

DECISION



11612 Transp.
THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-193964

DATE: October 5, 1979

MATTER OF: Mercury Van Lines, Inc. DLG 02984

DIGEST:

1. Rate tenders issued pursuant to Section 22 of Interstate Commerce Act, 49 U.S.C. 22, 317(b) (1976), are continuing offers to perform transportation services for stated prices.
2. Where Government-offeree's Tender Filing Instructions, binding on carrier-offeror, provide that supplement canceling rate tender will not become effective until 30 days after receipt by Government-offeree, carrier-offeror's cancellation supplement making cancellation dependent on Government-offeree's acceptance date does not automatically become effective 30 days after receipt by Government-offeree but becomes effective when accepted by Government-offeree.

Mercury Van Lines, Inc. (Mercury) Requests ~~our~~ FOR review of audit actions taken by the Transportation Audit Division, General Services Administration (GSA) DLG 01856 on seven notices of overcharge sent to Mercury. Further action by GSA on these overcharges is being held in abeyance pending this review. The review is being made under 49 U.S.C. § 66(b) (1976) and 4 C.F.R. § 53.3 (1978) since GSA has agreed that its action in this case constitutes finality of administrative consideration. See 4 C.F.R. § 53.1 (1978).

The notices of overcharge result from GSA's determination that freight charges lower than those collected by Mercury were in effect and applicable to seven shipments of household goods transported by Mercury between June 9 and 17, 1977, in interstate commerce on Government bills of lading. The lower freight charges are derived from Mercury's rate Tender's ICC #63 and ICC #64 (Tender 63 and Tender 64).

~~007197~~ / 110532

We hold that Mercury's cancellation of Tender 63 and Tender 64 did not become effective until June 22, 1977, when Mercury's cancellation supplements were accepted by the Military Traffic Management Command (MTMC), which was after the seven shipments were tendered to Mercury for transportation. *DA602992*

Mercury is a motor carrier subject to regulation under Part II of the Interstate Commerce Act. Under Section 22 of that Act, as amended, 49 U.S.C. 22 (1976), made applicable to motor carriers by Section 217(b) of the Act, 49 U.S.C. 317(b) (1976), Mercury submitted to the Department of Defense through MTMC several offers to transport household goods at rates less than its rates otherwise applicable to DOD shipments.

The offers involved in this case are Mercury's Tenders Nos. 63, 64, 70, 71, 72 and 73. Each contains or refers to a schedule of rates, a description of the services and territories covered and numerous conditions and instructions. One of the conditions in each tender requires in part that it may be canceled or modified by written notice of no less than thirty days by either party to the other.

On May 2, 1977, Mercury filed with MTMC Supplement #2 to Tender 63 and Supplement #1 to Tender 64. The supplements, prepared on tender forms prescribed by MTMC, contained a statement indicating that their purpose was to cancel the tenders in their "entirety." In item 7, the "EFFECTIVE DATE" space on the tender forms, Mercury specified "MTMC Acceptance Date."

On the same date and during a so-called "Regular Me-Too Filing Cycle", Mercury filed with MTMC on similar tender forms its Tenders 70, 71, 72 and 73 which were designed to replace Tender 63 and Tender 64. The phrase "MTMC Acceptance Date" is shown in item 7 of the tender forms.

MTMC rejected the entire package of tender forms because of an error in one of the replacement tenders; Mercury resubmitted them and MTMC accepted them on June 22, 1977.

Mercury contends that when it filed cancellation supplements to Tender 63 and Tender 64 on May 2, 1977, those supplements became effective thirty days later, or on June 2, 1977, before it received the seven shipments for transportation. It also contends that an error in a replacement tender should not have any effect on the cancellation of any other tender.

GSA contends that since Mercury made its tender cancellations dependent or conditioned on the "MTMC Acceptance Date," which GSA says was June 22, 1977, Tender 63 and Tender 64 were in effect during the period in June when the shipments were given to Mercury for transportation.

In a report to us MTMC states that at least one of the replacement tenders contained errors and it was "rejected" together with the other replacement tenders and the cancellation supplements.

" . . . in conformance with our practice to do so when new tenders and cancellation supplements for tenders being replaced . . . are simultaneously submitted and the new tenders are found defective."

MTMC's reason for its practice is its belief that a carrier would not want a higher rate in effect (the result of rejecting a replacement tender and accepting cancellation of the tender being replaced) because the carrier would lose future Government business to its competitors; it also states that the practice is in the Government's interest since the low rates are preserved.

Section 22 of the Interstate Commerce Act, supra, exempts transportation services performed for the United States from the rate provisions of the Act and permits carriers to transport, store or handle property for the United States free or at reduced rates. See Public Utilities Commission of California v. United States, 355 U.S. 534 (1958); United States v. Georgia Public Service Commission, 371 U.S. 285 (1963). And it is the general consensus that a common carrier rate tender under Section 22 is a continuing offer to furnish transportation services at special rates and charges, subject to the terms

and conditions specified. C & H Transportation Co., Inc. v. United States, 436 F.2d 480 (Ct. Cl. 1971); 51 Comp. Gen. 541 (1972). As continuing offers, these Section 22 tenders create in the Government the power to make a series of independent acceptances, and that power is good until effectively revoked by the one making the offers. Corbin on Contracts, section 38 (1963); Williston on Contracts, 3rd Ed., section 58 (1957); Restatement of Contracts, sections 34, 41 (1932).

These continuing offers, at least in the context of offers to move household goods for DOD, cannot be made or canceled at the unfettered caprice of the carrier. DOD has created an elaborate system prescribing some aspects of the format and content that these tenders must possess in order for them to be accepted by DOD, the offeree, or canceled by the carrier, the offeror. See DOD Regulation 4500.34R and Instructions For Filing Manual Uniform Tenders of Rates And/or Charges For Personal Property Shipments, issued by MTMC. (Tender Filing Instructions)

These are provisions of the Tender Filing Instructions that are pertinent to this case:

"4. Procedures.

* * * * *

(2) Regular Me-Too Filing Cycles.

(a) There are two Regular Me-Too Filing Cycles per year. These Regular Me-Too Filing Cycles provide carriers an opportunity to meet existing rates on file. Tenders that satisfy administrative and technical requirements will be given an 'Effective Date' 30 days after receipt.

(b) If an error or omission of any kind is found, in a tender submitted during the regular 'Me-Too' Filing Cycle, the tender will be rejected. . . .

c. Cancellations. Supplements which involve cancellations will not become effective until 30 days after they are received

by MTMC-PPC. (This does not nullify the requirement that once a tender is accepted, it must remain in effect for a minimum of 30 days). Failure to meet these requirements will be cause for rejection of Cancellation Notices. Resubmission of a Cancellation Notice will be accepted by MTMC 30 days from date of receipt of resubmission (2nd receipt date) in MTMC-PPC provided that all administrative requirements are satisfactorily met. On tender format, fill in Blocks 1, 2, 3 (origin installation(s) only - No requirement for statement 'Shipments controlled by and moving on - - - -'), 4, 7, 9, 11 (show where 'Future rates will be found'), 13 and 24. All other Blocks are to be blank."

We find nothing in paragraph 4.c. of the Tender Filing Instructions (or elsewhere in those Instructions) to support Mercury's view that cancellation supplements become effective automatically thirty days after receipt by MTMC; they provide only that cancellation supplements will not become effective prior to thirty days from receipt by MTMC. In this case, Mercury controlled the effective date of the cancellation supplements by inserting in item 7, "EFFECTIVE DATE", of the tender format the phrase "MTMC Acceptance Date"; it thereby indicated its intent that the cancellation supplements would become effective when accepted by MTMC.

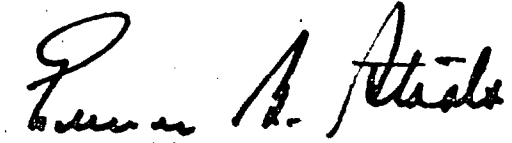
Mercury could have inserted in item 7 a thirty-day time limit, a phrase reading "30 days after receipt by MTMC" or a specific date, such as June 2, 1977, but it did not. Because Mercury made its cancellation supplements dependent or conditioned on the "MTMC Acceptance Date", which was June 22, 1977, we agree with GSA that Tender 63 and Tender 64 were still in effect when Mercury received the seven shipments for transportation.

Although we agree with Mercury that an error in a replacement tender should not have any effect on the cancellation of any other tender, it did in this case because of the language used by Mercury in its cancellation supplements. However, we intend to ask MTMC to review and examine its practice of rejecting new tenders and cancellation supplements for tenders being replaced when they are simultaneously submitted and the new tenders are found defective.

B-193964

6

GSA's audit action on the seven notices of overcharge is sustained.

A handwritten signature in dark ink, appearing to read "Thomas A. Atchley". The signature is written in a cursive style with a large initial "T" and "A".

Comptroller General
of the United States