Billed PUM

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

FILE: B-215958 **DATE:** February 18, 1986

MATTER OF: Leonard Brothers Trucking Company, Inc. - Reconsideration

DIGEST: Under Department of Defense regulation and the carrier's tariff provisions, the mere sealing of a carrier's vehicle by a Government shipper and noting such sealing on the bill of lading, without a written request for exclusive use or a statement prohibiting the carrier from breaking the seals, do not show intent to obtain exclusive-use service. Therefore, the carrier is not entitled to exclusive-use charges solely because the shipper sealed the vehicle and noted the seal number on the bill of lading. On reconsideration, Leonard Bros. Trucking Co., Inc., B-215958, December 5, 1984, overruled.

The General Services Administration asks for reconsideration of our decision, Leonard Bros. Trucking Co., Inc., B-215958, December 5, 1984. There we held that despite the absence of a written request for exclusive-use-of-vehicle service on a Government bill of lading, the carrier was entitled to exclusive-use charges because Government shipping officers applied seals to the carrier's vehicles and noted the seal numbers on the bills.1/

The General Services Administration contends that the decision misinterpreted the exclusive-use rule published in the carrier's tariff and failed to consider Government transportation practices and precedent of this Office. Upon reconsideration, we overrule our prior decision.

1/ The General Services Administration now concedes that the carrier is entitled to exclusive-use charges for transportation of 7 of the 55 shipments involved because, in addition to sealing, the bills contained a "Do Not Break Seals" annotation.

Facts and Issue

The issue is whether the applicable rates should be applied to each shipment's actual weight or to a greater minimum weight provided in the carrier's exclusive-use rule.[2/] The rates were derived from Leonard's Tender ICC-LEBT 30-C, a local rate quotation applicable to United States Government freight. The tender covered general commodities, commonly known as "Freight All Kinds," Classes A and B Explosives, Sensitive Weapons and Ammunition, and Size and Weight commodities. The bills of lading show that most of the shipments involved in this case consisted of Freight All Kinds and reflect a wide range of weight and displacement.

The exclusive-use rule, which has become the subject of conflicting interpretations by Leonard and the General Services Administration, was published in item 470 of National Association of Specialized Carriers Rules Tariff, ICC NAS 190-A. Reference to the tariff was based on item 100 of the tender which named ICC NAS 190 among the tariffs governing Tender ICC-LEBT 30-C. Section 1 of item 470 of the tender contains the general rule that the carrier retains discretion over selection of vehicles, whether to transfer shipments to other vehicles and whether to load additional freight on the same vehicle. Section 2 describes the circumstances under which the carrier waives these prerogatives and grants the shipper exclusive use, subject to the minimum charge. The relevant portions of section 2 as they appeared when the shipments moved (prior to October 4, 1982) follow:

"SECTION 2

"EXCLUSIVE USE OF VEHICLE

"(a) When exclusive use of carrier's equipment is requested or demanded by the shipper or consignee to meet the needs

---

2/ The tariff's exclusive-use rule, which in effect is a minimum-charge rule, contained a minimum weight of 36,000 pounds although a tender rule modified the weight to 33,000 pounds.

> of special conditions, charges thereon will be computed at the actual weight of the shipment subject to a minimum charge based on 36M * * * at the applicable rate for each vehicle used. * * *
>
> "(b) Where the shipper or the carrier, by instructions of the shipper, affixes the shipment to or in the carrier's vehicle by means of a numbered seal and such seal number appears on the bill of lading or shipping instructions, such shipment will be given exclusive use of the vehicle subject to the provisions of Paragraph (a) of this item.
>
> "(c) Subject to availability of equipment, exclusive use of the vehicle shall be provided when the bill of lading or other written instructions bear the statement that exclusive use is required or requested and such service will not be provided unless the bill of lading is so annotated or other written instructions are provided."

The December 5, 1984 decision held, as we have said, that simply affixing a seal and noting its number on the bill of lading constituted a request for exclusive-use service. The General Services Administration contends that the three paragraphs should be read together, which would require a written request for the service on the bill of lading as a prerequisite to applicability of exclusive-use charges, a contention with which we now agree.

Discussion

The General Services Administration officials point out that paragraph (b), by its terms, is subject to paragraph (a) which provides the method for charging for exclusive-use service when it is "requested or demanded" by the shipper. They also argue that paragraph (c) must be applied with paragraphs (a) and (b). Paragraph (c)

specifically requires that written instructions be provided requesting exclusive use or "such service will not be provided." Thus, it is argued that without a written request for exclusive use, the service is not to be provided and charges for such service are not applicable.

The General Services Administration officials provided statements of the Government shipping officers responsible for these shipments that exclusive-use service was not requested or required for the shipments involved. Also, various reasons for sealing the vehicles without any intent to deny the carrier access were presented, including reasons provided in Department of Defense regulations, DLAR 4500.3. Those requlations make it clear that the carrier retains the right of access to its equipment notwithstanding that seals are applied by the Government except for certain specific reasons, in which case the bill of lading is to be so annotated. Among the reasons for sealing without denying carrier access to the vehicle, reflected in paragraph 213012 of DLAR 4500.3, are when a shipment occupies the full visible capacity of the vehicle or is of sufficient weight to take a truckload rate.3/

Practical reasons for sealing without denying the carrier access include protection against theft by third parties particularly between the time the vehicle is loaded and the time it arrives at the carrier's terminal. Another situation is where "signature security service" is provided; that is, where the shipment must be signed for by each person having custody of it as it progresses to destination. Also, seals are often applied on "shipper load and count" shipments, where the shipper assumes responsibility for the loading and correct count of the freight thus relieving the carrier of responsibility.

While the provisions of DLAR 4500.3 are directed to the Government shipping officers, these reasons for sealing vehicles without the intent to deny the carrier access are not limited to Government shipments. In any event, generally carriers are expected to be aware of the usual

---

3/ A shipment of sufficient weight to take a truckload rate does not have to fill the full visible capacity of a vehicle. Often, truckload shipments do not fill the weight or space capacity of vehicles.

shipping practices of the Government, a major user of transportation services. See Alcoa S. S. Co. v. United States, 338 U.S. 421, 429 (1949); Ultra Special Express, 55 Comp. Gen. 301 (1975).

The carrier does not argue that exclusive-use service was actually requested, but that the presence of seals on the vehicles, which it states it did not feel free to break, prevented it from adding additional freight to the shipments.

While there is an obvious dispute over the effect of the Government's sealing practices, the Government's explanation of these practices supports the agency's interpretation of the three subparagraphs in section 2 of the carrier's exclusive-use rule. That is, the rule should be interpreted as an integrated whole, and thus exclusive-use charges are not applicable in the absence of a written request for the service, notwithstanding that the vehicle is sealed. This is consistent with our precedent where we held that the mere sealing of a vehicle (even with a lock-type seal), or sealing with an ordinary seal coupled with a bill of lading notation of sealing, did not disclose an intent to deprive a carrier of access without some further written notice such as a notation "Do Not Break Seals." See American Farm Lines, Inc., B-203805, B-204113, December 24, 1981.

In addition, to the extent that the tariff provision may present an ambiguity concerning whether each subparagraph should be independently considered or whether the three should be viewed as a whole, where such a carrier-drafted tariff provision is ambiguous, it is the established rule to resolve the ambiguity in favor of the shipper. See Eastern Airlines, Inc., 55 Comp. Gen. 958 (1976), and Starflight, Inc., B-218844, November 26, 1985.

Also for consideration is an October 4, 1982 revision of Tariff 190, applicable after most of the shipments involved here moved, expressly providing that the carrier will not assess exclusive-use charges on the basis of the Government's sealing and recording of seal numbers alone. Rather than being a substantive change in the tariff, however, we find that to be merely a clarification of the matter since, as the carrier concedes, the item was revised

at the request of the Department of Defense to "minimize the confusion" relating to the application of seals by the Government. Where a revision is recognized as a mere clarification of existing intention, it is not viewed as a material change in the tariff. See Leonard Bros. Trucking Co., Inc., B-196671, June 2, 1981.

Accordingly, in view of the additional arguments presented, and upon further consideration, our previous decision is overruled and the deduction action taken by the General Services Administration is sustained.

for Milton J. Socolar
Comptroller General
of the United States