The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Starflight, Inc. - Reconsideration

File: B-212279

Date: September 2, 1986

DIGEST

Where an air cargo carrier purports to substitute a new rate tender for an existing tender, and in the same document cancel the existing tender, and the Military Traffic Management Command returns the document because of numerous deficiencies, rejection of the document for filing prevents cancellation of existing rates as well as substitution of new rates. Therefore, the rates in the existing tender may be used in determining correct charges on shipments to which they apply. On reconsideration, Starflight, Inc., B-212279, November 13, 1984, modified. Mercury Van Lines--Reconsideration, B-193964, June 27, 1980, distinguished.

DECISION

The General Services Administration (GSA) asks for reconsideration of our decision, Starflight, Inc., B-212279, November 13, 1984. We held there that in its audit of bills from Starflight, Inc., for certain transportation services furnished the Department of Defense, GSA could not apply rates from tenders that had been rejected by the Military Traffic Management Command (MTMC) as defective. We also held, based on Mercury Van Lines--Reconsideration, B-193964, June 27, 1980, that despite MTMC's rejection of the defective proposed tenders, they were nonetheless effective in providing written notice to the Government that the carrier was cancelling its existing tenders; therefore, in the absence of any other applicable tender, GSA would be required to apply quantum meruit as a basis for determining the correct charges for the transportation services performed.

The request for reconsideration is concerned primarily with the holding that the defective new tenders, referred to as Tenders 6, 7 and 8, canceled existing Tenders 2, 3 and 4, although the GSA also asks for clarification, for future audit guidance, on general principles relating to MTMC's rejection and cancellation of tenders.

GSA contends that our determination that MTMC's rejection of the proposed tenders resulted in the simultaneous rejection of new rates and cancellation of existing rates was a misinterpretation of the intention of the parties. That is, GSA indicates that MTMC and Starflight did not intend that shipments continue to move by Starflight without any agreed rates being in effect.

Upon reconsideration we modify our prior decision. Modification is based on material factual distinctions between Mercury, supra, and this case.

RECONSIDERATION

In Mercury the carrier filed two separate documents simultaneously: a tender purporting to substitute new rates for an existing tender, and a supplement that intended to cancel the existing tender. Both were returned, or rejected by MTMC, although only the substitution tender did not comply with MTMC's tender-filing procedures. We held that where the carrier simultaneously filed a cancellation supplement to an existing rate tender, and a substitution tender, MTMC could not reject the cancellation supplement where it complies with applicable procedures simply because the substitution rate tender was defective. Here, Starflight purportedly canceled the existing tender and substituted new rates simultaneously in the same document and there is no dispute that the document failed to comply with MTMC's tender-filing procedures. We held that MTMC could reject a proposed tender that did not comply with its filing procedures.1/

As to the question of whether cancellation of existing rate tenders was intended to depend on MTMC's acceptance of proposed new tenders, we noted in Mercury that the separate cancellation document referred to a specific tender for future application of rates, which was different from the defective substitution tender. Thus, the carrier's intention was clear that the cancellation supplement was not dependent on acceptance of the replacement tender. In the present case, no such reference is made. Instead, the wording of the tenders and

---

1/ In an informal written presentation dated February 24, 1986, MTMC identified various deficiencies in the documents and while agreeing with the principle in Mercury, requiring the agency to accept a conforming cancellation notice that is separate from a simultaneous substitution rate tender, MTMC stated it could not effectively manage the tender-filing program if a defective document, covering both functions, became effective only as to one.

the absence of any reference to another effective tender strongly indicate an intent that the cancellation of the existing tenders depended on acceptance of the new tenders. Since the new tenders were rejected, for several deficiencies, it follows that in the absence of clear reference to another applicable tender, the cancellations, as part of the same documents, were also properly rejected.

Thus, our November 13, 1984 decision relating to MTMC's rejection of Tenders 6, 7 and 8 is affirmed to the extent it held that those tenders were not in effect when the shipments moved and the rates therein were not applicable. However, we modify the decision to the extent that it held that receipt of the defective proposed Tenders 6, 7 and 8, resulted in cancellation of existing Tenders 2, 3 and 4. Therefore, GSA may consider the rates therein for determination of correct charges to the extent of their applicability.

INCIDENTAL QUESTIONS

GSA perceives that the rule in Starflight--that MTMC's return of a carrier's rate tender constitutes a rejection--conflicts with the general rule that a tender is a continuing unilateral offer which only the offeror has power to cancel. See 51 Comp. Gen. 541 (1972). GSA contends that clarification is necessary for its audit work, in view of MTMC's recent position that it has a legal right to reject and cancel tenders under MTMC Memorandum No. 59-1.

Starflight should not be read as holding that MTMC rejected existing tenders. MTMC rejected proposed tenders. Under MTMC procedures, until it accepts and distributes tenders, they should not be viewed as continuing unilateral offers. We also point out that an exception to the general rule that only the carrier may cancel a tender is the rule that the parties may agree that either party may terminate the offer upon specified notice and the uniform tender does provide for cancellation by the Government. Generally, we see no legal objection to MTMC's rejection of proposed tenders that in its judgment do not satisfy the transportation requirements of the United States, and for the same reason reserve the right by regulation or agreement to cancel tenders, since carriers contracting with the Government are charged with familiarity with its procedures. See Alcoa S.S. Co. v. United States, 338 U.S. 421, 429 (1949); Ultra Special Express, 55 Comp. Gen. 301 (1975).

To date, we have not seen where MTMC has relied on Memo 59-1 to cancel existing tenders. That publication to our knowledge has been used as guidance in rejecting proposed tenders while

tender provisions themselves have provided MTMC with authority to terminate or cancel existing tenders on proper notice. It seems to be within MTMC's authority to make reasonable alterations in its regulations concerning rejection and cancellation as a condition of carriers' sharing in Government traffic.

for Milton J. Socolar
Comptroller General
of the United States