117162 20391

DECISION

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

FILE: B-203805, B-204113 DATE: December 24, 1981

MATTER OF: American Farm Lines, Inc.

DIGEST:

1. As a condition of applicablility of exclusive use charges, motor carriers$ exclusive use of vehicle rules require that the GBL bear a notation indicating that the shipper requests exclusive use of vehicle service. Therefore, the sealing of a vehicle without notation, in form or substance, requesting exclusive use service, does not constitute such a request.

2. A tender requirement cannot be waived and, in the absence of substantial compliance with the rule, exclusive use charges are not applicable.

3. The Campbell "66" Express, Inc. v. United States decision established that substantial compliance with the exclusive use notation requirement is satisfied by a certification on the bill of lading which reasonably apprises the carrier that the shipper is requesting exclusive use of the vehicle.

4. A notation "DO NOT BREAK SEALS EXCEPT IN CASE OF EMERGENCY OR UPON PRIOR AUTHORITY OF THE CONSIGNOR OR CONSIGNEE," on the GBL and the sealing of a vehicle, in light of Department of Defense regulations, constitutes a request for exclusive use of vehicle, since the notation reasonably apprises the carrier that exclusive use was requested.

5. Merely applying a seal or sealing with the annotation "CABLE LOC SEALS APPLIED" does not constitute a request for exclusive use

because these actions do not satisfy the substantial compliance test of the Campbell decision.

American Farm Lines, Inc. (AFL), requests review of the disallowance by the General Services Administration (GSA) of its claim for additional freight charges on 10 Government bills of lading (GBL). The carrier's supplemental bills contain charges for exclusive use of vehicle service which are in addition to those originally billed and paid. GSA contends that the charges are not applicable because the conditions of the carrier's various exclusive use tender rules, which provide for such service, were not met.

Generally, to establish the applicability of exclusive use of vehicle charges, two conditions must be met. There must be substantial compliance with requirements of the tariff or rate quotation for an annotation on the GBL requesting such service. Campbell "66" Express, Inc. v. United States, 302 F.2d 270 (Ct. Cl. 1962) (Campbell). And, there must be some evidence that exclusive use of vehicle service was, in fact, performed. Terminal Transport Company, Inc., 44 Comp. Gen. 799 (1965).

The following language which is from item 130 of AFL's Tender C-310 is illustrative of the various rules involved and shows the requirement for a notation requesting the service. Paragraph one states that:

"Exclusive use of a vehicle or vehicles is offered to meet the needs of shippers who require segregation of their freight from the freight of other shippers for protection against damage, scrutiny, pilferage, or for any other reason."

Paragraph two requires shippers to indicate on the bill of lading that the service is requested:

"Upon request of the shipper, the carrier will furnish a vehicle * * * which vehicle * * * will be assigned to, and exclusively used

> by the carrier for, the transportation of the shipment. [A] Government Bill of Lading * * * bearing a notation indicating that the shipper requests such exclusive use * * * must be provided for each shipment." (Emphasis added.)

Paragraph three provides an option to the shipper to apply locks and seals to vehicles suitable to sealing and to instruct the carrier to deliver the vehicle with seals intact. The carrier alleges that the service was requested and performed. GSA disallowed the claims on the basis that the Government did not request the service and none of the GBLs contain the required notation.

AFL concedes that the shipper did not indicate specifically on any of the GBLs a request for exclusive use; however, AFL contends that the bills reflect three sets of circumstances that constitute, in substance, requests for exclusive use of vehicle service, as contemplated by the Court of Claims in the Campbell case.

The first situation involves several GBL's, including GBL K-3459199. They contain no annotation concerning seals, but AFL submits evidence that the shipments were nevertheless sealed with a cable seal lock that cannot be removed by ordinary means, thus affording a higher degree of security for the shipment than an ordinary twist seal. The second situation, covered by GBL M-3107482, involves a shipment that was sealed with a cable seal lock, and the GBL was annotated, "CABLE LOC SEAL APPLIED TO DOORS. DO NOT USE FLAME PRODUCING DEVICE TO REMOVE." GBL K-4244764 is an example of the third situation; ordinary seals were applied to the vehicles and the GBLs contained the annotations, "DO NOT BREAK SEALS EXCEPT IN CASE OF AN EMERGENCY OR UPON PRIOR AUTHORITY OF CONSIGNOR OR CONSIGNEE."

In our view, where the GBL is annotated, "DO NOT BREAK SEALS," the carrier has substantially complied with its tender requirement for an annotation on the GBL indicating a request for exclusive use service. In the other fact circumstances, there is no substantial compliance

with the tender requirement for a written annotation requesting exclusive use service. Therefore, with respect to GSA's audit action on AFL's claims, we sustain GSA in part and reverse GSA in part.

AFL quotes extensively from Campbell to support its interpretation of the doctrine of substantial compliance. It argues that the application of the security type seal (with or without an annotation indicating its application to the doors) or application of an ordinary seal with an annotation, "DO NOT BREAK SEALS," constitutes a request for exclusive use.

The carrier points out that any of the described circumstances has the same effect as a GBL annotation specifically requesting exclusive use service; sealing of the vehicle guarantees the Government that its shipment will be segregated and deprives the carrier of operating alternatives, for example, transferring the shipment to other equipment for consolidation, or consolidation with other freight on the original trailer.

We agree with the carrier that exclusive use was requested where the GBL was annotated, "DO NOT BREAK SEALS."

The tender language requires that the GBL bear a notation indicating the shipper requests exclusive use. In our view the tender language, requiring a notation indicating that exclusive use is requested does not necessarily restrict the required notation to the precise words, "exclusive use." A notation which states in substance a request for exclusive use would appear acceptable. Thus, the annotation, "DO NOT BREAK SEALS" would in effect satisfy the tender requirement by indicating that the carrier will assign a vehicle and exclusively use a vehicle for the transporation of a shipment, and that the carrier will be denied access to the vehicle. In substance this constitutes a request for exclusive use of the vehicle.

In Campbell, the Court of Claims addressed the issue of whether or not a tariff rule requiring the shipper to endorse the GBL, "Exclusive use of vehicle requested," had to be complied with literally. The Court stated that:

> "It is true that the tariff rule expressly provides what language is to be endorsed on the bill of luding in order to request exclusive use of a carrier's vehicle, but we do not think it was intended that all other language adequate to make the same request was to be excluded. It was not intended that form rather than substance would govern the transaction. If there appears on the bill of lading some written notation, which reasonably apprises the carrier that the shipper is requesting the exclusive use of its vehicle, we think this is sufficient compliance with the requirement for making the exclusive use rates applicable."

Applying the Campbell rationale to those AFL claims involving a GBL annotated "DO NOT BREAK SEALS," in our view, the annotation reasonably apprises the carrier that the shipper is requesting the exclusive use of vehicle service.

Our conclusion is supported by reference to Government regulations. See Military Traffic Management Regulation DSAR 4500.3 and Department of the Navy Transportation Safety Handbook for Hazardous Materials, NAVSEA OP 2165, volume 1. See also, American Farm Lines, Inc., B-199475, September 29, 1981.

Whenever the shipping officer seals the carrier's equipment for the purpose of denying the carrier access thereto and places the "DO NOT BREAK SEALS" notation on the GBL, the regulations (DSAR 4500.3, para. 213012 June 1, 1979) state that the GBL will be annotated requesting either exclusive use or special military service. Since AFL does not offer special military service under the applicable tenders, in our view, under the instruction in the regulation, AFL could reasonably assume that the annotation constituted a request for exclusive use service.

AFL also must show that exclusive use service was furnished. We have stated that the best evidence of the actual performance of authorized exclusive use service is a showing of a clear seal record on the GBL. Terminal Transport Company, Inc., 44 Comp. Gen. 799, 801-802 (1965). No violations of the seals applied to the shipments involved here were noted on the GBLs. GSA suggests that violations of seal integrity may not have appeared on the GBL because, at the time of shipping, the Government was not aware that the shipment was moving on an exclusive use basis, and, therefore, contends that here a clear seal record does not necessarily prove exclusive use was furnished. However, AFL does not solely rely on a clear seal record to show the service was furnished. AFL has submitted "Payroll and Route Sheets" which it states are kept in the normal course of doing business which show that each load shipped under the GBLs submitted for review moved from origin to destination without consolidation with any other load. This Office has stated that absent a showing of a clear seal record on the bill of lading, "other records prepared by carriers in their normal business operations might contain sufficient pertinent information to satisfactorily establish the performance of the premium service." Terminal Transport Company, Inc., supra. In our view, AFL's business records satisfactorily demonstrate that the exclusive use service was furnished for the annotated shipments.

With regard to the GBLs which contain no annotation, or simply state that a seal was applied, we hold consistent with precedent that the application of seals alone does not reasonably indicate expressly or implicitly that exclusive use has been requested. The Campbell substantial compliance test does not eliminate the need for a notation which is indicative of a request for exclusive use of vehicle. In other words, the shipper's conduct in sealing the vehicle cannot substitute for a written annotation. See Ringsby United, 52 Comp. Gen. 576 (1973); Terminal Transport Company, 43 Comp. Gen. 384 (1965); Georgia Highway Express, Inc., B-157576, March 29, 1966; Garrett Freightlines, Inc., B-160656, March 6, 1967.

We are not persuaded that the mere sealing of the vehicle indicates a request for exclusive use. The applicable tenders provide that the shipper must apply seals. However, at least in one of these tenders, AFL tender C-310, the carrier expressly reserves the right to remove such seals in order to comingle the shipment with cargo from other shippers. Absent the "DO NOT BREAK SEALS" notation, in our view, the carrier had the option of removing the seals, and transferring or consolidating shipments. Under such circumstances, we cannot agree that exclusive use was requested.

GSA's audit action is sustained in part and reversed in part.

Harry R. Van Cleve

For Comptroller General
of the United States