DECISION

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

FILE: B-206567 DATE: September 23, 1983

MATTER OF: Sedalia-Marshall-Boonville Stage Line, Inc.

DIGEST:

1. Commuter all-cargo air carrier not subject to tariff-filing requirements should not be refunded deductions for alleged overcharges based on the difference between the carrier's published rates and the rates contained in a tender executed by the carrier, where there is conflicting evidence in the record whether the tender was ever accepted by the Government.

2. Commuter all-cargo air carrier should be refunded deductions for alleged overcharges based on the difference between tariff rates, required to be filed with the Civil Aeronautics Board, and the rates contained in a tender executed by the carrier, since under the Federal Aviation Act of 1958 there is no authority for air carriers to give preferential rates to the Government unless they are properly filed with the Board or the Board has exempted the carrier from its filing requirements.

3. Where an air carrier executed a tender when it was exempted from tariff-filing requirements of the Civil Aeronautics Board, but the Board subsequently required the carrier to file tariffs, the filed tariffs replaced the tender by operation of law. When the carrier later was exempted from tariff-filing requirements, the tender was not revived unless the parties so agreed, and deductions based on the tender thus were not proper.

4. Nonbilling carrier properly may claim a refund of deductions taken by Government

from payments due the billing carrier where the billing carrier in turn set off deductions against amounts it owed the nonbilling carrier, since the nonbilling carrier obtained subrogation rights by operation of law.

Sedalia-Marshall-Boonville Stage Line, Inc. (SMB) requests our review pursuant to 31 U.S.C. § 244(b)(Supp IV 1980) (now to be codified at 31 U.S.C. § 3726) of deductions taken by the General Services Administration (GSA) to recover alleged overcharges collected by SMB and its connecting carriers for air transportation services performed between 1975 and 1979. All of the services involve shipments made to or from the Red River Army Depot in Texas, and most of the shipments involved SMB in conjunction with other carriers. GSA deducted the alleged overcharges both from payments due SMB directly and from payments due to other carriers for shipments on which SMB was a connecting carrier. In those cases, the delivering carrier in turn deducted that amount from its payments due SMB. These alleged overcharges are based on the difference between SMB's commercial rates, under which it submitted its bills, and the rates included in a tender executed by SMB in 1971. The matter is also the subject of litigation in the United States Claims Court, Sedalia-Marshall-Boonville Stage Line, Inc. v. United States, No. 167-82C. The proceedings have been stayed pending our review.

SMB is a commuter all-cargo air carrier subject to the Federal Aviation Act of 1958, as amended, 49 U.S.C. §§ 1301 et seq. (1976) and the regulatory authority of the Civil Aeronautics Board (CAB). For all but 15 months of the period in question (January 9, 1978 to March 14, 1979) the CAB exempted such carriers from any tariff-filing requirements. Most of the shipments occurred in the period preceding CAB regulation, but some took place during the period of CAB regulation and others afterwards.

We believe that the carrier should be refunded the deductions taken for shipments made during the period of CAB rate regulation and after that period, but not for those shipments made before the rate-regulation period.

During the time it was exempt from the tariff-filing requirements, the carrier published its rates in its own rate schedules and in industry directories. According to the carrier, the Government or a connecting carrier routing

a Government cargo via SMB most often used the rates set forth in SMB's most current schedule. Nonetheless, in 1971 SMB executed a tender under which it offered to perform certain transportation services to and from the Depot for the Government at stated rates. By the terms of the tender, the offer was effective on a continuing basis unless canceled by the carrier on "written notice." GSA maintains that the rates on this document are the rates to which the Government was entitled, and the agency bases its overcharge findings on the higher rates actually charged by SMB for the shipments.

According to SMB, Depot personnel had requested that SMB sign the tender as a formality in connection with a specific shipment, and SMB--which had no prior experience with tenders--understood the document as merely representing its agreement to transport the shipment at SMB's then current rates. The carrier did not intend to offer to perform future shipments at those same rates, it states, but at whatever its current rates would be at the time of shipment. The claimant alleges that the Depot prior to 1971 had contracted for SMB's services at whatever rates were current at the time, and that the Depot subsequently continued to accept SMB's bills at such rates. The deductions were taken after GSA audits.

Both SMB and GSA now agree that for the period January 9, 1978 through March 14, 1979, when the CAB required carriers such as SMB to file tariffs with the CAB, these tariffs governed the charges to be made for transportation services. GSA states that lower rates in SMB's 1971 tender "became voidable during that period and such overcharges are erroneous." Consequently, GSA states that any deductions for overcharges[1] between January 9, 1978 and March 14, 1979 should be refunded to SMB. We have no reason to disagree with GSA's decision to refund the deductions it made for alleged overcharges during this period.

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[1]GSA limits its agreement to only those shipments where the overcharge deductions were made from payments due to SMB. It does not include deductions made from other carriers' payments which those carriers in turn made from payments due SMB.

GSA does not agree, however, that its deductions for alleged overcharges made during the period after March 14, 1979 are improper. Apparently, GSA believes that SMB's tender was void only during the period when the tariffs were in force and became effective again after the CAB lifted its tariff filing requirement. We believe, however, that when CAB published its regulations making SMB subject to tariff-filing requirements, that action had the effect of terminating SMB's tender since only filed tariff rates would be valid. See 1 Williston on Contracts, supra, § 50A (which points out how an offer may be extinguished by operation of law). Once the tender was terminated and replaced by rates represented by the tariff, the old tender could not automatically renew itself when the tariff filing requirement was rescinded; the carrier would have had to take some affirmative action to revive the tender. See 23 Comp. Gen. 776, 785 (1944). Since it did not, there no longer existed a binding legal obligation on SMB to provide services at the tender rates. Therefore, we believe GSA's deductions for overcharges taken after March 14, 1979 were improper.

Concerning the period prior to January 9, 1978 when SMB was not subject to CAB's tariff-filing requirements, SMB had the right to agree to give the Government a rate lower than the rate it charged its commercial customers, see Public Utilities Commission of California v. United States, 355 U.S. 534 (1958), and therefore could properly submit a tender offering the Government such rates.[2] See Benton Rapid Express, Inc. v. United States, 171 F. Supp. 868 (Ct. Cl. 1959).

A tender is not a contract but a continuing unilateral offer which ripens into a contract when the Government manifests its acceptance by making any shipment under its terms, and the construction of a tender is governed by the established principles of contract law. 37 Comp. Gen. 753 (1958). It is an established principle of contract law

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[2]The tender document cited section 22 of the Interstate Commerce Act as primary authority for a shipper's offer of lower rates to the Government. This Act, of course, is not applicable to air carriers like SMB. Nevertheless, the tender expressly provided that rates could be offered under "other applicable authority" which would clearly cover the situation here.

that a contract generally entails an offer and acceptance, and an acceptance, to be valid, must comply with the terms of the offer. See 1 Corbin on Contracts § 89; 1 Williston, supra §§ 64 and 73.

In this regard, SMB argues that it cannot under any circumstances be bound to an offer it did not make. SMB states that when it signed the 1971 tender it had no intent to bind itself to an open-ended offer to carry cargo indefinitely at its 1971 rates. The terms of an offer are not determined by the offeror's subjective intentions, however, but by the objective written terms of the offer it has executed. See 1 Corbin, supra § 34; 1 Williston, supra § 22; B-174445, April 25, 1972. Here, the tender document (the offer) stated that the carrier offers the specified rates "on a continuing basis to the United States Government" and provided that if the carrier no longer wishes to offer the specified rate it must notify the Government "in writing" according to the terms of the tender. It is thus clear that by signing the tender SMB did indeed offer to provide these services on a continuing basis at the specified rates.

SMB further argues that if in fact its signing of the tender constitutes an offer, that offer did not mature into a contract because it was never accepted by the Government.

We believe SMB has submitted some evidence to show that the tender was not submitted to the Government official duly authorized to approve the tender. The Government's duly authorized agent for the approval, modification or cancellation of tenders is the Commander of the Military Traffic Management Command (MTMC). See 51 Comp. Gen. 541 (1972). In this respect, the tender specifically required that copies of it be submitted to the Commander, MTMC.

Supporting its view that the tender was not received by MTMC and thus not accepted, SMB points out that none of the Government bills of lading included a notation referencing the tender and notes that at least one bill of lading included an estimated transportation charge consistent with SMB's then current rates as opposed to the tender rates. SMB also relies on a letter dated March 19, 1982 from MTMC stating that although records pertaining to rates in effect prior to 1979 are not available, it believes that MTMC subscribed to the rates published by the Airline Tariff Publishing Company--one of the industry publications which SMB alleges formed the basis for determining its rates.

On the other hand, GSA's submissions to this Office state that the tender was approved by MTMC, apparently based on the tender having being stamped "ACCEPTED AND DISTRIBUTED." The stamp also bears the date September 30, but the year is not legible on the copies in the record. MTMC has informally advised us that the stamp on the tender does indicate that MTMC reviewed and approved the tender. Although the year borne on the stamp is illegible, we believe the stamp also tends to show that the tender was approved in the normal course of events during 1971.

The fact that the Government bills of lading failed to include the terms of the tender or to cite the tender does not mean that the tender does not apply to the shipments covered by those bills of lading. Under the governing regulations which have the force and effect of law, Delta Steamship Lines, Inc., 58 Comp. Gen. 799 (1979), Government bills of lading are subject to any tender or equivalent agreement under which the lowest rates are available, unless otherwise indicated on their face. 41 C.F.R. § 101-41.302-3(e)(1982). While SMB argues that at least in some cases the bills of lading include estimated charges that are consistent with its commercial rates and not the tender, we believe that these notations are merely estimates and do not constitute an agreement by the Government to pay more than the lowest available rates.

In view of SMB's lack of experience with Government tenders, that firm may well have genuinely believed that in executing the 1971 tender it was making a one-time offer to carry freight at its then current rate. Nevertheless, the carrier bears the burden of proving the correctness of its charges. See United States v. New York, New Haven & Hartford Railroad Co., 355 U.S. 253 (1957). Therefore, we believe that in the face of conflicting evidence we must conclude that the tender signed by SMB did mature into a binding contract and that the rates included on that tender represented the proper charges for transportation services rendered during the initial period.

SMB argues that even if the tender was binding, the Government should not be permitted to benefit from those rates as they became unconscionable because of drastically increased fuel costs during the period in question. Under the terms of the tender, SMB could have canceled the tender 30 days after written notice if its increased operating costs made the tender's rates overly burdensome. See William S. Richards, supra. Having failed to do so, SMB cannot rely on increased operating costs alone to defeat the tender. See Ultra Special Express-Reconsideration, B-181560, November 19, 1975.

SMB further maintains that the Government's collection actions, in some cases years after the shipments took place, were unconscionable and should not be enforced. The statutory framework for the Government's payment for transportation services contemplates that in exchange for the carriers' right to receive prompt payment of transportation bills without objection the Government later may audit the bills and then, within 3 years after the bills are paid, offset any overpayments against subsequent bills submitted by the carriers. See United States v. New York, New Haven and Hartford Railroad Co., supra. Moreover, contrary to SMB's arguments, the Government's attempt to recover overpayments cannot be barred by laches. See United States v. Garcia & Diaz, Inc., 291 F.2d 242 (2d Cir. 1961). The time constraints for the Government's deduction actions are only those prescribed by statute, and those are, as previously indicated, that the deduction be made not later than 3 years after the time the bill is paid. 31 U.S.C. § 244 (Supp IV 1980) (now to be codified at 31 U.S.C. § 3726(b)). It appears that GSA took all of the deductions within that time frame. Thus, we have no basis to object to the timing of GSA's deductions.

GSA raises a procedural objection to our consideration of SMB's claim as it regards those shipments for which SMB was a connecting carrier and another carrier billed the Government. GSA basically asserts that under its regulations only the billing carrier may submit a claim concerning deductions for overcharges. We do not agree. SMB in this case essentially is entitled to stand in the shoes of the billing carrier for the purpose of claiming a refund of the deductions because SMB obtained subrogation rights by operation of law when the billing carriers, against whom GSA's deductions were taken, exercised their right in turn to set the deductions off against amounts they owed SMB. See Joseph Slemp, B-206799, April 21, 1983, 83-1 CPD 426.

The Government's proper concern is that any payments are made to the proper party in interest so that the Government obtains a valid acquittance. Joseph Slemp, supra. To this end, we recommend that, where refunds are in order, GSA refund an overcharge deducted from moneys owed a carrier other than SMB only after SMB provides a waiver of claim from the carrier.

We allow SMB's claim as to those deductions made by GSA from payments due it for the period of January 9, 1978 through March 14, 1979 as well as for the period after March 14. SMB's claim is also allowed as to those deductions made during the above cited period, from

carriers other than SMB and in turn made from payments due SMB from those other carriers if SMB is able to produce satisfactory waivers from those other carriers.

We deny SMB's claim pertaining to deductions made by GSA from all payments due prior to January 9, 1978.

for Milton J. Socolar
Comptroller General
of the United States