DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

60002

FILE: B-181560 DATE: OCT 1 1975

97861

MATTER OF: Ultra Special Express

DIGEST:

Arrival of shipping documents in advance of actual unloading is irrelevant to issue whether United States is liable for vehicle detention charges for unloading performed in excess of two hours where motor carrier, with knowledge of fact that vehicles are scheduled for unloading at an ocean terminal by Military Traffic Management Command, offers to perform transportation services which include use of its vehicles at no extra charge for two hours for unloading.

During 1975, Ultra Special Express (Ultra) presented several hundred supplemental bills or claims totaling about $875,000 for additional transportation charges consisting of detention charges allegedly incurred at the Military Ocean Terminal, Bayonne, New Jersey (MOTBY) on over 1,700 shipments moving on Government bills of lading (GBL). The transportation was performed and Ultra collected its line-haul transportation charges on the 1,700 shipments over a three-year period, dating back to as early as 1971.

The written record submitted by the claimant consists of two papers attached to each supplemental bill or claim. They are a form entitled "Support for Undercharges," containing information on each truckload of cargo, and a copy of an unidentified form containing information whose relevance is not explained.

Our Transportation and Claims Division (TCD) assembled the payment record on three of these claims and submitted them to us. Claim No. TK-975143 covering GBL No. E-8690339 is illustrative.

The GBL shows that Ultra transported a shipment of miscellaneous cargo from Davisville, Rhode Island, to MOTBY. The original carrier bill No. 244 for line-haul charges of $141 and for accessorial charges of $9.55 (total of $150.55), was paid on March 30, 1972. A claim by supplemental bill No. 244A for additional line-haul charges of $34 was presented on February 19, 1974, and

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upon allowance and payment, the charges collected by the carrier were increased to $184.55. Supplemental bill No. 244B for $1,410, the claim here under consideration, was presented February 28, 1975, or about three years after the original billing, and exceeds the amount of the previous billing by about nine times.

The "Support for Undercharges" form relating to the claim is reproduced below:

SUPPORT FOR UNDERCHARGES
ULTRA SPECIAL EXPRESS
P.O. BOX 808 FREEHOLD, NEW JERSEY 07728

| REFERENCE | VOUCHER NO. | DATE PAID | CARRIER BILL NO. |
|---|---|---|---|
| | R 3981 | 4/72 | 244 |
| B/L No. | E-8,690,339 | DATE | 2-17-72 |
| FROM | DAVISVILLE, R.I. | TO | M.O.T. BAYONNE, N.J. |
| COMMODITY | MISC. CARGO | DIM | |
| AUTHORITY | I.C.C. #3 | AMOUNT CORRECT | $1594.55 |
| | | AMT.PAID TO U.S.E. | 184.55 |
| | | AMT. DUE U.S.E. | $1410.00 |

CHARGES:

LINE HAUL AS BILLED: $175.00

PERMITS & TOLLS AS BILLED: 9.55

*DETENTION OF EQUIPMENT: 1410.00

TOTAL $1594.55

NOTE: PER C G DECISION #181560 DATED JAN. 29, '75

*DETENTION OF EQUIPMENT. 94 HRS. AT $15/HR:

PRELODGE NOTICE GIVEN AT M.O.T. BAYONNE

AT 11 a.m. ON 2-18-72, PERMITTED DELIVERY

AT 11 a.m. ON 2-22-72, LESS 2 HRS. FREE TIME.

The note "Per C G Decision #181560, dated Jan. 29, '75" apparently relates to a letter dated January 29, 1975, B-181560, from the Comptroller General informing Ultra that TCD had been instructed to allow a claim for detention charges, and to withdraw a notice of overcharge, on a shipment of three truckloads of Government property that arrived for unloading at Military Ocean Terminal, c/o Grace Prudential Lines, Shed 138, Port Newark, New Jersey, when the pier was closed due to the death of a Union Vice President. Because that letter merely informed Ultra that the Comptroller General had instructed TCD to allow a claim, it has no precedential value on the question of the liability of the United States for detention charges at MOTBY presented in these claims.

The tariff authority shown, "I.C.C. #3", refers to the carrier's Section 22 Tender I.C.C. No. 3. Below are pertinent provisions of that tender:

Item 10.

> "I am (We are) authorized to and do hereby offer on a continuing basis to The United States Government, ... pursuant to Section 22 of the Interstate Commerce Act, ... the transportation services herein described, subject to the terms and conditions herein stated. * * *"

Item 16. Accessorial Services

> "The accessorial services shown below will be furnished by the carrier on request of the shipper at the rates or charges specified in this item, which will be in addition to the rates or charges shown in items 11 and 12. Such requests must be shown on the Bill of Lading and initialed by the person requesting same. PLEASE SEE ATTACHMENT #3 OTHERWISE: Apply all rules and regulations of heavy (sic) and Specialized Carriers Tariff Bureau, Tariff 100-E, MF-I.C.C. 26 including supplements and reissues"

Attachment #1. Points Service Offered

* * * * *

"ITEM: 3 BETWEEN Military Ocean Terminal, Bayonne, New Jersey.

"ITEM: 6 AND all points and places in CONNECTICUT, DELAWARE, MARYLAND, MASSACHUSETTS, NEW JERSEY, NEW YORK, PENNSYLVANIA, except Philadelphia, RHODE ISLAND, VIRGINIA, and the DISTRICT OF COLUMBIA."

Attachment #3. Exceptions and Additional Charges

* * * * *

"Additional Charges C (condition of shipment acceptance by Carrier)

2 hours free time for loading and/or unloading will apply on all Rate Tables as foung [sic] in Attachment #2 hereof, time in excess must specify arrival and departure date and time at origin and/or destination while Carrier's Driver is at hand. Charges if any will be added to shipment cost."

The line-haul rates and minimum charges are contained in Attachment No. 2.

We begin by noting that claimants have the burden of proving their claims. See United States v. New York, New Haven & Hartford RR., 355 U.S. 253, 262 (1957); 51 Comp. Gen. 208, 214 (1971). In a decision dated August 5, 1974, B-180733, Ultra was apprised of this legal prerequisite to its right to payment of a claim. Through publication of section 54.9 of Title 4, Code of Federal Regulations, Ultra, as well as other carriers, is given notice that in the presentation of claims for settlement before the General Accounting Office, the claimant must establish the clear liability of the United States and the claimant's right to payment under the contract of carriage, among other things, and the factual situation disclosed by the written record.

Both carrier and shipper are bound by their stipulations of service and rates. Southern Railway v. Prescott, 240 U.S.

632, 638 (1916). Thus, the detention charges here involved cannot be collected until the terms and conditions of the carrier's detention rules and all duties imposed by law as conditions precedent to their application have been complied with. See 13 C.J.S. Carriers, § 336. And duties imposed by law include settled custom and usage; its evidence consists of the understanding of the parties in their contracts which are made with reference to such usage and custom. See Strothers v. Lucas, 12 Pet. 410 (1838). It seems clear that custom and usage is used to explain the meaning of words and the intentions of the parties when they have knowledge of its existence and have contracted with reference to it. Barnard v. Kellogg, 10 Wall. 383 (1870). It is established that regulations, issued pursuant to lawful authority, have the force of law. 51 Comp. Gen. 208, 210 (1971); Public Utilities Commission of California v. United States, 355 U.S. 534, 542 (1958). And a regulation governing the publication of detention rules provides that tariffs authorizing detention of vehicles or providing charges therefor, shall clearly show their applicability. 49 C.F.R. 1307.35(a) (1971).

Another well-established rule is that any ambiguity in a tariff written by the carrier is interpreted strongly in favor of the shipper. Indiana Harbor Belt RR. v. Jacob Stern & Sons, 37 F. Supp. 690, 691 (N.D. Ill. E.D. 1941); Chicago & Northwestern Ry. v. Union Packing Co., 326 F. Supp. 1304, 1307 (D. Neb. 1971). This was explained to Ultra in our decision of January 28, 1975, B-182110, citing C & H Transportation Co. v. United States, 436 F. 2d 480 (Ct. Cl. 1971).

Tender I.C.C. No. 3 incorporates by reference certain provisions of Heavy & Specialized Carriers Tariff 100-E, MF-I.C.C. 26 (Tariff 100-E). Although not articulated in the record, Ultra apparently is relying on the purported significance of a "prelodge notice," referred to in the Support For Undercharges, to support its claim; according to Ultra, it starts the period of detention. But nowhere in the record is there a reference to a specific provision in Tender I.C.C. No. 3 or Tariff 100-E that would make applicable the detention charges claimed.

By following the instructions in item 16 of I.C.C. No. 3, i.e., by referring to the "accessorial services shown below,"

we are referred to Attachment 3, which contains a detention provision in "Additional Charges C." That provision designates unloading time in excess of two hours as an accessorial service requiring assessment of charges in addition to the line-haul rates in Attachment 2.

By the terms of item 16, before the carrier will furnish the accessorial service of allowing the consignee to use a vehicle while unloading, in excess of two hours, (1) a request for such service must be made; (2) the request must be noted on the bill of lading; and (3) the request must be initialed by the requesting person. Further, according to the terms of Attachment 3, (4) the arrival date and time at destination must be specified, apparently (5) in the presence of the carrier's driver.

Conditions precedent to liability of the Government for detention charges would be compliance with these tender provisions, and proof of actual detention of a vehicle after the consignee had used two hours for unloading. Compliance and proof of detention are totally absent from the record.

It is clear that the transportation services offered under the reduced rates contained in Attachment 2 to the tender include the consignee's control and direction of the vehicle for two hours for the purpose of unloading. A minimum requirement of "unloading" is actual movement of the lading. Tennessee Carolina Trans., Inc. - Investigation, 337 I.C.C. 542, 551 (1970). The lading cannot be moved until the consignee accepts delivery at a specified unloading point. The claimant admits that MOTBY did not permit delivery of the shipment transported on GBL No. E-8690339 until 11:00 a.m. on Tuesday, February 22, 1972. The claimant furnishes no evidence showing that the consignee appropriated the use of its vehicle in excess of the two hours that the carrier agreed was covered by the line-haul rates in Attachment 2. Detention does not begin to run until the time that the shipper undertakes an affirmative act appropriating any given vehicle to its own use. See Chicago & Northwestern Ry. Co. v. Union Packing Co., supra, at 1307.

We do not see the relevancy of the date and time of a "prelodge notice" to the issue of liability for detention charges. On page 25 of Reference Text 451, "Conus Terminal Operations," U.S. Army Transportation School, Fort Eustis, Virginia, December 1972, "prelodging" is described as the process of sending transportation papers ahead of a shipment. It further explains that:

> "The prelodged documents go to the freight traffic division. Therefore, the division is able to schedule arrival time of trucks daily and to preassign unloading points for each truck scheduled to arrive at the terminal. By providing an orderly flow of traffic into the terminal, the carrier is assured of prompt processing and shortened turnaround time."

Whether the documents are "prelodged" by the carrier or by the shipper has no legal significance. It is clear that under regulations and by custom known to Ultra, unloading at MOTBY is performed by prescheduling the arrival of trucks. Ultra contracted with reference to these regulations and with full knowledge of the inbound traffic flow procedures at MOTBY when it offered the reduced rate transportation services under its Tender I.C.C. No. 3.

By law, Military Traffic Management Command (MTMC), (formerly Military Traffic Management & Terminal Service), is given the responsibility to manage cargo flow of Department of Defense shipments within the United States, and to develop and maintain uniform procedures, regulations, forms and other documents for such movements. 32 Fed. Reg. 6295, 6298, April 21, 1967. In paragraph VII E.1.c of DOD Directive 5160.53, March 24, 1967, MTMC is charged with the duty of providing traffic management and terminal service incident to such movements, including control of the flow of cargo into and processing through the military ocean terminals. Under Army Regulation 55-357, traffic flow procedures into MOTBY require arrival of trucks at specified dates and times. And the Interstate Commerce Commission has observed that prearranged scheduling eliminates detention. See Detention of Motor Vehicles - Middle Atlantic and New England Territory, 325 I.C.C. 336, 360 (1965).

The great number of shipments covered by this and other claims (and by many others observed through our audit), indicates that Ultra has had an active relationship with MOTBY and knowledge of its receiving practices. Furthermore, on a form submitted with its claims, in bold print, is the statement, "GOVERNMENT SERVICE IS OUR ONLY PRODUCT." The Supreme Court stated in Alcoa S.S. Co. v. United States, 338 U.S. 421, 429 (1949), that an experienced carrier is charged with familiarity

with procedures used by its largest customer. Also, in a letter dated September 11, 1974, to TCD, Ultra admitted that all deliveries at ocean terminals must be scheduled.

Conditions precedent to Ultra's right to detention of vehicle charges include performance of its duty imposed by law to control the arrival of its trucks at MOTBY according to prescheduled unloading date and time and performance of its stipulated duty to permit the Government, upon arrival of Ultra's scheduled vehicles at the appointed place and time, to use the vehicles for two hours for the purpose of unloading the vehicles' lading.

In the absence of any showing that agents of the Government appropriated the use of Ultra's vehicles in excess of two hours after arrival of the vehicles at the scheduled place and time for unloading, we conclude, as a matter of law, that Ultra has failed to establish the liability of the United States for the detention charges presented in Ultra's claims.

We today have informed TCD to disallow the claim for detention charges of $1,410 allegedly due Ultra on the shipment moving under GBL No. E-8690339 (our Claim No. TK-975143) and to disallow other similar claims.

R.F. KELLER

Deputy Comptroller General
of the United States