12568 TRANS

DECISION

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

FILE: B-195482 DATE: January 17, 1980
1 DLG 03069

MATTER OF: Baggett Transportation Company--
[Reconsideration of Deduction Action by GSA To Recover Carrier Overcharges]

DIGEST:

1. Reimbursable nature of Foreign Military Sales program does not rebut presumption, arising from Government bill of lading contracts and Government's payment of resulting transportation charges to carrier, that Government was not in fact reimbursed by its FMS customers.

2. Where Government pays full transportation charges and is not reimbursed, Government receives entire benefit of lower section 22 rates.

Baggett Transportation Company (Baggett) requests reconsideration of our decision of October 16, 1979, B-195482, in which we sustained deduction action taken by the General Services Administration (GSA) to recover overcharges collected by Baggett in connection with the transportation of Foreign Military Sales (FMS) shipments, in 1977. See the Arms Export Control Act, 22 U.S.C. 2751 (1976). The overcharges represented the difference between commercial tariff rates, considered by Baggett to be applicable to the FMS shipments, and lower section 22 rates, considered by GSA to be applicable to those shipments.

Based on our decision of March 30, 1978, B-190739, to True Transport, Inc., we held that Baggett failed to rebut the presumption of fact that the Government received the entire benefit of the lower section 22 rates. 49 U.S.C. 22 (1976). The presumption arises from issuance of Government bills of lading (GBL) and from payment of transportation charges from appropriated funds.

Baggett contends that the presumption is rebutted by the reimbursable nature of the FMS program. Baggett describes the Government's function under FMS contracts

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(DD Form 1513) as merely that of arranging for transportation of the shipments on behalf of its FMS customers, noting also that under FMS contracts title passes to the customers at point of origin.

In True Transport and in our decision to Baggett, we considered the reimbursable nature of the contracts between the Government and its FMS customers. Our holdings clearly turn on a crucial question of fact: whether the Government was in fact reimbursed. On that question, we referred to a report, LCD-77-210, B-165731, August 19, 1977, which found that FMS customers were not reimbursing the United States, and to a letter from the Department of Defense supporting the report's findings as to shipments prior to May 1, 1978, which date covers the shipments in this case.

Despite this evidence, Baggett argues that there is no evidence showing that the Government was not reimbursed for payment of the transportation charges on the shipments handled by Baggett. Since the shipments were transported on GBLs and the freight charges were paid by the Government upon presentation, as required by 49 U.S.C. 66(a), Baggett has the burden of proving the correctness of the freight charges it collected initially. United States v. New York, N.H. & H.RR., 355 U.S. 253 (1957); Pacific Intermountain Express Co. v. United States, 167 Ct. Cl. 266, 270 (1964). This it has not done.

On the assumption that the Government was not reimbursed, Baggett argues that third parties--the FMS customers--received benefit from the reduced section 22 rates, concluding that the Government is not entitled to the lower rates. For support of this argument, Baggett cites several administrative and judicial decisions for the principle that section 22 rates apply to transportation for the Government only if the benefit accrues solely to the United States. The "benefit" test simply involves identification of the party who bears the full cost of the transportation. This principle was referred to in True Transport, where we cited In Interpretation of Government Rate Tariff for Eastern Central Motor Carriers Association Inc., 323 I.C.C. 347, 350 (1964), and Southern Pacific Transportation Company v. United States, 505 F.2d 1252 (Ct. Cl. 1974).

We do not have here a situation where a government contractor enters into the contract of carriage directly with the carrier; that can raise a question of whether the Government reimbursed the contractor for the full costs of transportation. But there is no question here that the Government paid the entire freight charges as a result of its liability directly to Baggett under the GBL contracts. The benefit to the Government flowed from the reduction in the amount it was required to pay, and did pay (after deduction). We cannot attribute to Baggett any notion that it did look or would have looked to the Government's FMS customers for payment of its charges. Havens & Co. v. Chicago & North Western Ry. Co., 20 I.C.C. 156 (1911) and Henry H. Cross Co. v. United States, 133 F.2d 183 (7th Cir. 1943), cited by Baggett, involve contractor shipments and are inapposite here.

Our decisions recognize the separate legal identities of the FMS contracts and the GBL contracts; they turn on the factual question of whether the FMS customers reimbursed the Government. True Transport and our decision to Baggett resolve that factual question in the Government's favor, and in the absence of any new relevant factual evidence on that crucial question, we affirm our decision of October 16, 1979.

R.F. Keller

Deputy Comptroller General
of the United States