TRANSP.

DECISION

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

9544

FILE: B-192411 DLG01356 DATE: March 29, 1979

MATTER OF: Hilldrup Transfer & Storage Co.

DIGEST:

1. United States and carrier may contract independently of tariff filed with State regulatory commission although, in absence of contract, tariff applies.

2. Rates and charges in intrastate tariff are "otherwise applicable" within meaning of alternation provision in tender.

3. Government officers have no authority to contract for interstate or intrastate transportation at rates higher than those available to the general public for the same or similar services.

Hilldrup Transfer & Storage Company (Hilldrup) requests review of deduction action taken in November 1978, by the General Services Administration (GSA) to recover an overcharge collected by Hilldrup on a shipment of household goods owned by Captain Joseph G. Raker, USAF. See 49 U.S.C. 66(b)(Supp. V, 1975). The shipment was picked up by Hilldrup's agent at Key West, Florida, on Government bill of lading No. K-1025376 (GBL) on July 6, 1976, and delivered to Callaway, Florida, on July 12, 1976.

Freight charges of $2,465.90 were collected by the carrier. They are derived from Government and Military Rate Tender No. 1-H, I.C.C. No. 35 (Tender 1-H). The overcharge of $494.02 is the difference between the $2,465.90 collected and freight charges of $1,971.88 derived from Florida Household Goods Carriers' Bureau Tariff 13, HG-FPSC 13 (Tariff 13), GSA's audit basis. Most of the overcharge represents a bridge charge of $4 per 100 pounds, found in item 150 of Tender 1-H and applicable to transportation performed through Islamorada, Florida, and points south and west in the Florida Keys.

Hilldrup and GSA state that the issue involving GBL K-1025376 is present in similar intrastate Florida shipments transported by Hilldrup and other carriers.

Hilldrup contends that the audit action is unfair in the context of the circumstances surrounding the assessment of the bridge charge on intrastate traffic traversing the Florida Keys. Hilldrup explains that without the bridge charge the carrier would have had to transport the household goods shipment at a loss because the imposition of weight

[Request for Review ~~of 44943~~ of Deduction Action]

restrictions by the Florida Department of Transportation on bridges in the Florida Keys reduced payloads, requiring a drastic change in the carrier's method of operation. A provision similar to the bridge charge in Tender 1-H was added to the interstate commercial tariffs, but, according to Hilldrup, none was added to the intrastate commercial tariff because the "vast majority of the shipments moving to and from the Key West area are for the account of the Department of Defense."

Hilldrup also contends that the rates and charges in Tender 1-H are applicable despite the fact that they are higher than those derived from the intrastate tariff. It argues that military traffic is covered by a detailed set of rules found in a Tender of Service that requires a performance different from that required by the intrastate tariff. It also states that the GBL requirement for extended storage-in-transit (SIT) constitutes a different service than that contemplated by the intrastate tariff. Hilldrup explains that the intrastate tariff limits SIT to 60 days whereas the Government requires 90 days SIT and can extend it up to 180 days, thereby substantially increasing the potential tenure of common carrier liability.

GSA contends that Tariff 13, the intrastate tariff, is applicable to this shipment for three reasons. First, GSA relies on item 23 of Tender 1-H which provides that the tender will not apply for a carrier where the total charges accruing under the tender exceed the total charges otherwise applicable for that carrier for the same services. Second, GSA refers to its regulations naming the terms and conditions governing the use of GBLs. One of those terms provides that a shipment made on a GBL "shall take a rate no higher than that chargeable had the shipment been made on the uniform straight bill of lading . . . provided for commercial shipments." 41 C.F.R. 101-41.1302-3(c)(1978). Third, GSA argues that Section 22 of the Interstate Commerce Act, as amended, 49 U.S.C. 22 (Supp. V, 1975), which permits carriers to transport property for the United States free or 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 services.

We note first that under paragraph 6001 of Department of Defense Regulation 4500.34-R, a carrier who wants to participate in the through GBL method of transporting household goods must:

> "(1) Submit a Tender of Service to HQ MTMC. [Headquarters, Military Traffic Management Command]
>
> (2) Receive approval of its Tender of Service by the Commander, MTMC.
>
> (3) Submit a Letter of Intent to each shipping office it wishes to serve.

(4) Be qualified by the ITO. [Installation Transportation Officer]

(5) Be listed in the Personal Property Carrier Approvals Printout(s) and supplements thereto published and disseminated by HQ MTMC.

(6) Have a published tariff on file with the Interstate Commerce Commission, State regulatory body for intrastate service, or an accepted Uniform Tender of Rates and/or Charges for Transportation Services on file at HQ MTMC."

The Tender of Service names the qualifications required of the carrier, contains carrier service and performance requirements and sets forth the mutual understandings between the carrier and DOD.

Tender 1-H is the accepted Uniform Tender of Rates referred to in paragraph 6001(6) of the DOD regulation. It sets forth in detail the rules, regulations, rates and charges governing shipments of military household goods between points in the United States. Although the tender states on its cover sheet that for the carriers named in the tender, it ". . . names reduced rates under authority of Section 22 of the Interstate Commerce Act . . .," it is not restricted to interstate traffic but applies to the intrastate traffic of many carriers including Hilldrup.

Tariff 13 is the intrastate tariff referred to in paragraph 6001(6) of the DOD regulation. It is published under Florida law which requires intrastate carriers to publish and file rates and prohibits carriers from deviating from them.

Tender 1-H applies to Hilldrup's intrastate Florida shipments. In its absence, intrastate tariff rates ordinarily would apply by operation of law. Alabama Highway Express, Inc. v. United States, 146 Ct. Cl. 594 (1959). The court there cited Pub. Utilities Comm'n of California v. United States, 355 U.S. 534 (1958), for the holding that state laws could not prohibit carriers from transporting Government property at lower rates agreed to by the parties. See also United States v. Georgia Public Service Comm'n, 371 U.S. 285 (1963). It is also clear that the United States can contract to pay higher rates than the regularly filed tariff rates where the Government obtains services and privileges not extended to commercial shippers. Alabama Highway Express, Inc. v. United States, 146 Ct. Cl. at 600; and Greyhound Corporation v. United States, 124 Ct. Cl. 758 (1953). Both cases involved intrastate shipments. In the former case, the carrier refused to agree to an alternation provision similar to item 23 of Tender 1-H; in the latter case, the carrier agreed to furnish buses that it had no duty at law to provide to the public generally. See also United States v. Louisville & Nashville R.R. Co.,

221 F.2d 698 (6th Cir. 1955); United States v. Missouri Pac. R.R., 56 Ct. Cl. 341 (1921); Southern Pacific Co. v. United States, 62 Ct. Cl. 649 (1926). In B-177939, November 6, 1973, we recognized the existence of a special benefit where the carrier furnished specialized equipment to meet the peculiar needs of the Government.

The existence of Tender 1-H, however, cannot preclude the applicabilit of intrastate rates for similar services. It long has been the rule that officers of the Government have no authority to contract for interstate or intrastate transportation at rates higher than those available to the general public for the same or similar service. See 57 Comp. Gen. 584 (1978). Indeed, item 23 of Tender 1-H is a recognition of that fact.

The Letter of Intent, referred to in paragraph 6001(3) of the DOD regulation, was filed with the ITO U.S. Naval Air Station, Key West, Florida, and shows that Hilldrup agreed to participate in the traffic at rates and charges shown in Tender 1-H and this was acknowledged and accepted by the ITO. In the "Tariff or Special Rate Authorities" block of the GBL is the notation "MGRT 1H" [Tender 1-H]. Although the parties intended that Tender 1-H apply, under item 23 of the tender Hilldrup agreed that the rates and charges therein would not apply if the total charges thereunder exceeded the total charges otherwise applicable for the same service. Compare B-190757, July 28, 1978.

While the primary question is whether the services and privileges offered to the United States under Tender 1-H are substantially similar to those available to the general public under the intrastate tariff, we first must consider whether Hilldrup would have been required by Florida law to transport the shipments for the Government at the rates and charges published in Tariff 13.

In United States v. Carter, 121 So.2d 433 (Fla. 1960) the Supreme Court of Florida, citing, among other cases, Pub. Utilities Comm'n of California, supra., could be construed to have held that the pertinent sections of Florida Statutes, F.S.A. 323.08, 323.09, 323.19, among others, requiring intrastate carriers to publish and file rates, and prohibiting any deviation from those rates, do not apply to transportation of Government property or household goods of servicemen. But the precise issue considered by the court was whether the state regulatory commission could prohibit common carriers from entering into any agreement (like the one in Tender 1-H) with the United States for the transportation of Government property and servicemen's household goods at any rate except as approved by the commission. The issue of whether carriers could be required to transport this traffic at rates and charges applicable to the public generally was not raised or considered.

The court adopted the rationale of Public Utilities Comm'n of California, recognizing the Government's policy of negotiating rates to effect savings in transportation costs, and further noting that the economies were for the benefit of all of the people. 121 So.2d at 436. In view of this rationale, we cannot attribute to the court an intention to deprive the United States of the operation and protection of Florida's laws where to do so would discriminate against the United States with reference to commercial shippers. Furthermore, no opinion is an authority beyond the point actually decided, and the court did not consider the question whether the United States, as any commercial shipper, is entitled to the published intrastate tariff rates where its officers decided that they were most advantageous to the Government. See United States v. Rias, 524 F.2d 118 (5th Cir. 1975), and United States v. Cocke, 399 F.2d 433, 452 (5th Cir. 1968), cert. denied 394 U.S. 922. We conclude that the rates and charges published in Tariff 13 were "otherwise applicable" within the meaning of item 23 of Tender 1-H, provided the services offered by the tender and tariff were similar. That question depends on whether the Government received in Tender 1-H any additional benefits or privileges not available to the public in Tariff 13.

This is a breakdown of the freight charges derived from Tariff 13 and Tender 1-H which shows the components of the overcharge:

	Tariff 13	Tender 1-H	Difference
Linehaul charges	$1,345.58	$1,272.00	($73.58)
Shipment charge	-	39.00	39.00
Bridge charge	-	480.00	480.00
Packing charges	593.80	644.90	51.10
Extra Pickup	20.00	20.00	-
Appliance Service	12.50	10.00	(2.50)
	$1,971.88	$2,465.90	$ 494.02

Except for the bridge charge and the shipment charge, the tender and tariff cover the same services.

Hilldrup states that the addition of the bridge charge of $4 per 100 pounds to the tender was a necessary measure to compensate the carrier for the additional costs of operation resulting from the bridge weight restrictions. By admission of the carrier the additional charge of $480 on this shipment, due to assessment of the bridge charge, is a consequence of action apparently taken by the Florida Department of Transportation. No benefit or privilege was granted to the Government by the change in Hilldrup's method of operations. Hilldrup was saddled with the same operational handicaps in the transportation of household goods shipments

from and to Key West, Florida, whether the shipment was tendered under Tariff 13 by a member of the general public or by the Government.

The shipment charge is contained in item 12 of Tender 1-H; Tariff 13 does not contain a similar charge. However, note 2 in item 12 provides: "This additional assessment charge is not related to physical services performed by or for the carrier . . .." Since the shipment charge is not related to the carrier's performance of a physical service we question whether it is a transportation charge. See 52 Comp. Gen. 612, 613 (1973).

Hilldrup argues that the Tender of Service requires a performance different from that required by the intrastate tariff. But the Tender of Service is not a tariff and Section 1A.2a of the Tender of Service reads: "I understand that this is a Tender of Service and not a Rate Tender." See also, Trans Ocean Van Service v. United States, 426 F.2d 329, 335 (Ct. Cl. 1970), in which the Court stated that the Tender of Service does not purport to quote rates or to provide rates or formulae for the computation of freight charges. Thus, performance required by the Tender of Service is immaterial to the question whether the two rate authorities, Tender 1-H and Tariff 13, cover the same services.

Hilldrup's argument that the GBL requirement for extended SIT constitutes a different service from that contemplated by the intrastate tariff is untenable. Aside from the fact that Captain Raker's household goods were not stored in transit, both tariff and tender provide charges for SIT services. The fact that Hilldrup's potential liability for loss and damage may be made more extensive under the tender than under the tariff is irrelevant because a common carrier's liability for loss and damage is distinct from the shipper's liability for freight charges. [Alcoa S.S. Co. v. United States, 338 U.S. 421 (1949); National Trailer Convoy, Inc. v. United States, 345 F.2d 573 (Ct. Cl. 1965)] and is not an additional benefit or privilege relating to freight charges.

We agree with GSA that under item 23 of Tender 1-H and under the terms of the GBL, Tariff 13 provides the lowest applicable charges on the shipment transported by Hilldrup under GBL No. K-1025376.

In these circumstances and since Hilldrup has the burden of affirmatively proving its case, 57 Comp. Gen. 155 (1977), GSA's deduction action was correct and is sustained.

R.F. Keller.

Deputy Comptroller General
of the United States