention of the rule. The shipper's difficulty of discovering and proving the carrier's fault, his inability to contradict the carrier's witnesses, the carrier's exclusive possession of evidence, etc., all require continuation of the rule. See United States v. Seaboard Coastline R.R., 384 F. Supp. 1103, 1105 (E.D. Va. 1974).

Codification of Rule

In 1906, the so-called Carmack Amendment to the Interstate Commerce Commission was enacted. The amendment, 49 U.S.C. 20(11) and (12) (1970), which has been made applicable to motor carriers (49 U.S.C. 319 (1970)), and to freight forwarders (49 U.S.C. 1013 (1970)), as well as to railroad and other common carriers subject to Part I of the Interstate Commerce Act, governs the rights and liabilities of the parties to the bill of lading contract. Under the Carmack amendment the carrier is liable for all damage to the goods transported by it unless it affirmatively shows that the damage was occasioned by the shipper, acts of God, acts of the public enemy, public authority, or the inherent vice of nature of the commodity. United States v. Gulf, Mobile & Ohio R.R., 259 F. Supp. 704, 707 (E.D. La. 1966). The overall purpose of the Carmack amendment is to impose a single uniform federal rule on obligations of carriers operating in interstate commerce. Rocky Ford Moving Vans, Inc. v. United States, 501 F.2d 1369 (8th Cir. 1974). See also, L. E. Whitlock Truck Service, Inc. v. Regal Drilling Co., 333 F.2d 488, 491 (10th Cir. 1964).

Connecting Carriers

The Interstate Commerce Act provides that the initial carrier upon the acceptance of property for interstate transportation must issue a receipt or bill of lading and that the initial carrier is liable for any loss or damage caused by it or by any succeeding carriers and that the delivering carrier is liable for any loss or damage caused by it or any preceding carrier. 49 U.S.C. 20(11), 319, 1013.

Thus, the Act makes both origin and delivering carriers liable for loss and damage occurring en route. Minneapolis, St. P. & S.S.M. R.R. v. Metal-Matic, Inc., 323 F.2d 903 (8th Cir. 1963); Phoenix Insurance Co. v. Monon R.R., 438 F.2d 1403 (8th Cir. 1971). Of course Government audit procedures and the general use of the Government bill of lading envision that payment of charges and settlement of claims will be made with the destination or delivering carrier. However, it is not often, except when the destination carrier is bankrupt or out of business, that one looks to the initial or connecting carriers for settlement of loss and damage claims arising from interstate shipments.

Government Bill of Lading

As indicated, the initial carrier has a duty to issue a bill of lading when it receives property for interstate transportation. The bill of lading serves a threefold function: it is (1) a receipt for the goods, (2) the contract of carriage and (3) serves as a document of title. The commercial bills of lading contain as one of the terms and conditions a provision that the carrier in possession of any property described therein shall be liable for any loss or damage. However, it states further that no carrier shall be liable for any loss or damage caused by (1) act of God, (2) public enemy, (3) authority of law, (4) act or default of the shipper or owner or (5) natural shrinkage. The commercial bills of lading also provide that all claims for loss and damage must be filed, in writing, within nine months of delivery or the date delivery should have been made and all suits must be instituted within two years and one day from the date notice in writing is given by the carrier to the claimant that the carrier has disallowed his claim or part thereof.

The Government bill of lading provides that "unless otherwise specifically provided or otherwise stated hereon, this bill of lading is subject to the same rules and conditions as govern commercial shipments made on the usual forms provided therefor by the carriers." The Government bill of lading also incorporates by reference certain provisions of the Code of Federal Regulations which provide that in case of loss or damage in transit, the rules and conditions governing commercial shipments shall not apply as to the period within which notice thereof shall be given the carriers or to period within which claim thereof shall be made or suit instituted. See FPMR Temp. Reg. G-23, sec. 101-41.302-3(4)(g) (1975).

Prima Facie Case

In most loss and damage cases, one tries to establish a prima facie case of carrier liability; namely, that the evidence shows that (1) the shipment was delivered (turned over) to the carrier

at origin in good condition or at least in better condition than when received at destination, (2) the shipment arrived in a damaged condition and (3) the amount of damages can be established. Missouri Pacific R.R. v. Elmore & Stahl, 377 U.S. 134, 138 (1964). Thus, under section 20(11) of part I of the Interstate Commerce Act, (49 U.S.C. 20(11) (1970)), the carrier is liable without proof of negligence unless it affirmatively shows that the damage was caused by the shipper, act of God, public enemy, public authority, or the inherent vice or nature of the commodity.

Freight Forwarders - Common Carrier Liability

Under section 20(11) of the Interstate Commerce Act a freight forwarder is liable to the shipper for loss and damage to freight exactly as if it were an initial carrier. Chicago, Milwaukee, St. Paul & Pacific R.R. v. Acme Fast Freight, Inc., 336 U.S. 465 (1949). See also 46 Comp. Gen. 740 (1967). But a claim by an international independent ocean freight forwarder for freight charges deducted from amounts otherwise due the carrier on account of damage caused to a shipment is allowable where the carrier acts only as an agent of the shipper and assumes no responsibility for the transportation of goods. B-183826-O.M., August 27, 1975.

Improper Packing

To escape liability for damages to a shipment on the basis of "improper packing," a carrier must show that the improper packing was the sole cause of damage, that the defect was latent and concealed, and not discernible to the ordinary observation of agents of the carrier, and that the carrier was free of negligence in handling the shipment. Thus mere allegations of faulty packaging without evidence that packaging was the sole cause of damage will not rebut the presumption of negligence by the carrier. 55 Comp. Gen. 611 (1976). The carrier's prima facie liability having been established, it had the burden of proving otherwise but failed to show lack of negligence and improper packing, in fact, its agent participated in loading the shipment. 52 Comp. Gen. 930 (1973).

Released Valuation

Where a released valuation provision limiting damages to a maximum of \$1.50 per pound is included in the applicable tariff and is specifically stated on the bill of lading, both the Comptroller General and the courts have consistently held that the limit of recovery for loss or damage to part of a shipment is not the valuation of the entire shipment, but only the proportion thereof based on the weight of goods actually lost or damaged. B-179932-O.M., December 14, 1973.

Condition 5 of the Government bill of lading that "shipment is made at the restricted or limited valuation specified in the tariff or classification at or under which the lowest rate is available" entitles the Government, on a shipment subject to a section 22 quotation that does not require notice of shipper's released valuation in a specified form, to the lowest rate provided in the quotation-- the released value rate.

Even though a quotation is not a "tariff or classification within the strict meaning of the Interstate Commerce Act, it is the schedule of charges for services contemplated by the definition of the word "tariff"--a statement by a carrier that it will furnish certain services under certain conditions for certain prices, a schedule of rates and charges. 48 Comp. Gen. 335 (1968).

Freight Charges

The courts have held that freight charges are not due unless and until the goods reach their ultimate destination. Alcoa Steamship Co. v. United States, 338 U.S. 421 (1949); National Trailer Convoy v. United States, 345 F.2d 573 (Ct. Cl. 1965), and Strickland Transportation Co. v. United States, 223 F.2d 466 (5th Cir. 1955). See also 50 Comp. Gen. 164 (1970).

The holding in United Van Lines, Inc. v. United States, 448 F.2d 1190 (Ct. App. D.C. 1971), that a motor carrier may retain payment made of line-haul transportation charges for a shipment of serviceman's household goods destroyed while in temporary storage at destination awaiting delivery is not for general application since other contracts of carriage provide significant legal reason for confining the United decision to the facts in that case, and because the Court did not consider the many carrier tariffs, quotations, or commercial bills of lading which impose liability on the motor carrier or freight forwarder for goods in temporary storage. Entitlement to transportation charges where household goods are destroyed or stolen while in temporary storage at destination before delivery depends in each case upon the facts and controlling contract provisions in tariffs, quotations, or commercial bills of lading which may impose liability on the motor carrier or freight forwarder. Charges paid where goods have been destroyed or stolen should be recovered. 52 Comp. Gen. 673 (1973).

Evidence

A delivery receipt affords a written record of the facts appearing at the time of delivery. The rule is settled that a clear delivery receipt is not conclusive and does not prevent proof of damage by

other means. Rhoades, Inc. v. United Air Lines, Inc., 340 F.2d 481, 486-487 (3d Cir. 1965); Red Arrow Freight Lines, Inc. v. Howe, 480 S.W. 2d 281, 287 (Tex. Civ. App. 1972).

Carrier's claim for money administratively setoff because of damage to an aircraft engine is disallowed where the damage was discovered and carrier notified 1 1/2 hours after delivery, and an inspection made the next day by the carrier's representative. And the engine, although moved to the engine shop, was moved only a short distance and in a manner that could not have caused damage. B-185283-O.M., July 2, 1976.

The Government bill of lading with no exception is prima facie evidence that parts of shipment open to inspection and visible were received by the carrier in good order, and that damage done was to the containers which were open to inspection and visible rather than to the goods concealed inside the containers. 54 Comp. Gen. 742 (1975).

Improper Loading

Setoff of monies due a carrier against Government claims for loss and damage caused by improper loading by shipper of cartons of folding beds under the carrier's trailer, which was readily apparent to the carrier's driver, was proper because improper loading by a shipper can constitute complete defense to damage claims only when shipper loading is not apparent on ordinary observation by the carrier. 54 Comp. Gen. 742 (1975)

Loading by the Shipper

Usually the primary duty as to the safe loading of property is upon the carrier. When the shipper assumes the responsibility of loading, however, he generally becomes liable for the defects which are latent and concealed and cannot be discerned by ordinary observation by the agents of the carrier; but if the improper loading is apparent, the carrier will be liable notwithstanding the negligence of the shipper. United States v. Savage Truck Line, Inc., 209 F.2d 442, 445 (4th Cir. 1953), cert. denied, 347 U.S. 952 (1954); B-183074-O.M., March 4, 1975; 52 Comp. Gen. 930 (1973).

Packing Sufficiency

To escape liability for damages to shipment on basis of improper packing, carrier must show improper packing was sole cause of damage, that defect was latent and concealed, and not discernible to ordinary observation of agents of the carrier, and that the carrier was free of negligence in handling the shipment. Therefore, a carrier who

accepts a shipment alleged to have been defectively packaged--discernible and not latent defect--which it should have refused to accept, and who is unable to prove that no fault on its part contributed to the cause of damage is liable for damage claim of the Government. 46 Comp. Gen. 740 (1967); 55 Comp. Gen. 611 (1976).

Notice

The failure of the consignee to notify the agent's carrier of a loss does not affect the merits of the case where Condition 7 on the back of the Government bill of lading makes inapplicable the normal commercial time constraints as to notice of damage. B-183277-O.M., May 29, 1975; Seaboard Air Line R.R. v. United States, 216 F.2d 855 (4th Cir. 1954). And it is not necessary that the carrier be given the opportunity to make an inspection at a later date where the damage was discovered at the time of delivery, in the presence of the carrier's agents, and was noted on the bill of lading. B-180562-O.M., March 8, 1974.

Measure of Damages

Generally, where goods are lost or delivered in a damaged condition, the correct measure of damages is the amount of money which will place the shipper in the same position it would have enjoyed had the loss or damage not occurred. United States v. Northern Pacific Ry., 116 F. Supp. 277, 278 (D. Minn. 1953). The carrier is liable for the full actual loss to the shipment. Illinois Cent. R.R. v. Crail, 281 U.S. 57, 63 (1930).

Salvage. The law is well settled that where goods are shipped by common carrier and become damaged in transit, the consignee has the duty to accept the shipment and the only right a carrier has in the goods it transports is a lien for its freight and other lawful charges, and that a common carrier's liability ceases upon delivery. Therefore, carrier had no right to salvage, administrative office acted reasonably in mitigating damages and carrier's claim for money administratively setoff because salvage was not returned to it is denied. B-185296-O.M., May 5, 1976.

No market value. In action against a carrier to recover the value of property which has no market value, measure of damages is the value of property to plaintiff, and in ascertaining this value, inquiry may be made into the constituent elements of cost to the shipper of producing or obtaining the property, practicability and expense of replacing it, and other considerations which in the particular case affect the value. 14 Am. Jur. 2d Carriers, section 642 (1964).

Thus, where the administrative office does not know the market value of a specialized trailer, but a market does exist, where replacement cost would be 2 1/2 times the original cost, and where the trailer was extensively refurbished, the original cost of the trailer is a reasonable measure of damages. B-182831-O.M., May 27, 1976; 40 Comp. Gen. 178 (1960).

Overhead. The inclusion of overhead in damages collected from a carrier for the Government's repair of radar sets damaged in transit was not improper simply because the overhead constituted 43 percent of the damages assessed since the law is concerned with the restoration of a claimant to the position he would have occupied had there been no loss or damage to its shipment, and the overhead cost assessed can be sustained by cost accounting records. Moreover, the courts in addition to direct cost of labor and materials have included overhead in damages allowed, and the carrier previously accepted overhead charged when the overhead represented 20 percent of repair costs. 53 Comp. Gen. 109 (1973).

Shipper's Load and Count

When the phrase "shipper's weight, load and count" appears on the bill of lading, the burden is on the shipper to prove that the amount specified in the bill of lading was actually loaded. Dublin Company v. Ryder Truck Line, 417 F.2d 777 (5th Cir. 1969); 49 U.S.C. 101 (1970). Thus, where there are no loading tallies for the shipment or no evidence that the car was properly braced, the Government would be unable to establish a prima facie case of carrier liability. B-181010-O.M., May 10, 1974; B-180680-O.M., April 9, 1974; B-180601-O.M., March 20, 1974.

Sealed Cars

A clear seal record, in and of itself, is not sufficient to overcome a presumption of carrier liability in situations where nothing suggests that the count made on behalf of the Government was other than honest and accurate. B-184395-O.M., August 13, 1975. However, where a loading tally does not materialize until two months after discovery of a shortage, question arises as to its probative value and to the sufficiency of the evidence to support the Government's case. B-179883-O.M., November 23, 1973.

Perishables

If potatoes were, in fact, delivered in good condition to the railroad and arrived at their destination in worsened condition, the railroad was required to prove that it was not negligent in its handling

of the potatoes, that the worsened condition was due solely to a combination of fault or inadequacies in the bills of lading and in the transportation service requested by the shipper, and to some inherent defect in the potatoes. Arnold J. Rodin, Inc. v. Atchison, Topeka & Santa Fe Ry., 477 F.2d 682 (5th Cir. 1973).

A railroad tariff allowing an extra 24-hour grace period before liability could be assessed for market decline because of delays to perishables was invalid under the Interstate Commerce Act provision rendering the carrier liable for loss, damage, or injury to property caused by it, and providing that no contract shall exempt a common carrier from the liability imposed. Peter Condakes Co., Inc. v. Southern Pacific Co., 512 F.2d 1141 (7th Cir. 1975).

Released Valuation

Only by granting its customers a fair opportunity to choose between higher or lower liability by paying a correspondingly greater or lesser charge can a carrier lawfully limit recovery to an amount less than the actual loss sustained. New York, New Haven & Hartford R.R. v. Nothnagle, 346 U.S. 128, 135 (1953). The decisions in this area are based on the premise that the shipper should receive consideration in the form of a lower rate for the correspondingly greater risk of loss that he must bear.

The deduction by the Government of the full value of goods damaged in transit (instead of an amount based on a released valuation), and the subsequent denial of a claim for the amount deducted is sustained where the contract of carriage is complete and unequivocal on its face as to the contracted rate, and where the contracted rate was the only one available to the Government. 53 Comp. Gen. 747 (1974).

Shortages

Carrier's delivery of a shipment on a free-astray basis does not explain the loss in transit of a similar shipment admittedly received later by the carrier at origin, where the evidence shows existence at origin of two separate different sized similar shipments released for transportation two days apart. B-185131, September 30, 1976.

On a shipment of wooden boxes of ammunition for cannon with explosive projectiles weighing 795 pounds and subject to freight charges computed on a minimum of 2,500 pounds, the additional charges

claimed by the delivering and billing carrier on the basis of a second freight movement of boxes found astray at the origin carrier's terminal because the Government prepared the bill of lading and incorrectly showed the quantity shipped as five boxes instead of 15 boxes, properly was disallowed since pursuant to section 219 of the Interstate Commerce Act, 49 U.S.C. 319 (1970), the carrier and not the shipper is responsible for issuing an appropriate bill of lading and the fact that the shipper prepared the bill of lading does not relieve the carrier of the duty of ensuring the bill of lading was correctly prepared. 52 Comp. Gen. 211 (1972).

Act of God

Where the report of the administrative office reasonably establishes that the damages to the shipment resulted from an "Act of God" and that neither the freight forwarder, with which the Government contracted for the door-to-door service under the bill of lading contract, nor its storage agent was considered negligent in failing to prevent the damage, the administrative conclusion that such forwarder or its agent is not liable for the damage thus appears proper. B-176805-0.M., September 19, 1972.

Articles of High v. Extraordinary Value

A claim acquired by assignment pursuant to the Military Personnel and Civilian Employees' Claims Act, 31 U.S.C. 240 (1970), against a carrier for the loss of antique Imari and Kutani Japanese porcelains in the transportation of an Air Force officer's household goods properly was recovered by setoff against the carrier who denied liability because the porcelains were not declared to have extraordinary value, the loss was not listed at the time of delivery, and the shipment being the only one in the van, it could not have been misdelivered. However, although of high value, antique porcelains are not articles of extraordinary value and since the valuation placed on the shipment was intended to include the porcelains, a separate bill of lading listing was not required, the clear delivery receipt may be rebutted by parol evidence, and the carrier's receipt of more goods at origin than delivered establishes a prima facie case of loss in transit. 53 Comp. Gen. 61 (1973).

Doctrine of Res Ipsa Loquitur

Where the claimant elects to predicate the legal action against the carrier on the theory of negligence, the claimant is aided in proving his cause of action by the doctrine of res ipsa loquitur. The rule applies where (1) an unusual or unexplained accident occurs which ordinarily does not happen in the absence of negligence, (2) the

person against whom the rule is applied has exclusive control of the instrumentality which caused the damages, and (3) the person sustaining the loss is without fault. Since fires do not ordinarily erupt in bus engines, a presumption of negligence on the part of the carrier arises under the rule of res ipsa loquiter. B-176677-O.M., September 6, 1972.

Mobile Homes

Mobile home carriers are subject to the Carmack Amendment, 49 U.S.C. 20(11) (1970), and cases involving perishable goods apply to durable goods. Thus, a prima facie case is established and the carrier liable where the mobile home is delivered to the carrier in good condition, delivered to the consignee in damaged condition, and the amount of the damages ascertained. Missouri Pacific R.R. v. Elmore & Stahl, 377 U.S. 134, 138 (1964). And the carrier has the burden of proof to show that an alleged inherent defect was the sole cause of damage. Further, the carrier's tariff item excluding it from liability is ambiguous, and appears to be a rule exempting a carrier from its own negligence, and therefore in violation of 49 U.S.C. 20(11) (1970). 55 Comp. Gen. 1209.

En Route Damages. The owner of a house trailer is liable for excess costs for trailer repairs incurred en route where accessorial charges are based on lawfully published tariffs and properly payable upon presentation. B-164008-O.M., June 19, 1968. And the owner is liable where the record is not sufficient to establish negligence on the part of the carrier and where the record indicates damage may have been caused by inherent defects in the trailer. B-184788-O.M., May 12, 1976.

CHAPTER 12

MERCHANT MARINE ACT. 1936

The Merchant Marine Act, 1936, 46 U.S.C. 1101-1294, was designed to encourage the construction, maintenance and operation of a merchant fleet in order to serve the country's needs in both peace and war. To accomplish this purpose the Act set up the United States Maritime Commission. The Maritime Commission was reorganized into the Federal Maritime Board (1950-Reorganization Plan No. 21, 64 Stat. 1273), now called the Federal Maritime Commission (Reorganization Plan No. 7 of 1961, 75 Stat.80, as amended), an independent agency. The commission now administers the regulatory aspects of the Act. The Maritime Administration, which now administers the promotional programs under the 1936 Act, functions under the Department of Commerce.

CHAPTER 13

RELIEF OF CERTIFYING AND DISBURSING OFFICERS

Act of December 29, 1941, 31 U.S.C. 82c

The last proviso in the act of December 29, 1941, provides that the Comptroller General shall relieve certifying officers of liability for transportation overpayments made to carriers subject to section 322 of the Transportation Act of 1940, as amended, 49 U.S.C. 66, when such overpayments occurred solely because the administrative examination made prior to payment did not include a verification of transportation rates, freight classifications or land-grant deductions.

Relief Unavailable to Vendors

The relief granted in the last proviso in section 82 c of Title 31, U.S.C., pertaining to overpayments for transportation charges, applies only to payments made "to any common carrier covered by section 66 of Title 49" and does not apply to payments made to vendors for freight or express charges prepared by them. B-129549, February 25, 1959.

Doubtful Overpayments

Where the voucher and invoice did not include a charge specifically stated as "storage" where the evidence is not clear as to whether the charges for unpacking and "handling in" at a warehouse constitute an overpayment and where administrative efforts to collect the overpayment from others prove unavailing, relief may be granted the certifying officer under the provisions of 31 U.S.C. 82c. B-130548-O.M., April 1, 1957.

Blanket Exemption

To the extent specified in the second proviso of 31 U.S.C. 82c, a certifying officer would be relieved of liability only if an examination of the payment voucher disclosed that the overpayment had resulted solely from a failure on the part of the certifying officer to verify the transportation rates, freight classifications, or land-grant deductions; but this statute does not authorize the granting of a "blanket" exemption from liability, although the final action by the Comptroller General may be broadly characterized as automatic because he is required to afford relief whenever he finds overpayments of the type involved. B-136352-O.M., August 21, 1958.

Commercial Bills of Lading

The act of June 1, 1942 (31 U.S.C. 82g), which applies only to transportation furnished on Government bills of lading or transportation requests, was enacted at the instigation of the War Department and affords relief to disbursing officers and certifying officers (including those of the military agencies) similar to that available under the act of December 29, 1941 (31 U.S.C. 82b--82e), as to transportation payments.

Conditions on Payment Must be Observed

While disbursing officers and certifying officers are exempt under 31 U.S.C. 82g from liability for overpayments for transportation in the case of improper transportation rates or classifications, this immunity does not extend generally to payments which are not supported by properly accomplished Government bills of lading where such accomplishment is required as a condition precedent to payment. See B-103315-O.M., July 31, 1952; B-152206-O.M., June 12, 1964; B-161449-O.M., June 14, 1967.

Applies Only to Government Paper

The provisions for relief of disbursing and certifying officers contained in section 82g of Title 31, U.S.C., apply only to transportation furnished on "Government bills of lading or transportation requests." B-129549, February 25, 1959; B-140404-O.M., October 15, 1959; B-163995, November 18, 1968.

Effect of Section 322

Under the provisions of section 322 of the Transportation Act of 1940, 49 U.S.C. 66, carriers' bills for transportation services are required to be paid promptly without prior audit by the General Accounting Office. As the law shows, the right is reserved to the Government to recover any overcharges which might have been collected by the carrier, although payment was made without exception by the Government disbursing officer who himself might be immune from liability for excess payments made on Government bills of lading. B-159103, March 27, 1967.

While it has been our practice in recent years to seek adjustments of overpaid transportation charges direct from the overpaid carriers, including those instances when there was no statutory relief from liability afforded disbursing officers, such ability to adjust with the carriers has not necessarily resulted in abandonment of proceedings which might place the burden of adjustment upon accountable officers in appropriate circumstance. B-161449-O.M., June 14, 1967; B-152206-O.M., June 12, 1964.

Audit of Procedures of Certifying Officers

The act of December 29, 1941, 31 U.S.C. 82c, having spelled out the limit of responsibility and accountability of certifying officers, it is presumed that the duties and responsibilities of such employment are covered by administrative regulation, practices and procedures not inconsistent therewith. We are not aware of any requirement on the part of the General Accounting Office for positive action to audit the manner; that is, the procedure followed by such officers, in discharging their responsibilities. B-147293-O.M., February 21, 1962.

Act of June 1, 1942, 31 U.S.C. 82g

The act of June 1, 1942 applies to both disbursing and certifying officers and provides that such officers shall not be held liable for overpayments for transportation furnished on Government bills of lading or transportation requests--

"when said overpayments are due to the use of improper transportation rates, classifications, or the failure to deduct the proper amount under land-grant laws or equalization and other agreements."

Relief Unavailable to Assignees

The relief afforded certifying and disbursing officers from liability for overpayments for transportation services under the provisions of 31 U.S.C. 82c and 82g is not intended to be available in the case of overpayments to assignees of amounts assignable under the Assignment of Claims Act, 31 U.S.C. 203, 41 U.S.C. 15. B-153621, March 10, 1964.

Relief Unavailable for Payment of Time-barred Bills

Payment of time-barred bills by disbursing officers constitutes an improper expenditure of Government funds, and the relief afforded certifying and disbursing officers from liability for overpayments for transportation services under the provisions of 31 U.S.C. 82c and 82g would not be applicable. B-152206, December 10, 1964.

Specific Exemption

31 U.S.C. 82g specifically exempts both disbursing and certifying officers from liability for overpayments made for transportation furnished on Government bills of lading or transportation requests when the overpayments are due to the use of improper transportation rates, classifications, or the failure to deduct the proper amount under land-grant laws or equalization and other agreements. B-136352-O.M., August 21, 1958.

Commercial Paper-Ocean Transportation

Inasmuch as the terms and conditions of the Government bill of lading are incorporated by reference on the commercial documentation used under procedures for the procurement of ocean freight transportation, the relief afforded the disbursing and certifying officers under 31 U.S.C. 82g shall be afforded those officers on payments for shipments moving in accordance with these procedures. Additionally, as to shipments hereunder, the certifying and disbursing officers are relieved of the present requirement that the consignee's certificate of delivery must be obtained before payment is made for ocean freight shipments. B-150556, June 16, 1967.

Act of August 11, 1955, 31 U.S.C. 82a-2

31 U.S.C. 82a-2 provides that whenever any deficiency occurs in the accounts of any disbursing officer because of an illegal, improper or incorrect payment, and the Comptroller General or any officer of the General Accounting Office determines that such payment was not the result of bad faith or lack of due care on the part of such disbursing officer, the Comptroller General or his designee is authorized in his discretion to relieve such disbursing officer. The act further provides that such relief may be denied if the Comptroller General or his designee determines the agency concerned has not diligently pursued collection action in accordance with procedures prescribed by the Comptroller General. B-136352-O.M., August 21, 1958.

Act of August 30, 1964, 31 U.S.C. 82b-1(a)

31 U.S.C. 82b-1(a) provides that no certifying or disbursing officer acting in good faith and in conformity with provisions with respect to adequate and effective sampling procedures established by the head of a Government agency for the examination of disbursement vouchers for amounts less than \$100 shall be held liable with respect to any certification or payment by him on a voucher which was not subject to specific examination because of the prescribed sampling procedures provided that such officer or his agency have diligently pursued collection action to recover the improper payment in accordance with procedures prescribed by the Comptroller General.

CHAPTER 14

SECTION 322 OF THE TRANSPORTATION ACT OF 1940

Section 322 of the Transportation Act of 1940, as amended, 49 U.S.C. 66, is supplementary to the Interstate Commerce Act and provides for the payment upon presentation of bills for transportation furnished by common carriers subject to the Interstate Commerce Act, as amended, or the Civil Aeronautics Act of 1938 (now the Federal Aviation Act of 1958), prior to audit or settlement by the General Accounting Office, and specifically reserves to the United States the right to deduct subsequently discovered overcharges from amounts otherwise due those carriers.

Section 322 also provides (a) a time limit of three years for the recovery of overcharges by setoff or deduction, and (b) a three-year time limitation on the presentation of carriers' claims to the General Services Administration or its designee. For a discussion of this aspect of section 322 see Time Limitations on Payment of Transportation Bills and Claims.

AbeYance Pending Review of Issue

Withholding collection of transportation overcharges pending review of a disallowance involving the same issue may not be approved, as absent evidence demonstrating need for special treatment of a carrier, departure from the procedures established to implement 49 U.S.C. 66, providing for payment of carrier transportation bills prior to audit or settlement and the deduction of overcharges from amounts subsequently found due is not warranted. However, the carrier may file a claim for refund of any collection, and the resolution of the issue pending will control bills involving the identical issue. 46 Comp. Gen. 63 (1966).

Deduction Reclaims - Procedure

Although a carrier may reclaim transportation overcharges collected by deduction, a carrier who fails to establish a clear legal right to refund of the deduction is not entitled to a refund, even though the statutory period for bringing court action has expired. The authority in 49 U.S.C. 22 permitting transportation of Government property at reduced rates does not provide for contracting at rates higher than those available to the general public. 44 Comp. Gen. 769 (1965).

Setoff of Misrouting Damages

When in connection with the routing of an unrouted Government shipment over a route producing freight charges in excess of those over a lower rated route as provided by tariff the validity of the charges is questioned by the GAO and the carrier is requested to

refund the difference. such a difference represents presumptive misrouting damages. And, even though such misrouting damages are not overcharges as defined in 49 U.S.C. 66 for collection by setoff under that section, they are for recovery by administrative deduction from amounts due the carrier by the GAO (now GSA) under the common law setoff right of the United States. 43 Comp. Gen. 772 (1964).

Abatement Pending Court Action

Abatement of collection action against one carrier by the GAO until a final determination is made on a suit filed by another carrier involving the same legal issues might lose to the Government its right specifically provided by statute of recovering improper charges in view of the reduction to 3 years in the time in which the Government has to make deductions under 49 U.S.C. 66; therefore, the abatement action requested by the carrier is not warranted. 40 Comp. Gen. 101 (1960).

Certification of Transportation Bills

Elimination of the requirement that any bill or invoice submitted by transportation companies for transportation and accessorial charges be certified by a representative of the carrier is not approved, partly because of the provision for payment of transportation bills for transportation charges upon presentation prior to audit by the GAO (now GSA) set out in 49 U.S.C. 66. 38 Comp. Gen. 462, 468-469 (1959).

Burden of Proof

The Supreme Court of the United States has held that the burden of proof to establish the lawfulness of its charges continues to remain with the carrier after deduction has been made under 49 U.S.C. 66. New York, N. H. & H. R. Co. v. United States, 355 U.S. 253 (1957). 37 Comp. Gen. 535, 536 (1958).

Burden of Proof

It is not incumbent upon GAO (now GSA) to prove the correctness of its audit action when stating an overcharge against a carrier. Section 322 of the Transportation Act of 1940, as amended, 49 U.S.C. 66, requires the United States to pay bills for transportation services upon presentation prior to audit or settlement by this Office but reserves the right of the Government to deduct the amount of any overcharges from any amount subsequently found due such carrier. Thus, the burden is always on the carrier to establish the lawfulness of its charges for transportation services rendered for the United States. See United States v. New York, New Haven and Hartford Railroad Co., 355 U.S. 253 (1957). B-1 2748-O.M., June 11, 1971.

Common Law Right of Setoff

The Transportation Act of 1940, an act supplementary to the Interstate Commerce Act, provided in section 322 (49 U.S.C. 66), for prompt payment upon presentation, without prior audit here, of bills for transportation furnished by common carriers subject to the Interstate Commerce Act, and specifically reserved to the United States the right to setoff subsequently discovered overpayments (overcharges by Public Law 85-762, effective August 26, 1958), from amounts otherwise due those carriers. Aside from this statute, however, the United States possesses the common law right of setoff. 36 Comp. Gen. 263 265 (1956).

Certifying and Disbursing Officers

Payment of time-barred bills by disbursing officers constitutes an improper expenditure of Government funds, and the relief afforded certifying and disbursing officers from liability for overpayment for transportation services under the provisions of 31 U.S.C. 82c and 82g would not be applicable. B-152206, December 10, 1964.

Unused Tickets

Unused passenger tickets are defined as "overcharges" within purview of 49 U.S.C. 66(a), thereby subject to deduction under this section. They constitute charges paid to carrier for transportation services not performed. Pub. L. 93-604 provides authority to GSA to delegate to Army Finance and Accounting Center authority to deduct from current carrier bills value of unused tickets, where known. B-153862-O.M., Nov. 19, 1975.

Time of War

The period of time denoted by the statutory phrase "time of war" in 49 U.S.C. 66 would begin when the Congress of the United States exercised its power under Article 1, Section 8, Clause 11 to declare war. The statutory period would not include the duration of a national emergency proclaimed by the President under the executive power. B-140021-O.M., April 11, 1962.

Intrastate

Where carrier performs intrastate transportation service but also possesses interstate operating authority, 49 U.S.C. 66, is not for application; the limitations specified in 49 U.S.C. 66 are applicable only in the case of interstate or foreign transportation services. B-140015-O.M., April 11, 1962.

Transfer of Transportation Rate Audit Function from GAO to GSA

The General Accounting Office Act of 1974, Public Law 93-604 88 Stat. 1960, amends section 322 of the Transportation Act of 1940 (49 U.S.C. 66) by transferring the transportation rate audit function and personnel from the General Accounting Office to the General Services Administration (GSA). The transfer was made effective on October 12, 1975. B-163758, August 27, 1975.

Review of GSA Transportation Settlement Actions by GAO

The GAO Act of 1974 does not, however, affect the authority of GAO to make audits in accordance with the Budget and Accounting Act, 1921, as amended (31 U.S.C. 41), and the Accounting and Auditing Act of 1950, as amended (31 U.S.C. 65). It grants to any carrier or forwarder the right to request the Comptroller General to review action on its claim by GSA. Such request shall be barred forever unless received in the GAO within 6 months (not including in time of war) from the date the GSA action was taken or within the periods of limitation specified in 49 U.S.C. 66, whichever is later. B-163758, August 27, 1975.

Finality of Administrative Consideration

Carrier granted review of a letter from the General Services Administration (GSA) sustaining a Settlement Certificate issued by the former Transportation and Claims Division (TCD) of the GAO, now a part of GSA. See the General Accounting Office Act of 1974, 88 Stat. 1959, approved January 2, 1975. The review was made under 49 U.S.C. 66(b) (Supp V, 1975), and 4 C.F.R. 53.3 (1977), since it was apparent that the GSA letter constituted finality of administrative consideration. See 4 C.F.R. 53.1(b) (3) (1977). B-188091, July 11, 1977.

GAO Review of Audit Responsibility Delegated by GSA

Pursuant to authority provided in 49 U.S.C. 66, as amended by Pub. L. 93-604, the Administrator, GSA designated U.S. Army Central Finance and Accounting Office, Europe as designee to audit and settle accounts involving charges for transportation service furnished for the account of U.S. arising in Europe. See 41 F.R. 2446. However, under 49 U.S.C. 66(b) carriers are authorized to request the Comptroller General to review the actions taken on their claims. B-187110, February 15, 1977.

Regulations for Review of GSA Transportation Settlements

GAO has prescribed the following regulations governing requests by carriers and forwarders for review by the Comptroller General

of the transportation audit action by GSA on carriers' and forwarders' bills and claims which are published in part 53 of title 4 of the CFR:

"Sec. 53.1 Definitions.

(a) 'Claim' means any bill or demand, including submission of voucher or supplemental bill, for payment of charges for transportation and related services by a carrier or forwarder entitled under 49 U.S.C. 66 to payment for such services prior to audit by the General Services Administration.

(b) 'Settlement' means any action taken by the General Services Administration in connection with the audit of payments for transportation and related services furnished for the account of the United States that has a dispositive effect, including:

(1) Deduction action (or refund by carrier) in adjustment of asserted transportation overcharges;

(2) Disallowance of a claim, or supplemental bill, for charges for transportation and related services, either in whole or in part,

(3) Any other action that entails finality of administrative consideration.

Sec. 53.2 Actions reviewable by Comptroller General.

Actions taken by the General Services Administration on a claim by a carrier or freight forwarder entitled under 49 U.S.C. 66 to be paid for transportation services prior to audit that have dispositive effect and constitute a settlement action as defined in sec. 53.1 will be reviewed by the Comptroller General, provided request for review of such action is made within six months (not including time of war) from the date such action is taken or within the periods of limitation specified in 49 U.S.C. 66(a), whichever is later.

Sec. 53.3 Requests for review.

Requests for review of settlement actions by the General Services Administration should be addressed to the Comptroller General of the United States, U.S. General Accounting Office, Washington, D.C. 20548. Each request for review must identify the transaction as to which review is requested by the date the action was taken, the Government bill of lading or Government transportation request number, the carrier's bill number,

Government voucher number and date of payment, General Services Administration claim number, or other identifying information, to enable speedy location of the pertinent records. Each request for review should state why the action taken is believed erroneous and specify any factual, technical, or legal basis relied on.

Sec. 53.4 Copies to General Services Administration.

Review of settlement actions will be expedited if a copy of the document requesting review by the Comptroller General is sent to the General Services Administration to facilitate assembly of the pertinent records."

CHAPTER 15

Section 22 QUOTATIONS

Section 22 of the Interstate Commerce Act provides that nothing in Title I of the Act shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States. While Title I pertains to interstate common carriers by rail and pipeline, the provisions of section 22 have been made applicable to (1) motor common carriers and (2) water common carriers and freight forwarders subject to regulation by the Interstate Commerce Commission by 49 U.S.C. 317 (b), 906(c) and 1005(c).

A tender or quotation to the Government made pursuant to Section 22 of the Interstate Commerce Act usually is an offer either to perform transportation services at a reduced rate or to furnish, at the going rate, an additional service not available to the public. The offer is usually made so that the offeror may secure part or all of the available traffic contemplated by the tender. Upon the Government's accepting the tender by offering goods for carriage under its terms, a contract generally is formed.

Although section 22 quotations should be filed with the Interstate Commerce Commission and, except for those involving information the disclosure of which would endanger the national security, preserved for public inspection, there is no special form for quotations or tenders. Very often a simple letter embodying an advance (or retroeffective) agreement to apply certain rates or routes or the provision of certain tariffs will suffice. While some agencies now have special standard forms for use in submitting section 22 quotations or tenders, informal agreements reduced to some form of writing are considered valid.

Free or Reduced Rate Transportation

Section 217(b) of the Interstate Commerce Act, 49 U.S.C. 317(b), which generally prohibits deviations from the legally published tariff provisions, also makes applicable to common carriers by motor vehicle subject to Part II of the Act the provisions of Section 22, and numerous court decisions have established the principle that a rate tender extended to the Government under Section 22 provides an exception to the rule requiring the carriers to collect their legally published tariff charges. B-179386, October 15, 1973.

Free or Reduced Rate Transportation

Motor carriers in interstate commerce are permitted under sections 22 and 217 of the Interstate Commerce Act to contract with the United States for transportation services either without charge or at rates less than those published and filed with the Interstate

Commerce Commission. C & H Transportation Co., Inc. v. United States, 436 F.2d 480, 483, 193 Ct. Cl. 872, 878 (1972).

Section 22 in conjunction with section 217(b) of the Interstate Commerce Act, 49 U.S.C. 22 and 317(b), allows an exception when the carrier is dealing with the Government to the usual proscription against collecting a different amount for the transportation service than prescribed by tariff, and permits a carrier to adjust rates after a shipment has moved. B-172498, March 20, 1972.

Retroactive Issuance and Application

Responding to carrier's contention that commodity rates applied to furniture shipments were not unreasonable although they were higher than classification, and that carrier would be exposed to I.C.C. sanctions for deviating from filed rates if presumptively unreasonable charges were refunded, I.C.C. has stated that sec. 22 rate need not be established until after service has been performed, and numerous court decisions have established that rate tender extended to the Government under section 22 provides an exception to general prohibition in section 217 (b) of Interstate Commerce Act against deviations from legally published tariff provisions. B-168440, July 21, 1971.

Free or Reduced Rate Transportation

Arrangements to reduce legal freight charges, otherwise a violation of the Elkins Act, 49 U.S.C. 41-43, can be effected under section 22 of the Interstate Commerce Act, 49 U.S.C. 22, which operates to exempt from the rate regulation of the Act transportation services performed for the United States and a carrier need not abide by its published rates when dealing with the Government. B-175560, January 4, 1973.

Mandatory or Elective

The right of carriers to transport property free or at reduced rates is elective and not mandatory. United States v. Union Pacific R. Co., 28 I.C.C. 518, 523-524 (1913).

Voluntary Rates

Special rates to the Government are offered voluntarily by common carriers, such as railroads, under Section 22 of the Act (49 U.S.C. 22). 53 Comp. Gen. 977 (1974).

Released Valuation--Bill of Lading Provision

Condition 5 of the Government bill of lading that "shipment is made at the restricted or limited valuation specified in the tariff or

classification at or under which the lowest rate is available" entitles the Government on a shipment subject to a section 22 quotation that does not require notice of shipper's released valuation in a specified form to the lowest rate provided in the quotation--the released value rate. Even though a quotation is not a "tariff or classification" within the strict meaning of the Interstate Commerce Act, it is the schedule of charges for services contemplated by the definition of the word "tariff"--a statement by a carrier that it will furnish certain services under certain conditions for certain prices, a schedule of rates and charges. 48 Comp. Gen. 335 (1968).

Released Value Quotations--Acceptance

Released valuation quotations which are offered by common carriers to the U. S. for transportation services under 49 U.S.C. 22 and which require the agreed or released valuation to be declared on the bills of lading in a specified form as a condition to the use of a reduced rate offer, may not be regarded as having been accepted by the Government by the mere existence of a provision on the back of the bill of lading (i.e., Condition 5) concerning released valuation shipments in the absence of the required statement in the specified form. 38 Comp. Gen. 768 (1959).

Acceptance

Rate quotations are continuing unilateral offers and it is an elementary principle of contract law that offers to be accepted, must be accepted in the precise terms in which they are made. Any material variance in an offer constitutes a counter offer which requires acceptance by the offeror to become operative. 53 Comp. Gen. 747, 749 (1974).

Acceptance

Carrier tenders under Section 22 of the Interstate Commerce Act, 49 U.S.C. 22 (1970), are offers to furnish transportation services at special rates and conditions; they are subject to established principles of contract law, one of which is that acceptance of offer must comply exactly with conditions of offer. B-196928, March 28, 1977.

Acceptance

Where offer in Tender 1-W is conditioned to apply "only in absence of an applicable Tender", existence of applicable individual tender 150 prevents acceptance of Tender 1-W. B-186928, March 28, 1977.

Bid Evaluation

In the evaluation of f.o.b. origin bids, the use of preferential rates offered to the Government by common carriers pursuant to 49 U.S.C. 22 is required under paragraph 1-1313 of the Armed Services Procurement Regulation without evaluating the responsibility of a carrier, who possessing a certificate of public necessity from the I.C.C. is presumed to be fit, willing and able to perform in accordance with the requirements, rules and regulations of the Commission. 46 Comp. Gen. 77 (1966).

Bid Evaluation

Effective date for bid evaluation purposes. For purpose of using carriers' "section 22" tenders in evaluation of bids under solicitation for field desks, there is no provision in ASPR for evaluating carriers' responsibility or likelihood that preferential "section 22" tenders offered to Govt. by carriers will still exist on date of shipment. However, since "section 22" tenders are continuing unilateral offers which may be withdrawn by carrier in accordance with terms of particular tender, even though there is no assurance of continued existence of tender, contracting agency need not determine in evaluating bids that these rates will exist on date of shipment, so long as they are in effect or are to become effective prior to date of expected shipment and are on file or published as provided in ASPR 19-301.1(a). 53 Comp. Gen. 443 (1973).

Bid Evaluation

Contention that preferential "section 22" rates tendered by carriers regulated by ICC to the Government cannot be used in computing transportation costs for evaluation of f.o.b. origin bids to furnish field desks, since clause in ASPR 7-103.25 was not included in IFB, is not valid because wording of clause appears verbatim in invitation. Moreover, ASPR 19-217.1(a), which protestant views as requiring inclusion of clause, only requires inclusion if contractor may be required by the Government to ship desks under prepaid commercial bills of lading. 53 Comp. Gen. 553 (1973).

Responsive Bid

Where a carrier bids certain rates for services not fully covered by filed tariffs, his bid will be considered responsive notwithstanding the fact that the quoted rates were not filed with the Interstate Commerce Commission; under section 22 the filing may be accomplished later, to apply retroactively. B-158634, October 6, 1966.

Contractor Shipments

Both Appellate Division and Review Board of Interstate Commerce Commission denied reconsideration of finding and order of Administrative Law Judge who agreed with GAO that contractor shipments were property of U.S. and that inland shipments should be rated at lower rates provided by Section 22 Quotation 120, and since Court of Claims ordered referral of question over opposition of Government, GAO believes court should now follow decision and order of Commission. Port additive charge and port terminal allowance issues are also involved in lawsuits involving Government contractors. B-166436-O.M., April 5, 1974.

Cost-Plus-a-Fixed-Fee Contractors

Shipments by a cost-plus-fixed-fee Government contractor that move on commercial bills of lading indicating the transportation charges are borne by the Government, even though not paid over to the carrier by the Government, qualify for section 22 rate privileges, the Government receiving the actual and total benefit of the special rates. 45 Comp. Gen. 118 (1965).

Reimbursement of Charges

Since section 22 authorizes preferential rates "for or on behalf of" the Federal Government, reduced rates and charges which the Government ultimately assumes as a distinct item of reimbursement to a supply contractor are legal. Givens v. Louisville & Nashville R. Co., 140 I.C.C. 605, 606 (1928).

Released Valuation

The released value rates in a tariff supplement (requiring a shipper statement of declared value) filed with the Interstate Commerce Commission (I.C.C.) by a motor carrier after contracting to transport Government shipments at lower than tariff rates pursuant to 49 U.S.C. 22, do not apply to the tender, and the liability of the carrier for damage to equipment transported at the reduced rates is the full value of the damage, because the intent that the released value rates apply with the tender rates does not appear in the tariff supplement or in the tender nor is it otherwise evidenced. And the carrier having accepted the shipment without the required value declaration on the face of the bill of lading, the fact that the tender is subject to the rules and regulations on volume shipments on file with the I.C.C.

does not operate to incorporate the released value rates into the tender or to convert the unreleased quotation rates into an offer of a choice of rates based on valuation, and, only a single rate having been offered, the printed restricted value provision (Condition 5) on the bill of lading does not limit carrier liability. 45 Comp. Gen. 42 (1965).

Released Valuation

Although released value rates are declared by section 20(11) of the Interstate Commerce Act, 49 U.S.C. 20(11), to be unlawful and void except in the case of passenger baggage or approval by the Interstate Commerce Commission, under section 22 of the Act, 49 U.S.C. 22, reduced rates conditioned upon limited liability may be granted to the Government for the transportation of commodities for which released value rates have not been approved by the Commission. See 38 Comp. Gen. 768 (1959). B-159554-O.M., August 11, 1970.

Released Valuation

All freight rate offered to the Government under sections 22 and 217(b) of the Interstate Commerce Act, was not subject to released valuation, since it was the only all freight rate available to the Government and to be effective a restrictive valuation must offer shipper a choice of rates not subject to restriction. 53 Comp. Gen. 747 (1974).

In the case of transportation of Government property, carriers may offer reduced rates based on limited liability even though the rates have not been approved by the Commission, under 49 U.S.C. 22, citing 38 Comp. Gen. 768 (1959). B-168106, March 14, 1974.

Released Valuation

Lower rates in carrier's section 22 rate tender covering office equipment apply, and valuation charges provided in governing tender not assessable where shipments moved on commercial bills of lading marked for conversion to Government bills of lading (GBL), since shipments deemed released to value not exceeding 60 cents per pound per article under terms of governing tender and Condition 5 of GBL selects lower rates in absence of tender requirement for declaration of value. 53 Comp. Gen. 868 (1974).

Agency Not Party to Quotation

A common carrier quotation under 49 U.S.C. 22, granting a special lower-than-tariff arrangement to individual agencies of the U.S., is an offer to furnish transportation services at special rates and charges, subject to the terms and conditions specified, which offer is accepted and ripens into a contract as to a particular shipment when the offeree elects to and does utilize the service described in the offer and settles the charges in accordance with its terms, and the carrier-offeror having the right to select the party with whom to deal, a section 22 tender issued and specifically limited to a certain agency may not be accepted and used by another agency unless the carrier-offeror, even if only by a bill of lading annotation, authorizes such use of the section 22 quotation. 45 Comp. Gen. 118 (1965).

Agency Not Party to Quotation

Payment for shipment of Electrical Instruments, NOI, by Coast Guard, which was transported in 40-foot trailer given exclusive use, with released valuation of 60 cents per pound, properly was computed under Trans Country Van Lines Tender I.C.C. No. 50--a section 22 Tender--that had been referenced in the Government bill of lading, and carrier is not entitled to additional charges claimed. Carrier's claim is based on Government Rate Tender I.C.C. No. 1-U, which names Coast Guard because Tender I.C.C. No. 50 does not, and on fact its commercial bill of lading makes reference to I.C.C. No. 1-U. However, I.C.C. No. 50, section 22 Tender is offered to the "United States Government" and until canceled is available to any Government agency, without giving special notice, that is willing to do business with offering carrier, unless agency is specifically excluded from Tender. 52 Comp. Gen. 927 (1973).

Agency Not Party to Quotation

Applicability of special rates to all agencies nonetheless motor carrier contends that since shipment was transported for Coast Guard (CG), I.C.C. No. 50 has no application because allegedly tender was offered solely to Military Traffic Management and Terminal Service (MTMMS) or Military Departments and not to CG; however, GAO stated that a "section 22 tender carrier offers generally to U.S. Government" is available to any Government agency not excluded, willing to do business with offering carrier. Item 10 of I.C.C. No. 50 constitutes continuing offer to U.S. General offer made to particular class of persons may be accepted by anyone coming within description of class. See 37 Comp. Gen. 753 (1958). B-178237, October 9, 1973.

Reimbursement by Using Agency

Tenders offered pursuant to 49 U.S.C. 22 to the Military Traffic Management and Terminal Service or to the General Services Administration (GSA) are available on traffic for account of the National Aeronautics and Space Administration (NASA) under a Government bill of lading, or a commercial bill of lading for conversion to a Government bill of lading, where the charges billed to and paid by the military or GSA cite a military or GSA appropriation and are subject to reimbursement, notwithstanding the fact that a rate tender is individual to the offeree, because the tender of special rates would be accepted by the designated offeree with whom the carrier-offeror deals exclusively, and when the bargain between the parties is completed upon payment of the charges by the offeree on the shipments made for the account of another party, the carrier-offeror has no interest in the reimbursement arrangement between the offeree and the other party.

Direct Payment to Carrier by Using Agency

The fact that a Government agency other than the offeree tendered special rates pursuant to 49 U.S.C. 22 is billed and pays the charges on shipments made for its account under Government bills of lading issued by the offeree and citing the appropriation of the using agency, or on commercial bills of lading for conversion to Government bills of lading, does not operate to bar the applicability of the section 22 rates, the designated offeree by issuing the bill of lading having accepted the offer of the carrier and entered into a contract assumes the status of a consignor liable for the freight charges should the consignee default, absent a special contractual provision to the contrary; therefore, the Military Traffic Management and Terminal Service or the General Services Administration may issue bills of lading on traffic for the account of the National Aeronautics and Space Administration, notwithstanding the fact that the shipping charges are to be billed to and paid by that agency; however, a rate tender would not be applicable if the bill of lading were issued by an agency other than the offeree, absent a showing of the offeror's intent to extend the section 22 rates to other agencies. 45 Comp. Gen. 118 (1965).

Quotation Rates Higher Than Tariff Rates

49 U.S.C. 22 while permitting transportation of Government property at reduced rates does not authorize officers of the Government to contract for transportation at rates higher than those available to the general public for the same service. 44 Comp. Gen. 769, 772 (1965).

Charges Higher Than Filed Tariffs

It is contended that audit and settlement of transportation bills for services performed for Government utilizing two 26-foot flatbed trailers pulled by one truck-tractor (double bottoms), is contrary to B-175517, August 3, 1972, inasmuch as furnishing of "double" trailers is unusual and special services; however, there is no authority whereby carriers may contract to furnish services for U.S. at charges higher than those provided in tariffs on file with Interstate Commerce Commission; therefore, carrier cannot, by voluntarily filing section 22 quotation with agency and making equipment available, preclude Government from making its shipments at lower published tariff rates. See 39 Comp. Gen. 352, 354 (1959) B-175517, February 16, 1973.

Quotation Rates Higher Than Tariff Rates

Section 22 of the Interstate Commerce Act, 49 U.S.C. 22, provides only for free or reduced rates and does not authorize export rates which are higher than domestic rates available to the public, since carrier neither furnishes nor absorbs warfage or car unloading and, therefore, performs no different service. B-164696, December 17, 1971.

Higher Than Normal Tariff

The maximum freight rates which can be demanded from the Government for transportation services furnished by motor vehicle common carriers are the rates specified in the carriers' tariffs regularly published and filed with the Interstate Commerce Commission, and such rates must prevail over higher rates which are specified in a special quotation offered by the carriers and filed by the Government. 35 Comp. Gen. 681 (1956).

Quotation Higher Than Tariff

A project of the General Services Administration, originally dealing with freight, all kinds, rates, from a Government installation at Hingham, Massachusetts, and later extended to various geographical zones in the country was approved. The project anticipated that some of the individual quotation rates would be higher than tariff rates, but the quotation overall resulted in rate economies to the Government. B-154967, December 22, 1964, also B-130335, April 9, 1957.

Through Rate - Change of Destination

The diversion en route to the port of New Orleans of a shipment of household goods picked up in Germany to a destination in the U.S. other than the one to which consigned does not effect the application of the through rate provided in Quotation I.C.C. No. 14, the quotation containing no routing requirement prescribing the particular ports via which the through rates apply; although the port of New York would have been closer than New Orleans to the ultimate destination of the shipment, it is irrelevant that the shipment entered one port rather than another and the carrier is not entitled for that reason to payment in excess of the prescribed through rate; and the rates having been offered under 49 U.S.C. 22, the omission of a rule for computing transportation charges on diverted shipments, coupled with the inclusion of a means to ascertain the diversion service charge, justifies the construction that the through rate applied to the shipment diverted en route. 44 Comp. Gen. 146 (1964).

Point of Shipment Origin Effect

Waiver of routing restrictions in TCFB Freight Tariff No. 5-B, contained in joint quotation Union Pacific No. 19, Southern Pacific No. 7, relating to shipments stored in transit at Ordnance, Oregon, and reshipped to Port Chicago, California, for export, construed to apply only to those portions of through routes west of interchange points with Union Pacific because those carriers participating in the routes east of such interchange points are not parties to the joint quotation. B-180856-O.M., May 10, 1974.

Misrouted Shipment

An initial motor carrier who was tendered unrouted Government shipments subject to a special rate quotation authorized under 49 U.S.C. 22 and who forwarded them over the lines of connecting carriers other than carriers participating in the special rate quotation, in the absence of any evidence that the destination carrier had knowledge of the misrouting, is the carrier responsible for the misrouting and, therefore, the carrier liable for the excess transportation charges. 43 Comp. Gen. 55 (1963).

Rates on AEC Training Materials (Military Impedimenta)

An offer under 49 U.S.C. 22 to transport in passenger train service Atomic Energy Commission (AEC) shipments of training material in Government-owned cars under the same conditions and at the same

rates as those available for the transportation of military impedimenta is an offer to move the shipments under the Joint Military Passenger Agreement (JMPA) in effect at the time the transportation service is furnished; since the pertinent agreement provides that charges for transporting military impedimenta will be the same amount in dollars and cents as would apply if the shipments moved in regular freight train service under current tariffs and agreements with the military authorities, the section 22 quotation offered to the AEC requires that the same basis of charges apply equally in computing charges for the transportation of training materials for the AEC. 42 Comp. Gen. 203 (1962).

Reduced Rates Filed After Bid Opening

To permit a bidder after bid opening to offer to ship the equipment by a motor carrier who subsequent to opening of bids tendered a reduced transportation rate under 49 U.S.C. 22 would be tantamount to reserving to the bidder the right to modify his bid with respect to transportation rates after bid opening and contrary to proper procurement practices which require transportation costs to be evaluated on the basis of the rates actually filed and published at the time the bids are opened. 39 Comp. Gen. 774 (1960).

Restrictive Note Part of Offer

A restrictive note in a motor carrier quotation under 49 U.S.C. 22 which makes a truckload rating on a particular item applicable to the actual weight loaded in the vehicle used subject to a minimum weight of 25,000 pounds, but which requires the issuance of separate bills of lading for the contents of each vehicle, is to be interpreted-- in view of the statutory duty on the carrier to issue bills of lading-- as a part of the offer, imposing on the carrier when tendered a shipment which exceeds the capacity of the vehicles, the duty to inform the shipper and to see to the issuance of the necessary additional bills of lading. 39 Comp. Gen. 678 (1960).

Issuance of Separate Bills of Lading

The failure of a motor carrier under a section 22 quotation which provides for the issuance of separate bills of lading for each vehicle, to require the issuance of an additional bill of lading at the time a Government shipment was accepted under one bill of lading when the shipment was actually moved to the destination in two vehicles does not make the Government liable for additional transportation charges. 39 Comp. Gen. 678 (1960).

Continuing Offer v. Continuing Contract

A section 22 motor carrier tender which provides that the tender when accepted by the Government by making any shipment will constitute a transportation agreement, is not a continuing contract upon acceptance of the first shipment which obligates the Government by reason of the carrier voluntarily making available its trucks at specified points on a regularly scheduled basis, regardless of whether any freight is shipped, but instead is a continuing offer to enter into a series of contracts governing each shipment as tendered. 39 Comp. Gen. 352 (1959).

Continuing Offer v. Continuing Contract

Rate tenders issued pursuant to 49 U.S.C. 22 are considered to be continuing unilateral offers to perform transportation services for stated prices. Amendment to rate tenders which increased rates on past shipments are invalid because Government officers have no authority to change or modify existing Government contracts so as to increase the Government's liability without corresponding increased benefit to the U.S. B-154967-O.M., December 31, 1975.

Continuing Offer

Rate quotations made to the United States by carriers under section 22 of the Interstate Commerce Act, as amended, 49 U.S.C. 22, made applicable to motor carriers by 49 U.S.C. 317(b) are continuing unilateral offers to perform transportation services at named ratings or rates subject to the terms and conditions named therein. B-177354, June 21, 1973.

Continuing Offer

An offer under section 22 of the Interstate Commerce Act ripens into an agreement or contract when accepted by the Government by making any shipment or settlement under its terms. B-177354, June 21, 1973.

Contract or Offer

A tender voluntarily made to the Government pursuant to section 22 is a continuing unilateral offer which, as provided in item 10 thereof, ripens into an agreement or contract when accepted by the Government by "making any shipment or settlement under its terms." 37 Comp. Gen. 753, 754 (1958).

Continuing Offer

Tenders under section 22 and 217(b) of the Interstate Commerce Act constitute continuing offers by the carriers to ship goods for the Government in accordance with the provisions of the various tenders. C & H Transportation Co., Inc. v. United States, 436 F.2d 480, 481, 193 Ct.Cl. 872, 875 (1972).

Tenders are continuing unilateral offers; when accepted according to their terms, they ripen into contracts which are subject to interpretation according to established principles of contract law. They are not tariffs and are not applicable to commercial traffic but are restricted to apply on transportation furnished to U. S. Government, and they should not be so narrowly or technically interpreted as to frustrate their obvious design, but should be given meaning in light of principal apparent purposes they were intended to serve. See 37 Comp. Gen. 753, 755 (1958); B-170829-O.M., February 22, 1971.

Continuing Offer v. Continuing Contract

Tenders are rate quotations made to the United States under section 22 of the Interstate Commerce Act, as amended, 10 U.S.C. Code 22, made applicable to motor carriers by 49 U.S.C. 317(b), and are continuing unilateral offers to perform transportation services at named ratings or rates subject to the terms and conditions named therein. See C & H Transportation Co. v. United States, 436 F.2d 480, 481; 193 Ct.Cl. 872 (1971). The offer ripens into an agreement or contract when accepted by the Government by making any shipment under its terms. 53 Comp. Gen. 747 (1974).

Continuing Offer

"Rate tenders issued pursuant to 49 U.S.C. 22 and 317(b) * * * are considered to be continuing offers to perform transportation services for stated prices. 51 Comp. Gen. 541 (1972); 43 id 54, 59 (1963); 39 id 352 (1959); 37 id 753, 754 (1958). As continuing

offers they create in the person to whom the offers are made (the offeree) the power to make a series of separate contracts by a series of independent acceptances, and that power is good until effectively revoked by the person making the offers * * *. And it is settled that to be effective the offeror's revocation of an offer must be communicated to an received by the offeree * * *. B-181879, August 10, 1976.

Tariff Charges v. Quotation Charges

A motor carrier who voluntarily files a section 22 quotation with a Government agency and makes trucks available at the designated points specified in the tender on a regularly scheduled basis cannot preclude the Government from making its shipments at the lower published tariff rates, there being no authority in the Interstate Commerce Act or elsewhere whereby carriers may contract to furnish services to the United States at rates or charges higher than those in tariffs lawfully on file with the Interstate Commerce Commission. 39 Comp. Gen. 352 (1959).

Tariff Charges v. Quotation Charges

Carrier's claim for refund of \$54.50 deducted overcharge covering separate packing charges on household effects published in first part of Item 105 of Bureau's Military and Government Rate Tariff No. I-1 (MRS 1-D) should be denied since carrier's individual ICC Rate Tender No. 1425 was issued for sole purpose of changing maximum charge provisions in second part of Item 105 of MRT 1-D inasmuch as tender does not relate to line-haul or to any accessorial services other than packing, and tender expressly excepted maximum packing provision of MRT 1-D, reflecting intent to substitute tender provision for entire maximum charge provision MRT 1-D, including exception which constituted integral and inseparable part thereof. B-168955-O.M., February 12, 1970.

Unlike tariff rates, which are available to the public as well as to the Government and which must be filed with the Interstate Commerce Commission generally a minimum of 30 days before they can be made effective, Section 22 rates can be made effective immediately or even retroactively. 53 Comp. Gen. 977 (1974).

Tariff Charges v. Quotation Charges

On question of whether tariff or quotation rates must be used with particular tariff provision that states charge basis for exclusive use of vehicle service, it is clear from item 10 of Quotation

14-A that it contains rates for subject shipment of class A explosives, unless lower rates are available by tariff, since note I of item 5 in Quotation 14-A makes its provisions paramount, and said quotation contains no separate "exclusive use" provision, but does incorporate by reference such provision from item 570 of Tariff 30-C. Accordingly, applicable rate under paragraph 4 of item 570 is rate named in Quotation 14-A, and not higher rate in tariff. B-174445, January 4, 1972.

Lowest Common Carrier Costs

In view of 49 U.S.C. 22, there is no authority for procuring transportation services from one common carrier at a cost in excess of that for which equally satisfactory transportation could have been procured--without advertising--from another common carrier lawfully operating in the territory where such services are to be performed. 20 Comp. Gen. 793 (1941).

Tariff Rules Incorporated

A motor carrier's tender, pursuant to 49 U.S.C. 22, which offered the Government cheaper rates than those normally applicable under specific tariffs and which was silent as to the application of classification, exception and rate tariffs, except as specifically provided for certain packing requirements and accessorial services, to be construed as an operative tender requires the conclusion that the omission of applicable tariff provisions was by deliberate intent of the offeror who did not intend to be subject to tariff rules, and therefore, upon acceptance by the Government making a shipment, the Government became entitled to the cheaper rates offered in the tender. 37 Comp. Gen. 753 (1958).

Tariff Rules Incorporated

Carload rates named in a section 22 quotation apply on a mixed carload of commodities named in the quotation and other commodities since mixing rule published in carrier's filed tariff was incorporated into quotation by reference as a rule which decreases the amount to be paid, there being nothing to the contrary in the quotation. Union Pacific R. Co. v. United States, 434 F.2d 1341, 193 Ct.Cl. 521 (1970).

Tariff Rules Incorporated

Since Court of Claims in Union Pacific case--decided Dec. 11, 1970--construed "omnibus clause" in section 22 quotation, without qualification, as effectively incorporating mixed carload rule (Rule 10) of governing classification in computing charges for involved shipments, such incorporation should encompass all forms of

rule that would be applicable where no section 22 quotation is involved. Accordingly, carriers' bills respecting mixed carload shipments containing articles subject in part, or entirely, to section 22 quotation incorporating substantially the omnibus rule in section 22 quotation considered in above decision, should be audited accordingly. B-157117-O.M., April 28, 1971.

Tariff Rules Incorporated

Where each B/L covering shipment moving in trailer-on-flat (tofc) car service is annotated to show that shipment is subject to TCFB Section 22 Quotation No. 920, notice of overcharge based on determination that rates provided in TCFB Section 22 Quotation No. 922 were applicable should be cancelled since substituted service rules of transcontinental tariffs are neither expressly incorporated by reference into Quotation No. 922 nor may be read into quotation by necessary inference through omnibus clause (Quotation No. 920 expressly applies to tofc service and would be inapplicable if lower rates of Quotation No. 922 were construed as applying to service).

Tariff Rules Incorporated

Contention is that carrier states it has not kept its operating authorities in section 22 quotation up to date. Carrier may limit its operating authority as it sees fit in section 22 quotation; however, in order to incorporate section 22 quotation with regular tariff provision, intention of parties to accomplish this must be apparent, either by express provision or necessary inference. No intention was expressed in Quotation I.C.C. No. 45 to incorporate any of carrier's Tariff No. 7. Fact that operating authority in section 22 quotation may have been outdated is irrelevant since quotation can only be construed according to its language. B-179429-O.M., January 14, 1974.

Tariff Rules Incorporated

A common carrier may be reference incorporate into a Government rate tender the transportation services and charges published in other tariffs. 54 Comp. Gen. 610 (1975).

Construction and Interpretation

As a contract, a quotation is subject to interpretation according to established principles of contract law. It should not be so narrowly or technically interpreted as to frustrate its obvious design, but should be given a meaning in the light of the principal apparent purpose that it was intended to serve. 37 Comp. Gen. 753, 755 (1958).

Since most tenders are drafted by the submitting carrier or its agent, the language of the tender should be construed most strongly against the carrier and any doubt as to meaning should be resolved in favor of the Government. 39 Comp. Gen. 352, 355 (1959).

A Joint Military Passenger Agreement under 49 U.S.C. 22 for the transportation of military impedimenta in passenger service is in the nature of a special tariff covering specified transportation services for the Government and like any other tariff is to be construed according to the meaning which the words used reasonably convey; therefore, an offer to transport military impedimenta in passenger train service at the same charge--"the same amount in dollars and cents"--as if the shipment had moved in regular freight service requires a determination of what the normal freight charges would be on a like shipment of military impedimenta in freight service, and then those charges (dollars and cents) are to be applied via the passenger route. 42 Comp. Gen. 203 (1962).

The principles followed in the interpretation of a section 22 quotation are no different in character from that presented in the interpretation of any other document. Whenever possible, effect must be given to each word, clause or sentence and none should be rejected for lack of meaning or as surplusage. 44 Comp. Gen. 419, 420 (1965).

Construction and Interpretation

A section 22 quotation or agreement is not an inherently different type of tariff document to which rules of construction different from those generally applicable to the interpretation of tariff documents apply. Union Pacific R. Co. v. United States, 434 F.2d 1341, 1345, 193 Ct. Cl. 521, 529 (1970).

Construction and Interpretation

Any ambiguity in construction of a section 22 quotation must, in accordance with the normal rules relating to the interpretation of documents, be construed against the carrier, since it is the author of the quotation. Union Pacific R. Co. v. United States, 434 F.2d 1341, 1346, 193 Ct. Cl. 521, 530 (1970).

Construction and Interpretation

The ordinary rules of contract interpretation apply to a section 22 quotation as well as to a regular tariff. The intent of the parties is controlling. Union Pacific R. Co. v. United States, 434 F.2d 1341, 1345, 193 Ct. Cl. 521, 529 (1970).

Construction and Interpretation

Refund claim for transportation overcharges deducted for packing services (re special containers), which carrier alleges are excepted in Schedule B of individual tender (I.C.C. No. WB-267) from maximum charges set for item 20 in association tender (I.C.C. No. 1-U), is denied since no such exception appears in maximum charge provision of individual tender, language of which is plain and unambiguous, and intent thus manifested is alone intention to which law gives effect. Although section 22 quotations are strictly construed by Court of Claims, carrier would have Government read language into individual tender which is neither expressed nor required by implication; moreover, carrier agent's initial billing, in accordance with express language of Schedule B, supports Government position. B-165643, May 9, 1969.

Personal Effects and Unaccompanied Baggage

On issue of whether charges on silverware and other high value commodity shipments should have been assessed on basis of commodity rates in section 3 of Railway Express Agency Section 22 Quotation II-B, applying to "Unaccompanied Baggage and Personal Effects," although Joint Travel Regulations fail to define "personal effects" and apparently consider them as household goods, since par. M8006 authorizes separate shipment and expedited mode of transportation for property which is prone to pilferage or needed for member's duties or to prevent hardship, quotation description "Unaccompanied Baggage and Personal Effects" is construed to mean that portion of member's prescribed allowance of household goods which is authorized to be shipped separately, by expedited mode of transportation, from bulk of member's household goods. B-168275-O.M., January 16, 1970.

Construction and Interpretation

Rules for the interpretation of tariffs and quotations under section 22 of the Interstate Commerce Act are the same as rules for the interpretation of contracts, and the intent of the parties is controlling. Thus, the interpretation of readjustment provisions in contracts for transportation of fuel in pipelines is upheld, where carrier's intention is plain on the face of its offer, carrier receives a reasonable return on investment, and, if offer were ambiguous it would have to be construed strongly against the carrier author. 55 Comp. Gen. 1423 (1976).

Construction and Interpretation

Tenders are continuing unilateral offers; when accepted according to their terms, they ripen into contracts which are subject to interpretation according to established principles of contract law. They are not tariffs and are not applicable to commercial traffic but are restricted to apply on transportation furnished to U.S. Government, and they should not be so narrowly or technically interpreted as to frustrate their obvious design, but should be given meaning in light of principal apparent purposes they were intended to serve. See 37 Comp. Gen. 753, 755 (1958), B-170829, February 22, 1971.

Ambiguity

Where the provisions of a Section 22 Quotation create ambiguities, they are to be resolved against the carrier and in favor of the shipper. B-187317, January 27, 1977.

Point of Shipment

Claim for freight overcharges deducted pursuant to 49 U.S.C. 66 in payment of shipment of pallets of empty projectiles from Twin Cities Army Ammunition Plant, Minn., under Government bill of lading that made reference to section 22 I.C.C. (49 U.S.C. 22) special tariff rate--185--for shipments originating from New Brighton, Minn., located 2 1/2 miles from plant, was properly disallowed. Interpreting tender--continuous unilateral offer--as any other contract document to determine intent of parties, evidences plant and New Brighton are not different locations since it is common knowledge ammunition plants are not located within municipalities, Government agent believed special tariff rate applied or other carriers would have been tendered shipment, and carrier's agent did not object to B/L reference to I.C.C. 185 tender, issued to secure ammunition traffic. 51 Comp. Gen. 724 (1972).

Construction and Interpretation

A contract under section 22 of the Interstate Commerce Act, is subject to interpretation according to established principles of contract law. B-177354, June 21, 1973.

Construction and Interpretation

"Section 22 quotations or tenders * * * are not inherently so different from standard tariffs as to justify the application of rules of construction different from those applicable to the interpretation of tariffs" and "a tariff is no different from any other contract, in that its true application must sometimes be determined by the factual situation upon which it is sought to be impressed." Therefore,

notations required by tender were not intended to put form over substance, and any notations which substantially furnishes the information needed constituted substantial compliance with the requirement. B-183459-O.M., May 29, 1975.

Construction and Ambiguity

Shipments from the Twin Cities Army Ammunition Depot, located principally outside but adjoining New Brighton, Minnesota, are governed by Section 22 Quotation covering movements of ammunition from New Brighton, since the depot being the only source for movements of ammunition, the quotation would otherwise have no application and "The controlling principles are that for Section 22 quotations like other freight tariffs, the intent of the parties is controlling* * *, a reasonable construction linked to the shipped article is to be preferred over an absurd, strained, unnatural or improbable reading* * *, and that Section 22 ambiguities are resolved against the carrier. Red Ball Motor Freight, Inc. v. United States, Ct. Cl. Nos. 253-73, 419-73, decided May 28, 1976.

Construction

In Dealers Transit, Inc. v. U.S., Ct. Cl. No. 810-71, plaintiff argues that it was intention of carriers publishing Tender No. 200 to exempt from its operation commodities listed in Item 172, Tariff 13 (including dummy bombs); however, defendant contends that lower rates are provided by Tender 200 under section 22 of Interstate Commerce Act. Ordinary rules of contract interpretation apply--intent of parties is controlling. Parties to Tender 200 did not intend to exclude dummy bombs; moreover, under rules of tariff construction, tariff should be construed against carrier since carrier drafted tariff. B-174498, November 9, 1973.

Retroactive Amendment

On the basis of additional information which indicates that an amendment to a quotation gave the Government certain increased rights and privileges not previously available to it, and which made increased freight rates on Government shipments retroactively effective, the amendment will be regarded as having been supported by valuable consideration for application of the retroactive increase to shipments in storage at the transit point. 38 Comp. Gen. 449 (1958).

Advertising

Section 22 contracts are exempt from the statutory requirement that Government purchases of supplies or services shall be made through formal advertising. 49 U.S.C. 65(a).

State Laws

California statute was unconstitutional insofar as it prohibited carriers from transporting property of the United States at rates (section 22) other than those approved by the California Commission. Public Utilities Commission of California v. United States, 355 U.S. 534 (1958).

In ruling that California Public Utilities Commission case was not restricted for application only to military shipments the Supreme Court said that the state attempt to regulate Section 22 rates on intrastate traffic was unconstitutional. United States v. Georgia Public Service Commission, 371 U.S. 285 (1963).

Procurement

Procurement of transportation services is authorized from any common carrier lawfully operating in the territory where such services are to be performed. 49 U.S.C. 65.

Intrastate Carrier

In Francis v. United States, 320 F.2d 191 (1963), it was held that an intrastate carrier subjected itself to the Interstate Commerce Act and thus to section 322 of the Transportation Act of 1940, when it adopted as its own the rates and charges applicable to particular Government traffic published by an interstate carrier pursuant to 49 U.S.C. 22. 43 Comp. Gen. 461, 464 (1963).

Ocean-Land Transportation

The legality of an offer, purportedly under section 22 and 217(b) of the Interstate Commerce Act, 49 U.S.C. 22, 317(b), of single factor through joint motor and overseas ocean transportation has been questioned, since the Shipping Act of 1916, 46 U.S.C. 801, does not incorporate provisions similar to Sections 22 and 217(b), but the ocean carrier, by becoming a party to the Section 22 quotation, may be regarded as falling within the meaning of the phrase "common carrier subject to the Interstate Commerce Act" under the doctrine of United States v. Francis, 320 F.2d 191 (1963). B-177408-O.M., January 2, 1973.

Under the doctrine of United States v. Francis, 320 F.2d 191, 195 (9th Cir. 1963), by becoming a party to a Section 22 quotation the ocean carrier, Sea-Land Service, Inc., may be regarded as falling

within the meaning of the phrase "common carrier subject to the Interstate Commerce Act, and subject to the 3-year period of limitations in Pub. L. 85-762, 49 U.S.C. 66 (Supp. III, 1973), on claims before the General Accounting Office. 55 Comp. Gen. 174 (1975).

Applicability

Prior to regulations promulgated by the Interstate Commerce Commission in 1968, carriers could but need not limit coverage to particular forms of shipments, but if the carrier fails to insist on such measures the privilege of reduced rates under section 22 applies to all shipments "'for the United States'", in which the Government is shown to be the direct beneficiary of the reduction, and "neither the wording of the statute nor the apparent legislative intent to maintain the preferred position of governments in their transportation dealing allows" the Interstate Commerce Commission "to limit the scope of the section by reading in such a restriction." Southern Pacific Transp. Co. v. United States, 505 F.2d 1252, 205 Ct. Cl. 451 (1974).

Applicability

Prior to regulations promulgated by the Interstate Commerce Commission in 1968, a quotation under section 22 of the Interstate Commerce Act, 49 U.S.C. 22, could properly apply to a shipment which was actually and directly for the Government's account even though the Government's participation was not shown or indicated in the documentation. Southern Pacific Transportation Co. v. United States, 505 F.2d 1252, 205 Ct. Cl. 451 (1974).

Applicability - United States Government

Motor carrier contends that since shipment was transported for Coast Guard (CG), I.C.C. No. 50 has no application because allegedly tender was offered solely to Military Traffic Management and Terminal Service (MTMTS) or Military Depts. and not to CG; however, GAO stated that a "sec. 22 tender carrier offers generally to U.S. Government" is available to any Government agency not excluded, willing to do business with offering carrier. Item 10 of I.C.C. No. 50 constitutes continuing offer to U.S. General offer made to particular class of persons may be accepted by anyone coming within description of class. See 37 Comp. Gen. 753 (1958); B-178237, October 9, 1973.

Applicability

Carrier's section 22 tender covering office furniture, files and equipment is not applicable on shipments of BOQ furnishings and equipment, general commodities and household goods in connection

with closing of Floyd Bennett Air Field, but rather for application is tender that covers household goods since shipments of establishment moving from one location to another meets the ICC definition of household goods. 53 Comp. Gen. 869 (1974).

Applicability

Constructive weight of vehicles used is proper basis for charges under carrier's tender when vehicles are fully loaded, even though special service is not ordered. 53 Comp. Gen. 868 (1974).

Delivery Provisions

Section 22 quotation providing rates to military installation is applicable on shipments delivered to New Bomb Area actually comprising part of such installation, even though delivery instructions directing unloading at such area on bill of lading might be considered ambiguous and susceptible of interpretation that destination is outside installation. B-180131, October 2, 1974.

Applicability - Household Goods

For household goods carrier's shipments to qualify as household goods they must have been moved "pursuant to removal of establishment, or portion thereof, from one location to another." Two shipments moved from private corporation to military installation and three moved between military installations. Nothing indicates that shipments were made pursuant to removal of establishment or portion thereof. GAO believes that on five shipments carrier was without operating authority and is entitled to compensation only on quantum meruit basis--on rates in carrier's Tender 150 or in Section 22 tender 1-V, whichever is lower. B-181137, July 5, 1974.

Estoppel

Unlike transportation services for which carriers were required by law to collect no more, less or different than their tariff rates and for which the United States was bound by statute to pay the full tariff rates, the carrier may be estopped to collect additional charges for services rendered which were either unregulated or were subject to a statute--Section 22 of the Interstate Commerce Act, 49 U.S.C. 22--which permitted the assessment of less than tariff rates. B-159092, November 24, 1970.

Estoppel

Where carriers are required by law to collect no more, less or different than tariff rates estoppel is not applicable, but where the services rendered either were unregulated or subject to a statute--Section 22 of the Interstate Commerce Act, 49 U.S.C. 22--which permits the assessment of less than tariff rates, estoppel is applicable. B-157382, B-157840, April 27, 1972.

Form

It was held as to a period prior to enactment of the act of August 31, 1957, 71 Stat. 564, generally requiring section 22 quotations to be in writing and filed with the I.C.C., that a section 22-type quotation or reduced rate tender need not be in any particular form but can be on the bills of lading, slip of paper, verbally or in any other form so long as it is understood between the parties that the rates to be charged are less than those applicable under tariff arrangements. And that such section applied to intrastate traffic as well. Benton Rapid Express, Inc. v. United States, 171 F. Supp. 868 (1959).

Form

A carrier need not abide by its published rates when dealing with the Government, and the practice of retroactively confirming in writing a variation from the published tariff rate is permitted by section of the Interstate Commerce Act. Chicago, B. & Q. Co. v. United States, 439 F.2d 1224, 194 Ct. Cl. 688 (1971).

Retroactive Issuance and Application

Since under section 22 of the Interstate Commerce Act, 49 U.S.C. 22, a carrier need not abide by its published rates when dealing with the Government, and a deviation from a published tariff may be retroactively confirmed in writing without violating section 22, submission by the carrier of a bill for services rendered with no charge stated for storage, would act as a retroactive confirmation of its published tariff, and would be permissible. B-180142, May 29, 1975.

Retroactive Issuance and Application

Unreasonable charges were paid for transportation of motor vehicle (2,380 pounds). Application of 6,000-lb. minimum weight tariff provision resulted in \$276.61 excess charges. Sections 22

and 217(b) of Interstate Commerce Act constitute authority for adjustments in charges involving U.S. Government. Section 22 refers to retroactive application and Interstate Commerce Commission holds that section 22 rate need not be established until after performance. Commission agrees that 6,000-lb. minimum weight provisions for less truckload shipments of automotive vehicles are unreasonable to extent exceeding charges on actual weight. Refund will avoid litigation expenses. B-179361, March 6, 1974.

Retroactive Issuance and Application

Inasmuch as Interstate Commerce Commission (ICC) has held exception ratings higher than classification are prima facie unreasonable and less truckload class 200 rating provided in item 344, as exception to class 85 LTL rating for aircraft rocket launchers, was canceled effective January 3, 1970, carrier should consider availing itself of opportunity to issue retroactive section 22 quotations, and excessive charges, thereby obviating litigative expense of reparations proceedings (which include suit in appropriate district court, staying of this proceeding while complaint is filed with ICC on issue of reasonableness, and awaiting decision of Commission which is submitted to district court for entry of judgment) as well as burden of proving truckload minimum weight is too low in classification. B-167105, February 26, 1970.

Retroactive Issuance and Application

A voluntary refund of unreasonable charges may be legally effected under section 22 of the Interstate Commerce Act, as amended, 49 U.S.C. 22, made applicable to motor carriers by section 217(b) of the Act, as amended, 49 U.S.C. 317(b), by issuance of a retroactive quotation offering a reasonable level of charges for the shipment. B-168428, January 5, 1970.

Retroactive Issuance and Application

Motor carrier, paid \$576.08 in excess of reasonable charges incident to shipment of one Mustang (Ford) automobile (2,200 pounds) from California to Iowa, based on less-truckload minimum weight of 6,000 pounds (exception to item 389, Tariff 21-I), declined to refund on basis that section 22 rate quotations can be accomplished only prior to movement of shipment and that item 389 contains applicable tariff provisions since Commission "allowed" provisions of item 389 to become effective. Voluntary adjustment is requested since

section 22 language refers to retroactive application and ICC has stated section 22 rate need not be established until after performance. While admittedly carrier collected charges in accordance with applicable charge bases, GAO maintains charges are unreasonable. B-168428, February 18, 1970.

Retroactive Issuance and Application

Motor carrier contends it is without authority to make requested refund of \$507.20 incident to shipment of less truckload of pillows, NOI, without determination by hearing and decision by Interstate Commerce Commission (ICC); however, Government has authority under section 22, Interstate Commerce Act, to negotiate for transportation of property free or at reduced rates; moreover, ICC has stated that section 22 rate need not be established until after service has been performed. Refund without formal reparations proceedings would enable adjustment without payment of interest and other costs. B-179395, November 23, 1973.

Notation Compliance

Upon reconsideration of claim for additional freight charges for engine shipment by carrier who, after billing Government at lower rate, alleged that notation "CU 207" and statement of total weight on Government bill of lading did not comply with item 240 of Rocky Mountain Motor Freight Bureau Quotation No. 18 or section 8, rule 110 of National Motor Freight Classification No. A-9, claim is again denied, since fact that carrier billed Government on section 22 basis evidence carrier was sufficiently apprised of Government's request for lower rate based upon density of at least 8 pounds per cubic foot and clearly reflects carrier's understanding of reason for reference to Quotation No. 18; section 8, rule 110 of Classification A-9 was not violated since factors (weight and cubage/essential to determining density were stated on GBL) and, if carrier questioned density, article shipped in its possession could have been measured. B-167729, November 25, 1969.

Notation Compliance

When a shipper orders special service provided in carrier's section 22 tender, issued pursuant to 49 U.S.C. 22 and 317(b), which covers electronic equipment and instruments, and annotations on shipping document are in compliance with provisions of tender and are not disputed by administrative report, constructive weight of space of each vehicle ordered or used is proper basis for computing carrier's charges. Furthermore, under tender should each vehicle

be loaded to the full visible capacity of vehicle, even if shipper failed to annotate Government Bill of Lading or did not intend to request special service, carrier would be entitled to charges based on constructive weight. 53 Comp. Gen. 628 (1974).

Waiver of Requirements

In the case of a Government shipper, the carrier may, under the authority of section 22 and 217(b) of the Interstate Commerce Act, waive tariff requirements, which would otherwise have to be strictly enforced, by signing a correction notice to supply notation omitted from bill of lading. B-170090-O.M., March 10, 1972.

Released Valuation - Waiver

Under section 22 of the Interstate Commerce Act, as amended, 49 U.S.C. 22, carrier could waive limiting provisions of its released value tender, and transportation contract was not void as a matter of law but voidable at the carrier's option. B-169554-O.M., August 11, 1970.

Bill of Lading Correction Notice

On issue of whether correction notice, accepted by representative of origin carrier after shipment had moved, was adequate to support adjustment from class 45 rating on auto engines generally to class 37 1/2 rating on used engines, even though correction notices were to be regarded as technically insufficient to establish compliance with classifications terms, act of origin carrier's representative in acquiescing to change of description had effect of section 22 quotation, which may be retroactive and which represents exercise of permissive statutory authority to quote reduced rates to United States, including form of acknowledgement of correctness of change in description that has effect of producing lower charges. B-174694, February 29, 1972.

Transit Shipments

Concept of stopping shipment in transit and granting of transit privileges rests on fiction that two or more separate shipments may be treated as single through shipment and that through charges assessed will be lower than aggregate of charges applicable to separate shipments and, therefore, when upon expiration of recorded inbound transit credits on outbound shipment of explosives tendered under Section 22 Quotation, assessment of through rates results in higher

charge than aggregate of rates applicable to separate shipments, Government has right to disregard transit fiction, right recognized by Quotation, and upon settlement pursuant to 49 U.S.C. 66, of payment to carrier on basis of fictional through shipments, U.S. GAO properly used lower aggregate charges and carrier is not entitled to refund. 49 Comp. Gen. 266 (1969).

Transit Shipments

Shipment of military communication outfits that moved under Government bill of lading from California to N. Carolina and was accorded storage-in-transit privileges at intermediate point, properly was billed and payment made on basis of through rate, notwithstanding absence of through rate in applicable transcontinental tariff. Concept of transit privileges rests on fiction that two or more separate shipments are single shipment on which charges assessed are lower than aggregate of charges on separate shipments, and although concept is only applicable to private shippers when provided by tariff, lower through rate is accorded Government on its volume storage-in-transit shipments on practically all commodities by SPA Section 22 Quotation Advice A-610-F, as well as others. 49 Comp. Gen. 352 (1969).

Transit Shipments

With respect to Item 87, Item No. 6 of Section 22 Quotation 61-D provides that shipment shall be subject and entitled to all-rail carload rate applicable to inbound or outbound commodity, whichever is higher from port of importation to final destination, in effect by tariff or as provided in any applicable quotation on date of such shipment from port of importation. Any restriction in rate tariff affecting application of rate because of unauthorized stop in transit is obviously waived by the quotation. If it were otherwise, transit privilege intended under quotation could never be granted. B-169463, March 1, 1973.

Transit

Settlement disallowing claim for difference between through rate and lower combination of rates is sustained since right to base charges on lowest ones available was reserved to Government under section 22 quotation here involved, and transportation officer could have cancelled inbound transit credits at Avondale, and shipped to destination under standard Government bill of lading, in which case applicable charges on separate shipments unquestionably would have been local rates to and from Avondale. Furthermore, concept of

privileges is based on premise that through charge is lower than aggregate of charges otherwise applicable to separate shipments. B-173822, April 25, 1972.

Revocation Cancellation

Section 22 tenders are regarded as continuing offers to perform transportation services for stated prices, and power created in offeree thereunder to make separate contracts by separate acceptances continues until revoked. To be effective, however, revocation must be communicated to offeree who, under Military Traffic Management Regulations, is Commander, MTMTS, and use of phrase "written notice" in par. 9 of standard for tender most likely would be construed to mean a communication received. Accordingly, fact that supplements either canceling or modifying tenders were timely received in subordinate MTMTS offices or by state regulatory body is immaterial. B-172243-O.M., July 7, 1971.

Cancellation

Rate tenders which offer reduced freight rates pursuant to section 22 of Interstate Commerce Act (49 U.S.C. 22 and 317(b)) on Government traffic are continuing offers to perform transportation services for stated prices, and as continuing offers power is created in offeree to make series of separate contracts by series of independent acceptances until at least 30 days written notice by either party to tender of cancellation or modification of tender is received. Therefore, where Military Traffic Management and Terminal Service maintains supplements cancelling or modifying four rate tenders were not received and carrier insists they were mailed, question of fact is raised and administrative statements must be accepted, and overcharges resulting from controversy are for recovery from carrier either directly or by deduction from any amounts subsequently due carrier as provided by 49 U.S.C. 66. 51 Comp. Gen. 541 (1972).

Cancellation

Where in Section 22 tender carrier retains power of cancellation, administrative notification that tender will be considered inactive after certain date unless cancelled or reissued cannot be construed as effective cancellation. B-180699, October 2, 1974.

Revocation

"Rate tenders issued pursuant to 49 U.S.C. 22 and 317(b) * * * are considered to be continuing offers to perform transportation

services for stated prices. 51 Comp. Gen. 541 (1972); 43 id 54, 59 (1963); 39 id 352 (1959); 37 id 753, 754 (1958). As continuing offers they create in the person to whom the offers are made (the offeree) the power to make a series of separate contracts by a series of independent acceptances, and that power is good until effectively revoked by the person making the offers * * *. And it is settled that to be effective the offeror's revocation of an offer must be communicated to and received by the offeree * * *." B-181879, August 10, 1976.

Interstate Commerce Commission Jurisdiction

Although questions of a rate being "destructive" can be raised before the Interstate Commerce Commission, since the landmark decision about Section 22 rates before the Interstate Commerce Commission in Tennessee Products and Chemical Corp. v. Louisville & Nashville R.R., 319 I.C.C. 497 (1963), the Interstate Commerce Commission has taken the position that it lacks power to suspend Section 22 rates as being unjust or unreasonable, unjustly discriminatory, or giving undue or unreasonable preference or advantage, and, thus, it is apparently the Commission's position that it lacks power to find Section 22 rates "destructive." 53 Comp. Gen. 977 (1974).

Interstate Commerce Commission Jurisdiction

Whereas increases or decreases in tariff rates may be suspended by the Interstate Commerce Commission, Section 22 rates are not subject to the Interstate Commerce Commission suspension and may be increased, decreased, or even canceled at the discretion of the carrier offering the rates, subject to any agreements made between the carrier and shipper using or planning to use the rates. 53 Comp. Gen. 977 (1974).

Interstate Commerce Commission Jurisdiction

Since section 22 arrangements are voluntarily made, and ICC has no jurisdiction thereover beyond filing requirement, adoption notice did not embrace merged carrier's section 22 tender, and some overt showing of adopting carrier's intent to continue this offer was required, or evidence thereof from parties' dealings. Here, however, adopting carrier billed at tariff rates until tenders were offered in its own name, and apparently, Government informed adopting carrier that it could not transport Government shipments under merged carrier's tender. Therefore, settlement should issue on lowest available basis, not including said tender. B-174926-O.M., December 4, 1972.

Offeror's Merger with Another Carrier

Adoption Notice MF-I.C.C. No. 15, required of adopting carrier by Commission's Rules, did not effect adoption of merged carrier's section 22 tender so as to permit setoff of overcharges resulting from adopting carrier's application of its own tenders, which offered higher section 22 rates than those provided in merged carrier's tender. Furthermore, it does not appear that Government recognized continuing applicability of merged carrier's tender after date of adoption notice even though this tender was not formally canceled until 17 months after carriers' merger. B-174926, December 4, 1972.

Offeror's Merger with Another Carrier

Since section 22 arrangements are voluntarily made, and ICC has no jurisdiction thereover beyond filing requirement, adoption notice did not embrace merged carrier's section 22 tender, and some overt showing of adopting carrier's intent to continue this offer was required, or evidence thereof from parties' dealings. Here, however, adopting carrier billed at tariff rates until tenders were offered in its own name, and apparently, Government informed adopting carrier that it could not transport Government shipments under merged carrier's tender. Therefore, settlement should issue on lowest available basis, not including said tender. B-174926-O.M., December 4, 1972.

Reparations

Section 22 of the Interstate Commerce Act, made applicable to motor carriers by section 217(b), 49 U.S.C. 317(b), provides a convenient, practical, inexpensive, procedural mechanism for allowing carriers to refund prima facie unreasonable charges to the Government. B-169417, June 9, 1970.

Unreasonable Rates

Under general rule of Interstate Commerce Commission (I.C.C.) that class rate on particular traffic moving from and to specific points represents highest rate that such traffic should bear, and under provision of 49 U.S.C. 22, allowing exception when carrier is dealing with Government to usual prescription against collecting different amount for transportation service than prescribed by tariff, carrier may choose to voluntarily adjust presumptively unreasonable freight charges on passenger auto shipment to reasonable level, rather than to submit to proceeding before I.C.C. B-170669, May 19, 1971.

CHAPTER 16

SHIPPING ACT, 1916

The Shipping Act, 1916, as amended, 41 U.S.C. 801-842, requires common carriers by water operating on the high seas or the Great Lakes (not subject to regulation by the Interstate Commerce Commission under 49 U.S.C. 901-923) over regular routes in interstate and foreign commerce to file with the Federal Maritime Commission and keep open for public inspection maximum local and joint rates. Excepted from this requirement are cargo loaded and carried in bulk without mark or count and soft-wood lumber. Such rates are to be reasonable and may be fixed by the Commission if found to be unreasonable. When approved by and filed with the Commission, conference agreements are exempted from the antitrust laws to the extent necessary in carrying out the purpose of the Act. This applies to water carriers operating in foreign trade.

Free or Reduced Rates for Services

The acceptance by a Government agency as a shipper of the services of foreign freight forwarders free of charge or at reduced rates on the basis that reimbursement for such services would be included in the ocean freight brokerage fee paid by the water carrier to the forwarder for securing cargo for the ship constitutes a discriminatory act under section 16 of the Shipping Act, 1916, 46 U.S.C. 815, which makes it unlawful for forwarders to obtain by any unfair device or means transportation by water at less than the rates or charges otherwise applicable; therefore, if an agency determines that foreign freight services are needed, the services must be paid for from agency funds. 37 Comp. Gen. 601 (1958).

Commodity Misdescription

Notwithstanding the fact that a water carrier asserts that it is bound by conditions in its commercial bill of lading, placing responsibility on the shipper to describe cargo properly at time of shipment or to present description change prior to consignee taking delivery at discharge port, GAO contends that the actual, not the bill of lading, description is controlling and that 46 U.S.C. 817(b)(3) restricts common carriers by water in foreign commerce to rates in its filed tariff. B-157575, March 31, 1966.

Reparation Proceedings

Where carrier contends that it cannot honor an overcharge claim because it was not presented within the 6-month time limitation

contained in its tariff, the overcharge claim should be made the subject of reparation proceedings before Federal Maritime Commission since the carrier is prohibited by 46 U.S.C. 817(b)(3) from demanding or collecting greater charges than those provided in its tariff. B-161679, August 3, 1967.

Accrual of Cause of Action

Carrier refused to refund an overcharge for ocean transportation, asserting that payment of the Government's claim would be in violation of 46 U.S.C. 821, which provides that complaint must be filed before Federal Maritime Commission (FMC) within 2 years after cause of action accrues; however, while the Government bill of lading indicates that the shipment was received by the carrier on January 31, 1966, the record shows that the assessed charges were paid on August 5, 1966, when in our view the cause of action for overcharges accrued. GAO recommends that the overcharge be made the subject of action before the FMC. B-164813, July 22, 1968.

Relief Shipments

Relief agency was reimbursed the transportation charges on a shipment of dried milk spray weighing 225,865 pounds, shipped to Vietnam in March 1961, at the relief rate of \$56.50 per 2,000 pounds rather than at \$42 w/m based on cubic measurement, a lower charge basis. Apparently the relief agencies and the ocean carrier contracted for the \$56.50 rate which is set out in revised tariff effective November 9, 1960, and since prior to October 3, 1961, the effective date of 46 U.S.C. 813a, parties were free to make such a contract, the overcharge statement should be canceled if the Transportation Division determines that the relief rate is applicable. B-159484-O.M., October 24, 1966.

Unreasonable Preferences Prohibited

The court in United States v. Bloomfield Steamship Co., 359 F.2d 506 (1966), said that it is not reasonable to assume that Congress does not intend that the American taxpayer shall benefit from the principle of non-discriminatory charges consistent with the policy expressed in sections 16 and 17 of the Shipping Act, 1916 (46 U.S.C. 815,816), which is meant to prohibit unreasonable preferences or advantages to any particular person, locality, or description of traffic. B-142823, October 6, 1967.

Foreign Maritime Rates

Foreign maritime rates are not "fixed" by regulation to the extent that domestic rates are. The Shipping Act of 1916, nevertheless does give the Federal Maritime Commission authority under section 18(b)(5) to disapprove any rate in foreign commerce found to be unreasonably high or low as to be detrimental to the commerce of the United States. Section 17 of the act forbids carriers in foreign commerce to charge discriminatory rates, and gives the Commission authority to enforce this provision. The act also permits restriction on competition by the establishment of conference rates under agreements approved by the Commission. 48 Comp. Gen. 199.

Incorrect Tariff Rate Applied

Where charges were assessed by an ocean carrier on a shipment described on the Government bill of lading as Dozer Tractors on the basis of a rate pertaining to the tariff description "Tractors, with mechanical or electrical equipment mounted thereon," whereas a lower rate basis properly applicable to the shipment pertained to the tariff descriptions "Tractors, N.O.S." and "Tractor spare and replacement parts," overcharges should be collected from the ocean carrier because a greater compensation was charged and collected for the transportation and connected services than the rates and charges which are specified in the carriers tariff on file with the Federal Maritime Commission, which violates section 18 of the Shipping Act, 1916, 46 U.S.C. 817(b)(3). B-169784, March 17, 1971.

Charges were assessed by an ocean carrier on shipments of flour in bags on the basis of tariff rate applying to a port which provided lighterage services but a lower tariff rate applied to a port not providing lighterage services. Since the port at which the flour actually was delivered did not provide lighterage services, the lower rate applied and the overcharges should be collected from the ocean carrier because a greater compensation was charged and collected for the transportation and connected services than the rates and charges specified in its tariff on file in the Federal Maritime Commission, which violates section 18 of the shipping act 1916, 46 U.S.C. 817(b)(3). B-170442, August 26, 1970.

Setoff of Overcharges From Unpaid Billings

Where charges were assessed by an ocean carrier on a shipment of beds and parts on the basis of a rate that was not in the applicable tariff filed with the Federal Maritime Commission, the Government's right to the lowest applicable rate should be protected by collecting the carrier's overcharge by setoff from billings submitted by the carrier for which payment is properly due the carrier for transportation services rendered to the Government. B-183393, August 5, 1975.

Tariff Printing Error

Since there is a special statutory procedure in 46 U.S.C. 817(b)(3) allowing the Federal Maritime Commission to approve upon receipt of application within 180 days of shipment date refunds of charges collected as a result of clerical or administrative errors in the tariff, apparently the exclusive remedy for such errors, if the Government does not avail itself of this procedure, it must pay charges based on a clear and unambiguous tariff rate even if it is higher than was intended to be published because 46 U.S.C. 817(b)(3) provides that no carrier shall charge or demand or collect or receive a greater or less or different compensation for the transportation of property or for any service in connection therewith than the rates and charges which are specified in their tariffs on file with the Commission and duly published and in effect at the time. B-179648, March 11, 1974.

Where ocean carrier assessed and collected charges on the basis of a negotiated, agreed rate rather than a lower unambiguous tariff rate which contained a printing error but was filed with the Federal Maritime Commission, even though the carrier violated section 18(b)(3) of the Shipping Act, 1916, proscribing the charging, demanding, collecting or receiving, a greater or less or different compensation for the transportation of property or for any service in connection therewith than the rates and charges which are specified in tariffs on file with the Federal Maritime Commission and duly published and in effect at the time, the Government will not appeal a decision of the Federal Maritime Commission refusing to award the Government reparations under section 22 of the Shipping Act for the difference between the filed rate and negotiated rate because the granting of reparations is discretionary with the Commission and the decision was limited strictly to the peculiar facts of the case. B-170519, September 10, 1973.

CHAPTER 17

TIME LIMITATIONS ON ACTIONS

Statutes of limitations are binding on the United States only when Congress clearly provides for their application. And none of the several States can impose by statute or derivative regulation a time limit on actions by the United States. United States v. Summerlin, 310 U.S. 414 (1940). However, there are several statutes limiting the time for bringing administrative or judicial action or proceedings on charges, bills and claims by or against the United States arising from transportation services in which the Government has an interest. These statutory periods, among other things, vary depending upon the mode of transportation and the type of service involved and may involve freight charges, reparations or loss and damage.

I. JUDICIAL ACTIONS

Following is a list showing the judicial time limitations on actions before regulatory bodies or courts involving the most common situations (49 U.S.C. 66 and 31 U.S.C. 71a containing the time limitation on administrative [General Accounting Office or General Services Administration] actions are discussed later in this section):

<u>Action brought</u>	<u>Freight Charges</u>	<u>Reparations</u>	<u>Loss and Damage</u>
By rail carriers	3 years 49 U.S.C. 16(3)(n)&(1)		
Against rail carriers	3 years 49 U.S.C. 16(3)(c)&(1)	3 years 49 U.S.C. 16(3)(b) 49 U.S.C. 16(3)(f)	6 years 28 U.S.C. 2415
By motor carriers	3 years 49 U.S.C. 304a(1)&(8)		
Against motor carriers	3 years 49 U.S.C. 304a(2)&(8)	3 years 49 U.S.C. 304a(2) 49 U.S.C. 304a(8)	6 years 28 U.S.C. 2415
By freight forwarders Subject to the IC Act	3 years 49 U.S.C. 1006a(1)&(8)		
Against freight forwarders Subject to the IC Act	3 years 49 U.S.C. 1006a(2)&(8)	3 years 49 U.S.C. 1006a(2) 49 U.S.C. 1006a(8)	6 years 28 U.S.C. 2415
By water carriers Subject to the IC Act	3 years 49 U.S.C. 908(r)(1)(A) &(r)(5)		
Against water carriers Subject to the IC Act	3 years 49 U.S.C. 908(r)(1)(C) &(r)(5)	3 years 49 U.S.C. 908(r)(1) (B) 49 U.S.C. 908(r)(5)	6 years 28 U.S.C. 2415
<u>Action brought</u>	<u>Freight Charges</u>	<u>Reparations</u>	<u>Loss and Damage</u>
By water carriers not subject to the IC Act	2 years 46 U.S.C. 745		
Against water carriers not subject to the IC Act	6 years 28 U.S.C. 2415	2 years 46 U.S.C. 821	1 year 46 U.S.C. 1303(6) (If subject to Carriage of Goods by Sea Act, 46 U.S.C. 1300-1315)

<u>Action brought</u>	<u>Freight Charges</u>	<u>Reparations</u>	<u>Loss and Damage</u>
Domestic air carriage - by air carrier	6 years 28 U.S.C. 2401, 2501		
Domestic air carriage - against air carrier	6 years 28 U.S.C. 2415	6 years 28 U.S.C. 2415	6 years 28 U.S.C. 2415
International air carriage by air carrier	6 years 28 U.S.C. 2401, 2501		
International air carriage - against air carrier	6 years 28 U.S.C. 2415	6 years 28 U.S.C. 2415	2 years 49 Stat. 3000- Art. 29
By carrier exempt from regulation	6 years 28 U.S.C. 2401, 2501		
Against carrier exempt from regulation	6 years 28 U.S.C. 2415		6 years 28 U.S.C. 2415

Caveat

The limitation periods set out above generally commence to run at the time the cause of action accrues but in some cases the date of payment or other action is the significant date. Also, in certain cases the period is extended to allow suits to be filed within a certain number of days after the carrier rejects claims filed with it. And there may be contractual provisions in bills of lading shortening or affecting such limitation periods. These contractual provisions in some cases may be legal, in others illegal or of doubtful legality.

Foreign Air Carriers

The provision in 49 U.S.C. 66 that every transportation claim cognizable by GAO shall be barred unless received in GAO within 3 years was intended only to bar administrative settlement; and therefore, foreign air carrier's suit in U. S. Court of Claims against U. S. to recover unpaid freight charges was governed by 6-year statute of limitations (28 U.S.C. 2501), and action, which was brought more than 3 but less than 6 years after claim accrued, was not barred from consideration by the court. Iran National Airlines Corp. v. United States, 360 F. 2d 640 (Ct. Cl. 1966).

Interstate Commerce Act

Where each shipment was made on through bill of lading covering complete movement of goods between points in the United States and points abroad, each government bill of lading referred to Movers and Warehousemen's Association of America military rates tender which was published by plaintiff's agent and contained rates on shipment pursuant to Interstate Commerce Act, common carrier's claim for undercharges on portion of transportation furnished abroad was barred by three-year statute of limitations of Interstate Commerce Act. Transportation Act of 1940, 49 U.S.C. 66; Interstate Commerce Act, 49 U.S.C. 22, 304a. Von Der Ahe Van Lines, Inc. v. United States, 358 F.2d 999 (Ct. Cl. 1966).

Air Shipments

The billing for domestic air transportation services is based upon tariffs filed with the Civil Aeronautics Board under the Federal Aviation Act of 1958, 49 U.S.C. 1301. That act does not have a section similar to 49 U.S.C. 16(13)(c) which places a 3-year limitation on the period for commencing of an action at law. B-162116, September 6, 1967.

In regard to the statute of limitation for the filing of claims for air transportation services, in the case of Iran National Airlines v. United States, 360 F.2d 640 (1966), the court ruled that while the 3-year statute of limitations in 49 U.S.C. 66 barred administrative settlement of air transportation claims presented to the GAO more than 3 years after the claim accrued, the 6-year limitation period in 28 U.S.C. 2501 was operative in the case of such claims included in suits filed in the Court of Claims. B-162116, September 6, 1967.

Administrative v. GAO Jurisdiction

We note that 49 U.S.C. 16(3) relates to "actions at law" and does not control administrative settlement by the Commodity Credit Corporation (CCC) in absence of a corporate regulation. Unless CCC agrees to GAO handling or fails to act on particular claims such as those in favor of the United States, GAO would not participate in final administrative disposition of claims involving CCC shipments. B-160251-O.M., June 20, 1967.

Intrastate Traffic

Claim for shipping charges incident to intrastate shipment of household goods which carrier placed in storage in another State in 1959 after unsuccessful attempt to make delivery and held until owner authorized disposal of property in July 1965 is not barred by 3-year statute of limitations in 49 U.S.C. 304a, and may be paid since charges involve an intrastate movement and are predicated on a Virginia intrastate tariff. Removal of shipment to carrier's possession in Maryland after tender of delivery proved it to be undeliverable does not affect intrastate character of shipment, and claim is subject only to 10-year limitation in 31 U.S.C. 71a. B-160182-O.M., January 31, 1967.

Time Limitation Revision

Proposal to change the Through Government Bill of Lading (TGBL) Household Goods Military Basic Tender on shipments of household goods in door-to-door-container-Govt (MSTS) made between points

within continental U.S. and overseas points, by incorporating a "Limitation of Action," provision placing limit of 3 years upon filing of claims and actions at law by or against U.S. or participating forwarders for recovery of overcharges of undercharges, would be consistent with comparable statutory provisions (49 U.S.C. 66, 304a and 1006a); however, GAO lacks authority to determine validity or bind Government to 3-year limitation and cannot state that it will be bound by 3-year limitation proposed so as to modify statutory duties of GAO and those of the Justice Dept. B-162925, November 20, 1967.

Shipping Act of 1916

A conference rule providing that claims for adjustment of freight charges must be presented within six months after shipment date cannot bar recovery of an overcharge as reparation, where the complaint is filed under section 22 of the Shipping Act, 1916, more than six months but less than two years after the shipment date. United States v. American Export Isbrandsten Lines, Inc., 11 F.M.C. 298 (1968).

Limitation on Amount of Recovery

Where carrier billed shipper for amount less than amount carrier subsequently claimed to have been the proper charge, shipper paid billed amount more than three years prior to carrier's action but within three years of action deducted sufficient funds from other charges so as to receive benefit of lower rate, carrier was precluded from recovering on claim for amount over and above amount paid more than three years prior to action but was entitled to recover amount improperly deducted within three years of action. Interstate Commerce Act, 49 U.S.C. 304a(7). T.I.M.E. Freight, Inc. v. United States, 302 F. Supp. 573 (N.D. Tex. 1969).

No Limitation on Amount of Recovery [Contra T.I.M.E., supra]

Railroad's action against United States to recover additional freight charges allegedly due on shipments for which railroad was prepaid by commercial shipper who was reimbursed by government was timely, although more than three years after payments by shippers, where it was within three years of date that General Accounting Office denied railroad's supplemental bills and made deductions from other moneys owed railroad; railroad was not limited to recovering amounts deducted. Interstate Commerce Act, 49 U.S.C. 16(3); Transportation Act of 1940, 49 U.S.C. 66. Erie Lackawanna Railway Co. v. United States, 439 F.2d 194 (Ct.Cl. 1971).

Interstate Commerce Act provision relating to limitations on actions to recover for charges was intended to make cause of action accrue at time of delivery but, with respect to transportation for government, was intended to extend three-year statute of limitation for three years from the later of the three specified events: payment of charges, refund for overpayment, or deduction. Interstate Commerce Act, 49 U.S.C. 16(3); Transportation Act of 1940, 49 U.S.C. 66. Erie Lackawanna Railway Co. v. United States, 439 F.2d 194 (Ct. Cl. 1971).

Under Interstate Commerce Act provisions limiting suit for charges, where railroad was entitled to sue for undercharge within three years of date of administrative deduction, government also had right to sue to recover overcharges, and was entitled to assert counterclaim in railroad's action. Interstate Commerce Act, 49 U.S.C. 16(3); Transportation Act of 1940, 49 U.S.C. 66. Erie Lackawanna Railway Co. v. United States, 439 F.2d 194 (Ct. Cl. 1971).

Warsaw Convention

Air carriers claim for administrative deduction is properly for allowance since action at law was not brought by Government within two years as required by Article 29 of Warsaw Convention. 54 Comp. Gen. 633 (1975).

Limitation in Bill of Lading

The one-year limitation period contained in ocean carrier's bill of lading did not bar a suit by the Government for breach of the carrier's covenant in certification form that freight charges do not exceed prevailing rates. United States v. Waterman Steamship Corporation, 471 F.2d 186 (5th Cir. 1973).

It has been suggested that an issue exists concerning the validity of a carrier-imposed time limitation on a Government bill of lading. Its effect would be to accomplish by indirection that which Congress failed to do directly, that is, to impose a time bar against the Government on claims asserted by it for overcharges. It would pose a question as to whether Government officials may, without specific congressional authority, surrender sovereign rights. United States v. Yale Transport Corp., 184 F. Supp. 42, 46 n. 13 (S.D.N.Y. 1960).

Reparations

Reasonableness of Motor Carrier's Charges

Although in T.I.M.E. Inc. v. United States, 359 U.S. 464 (1959), it was held that the shipper had no right under then existing legislation to challenge the reasonableness of a motor carrier's past charges as being unreasonable, it is the understanding of GAO that section 6 of Public Law 89-170, 49 U.S.C. 304a(2), was enacted to extend to shippers the reparation procedure that the Supreme Court determined was not available under the prior legislation. B-161550, B-161666, September 1, 1967; B-162419, November 29, 1967.

Voluntary Reduction of Unreasonable Rates

Carrier's voluntary refund of unreasonably high tariff rates through provisions of 49 U.S.C. 22 is not viewed as a means of circumventing the reparations provisions of the act of September 6, 1965, 49 U.S.C. 304a(2), but as compatible with the basic purpose of the law, to afford motor carrier shippers a remedy for the recovery of reparations. B-161708, October 13, 1967.

Extension of Two-Year Limitation

Where rail carrier contended that the Government's remedy to file a reparations proceeding with the Interstate Commerce Commission was barred by the two-year period in 49 U.S.C. 16(3)(b), it was pointed out that such period was extended to three years by 49 U.S.C. 16(3)(i). B-144104, September 19, 1961.

Accrual of Cause of Action for Overcharges - Ocean Shipments

Although carrier viewed the cause of action as accruing on the date of the origin of the shipment, January 31, 1966, the charges including the overcharge were paid on August 1, 1966, and that is the date when the cause of action to recover an overcharge through the Federal Maritime Commission accrued. B-164813, July 22, 1968.

Loss and Damage

Some loss and damage claims involving water carriers are subject to the time limitation provided in the Carriage of Goods by Sea Act, 46 U.S.C. 1303(6). This section specifies that the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered. It is further provided in 49 U.S.C. 1303(8) that any clause, covenant, or

agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage or lessening such liability otherwise than as provided in the act is null and void and of no effect.

Loss and damage claims involving carriers subject to the Interstate Commerce Act are governed by the time limitation provided in 49 U.S.C. 20(11). A proviso in this section specifies that it shall be unlawful for any receiving or delivering common carrier to provide by rule, contract, regulation, or otherwise a shorter period for the institution of suits than two years from the day written notice is given by carrier to the claimant that the carrier has disallowed the claim or any part thereof.

There is a two-year time limitation provided by the Warsaw Convention, 49 Stat. 3000--Article 29, within which any action must be brought involving a loss or damage claim for both the United States and international air carriers.

For all other modes of interstate transportation involving loss or damage claims there are statutory six-year time limitations in 28 U.S.C. 2401, 2501, for carriers to bring action against the United States, and a six-year time limitation in 28 U.S.C. 2415 within which the United States must bring action against carriers.

There is no overall time limitation for loss and damage claims involving intrastate transportation but generally on this traffic one should look to the State laws.

Most Government shipments move on Government bills of lading (GBL). The GBL incorporates by reference certain provisions of the Code of Federal Regulations which provide that in case of loss or damage in transit, the rules and conditions governing commercial shipments shall not apply as to the period within which notice thereof shall be given the carriers or to the period within which claim thereof shall be made or suit instituted. See 41 C.F.R. § 101-41.302-3(4)(g) set forth in 42 Fed. Reg. p. 36683 (July 15, 1977).

Acts of Agent

Where equipment moving under a through Government bill of lading from California to New Hampshire was shipped by air carrier to Boston where destination motor carrier accepted it as air carrier's agent and delivered it damaged in New Hampshire with bill of lading noted, and when destination carrier declined on October 13, 1963, as agent of airline, to honor damage claim, no action is possible against

agent motor carrier since provisions of air tariffs constitute part of contract of carriage and preclude offset or suit unless brought within two years of claim disallowance, notwithstanding Condition 7 of GBL; however, recovery from air carrier is possible since two years has not expired from its June 10, 1965, letter declining payment. B-158994-O.M., June 24, 1966.

Recoupment

On ocean shipment from Spain to Vietnam subject to the Carriage of Goods by Sea Act where U.S. failed to bring suit for loss of goods within one year of the date when the goods should have been delivered under 46 U.S.C. 1303(6), it was pointed out that the duty to make recovery for loss of Government cargo and protect the Government's right from being extinguished clearly rests with the administrative agency or agencies involved and if the amount of loss is not recovered it should be reported to GAO within six months from the date demand was first made on debtor. However, a general average claim and the loss claim arose out of the same contract and circumstances and, under the doctrine of recoupment, GAO would not be barred from collecting the amount of loss from the amounts due on the general average claim. B-163281, July 24, 1968.

Setoff in Admiralty

Although amendments to the Federal Rules of Civil Procedure may justify a conclusion that the holding in U.S. v. Isthmian S.S. Co., 359 U.S. 314, no longer precludes collection by setoff, utilizing unrelated transactions, of any amount of a loss and damage claim against an ocean carrier, action may be unsuccessful because courts have held that where the Carriage of Goods by Sea Act is applicable the one-year limitation in 49 U.S.C. 1303(6), applies to suits by U.S.; moreover, court held in M.V.M., Inc. v. St. Paul Fire & Marine Ins. Co., 156 F. Supp. 879, reversed on other grounds 258 F.2d 374, that expiration of one-year time limitation extinguishes the cause of action as well as the remedy. B-159568, August 5, 1966.

Waiver of Limitations

An effective waiver of the one-year time limitation available under the Carriage of Goods by Sea Act (COGSA) for bringing an action to recover for damage of goods during shipment may be executed at commencement of relationship between shipper and carrier. Carriage of Goods by Sea Act, 46 U.S.C. 1303(6), 1305. United States v. Gulf Puerto Rico Lines, Inc., 492 F.2d 1249 (1st Cir. 1974).

Fact that bill of lading issued by carrier was overstamped by federal government officials to provide that government's shipment was made under terms of standard form government bill of lading which contained waiver by carrier of all limitation periods indicated that officers did not make any concessions to carrier concerning period of limitations and precluded carrier, which accepted overstamped bill, from arguing that government waived right to bring action for damage to shipment within six years and thus was subject to Carriage of Goods by Sea Act's one-year period of limitations for bringing action to recover for damage incurred during shipment. 28 U.S.C. 2415; Carriage of Goods by Sea Act, 46 U.S.C. 1303(6). United States v. Gulf Puerto Rico Lines, Inc. 492 F.2d 1249 (1st Cir. 1974).

Under statute providing that every action for money damages brought by United States upon any express or implied contract shall be barred unless commenced six years after accrual of right of action, United States, whose officers overstamped bill of lading to provide that government's shipment would be made under terms of standard form government bill of lading which contained waiver by carrier of all limitation periods, had six years in which to bring suit to recover for damage to goods during shipment. 28 U.S.C. 2415. United States v. Gulf Puerto Rico Lines, Inc., 492 F.2d 1249 (1st Cir. 1974).

COGSA Inapplicable to Actions by U.S.

Carriage of Goods by Sea Act provision that no action for damages during shipment may be maintained unless suit is brought within one year after delivery of goods does not apply to actions by the United States. Carriage of Goods by Sea Act, 46 U.S.C. 1303(6). United States v. Gulf Puerto Rico Lines, Inc., 492 F.2d 1249 (1st Cir. 1974).

COGSA Applicable to Actions by U.S. [Contra Gulf, supra]

Condition 7 of the Government bill of lading controlled the rights of the parties with respect to commencement of suit after more than one year rather than the provision and the tender of the carrier setting forth the statute of limitations in the Carriage of Goods by Sea Act. B-177238, March 28, 1973.

II. ADMINISTRATIVE ACTIONS

A. Act of October 9, 1940, 31 U.S.C. 71a

Until amended in 1975 by Pub. L. 93-604, this act provided a ten-year statute of limitations on claims cognizable by the GAO. Every claim (and that included transportation claims not subject to section 322 of the Transportation Act of 1940, as amended, 49 U.S.C. 66). cognizable by the GAO was forever barred unless

received in GAO "within ten full years after the date such claim first accrued."

Date of Accrual

Claims against the U.S. for transportation charges accrue upon the completion of the transportation service; that is, on the date of delivery of the shipment to the consignee, and the 10-year statute of limitations established by 31 U.S.C. 71a begins to run from that date. However, when an overpayment is collected from the carrier under 49 U.S.C. 66, a new recovery right, under the 10-year statute, accrues and such right as to transportation services performed prior to August 26, 1958 (the date of enactment of Public Law 85-762, 49 U.S.C. 16(3), which reduced the limitation period to 3 years) may be asserted by filing a claim in the GAO within 10 years from the date of the collection, but this right to assert a claim extends only to the amount actually collected. 39 Comp. Gen. 448 (1959).

Transit Privileges

Although there are two deliveries where Government property, transported on Government bills of lading is accorded a transit privilege, the first at the transit point and a later one at final destination, the continuity of the through movement is maintained, so that the inbound portion of the transportation is lost in the fiction of transit and the final delivery at the outbound destination fixes the carrier's right to freight charges and commences the running of the 10-year statute of limitations in 31 U.S.C. 71a. The timely filing and disallowance of the inbound carrier's supplemental claim, after payment to the outbound carrier on the outbound billing, neither tolled the statute of limitations nor gave new rights to the parties to the through shipment. 36 Comp. Gen. 739 (1957).

Additional Claims

The inadvertent payment in full of additional transportation charges, which were claimed by a carrier after the expiration of the 10-year statute of limitations, 31 U.S.C. 71a, and when no other charges were claimed or contemplated by either the carrier or the Government, cannot be regarded as a part payment or an acknowledgment of a larger debt to revive an indebtedness barred by the statute. 36 Comp. Gen. 362 (1956).

The payment of transportation charges in the full amount claimed by the carrier within the 10-year statute of limitation does not extend the time limitation, and therefore, a supplemental bill for

additional charges presented after the expiration of the 10-year period constitutes an entirely new claim, even though the same bills of lading are involved, and is barred by the statute. 36 Comp. Gen. 360 (1956).

Date of Accrual

Carrier who filed supplemental bill in 1960, consisting of charges not previously claimed under a bill of lading dated in 1943 and refund of part of charges deducted in 1946 from amounts otherwise due the carrier, on the basis that 31 U.S.C. 71a began to run in 1953 when the unpaid part of the claim for refund of items deducted was withdrawn, is not entitled to additional charges because the supplemental claim received in 1960 is considered to be a new claim, withdrawal of claim for refund in 1953 having terminated the original claim for refund of items deducted, and since it was filed more than 10 years after rendition of transportation service in 1943 and deduction action in 1946, the new claim is barred by 31 U.S.C. 71a. B-151961, December 10, 1963.

Date of Accrual - Amount Deducted

Carriers' contention that 31 U.S.C. 71a starts to run from the time deductions are made by Government from amounts otherwise due the carrier is true but only up to the amount of the deductions, for although a cause of action for transportation charges accrues upon delivery or tender of delivery, the right to claim charges expires 10 years from the delivery date, except that deductions made after the accrual date set the statute of limitations running anew for the amount of the deduction made within 10 years of the receipt of the claim. B-150539, B-147507, September 9, 1963.

Communications Carriers

The claim submitted by the Western Union Telegraph Company within the 10-year limitation period for filing claims with the United States General Accounting Office (GAO) for services denied administratively on the basis the claim was barred by the 1-year limitation of action provision in the Communications Act, 47 U.S.C. 415(a), is cognizable under 31 U.S.C. 71 and 236, as the time limitations for the commencement of "actions at law" prescribed by the Communications Act and the Interstate Commerce Act do not affect the jurisdiction of the GAO unless specifically provided by statute, and the 3-year limitation for filing transportation claims with GAO prescribed by section 322 of the Transportation Act, as amended, 49 U.S.C. 66, does not affect the right of firms providing service under the Communications Act to have their claims considered by GAO if presented within 10 full years after the dates on which the claims first accrued. 51 Comp. Gen. 20 (1971).

The Act of October 9, 1940, 31 U.S.C. 71a was amended January 2, 1975, by Pub. L. 93-604, Title VIII, § 801, 88 Stat. 1965. The period within which a claim for demand against the United States has to be filed was reduced from ten to six years. Section 802 provided that this amendment shall go into effect 6 months after the date of enactment (Jan. 2, 1975), and will have no effect on claims received in the General Accounting Office before that time.

B. Section 322 of the Transportation Act of 1940,
as Amended, 49 U.S.C. 66

Section 322 of the Transportation Act of 1940, as amended, 49 U.S.C. 66, originally provided a three-year time limit on the presentation of claims for transportation charges by carriers subject to the Interstate Commerce Act or the Civil Aeronautics Act.

Setoff Reclaims

The fact that a carrier waited more than 3 years from the date of an administrative deduction of a loss and damage claim from amounts payable to present to the GAO an offer in compromise and a supplemental bill for partial refund of the amount deducted, does not bar the reclaim, because 49 U.S.C. 66, which precludes allowance of a refund claim by GAO unless filed within 3 years of the deduction, applies to a withholding from carrier accounts to recover transportation overcharges, and since the withholding was made under the Government's common law right of setoff, a claim for refund filed in the courts would be governed by the 6-year statute, 28 U.S.C. 2401 and 2501, and a claim filed with GAO would be governed by the 10-year statute, 31 U.S.C. 71a. 46 Comp. Gen. 801 (1967).

Claims Must be Filed with GAO

A supplemental claim for transportation charges on a shipment of household goods which was received by the GAO more than 3 years after the accrual of the claim on the completion of the service and after payment of the original bill is barred under 49 U.S.C. 66, notwithstanding the fact that the claim had been filed with another Government agency, the statute of limitation providing that claims must be received in the GAO within 3 years after the date the claim first accrued, a requirement which may not be waived. 46 Comp. Gen. 436 (1966).

Timely Filing With General Accounting Office

The 3-year statute of limitation prescribed by 49 U.S.C. 66 affects both claims for transportation services against the U.S. and the rights of the Government to deduct overcharges and a carrier, to preclude the jeopardizing of its rights by the running of the statutory period may, before the expiration of the 3-year period, file a claim with the GAO. 46 Comp. Gen. 436 (1966).

Date of Accrual - Supplemental Payments

The deduction of an erroneous supplemental payment of freight charges on a Government shipment from subsequent carrier billing made 3 years after payment of the original bill is not barred by the 3-year statute of limitations provided in 49 U.S.C. 66, because the right reserved to the Government in 49 U.S.C. 66 to recover within 3 years from "the time of payment of bills" the overcharges subsequently found due in payments made for transportation services prior to audit or settlement has reference to both initial and supplemental payments. And, since a carrier making a refund of transportation charges, voluntarily or under protest, has 3 years from the date of refund to file a claim for recovery, a reciprocal right exists on the part of the Government to recover an erroneous supplemental payment under 49 U.S.C. 66, as amended, which is intended to prescribe equal treatment for carriers and the Government. 46 Comp. Gen. 223 (1966).

Freight Forwarder - Unregulated

A claim for transportation charges, waived by the motor carrier contracting to transport a shipment of household goods from overseas in through container service to an unregulated carrier (forwarder), who was not a party to the Military Rate Tender on which the charges are based, filed more than 3 years after the date of delivery, is barred by 49 U.S.C. 66. Delivery by the forwarder as agent (who improperly directed that payments be made to its assignee), or waiver by the motor carrier of the transportation charges, did not confer a greater right on the forwarder than the bill of lading contract provided; and even if authorized to bill in its own name, payment may not be allowed to the forwarder because the 3-year limitation for filing claims for transportation charges prescribed by 49 U.S.C. 66 and the rules and procedures governing the interstate operation of household goods carriers apply as well to the foreign segment of shipments moving on through GBLs, when a regular carrier subjects itself to the Interstate Commerce Act. 44 Comp. Gen. 609 (1965).

Transit Privileges

Transit shipments which originated in 1953 under GBLs but which were not delivered at destination until after August 26, 1958, the effective date of 49 U.S.C. 66, which establishes a 3-year limitation on claims for transportation "performed" and paid for after that date, must be regarded within the meaning of the act as being performed when the shipments were delivered at destination rather than when the shipments originated; therefore, since the claims for additional freight charges were not received in the GAO until more than 3 years after both delivery, "performance" of the transportation and payment, the claims are barred by 49 U.S.C. 66. 43 Comp. Gen. 13 (1963).

Date of Accrual

Carrier's supplemental claim for additional freight charges on transportation of sisal from transit point under bills of lading dated in December 1958 (originally moved under bills of lading in 1st quarter of 1953), received in GAO on April 6, 1962, is barred under 49 U.S.C. 66 which limits period of filing claim for recovery of transportation charges to 3 years for transportation services performed after August 26, 1958, since in absence of anything in act or in its legislative history indicating an intent to limit application to services begun after effective date of act, there is no basis for construing word "performed" in the statute as restricting its application to such transportation, as opposed to service begun before but completed after such date. 43 Comp. Gen. 13 (1963).

Claim Received in GAO

Claim for transportation charges was received in GAO after statute of limitations had run. GAO is prohibited by statute, 49 U.S.C. 66, from paying a claim received after the time period. B-185014, December 30, 1975.

Carrier's claim received in GAO more than 3 years after the cause of action accrued is time barred under the Transportation Act of 1940, as amended, 49 U.S.C. 66 (1970), notwithstanding carrier's assertion that claim was submitted to the Army Finance Center within the 3-year period. B-181708, August 16, 1974; B-174818, May 9, 1972.

Although an air carrier submitted a copy of an alleged bill it had sent to this Office to toll the 3-year statute of limitations under 49 U.S.C. 66, the copy alone, without other substantiating evidence, was not enough to verify the timeliness of its claim for the applicable transportation charges and therefore the claim is barred. B-182614, December 16, 1974.

Erroneous Payments

The right to recover an erroneous payment made to a carrier for a transportation service claimed to have been performed for the United States, but which in fact had not been performed for the United States, is not subject to the time limitation in 49 U.S.C. 66. 53 Comp. Gen. 866 (1974).

Intermodal Traffic

When a ocean carrier issues a joint rate tender with a motor carrier subject to the Interstate Commerce Act, the ocean carrier is barred from claiming additional transportation charges upon the expiration of the 3-year period provided under 49 U.S.C. 66. 55 Comp. Gen. 174 (1975). B-178546, May 14, 1974, B-177408, January 2, 1973..

Administrative Delays

Claims for transporting shipments under Government bills of lading that were not presented for payment to the United States General Accounting Office (GAO) within 3 years of the dates on which the claims accrued pursuant to section 322 of the Transportation Act of 1940, as amended (49 U.S.C. 66), by reason of delayed handling in the departments involved are barred and may not be considered for payment. A cause of action for transportation charges against the United States accrues under section 322 upon the completion of the transportation service and the statute of limitation begins to run from the date of delivery to the consignee, and the filing of a claim with some other agency of the Government does not satisfy the requirements of the act. Where the running of the 3-year period is imminent, claims may be filed directly with the Transportation Division of GAO. 51 Comp. Gen. 201 (1971).

Misrouted Shipment

Where because of failure to properly route February 9, 1967,, shipments of Army tractor trucks, which were delivered during February, the Government was not entitled to the transit privileges accorded the shipments and erroneously paid the carrier on the basis of through rates, the additional freight charges filed February 9 and July 27, 1971, based on higher local rates from transit point to destination, are barred since the claim was not received by the General Accounting Office within 3 years of payment in May, 1967, as required by section 322 of the Transportation

Act of 1940, as amended (49 U.S.C. 66). The cause of action for freight charges accrues upon delivery, extended on interstate shipments transported for the United States to 3 years from date of payment, refund, or deduction, whichever is later, and no refund or deduction being involved, the extended period of limitations commenced to run on dates of payment in May 1967 and expired during May 1970. 52 Comp. Gen. 713 (1973).

Waiver of Statute

Every claim cognizable by GAO for transportation charges shall be forever barred unless received in GAO within 3 years from the date the cause of action accrued, (2) payment of charges, (3) subsequent refund or deduction, (4) deduction made pursuant to this section, whichever is later. Statute of limitations cannot be waived by officers or agents of the United States. 51 Comp. Gen. 201 (1971); B-181333, March 26, 1975.

Transit Shipments

A claim for freight charges on the outbound transit movement accrued upon delivery of the outbound shipments at destination. Since the claim for additional amounts was received in GAO more than 3 years after delivery, the GAO is prohibited from making payment. 52 Comp. Gen. 713 (1973).

GAO Review of Claim Settlements

GAO regulations provide for discretionary Comptroller General review of claim settlements upon application of the claimant or his duly authorized attorney or agent. While there is no time limit on the request for review, because of the three year time limit in 49 U.S.C. 66 (1970), we have used a three year period as the measure of the reasonable time from the date of settlement within which a request for review should be received. B-182378-O.M., February 26, 1975.

Definition - "Any Time of War"

The phrase "any time of war" in 49 U.S.C. 66 would begin when the Congress of the United States exercised its power to declare war under the Constitution of the United States, Article 1, Section 8, Clause II. The Vietnamese conflict is not included within this definition. B-182444-O.M., May 6, 1975.

Section 322 of the Transportation Act of 1940, as amended, 49 U.S.C. 66, was further amended by the Transportation Payment Act of 1972. The 1972 amendment, 49 U.S.C. 66(a), Pub. L. 92-550, expanded the definition of overcharges to encompass all modes of transportation and all means of contractual arrangements or exemptions from regulations.

Deduction Actions

Deductions authorized by 49 U.S.C. 66(a) must be made within three years from the time of payment of bills (or supplemental bills, See 46 Comp. Gen. 223 (1966)). The time when the deduction is made is the date when the appropriate disbursing officer makes the transfer between the funds to be charged and credited. B-179425-O.M., October 30, 1973.

By the General Accounting Office Act of 1974, Pub. L. No. 93-604, approved January 2, 1975, the transportation audit function was transferred from GAO to the General Services Administration. The entire transportation audit function, including the settlement of claims, was transferred to GSA, with the General Accounting Office retaining its oversight responsibilities as well as an appellate function enabling carriers to request the Comptroller General to review executive agency action on their claims. See Hearings on H. R. 12113 before a Subcomm. of the House Comm. on Government Operations, 93d Cong., 2d Sess. 32 (1974). The transfer was effective October 12, 1975 (B-163758, August 27, 1975).

The authority for GAO to review an action taken by GSA on transportation claims is found at 49 U.S.C. 66(b) (Supp. V, 1975), which provides that:

"Nothing in subsection (a) of this section hereof shall be deemed to prevent any carrier or forwarder from requesting the Comptroller General to review the action on his claim by the General Services Administration, or his designee. Such request shall be forever barred unless received in the General Accounting Office within six months (not including in time of war) from the date the action was taken or within the periods of limitation specified in the second proviso in subsection (a) of this section, whichever is later."

Pursuant to this statutory provision, we have promulgated regulations for the review of GSA transportation settlement actions. 4 C.F.R. 53 (1977). Specifically, 4 C.F.R. 53.2 (1977) provides that:

"Actions taken by the General Services Administration on a claim by a carrier or freight forwarder entitled under 49 U.S.C. 66 to be paid for transportation services prior to audit that have dispositive effect and constitute a settlement action as defined in sec. 53.1 will be reviewed by the Comptroller General, provided request for review of such action is made within six months (not including time of war) from the date such action is taken or within the periods of limitation specified in 49 U.S.C. 66(a), whichever is later."

The periods of limitation referred to in both the statute and regulation, specified in 49 U.S.C. 66(b), are: (1) accrual of the cause of action, (2) payment of the transportation charges, (3) subsequent refund for overpayment and (4) deduction.

GSA Settlement

49 U.S.C. 66(b) provides that claims for the payment of transportation charges must be received in 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. B-188647, December 28, 1977.

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. B-188647, December 28, 1977.

GAO Review

Review requests must be received in GAO no later than six months from date of final dispositive action by GSA or three years from date of certain enumerated administrative actions, whichever is later. Carrier requesting review by GAO of GSA action after those dates is time-barred. B-189460, December 27, 1977.

CHAPTER 18

TRANSPORTATION OF HOUSEHOLD GOODS AND PERSONAL EFFECTS

Here is a brief explanation of the general regulations authorizing the shipment of household goods, privately owned motor vehicles and personal effects of Government personnel. For individual factual situations regarding the transportation company's responsibilities these shipments please refer to the relevant topic in this Manual. We also suggest that you consult the Civilian Personnel and Military Personnel Manuals.

Regulations Governing Members of the Uniformed Services

The basic authority for the shipment of household goods at Government expense for members of the uniformed services is Title 37 of the United States Code, Pay and Allowances of the Uniformed Services. It was enacted into positive law by section 1 of Public Law 87-649, September 7, 1962, 76 Stat. 451. Section 406 of Title 37 provides that under such limitations as may be prescribed by the Secretaries concerned, members of the uniformed services when ordered to make a change of station shall be entitled to transportation of household effects. Regulations issued under that authority are drafted by representatives of the uniformed services and are contained in Department of Defense, Joint Travel Regulations, Volume 1, Members of the Uniformed Services, Chapter 8, which are revised periodically.

Regulations Governing Civilian Employees of the Government

Chapter 57 of Title 5 of the United States Code, Government Organization and Employees, 5 U.S.C. 5701 et seq., enacted into positive law by section 1 of Public Law 89-554, September 6, 1966, 80 Stat. 378, is the basic authority for payment of travel and transportation expenses of civilian employees of the Government, including the cost of shipping household goods and personal effects.

Executive Order 11609, July 22, 1971, 3 C.F.R. 308 (1974), 3 U.S.C. 301 (Supp. V, 1975), delegated to the Administrator of General Services the authority to promulgate regulations prescribing employee travel and relocation allowances, reductions in payments in connection with meetings and training, and transportation entitlements for return of deceased employees and their families. Issuance of the Federal Travel Regulations is authorized by the Administrator of General

Services in Part 101-7 of the Federal Property Management Regulations (FPMR 101-7). Part 8 pertains to the transportation and temporary storage of household goods. Similar regulations covering the civilian members of the Department of Defense are contained in Volume 2 of the Department of Defense Joint Travel Regulations. The regulations for this Office are contained in the General Accounting Office Operations Manual, Order 0300.1, March 24, 1976. Regulations pertaining to household goods are likewise found in Part 8, page 2-33.

Commuted rates of payment are for application where civilian employees elect to ship, within the continental United States, excluding Alaska, their household goods and personal effects at their own expense and are later reimbursed by the Government. Executive Order 11012, March 27, 1962, 3 C.F.R. 97 (1974), 3 U.S.C. 301, transferred from the Office of Management and Budget to the General Services Administration the authority to prescribe the commuted rate schedule containing rates to be used in reimbursing employees for the expenses of their household goods shipments incident to official transfers. The commuted rate schedule is prescribed in FPMR 101-7, and is published in GSA Bulletin FPMR A-2 and its supplements.

Regulations Governing Personnel of the Department of State Foreign Service, United States Information Agency and The Agency for International Development

In accordance with the authority granted to the Secretary of State by the Foreign Service Act of 1946, 22 U.S.C. 801, et. seq., as amended; to the Director, United States Information Agency, under Reorganization Plan 8, 1953, and Executive Order 10477, August 1, 1953; to the Administrator, Agency for International Development, by the Foreign Assistance Act of 1961, Pub. L. 87-195, 75 Stat. 424, September 4, 1961, as amended, Executive Order 10973, November 3, 1961, 3 C.F.R. 90, as amended, and State Department of Delegation of Authority No. 104 of November 3, 1961, as amended, regulations governing the movements of household goods and effects having uniform applicability among Foreign Service personnel of Department of State, United States Information Agency (USIA), and Agency for International Development (AID) are prescribed in Department of State, Foreign Affairs Manual, Volume 6, Chapter 100.

CHAPTER 19

TRANSPORTATION TAXES

Federal Tax--Exemption

In the absence of an express provision to the contrary, a Federal tax statute is ordinarily construed as not imposing a tax on the United States for it is presumed that the United States will not tax itself. Where there is a Federal tax imposed on transportation services including those of the United States, the statute may authorize Government Officers to exempt transportation services furnished the United States Government where the full benefit of the exemption will accrue to the United States. See, for example, 26 U.S.C. 4293 and B-164702, June 28, 1968.

State Tax--Transportation

In connection with State taxes on intrastate transportation services, it has been held generally that where the incidence of the tax is on the vendor or supplier to the Government, and no exemption is provided in the statute as to sales to the United States, the constitutional privilege under which the Federal Government is immune to State taxation is not applicable. B-147615, December 14, 1961; see, also 24 Comp. Gen. 150 (1944); 33 *id.* 453, (1954).

State Tax--Economic Burden

Where provision is made by contract or tariff for passing on to the ultimate consumer the economic burden of a State tax on intrastate transportation service, the burden properly may be passed on as an element of the cost even though the user is the United States. B-147615, December 14, 1961; see, also 24 Comp. Gen. 150 (1944); 32 *id.* 423 (1953).

Foreign Government Tax

The tax imposed by the Cuban Government on transportation within that country, being a necessary part of the cost of such transportation, may be paid under the appropriation chargeable with the transportation. 15 Comp. Gen. 151 (1935).

Transportation Tax Not Part of Freight Rate

The tax formerly imposed by section 620 of the Revenue Act of 1942 on the amount paid for the transportation of property and

required to be paid by a lump sum construction contractor in connection with shipments of specified material and equipment allocated to the contractor by the Government for use in performance of the contract work, does not represent an increase in the cost of the materials and equipment or an increase in the freight charges within the meaning of a contract clause providing for "an equitable adjustment" on account of "any increase or decrease in the amount" specified in the contract "to cover the cost of the materials and equipment allocated to the contractor" and the "freight charges" thereon. 22 Comp. Gen. 1059 (1943).

The tax formerly imposed by section 620 of the Revenue Act of 1942 on the amount paid for the transportation of property--the legal incidence of which is on the shipper rather than the carrier, the latter being merely a collecting agent for the tax--is not a part of the compensation to which the carrier is entitled for its services and, therefore, does not represent an "increase" in the "freight rate" within the meaning of a provision in a VA cost contract requiring an adjustment in price in the event of an increase or decrease in the freight rate in effect on date of opening bids. 22 Comp. Gen. 623 (1942).

Tariff Provisions on Taxes

CAO had no objection to payment of carrier's bills which include charges by reason of a two percent New Mexico State Business privilege tax on shipments moving under Government bills of lading wholly within the State of New Mexico if the contract or tariff under which the services were rendered provide for passing on to the user of the service the amount of the tax. B-147615, December 14, 1961.

Where a carrier's tariff did not provide for increasing the transportation rates by the amount of a New Mexico business privilege tax on the gross receipts of businesses, including transportation, and there was no provision of the contract of carriage obligating the United States for payment of the tax, the state tax was not payable by a user of the transportation service. B-148311-O.M., April 20, 1962.

Alaskan aircraft carrier who was assessed transportation taxes by the Internal Revenue Service (IRS) on freight and passenger contract payments from January 1956 to June 1957 may be reimbursed them notwithstanding the general rule that the United States is exempt from Federal transportation taxes and despite the fact that the Air Force recommends that the claim be denied because the carrier made a

unilateral mistake in failing to include the tax in the bid price, since IRS ruled that the tax was properly assessable, and since the incidence of the tax is upon the transportation payment for which carrier is only secondarily liable; furthermore, in view of the carrier's published charter rates, etc., the contracting officer was charged with constructive notice of probable error and should have verified tax inclusion prior to award, and the evidence warrants the conclusion that the price based on the charter rates did not include the tax. B-137086-O.M., July 26, 1960.

Taxes as an Element of the Cost of Service

The burden of the state highway user taxes may properly be transferred to the user of the transportation service, including the United States, as an element of the cost of service. B-112615-O.M., January 13, 1953.

Carriers Charged with Notice of the Law

Carriers were charged with notice that shipments of property made to or from Government agencies moving under Government bills of lading were not subject to the transportation tax imposed by the Revenue Act of 1942, as amended, notwithstanding the fact that notations on the bills of lading indicated that such tax was to be advanced by the carrier and included in its voucher for transportation charges in addition to the published tariff rate, because Government officers are without authority to contract for charges where a statute provides for the nonpayment of a tax. B-90384, April 12, 1950.

Airport Departure Fees

Airport departure fees paid by military and civilian personnel incident to the official travel of themselves and their dependents are reimbursable on the basis of the decision in Evansville-Vanderburgh Airport Authority District v. Delta Air Lines, Inc., 405 U.S. 707 (1972). 52 Comp. Gen. 73 (1972).

Transportation Excise Tax on Air Transportation

Airline claim for payment of the excise tax on domestic air movement is for allowance where shipments does not move on through airwaybill and export exemption certificate is not furnished by Government agency within 6-month period as required in the regulations promulgated by the Internal Revenue Service and published at 26 C.F.R. 154.2. Tax imposed by the Airport and Airway Development and Revenue Acts of 1970, Pub.L. 91-258, 26 U.S.C. 4271. B-179248-O.M., August 21, 1971.

Transportation Excise Tax on Air Transportation

To facilitate the audit, the airlines have been requested to show the excise tax as a separate item in billing for air transportation services rendered for the United States. B-170342-O.M., September 16, 1970.

Transportation Excise Tax on Air Passage

Government agencies purchasing air transportation have primary responsibility for recovering overpayment of excise taxes paid on unused or partially used tickets for air transportation. The General Accounting Office becomes involved in the refund procedure only when the air carriers fail to refund and the account is referred here for collection or in the final reconciliation of an account. Amounts recovered are for credit to the appropriations from which the payments originally were made so that such amounts remain available for further use. B-170342-O.M., September 16, 1970.

Transportation Excise Tax on Air Passage

The Airport and Airway Development Act of 1970, Public Law 91-258, of May 21, 1970, effective July 1, 1970, 26 U.S.C. 4261, imposed an 8% excise tax which is payable on official Government air travel. The excise tax is, therefore, a part of the constructive costs for reimbursement to Government employees traveling on official business at their own expense. B-173304-O.M., July 15, 1971.

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