GAO

United States
General Accounting Office
Washington, D.C. 20548

Office of the General Counsel

B-236609

September 8, 1989

The Honorable Stuart E. Schiffer
Acting Assistant Attorney General
Civil Division
Department of Justice
Washington, DC 20530

Ref: SES:DMC:SRay:cbf:154-420-89

Dear Mr. Schiffer:
Subject: American Transfer & Storage Co., et al. v. United States, Ct. Cl. 420-89C

We are in receipt of your request of August 16, 1989, for a litigation report relating to the complaint filed in the above-referenced case, in which plaintiffs seek judgment for return of money deducted from their receipts by the General Services Administration (GSA) in collection of transportation overcharges which carriers' allege were erroneous.

Our records disclose that the plaintiffs' claims have not been considered in this Office, and we have no information concerning the matter raised in the complaint. Further, this Office has no record of any outstanding indebtedness owed by any of the plaintiffs to the government.

In accordance with 31 U.S.C. § 3726, the General Services Administration (GSA) has government-wide responsibility for prepayment and postpayment audit of agency transportation procurements. In furtherance of that function, receivables otherwise owed to carriers by government agencies, are subject to deduction to satisfy overpayments identified by GSA during audit. Related regulations, forms and procedures, including administrative remedies available to protesting carriers, are contained in title 41, Code of Federal Regulations, Part 101-41.

It is our understanding that the Military Traffic Management Command (MTMC), as traffic and acquisition manager for the shipment of personal property in the Department of Defense, publishes a standard solicitation applicable to intrastate personal property movements. Generally, carriers who wish

to participate in MTMC traffic agree to a standard Tender of Service (not to be confused with a carrier's individual rate tenders) imposing certain duties on them. Once they are accepted by MTMC and sign the Tender of Service, carriers then offer rates and charges in individual rate tenders offered under the solicitation. When the government accepts the tender offer by giving a shipment to the carrier, the tender becomes part of the contract of carriage and is recognized by statute as an exception to the requirement that the government pay the full applicable commercial rate, and for the common carrier to abide by its published tariff rates. The carrier is authorized to transport at free or reduced rates for the government. See 49 U.S.C. § 10721. See also Jetco, Inc. v. United States, 11 Cl. Ct. 837, 845 (1987); and Baggett Transportation Co. v. United States, 670 F. 2d 1011, 1012 (Ct.Cl. 1982). Tender rates and charges are usually offered on a required form which contains a clause providing that they will alternate with those in the carrier's other tenders or in his commercial tariffs covering the same service, so that the tender or tariff yielding the lowest overall charges for the service provided will ultimately apply to the movement. The Tender of Service, the solicitation, the lowest tender/tariff and the Government Bill of Lading are all components of the contract with the carrier.

While we have no particular knowledge of the facts in this case, it appears that MTMC decided to offer all personal property traffic from Fort Bliss to Fort Hood, during a peak period from June 1, 1988, to August 31, 1988, as a package to one or more carriers. When no offers were received, a MTMC employee allegedly informed each of 13 carriers that they could offer rates and charges even higher than those otherwise applicable through the usual tenders offered by the carrier under the intrastate solicitation, and that no alternation with lower rates and charges in these tenders would take place. As we understand the situation, carriers then offered higher rates and charges applicable to the Summer 1988 traffic from Fort Bliss to Fort Hood on the same required tender form, with the usual alternation clause, and without cancelling or modifying (fully or partially) generally applicable tenders under the intrastate solicitation. GSA then applied the lower rates and charges contained on the existing intrastate tenders when it conducted postpayment audits.

Generally, if two or more tenders or tariffs are applicable to a particular transportation movement or service, the one resulting in the lowest overall cost to the government will apply. Baggett Transportation Co., supra at 1012; and Southern Pacific Transportation Co. v. United States,

596 F.2d 461, 465 (Ct.Cl. 1979). In negotiating rates for their traffic, Government agents are generally prohibited from contracting for higher rates than those available to the public through the lowest published tariff. See Puerto Rico Marine Management, Inc., 57 Comp. Gen. 584, 586 (1978) and the cases cited therein. They are also prohibited from retroactively modifying a tender to provide for higher rates than those otherwise available at the time that the shipment moved. Retroactive Modification of Rate Tender, B-221075, May 13, 1986. However, they may agree to specific exceptions for future shipments at rates and charges higher than those otherwise available through existing tenders, so long as the new agreement specifies the extent that it will override existing lower tender rates and charges. See Star World Wide Forwarders, Inc., B-190757, July 28, 1978; Retroactive Modification of Rate Tender, supra and Puerto Rico Marine Management, supra. And, since its filing system is not statutorily mandated, MTMC can waive any requirement that a tender or an amendment thereto, even one amounting to an exception, have any particular format or content. Star World Wide Forwarders, Inc., supra.

Even if an authorized MTMC official agreed to the upward revision of the Fort Bliss to Fort Hood rates, the carriers still may not be able to recover. Unless some exchange of written correspondence constituting an agreement for a temporary increase in rates also reflects an agreement not to alternate, parol evidence generally would not be allowed to contradict express written provisions requiring alternation as contained in the carriers' own tenders providing for the increase.

For your convenience, copies of the Comptroller General decisions referenced herein are enclosed. If we can provide any further assistance, please contact the attorney from this Office assigned to this matter, Michael D. Hipple, at

Sincerely yours,

John J. Mitchell Jr.

John J. Mitchell, Jr.
Assistant General Counsel

Enclosures