



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: R & E. Hauling, Inc. - Actual v. Constructive
Miles - Retroactive Modification of Rate Tender
File: B-225087
Date: September 25, 1987

DIGEST

1. Where it is the custom to apply mileages from an industry mileage guide to rates offered in a carrier's rate tenders, the mileage guide, rather than actual miles, applies even though a particular tender's rate schedule does not specify whether it is governed by actual miles or the mileage guide.
2. Where no benefit results to the government from a carrier's tender supplement that retroactively increased freight charges by application of actual miles rather than lower constructive miles published in a mileage guide, the supplement is legally ineffective because no government officer or employee has authority to waive the government's contractual rights in these circumstances.

DECISION

R & E Hauling, Inc. (R & E), asks the Comptroller General to review actions taken by the General Services Administration (GSA) to make deductions from monies otherwise due the carrier to recover overcharges allegedly collected for the transportation of as many as 298 shipments of Department of Defense property. We conclude that R & E has not shown that GSA's deduction actions were improper; therefore, the actions are sustained.

BACKGROUND

R & E issued its Tender No. ICC 104, effective for 1 year, from November 10, 1984, until November 9, 1985. The tender offered mileage rates to the government for the transportation of Freight All Kinds, including hazardous materials, from the Defense General Supply Center, Bellbluff, Virginia, to various points in the State of Virginia. R & E offered the tender as a means of participating in the Military Traffic Management Command's (MTMC) Guaranteed Traffic

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Program under which sealed rates are tendered in response to a solicitation. The tenders are publicly opened and evaluated and a carrier is selected on the basis of the lowest overall cost and the ability to provide responsive, responsible service in a specific traffic lane. See 65 Comp. Gen. 563 (1986). R & E, apparently, as the low-cost carrier, received award of the exclusive right to handle traffic from Bellbluff to various destinations in Virginia at fixed rates for a 12-month period. In December 1984, the carrier noticed that the Government Bills of Lading (GBL) being issued showed mileages that were less than the actual mileages recorded by the carrier during transportation. This was particularly noticeable, apparently, in the transportation of hazardous materials which were required to be transported over circuitous routes. The mileages noted on the GBLs were obtained from the Household Goods Carriers Bureau Mileage Guide No. 12.

In response to R & E's proposal the traffic manager of the Defense General Supply Center, Richmond, Virginia, informally agreed that the Tender 104 rates would be governed by actual miles rather than mileages published in the Mileage Guide. After being informed of the informal arrangement MTMC officials apparently authorized issuance of Supplement 1 to Tender 104, to give effect to that arrangement by specifying the application of actual mileage "as verified by carrier certification of actual speedometer miles." Supplement 1 was issued on July 12, 1985, for retroactive application to shipments transported during the period from November 10, 1984, to May 31, 1985. Supplement 2 was issued on the same date specifically requiring application of the Mileage Guide effective June 1, 1985, until expiration of Tender 104, on November 9, 1985.

R & E billed and collected charges under Tender 104 on the basis of actual miles for shipments transported during the period between November 10, 1984, and June 1, 1985. In the audit of R & E's bills GSA determined that the lower mileages contained in the Mileage Guide were applicable and directed deduction of the difference between the freight charges collected by R & E on the basis of actual miles and what the charges would have been if based on the Mileage Guide.

R & E contends that its informal agreement with the Defense General Supply Center, formalized by issuance of Supplement 1 with MTMC approval, governs the transactions between November 10, 1984, and June 1, 1985; therefore, the actual miles were applicable.

GSA acknowledges that Tender 104 did not expressly provide for application of the Mileage Guide generally, and the rate

schedule in Item 23 did not specify either the Mileage Guide or actual miles. GSA notes, however, that most carriers use the Mileage Guide. It also notes that Item 47 of Tender 104, which pertains to stop off in transit and split delivery, is expressly governed by the Mileage Guide, and this reference to the Guide implies its general applicability.

MTMC states that it was the agency's intent that the Mileage Guide would apply. Further, it too states that it is the custom to apply the Mileage Guide, rather than actual miles, and all other carriers apply the Mileage Guide as a matter of accepted practice. It is contended that R & E's insistence on amending Tender 104 is evidence of the carrier's understanding that Tender 104 originally contemplated application of the Mileage Guide.

MTMC now contends, and GSA agrees, that issuance of Supplement 1, purporting to retroactively modify Tender 104 so as to expressly apply the Mileage Guide, is without legal effect under the principles applied in a somewhat similar case involving transportation from Bellbluff under the Guaranteed Traffic Program since the government received no benefit from the modification. See 65 Comp. Gen. 563, supra.

OPINION

We grant substantial deference to administrative agencies concerning the existence of material facts since the agencies are in a better position to know them. See Dan Barclay, Inc., B-217354, June 11, 1985, and 45 Comp. Gen. 99 (1965). Here, MTMC, the traffic manager of the Department of Defense, and GSA, the agency responsible for the government's transportation audit, state that it is the custom to apply the Mileage Guide to shipments governed by mileage rates, and that all other carriers apply the Mileage Guide. We have recognized that the government and carriers contract with reference to custom. See Ultra Special Express, 55 Comp. Gen. 301, 304 (1975). A rebuttable presumption flows from these facts that the carrier knew the rates solicited by the procuring agency would be applied based on the mileages published in the Mileage Guide. The carrier points to no legal authority for the modification secured from the agency or for MTMC's ratification thereof.

The principles applied in 65 Comp. Gen. 563, supra, govern. In that case we considered the legal effect of a tender supplement that increased freight charges to the government. It had been issued with MTMC's approval for application to transportation services that had already been performed. We held that in the absence of a showing that the government

received a benefit from the modification, such as the performance of special services not contemplated originally by the parties, government officers and employees have no authority to waive the government's contractual rights.

Here we agree with MTMC that the government received no benefit from the Supplement 1 modification of Tender 104, and we find that the modification was to the government's detriment.

Unlike the usual arrangement where the government distributes traffic in particular markets among various carriers at uniform or individually-published tender or tariff rates, the Defense General Supply Center, Bellbluff, Virginia, under DOD's Guaranteed Traffic Program, awarded traffic to R & E exclusively for 1 year, as the low-cost carrier determined on the basis of sealed bids. Since carriers customarily apply rates to mileages in the Mileage Guide, the government received nothing from that part of the modification which provided for application of the Mileage Guide from May to November 1985. That basis is what the government bargained for. The government lost what it had bargained for to the extent that actual mileages applied from November 1984 to May 1985. Further, it would appear that to permit the low-cost carrier, which received the exclusive 1-year award of traffic, to alter the basis of rate application to actual miles could undermine the integrity of DOD's Guaranteed Traffic Program if other carriers which bid on the traffic understood that their rates would be applied based on mileages in the Mileage Guide.

Although R & E may have been required to follow circuitous routes in the transportation of hazardous materials, the carrier's offer expressly included the transportation of hazardous materials. When R & E submitted its bid the carrier knew that the traffic being offered was Freight All Kinds which, as evidenced by Tender 104, would include hazardous as well as non-hazardous commodities, all being transported under the same rating system. Compare Mercury Motor Express, Inc., B-193029, December 7, 1978.

In view of our policy to accept the government's version of the facts unless it is shown to be clearly wrong, and two government agencies have stated that the custom was to apply the Mileage Guide, we find that GSA reasonably interpreted

the tender to apply the mileages in the guide, despite the carrier's disagreement.

Accordingly, GSA's audit actions are sustained.

for *Harry R. Van Cleave*
Comptroller General
of the United States