Gallen

DECISION

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

120253

FILE: B-206189, et al. DATE: December 30, 1982

MATTER OF: American Farm Lines, Inc.

DIGEST:

1. Where carrier initially files timely request for review of GSA's disallowance of transportation claims, but GAO suspends action and closes files on basis of GSA's representation that a reaudit is required, carrier's subsequent requests for review of adverse settlements resulting from GSA's reaudit must satisfy statute of limitation period because these constitute review of dispositive settlement actions taken by GSA.

2. Shipments of military communication outfits, electrical generators and engines combined, or electrical lighting and cooling or freezing machines are included in the commodities list under item 30(C) of American Farm Lines (AFL) Tender 345 and where carrier shows the commodities shipped are those which because of their size, weight or structure require special equipment, the rates published in Tender 345 are inapplicable, in the absence of released value annotation on the Government bill of lading.

3. Generators and roller motors (a wheeled road roller), which are not electrically driven, are not electrical machinery and apparatus within item 30(C) and they are not over-the-highway vehicles under item 30(B) of AFL Tender 345, but are articles covered by item 30(A). Therefore, the rates published in AFL Tender 345 are applicable despite absence of released value annotation on GBLs.

4. Shipments of electrical apparatus in boxes, and unboxed, and loose lighting equipment which easily can be loaded and unloaded without

special equipment and which is not overdimensional are not covered by item 30(C) of AFL Tender 345 since item 30(C) is limited to certain articles which because of size, weight, or structure require specialized equipment for handling.

American Farm Lines, Inc. (AFL), requests review of settlement actions taken by the General Services Administration (GSA) in connection with shipments that were transported under Government bills of lading (GBL). Both GSA and AFL agree that the principles set forth in this decision will resolve all issues raised in B-206189, B-206536, B-206615, B-207196, and a related claim under B-207198. AFL withdrew nine claims under B-206189, by letter to this Office dated July 23, 1982. The decision identifies the various claims as Appendices 1-12, a system adopted by the parties.

We affirm some of GSA's settlement actions and reverse others.

GSA argues that the majority of AFL's claims cannot be considered by GAO because the statute of limitations has expired, and if the claims are not barred the rates published in AFL's Tender 345 are applicable. The carrier disagrees.

GSA contends that AFL's requests for review were not filed in GAO within 6 months of the date of settlement action or within 3 years of payment of the carrier's bills as provided in Pub. L. No. 97-258, § 3726(b), (d)(1), 96 Stat. 976 (1982) (to be codified at 31 U.S.C. § 3726(b), (d)(1), formerly 31 U.S.C. § 244 (Supp. III, 1979)); 41 C.F.R. § 101-41.701(b) (1981), and 4 C.F.R. § 53 (1982).

AFL initially filed timely appeals of GSA's settlement actions on all these claims with GAO on June 3, 1981, for the purpose of meeting the statute of limitations. We requested a full report from GSA; however, when the agency represented, in a letter of July 9, 1981, that it would reaudit these claims and issue new certificates of settlement on the claims contained in Appendices 1-12 to

American Farm Lines, Inc., B-200939, May 29, 1981, we closed our files. In the above case,AFL argued that, in the absence of a GBL annotation indicating the commodity's value, the lower released value rates published in AFL's Tender 345 were not applicable because the released value provisions in item 30 required an annotation as a condition of their applicability. We interpreted item 30, and in our decision, set forth the general rule that in the absence of a GBL value annotation, applicability depended on the commodity shipped. This general principle was based on findings that paragraphs (B) and (C) of item 30, which contain lists of specified commodities, required an annotation as a condition of applicability, while paragraph (A) relieved the Government of the requirement on any commodity excluded from the lists in paragraphs (B) and (C).

However, as a result of its reaudit, GSA disallowed AFL's claims, and by letters dated January 14, 1982, filed (received) in GAO on January 22, 1982; February 12, 1982, filed with GAO on February 23, 1982; February 24, 1982, filed with GAO on March 2, 1982; and March 31, 1982, filed with GAO on April 16, 1982, the carrier requested our review of the settlements on the basis that they were not consistent with the principle established in B-200939, supra.

GSA contends that since the second request for review involving the claims initially filed on June 3, 1981, was not filed with GAO within 6 months of the date of settlement action or within 3 years of the original bill payment date, consideration of them is barred.

AFL responds that its initial requests for review filed on June 3, 1981, satisfies the statute of limitation and that its second request for review was merely to contradict the second denial by GSA of its claim. We disagree.

A carrier's request for review by the Comptroller General of a GSA transportation audit action is forever barred from consideration (with limited exceptions not applicable here) unless received by the GAO within 6 months from "the date the action was taken" or within the periods of limitation specified in 31 U.S.C. § 3726(a), supra, whichever is later.

The periods of limitation referred to in 31 U.S.C. § 3726, supra, are within 3 years of the date of: (1) accrual of the cause of action, (2) payment of the transportation charges, (3) subsequent refund for overpayment, and (4) deduction.

Our regulations, 4 C.F.R. § 53 (1982), define settlement as any final administrative action taken by GSA in connection with the audit of payments for transportation services furnished to the Government.

We think AFL's second requests for review in response to GSA's reaudit must satisfy independently the statute of limitations. We closed our file on AFL's June 3, 1981, request for review because GSA agreed to reaudit the claims; thus, in essence, GSA's original disallowances were no longer a dispositive settlement action under 4 C.F.R. § 53, supra, and our review of GSA's action would have been premature. The claims were reaudited, and GSA again disallowed the claims. However, the disallowance of these claims was made on a new basis, consistent with the guidance set forth under American Farm Lines, Inc., B-200939, May 29, 1981; that the articles shipped were covered by paragraph (A) which does not require an annotation, and not paragraphs (B) or (C) which required an annotation.

Therefore, the applicable 6-month filing period began on the date GSA, after reaudit, issued the settlement certificates disallowing each of AFL's claims for additional transportation charges. This action had dispositive effect on AFL's claims. Thus, the date of this action is the applicable starting date for the 6-month period.

For our purposes, the applicable date is the date GSA notified AFL of the results of its reaudit. GSA notifies carriers by sending them certificates of settlement. Thus, the 6-month period began when AFL received the certificates of settlement. In our view, the language of the statute, "the date the action was taken," presumes timely notice of the action to the party adversely affected, and absent receipt of the certificate of settlement, the carrier is unaware of the adverse action. Here, for example, for requests for review filed with GAO on January 22, 1982, AFL is timebarred on all claims of which it had notice of settlement prior to July 22, 1981. In its letter to GAO dated July 23, 1982, AFL advises that it received notice from GSA on some settlements on July 20, 1981. Since

requests for review of these settlements were filed here after the applicable 3-year period (the bills were paid in 1978) and the 6-month period had expired, they are timebarred.

For other requests for review, the only date in the record is the date of issuance of the certificates of settlement, for example, July 7 or July 13, 1981. In the usual course of business we allow 5 working days (1 calendar week) for receipt of settlement certificates. This appears to be consistent with AFL's records, since in its letter of July 23, 1982, AFL advises that AFL received certificates of settlement which GSA issued on July 13, 1981, on July 20, 1981. In the absence of evidence to the contrary, AFL is presumed to have received these notices before July 22, 1982, and these requests for review are also timebarred.

GSA should take action on these apparently timebarred claims consistent with our guidance. However, AFL should be provided an opportunity to submit objective evidence, if available, of the dates of receipt of the notices to show that these requests for review are not timebarred.

With regard to the timely filed requests for review, GSA should take action consistent with the foregoing.

Concerning the merits, the question is whether or not the commodities transported and the service rendered are covered under item 30(C). The articles AFL claims are covered by item 30(C) are military communication outfits, generators and engines, electrical generators or motors, electrical lighting, cooling or freezing machines, lathes, electrical welders, and various other electrically powered equipment.

The carrier contends that the commodities transported are included among those listed in item 30(C) of the tender; that when commodities listed therein are shipped, the GBL must contain a notation in specified form indicating the released value of the property, per 100 pounds; and that the shipper failed to annotate the GBLs; therefore, based on our decision, American Farm Lines, B-200939, May 29, 1981, Tender 345 rates are inapplicable. GSA contends that the commodities are covered by paragraph (A), not paragraph (C)

of item 30 of AFL Tender 345; therefore, since item 30(A) requires no annotation as a prerequisite to applicability, the rates published in Tender 345 apply to these shipments.

Item 30(C), applicable to these shipments, provides:

> "Rates published herein to the extent that they apply for the transportation of commodities which because of size, weight or structure require specialized equipment, viz:
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> "Aircraft and Aircraft Parts or Components, except Aircraft Engines and Parts thereof, including Afterburners and Quick Engine Change Units Electrical, Electronic, Radar, Radio, Sonar or Scientific Apparatus, Instruments, Machines or Machinery, including Parts and Components thereof * * *."

Under GSA's view, item 30(C) is inapplicable for two reasons. First, GSA contends that item 30(C) is limited generally to airplane parts or components and the articles shipped are not related to aircraft. Second, GSA, citing our decision, American Farm Lines, Inc., B-202352, June 2, 1982, asserts that AFL has not furnished proof that any specialized equipment was requested, used or required in the loading or unloading of these shipments and, therefore, item 30(C) is not applicable. GSA's theory that item 30(C) is limited to articles related to aircraft is that the items, for example, electrical machinery, are covered under item 30(C) only if they are components of aircraft. In other words, GSA asserts that "Electrical, Electronic, Radar, Radio, Sonar or Scientific Instruments, Machines or Machinery * * **" (electrical articles) are limited to those items which are parts or components of aircraft. We disagree.

We think it is clear that the electrical articles need not be parts or components of aircraft to be covered by item 30(C); it is intended that they stand on their own.

Prior to June 1976, item 30(C) read as follows:

"(C) Rates published herein to the extent that they apply for the transportation of commodities which because of size, weight or structure require specialized equipment, viz:

"Aircraft and Aircraft Parts or Components, except Aircraft Engines and Parts thereof, including Afterburners and Quick Engine Change Units
"Electrical, Electronics, Radar, Radic, Sonar or Scientific Apparatus, Instruments, Machines or Machinery, including Parts and Components thereof"

A tender revision dated June 21, 1976, removed the indentation which had indicated clearly that the electrical articles were separate from the "aircraft parts." In a September 13, 1979, revision of the tender, the electrical articles again were separated from aircraft parts by indentation. It was during the period between the 1976 and 1979 revisions that the shipments resulting in the subject claims occurred.

The Interstate Commerce Commission has held that:

"Accidents of tariff publication alone should not operate to continue rates upon a basis different from that upon which they were established and intended to be maintained."

Substitution of 35 percent for 33-1/3 percent increase in the class and commodity rates between Eastern and Southern Groups and the Southwest, 61 ICC 518, 522 (1921). See also, Empire Refineries, Inc. v. Director General of Railroads, as agent, Gulf, Colorado and Santa Fe Ry. Co., et. al., 58 ICC 713, 814 (1920). Our review of the record indicates that the compiler of the tender simply failed to bring forward an indentation in a revised tender. Therefore, we cannot agree with GSA that AFL intended by a failure to indent to change the substantive coverage of this provision.

Furthermore, the phrase "Electrical parts," for example, is not a term generally understood as excepted from "aircraft parts" or included under the term "Aircraft Engines and Parts thereof" as are "Afterburners" and "Quick Engine Change Units." We therefore reject GSA's contention

that "aircraft parts" modifies "in some way" "electrical parts." See American Farm Lines, B-199927, May 12, 1981, where we rejected a tender interpretation which we found unreasonable.

Accordingly, in our view, the following articles shipped are covered under item 30(C): Military communication outfits, listed under AFL's Appendix 1, come within the radio apparatus category of item 30; Generators and Engines combined, under Appendix 2, and several generators under Appendix 6, whose primary use, as reported by GSA, is to provide auxiliary electrical power to operate communication and lighting equipment or other items that do not have their own power sources, are, in our view, covered by the description electrical apparatus, machines or machinery in item 30; Generators and Engines combined, electric lighting with telescoping mast or floodlight fixtures under Appendix 4, and several under Appendix 6, also fall within the electrical apparatus machines or machinery category of item 30. We also find that cooling or freezing machines, under Appendix 5, and, lathes, drill presses, and other machinery under Appendix 7 and 9, are electrical machines or machinery under item 30. Electric cable, under Appendix 8, in our view, is covered under item 30(C) as electrical apparatus.

GSA reports that Appendix 3 consists of generators, engines and roller motors (wheeled road rollers) which are not electrically driven but are powered by an internal combustion engine. In our view, these are not covered by item 30(C) because they are not electrically powered apparatus. They are also not covered under item 30(B) which is limited to certain kinds of over-the-highway vehicles. See B-200939, et al., June 15, 1982. Therefore, we sustain GSA's audit action with respect to these claims.

With regard to those articles we determined are covered by item 30(C), under our decision, B-202532, supra, to prevail on its claim, AFL must also show that the transportation of these articles because of size, weight, or structure required the use of special equipment for loading, unloading or transportation.

AFL has provided evidence based on information from the GBL and other shipping documents that these commodities did require specialized equipment. For example, the GBLs

for several of these shipments indicate that a lowboy trailer was ordered and furnished. The ICC has held that lowboy trailers are "special equipment." Ace Doran Hauling & Rigging Co., Investigation of Operations, 108 MCC 717, 720 (1969). Therefore, on those shipments where lowboys were used and the GBL contains no annotation of released value, Tender 345 rates are not applicable.

In other shipments AFL shows from the weight of the articles that special equipment was required for loading and unloading. For example, GBL M-3,478,134, shows two generators, "weighing 13,000 lbs. total, capacity load, trailer mounted." In other cases, AFL indicates the shipments were overdimensional as evidenced by the state permits required to transport the articles on highways; an example is a shipment of two military communication outfits totaling 10,000 pounds, which were overdimensional and required permits. Finally, there were other articles, transported on GBL's which were annotated, "Delicate Instruments Handle With Extreme Care." This indicates that the nature or structure of the article requires special equipment for loading or unloading. (See National Automobile Transporters Association v. Rowe Transfer and Storage Company, Inc., 64 MCC 229, 240 (1955).) With one exception, GSA has not disputed this evidence. Based on this record, we conclude that AFL has shown that these articles were covered under item 30(C).

However, GSA reports that the shipment transported on GBL M-6,470,974, Appendix 6, contains 120 boxes of electrical apparatus weighing approximately 157 pounds each, which could easily be loaded and unloaded manually without use of special equipment, and also reports that the articles under GBL M-1,924,106, Appendix 6, consisted of unboxed loose lighting equipment not requiring special equipment. There is no indication the shipment was overdimensional or required special handling. We sustain GSA's audit action on these claims.

Also, under B-207198, AFL has agreed to accept GSA's notice of overcharge if we determine, as GSA apparently found, that three pieces of military pontoon bridge or foot bridges or parts (there apparently is a dispute as to the precise article shipped), each weighing 500 pounds, is not a commodity requiring specialized handling because of its

weight. We have reviewed the shipping documents and are unable to find any basis to reverse GSA's decision. There is no indication that the articles were overdimensional, required special permits or special handling. To this extent, we sustain GSA's audit position.

Accordingly, with regard to the other shipments we determined are covered by item 30(C), in the absence of an annotation of released valuation on these GBL's, Tender 345 rates were not applicable.

GSA's audit action is reversed, with the exceptions noted above, and settlement action should be taken in accordance with this decision.

for Milton J. Socolar
Comptroller General
of the United States