Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Phoenix Motor Express, Inc. - Exclusive Use

File: B-235886

Date: June 4, 1990

DIGEST

Military Traffic Management Command's Freight Traffic Rules Publication No. 1A precludes a carrier from assessing an additional charge for exclusive use of vehicle service when "per mile per vehicle used" rates apply.

DECISION

Phoenix Motor Express, Inc., requests review of the General Services Administration's (GSA) denial of Phoenix's charges for exclusive use of vehicle service on several Government Bills of Lading (GBL) shipments the firm transported. Phoenix asserts that the government asked for exclusive use service and therefore is obligated to pay the additional charge for it as noted in Phoenix's tenders ($.25 per mile). GSA denied the charge on the basis that Item 106 of the Military Traffic Management Command's (MTMC) Freight Traffic Rules Publication Number 1A (MFTRP 1A) precludes assessment of exclusive use premiums when payment already is based on "per mile per vehicle used" (PM) rates.

We sustain GSA's action.

BACKGROUND

The shipments involved moved between late 1987 and early 1989, and PM rates applied to them. GSA does not dispute that the government requested exclusive use service or that such service was provided with respect to these shipments. Item 105 of MFTRP 1A, which applied to the shipments,1/ permitted the carrier to charge in its tender a premium for

1/Submissions in this dispute indicate that MFTRP 1, as amended by Supplement 2 of December 1986, is applicable. However, because the shipments occurred after the effective date of MFTRP 1A on July 1, 1987, that publication is the one to be referenced. Items 105 and 106 in MFTRP 1A are essentially unchanged from MFTRP 1, Items 105A and 106.

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exclusive use. Item 106, however, which is described as an "exception" to Item 105, specified in paragraph 1 that:

> ". . . exclusive use of vehicle will be provided when requested by shipper, but charges for exclusive use of vehicle in ITEM 105 will not be assessed when . . . line-haul charges are based upon a minimum weight of 45,000 pounds or actual weight in excess of 45,000 pounds, or when tender rates are based on Rate Qualifiers [including] PM . . . ."

Despite the language in Item 106, Phoenix offered in its tenders PM rates and a charge of $.25 per mile when exclusive use service is requested. Phoenix argues that the PM rate only gave the government a reduced rate per pound on the line-haul portion of the transportation, but it did not give the government full and exclusive use of the vehicle. The carrier contends that paragraph 2 of Item 106 "directly contradicts" the government's position and "permits carriers to publish exclusive use . . . rates based on a minimum weight of 45,000 pounds" even where PM rates apply. Paragraph 2 states:

> "Carriers desiring to offer exclusive use of vehicle, as an optional accessorial service under ITEM 105, should complete Section F(2) of the . . . tender by entering an appropriate charge for EU(1). Carriers filing tenders with minimum weights based on 45,000 pounds, or . . . PM . . . should complete Section F(2) of the DOD tender by entering EU(1) $.X X."

Phoenix alleges that its interpretation of Item 106 is the one that is consistent with established rules and practices in commercial transportation.

GSA responds to Phoenix's argument by noting that a PM rate, by its nature, "implies the sole use of a carrier's vehicle." Both GSA and MTMC2/ interpret paragraph 2 only as allowing a carrier to offer exclusive use for competitive purposes, but at no additional charge.

ANALYSIS

We see no merit in Phoenix's position. Initially, we point out that while the government and carriers generally contract

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2/ Both GSA, as the government's transportation audit authority, and MTMC, as traffic manager for this type of traffic in the Department of Defense (DOD), have filed reports in this matter.

with reference to customary transportation practices, custom and usage are not used to vary the terms of an agreement that is clear on its face. Rather, they are used to explain the meaning of words and the intentions of the parties when the parties have knowledge of the existence of such custom and contract with reference to it. See Ultra Special Express, 55 Comp. Gen. 301, 304 (1975).

Here, the right to charge for exclusive use service under Item 105, as an additional charge to the line-haul charge, is expressly subject to Item 106. In our view, both the language in Item 106 and its intention are clear. The first paragraph of Item 106 states unambiguously that exclusive use charges cannot be assessed by the carrier when PM rates are applied, i.e., when the government already is being charged per vehicle, even if exclusive use service is requested and provided. We do not see the logic in Phoenix's point about paragraph 2, which we see as merely informing the carrier how to complete the standard Defense Department tender form if it desires to offer exclusive use of vehicle as an additional service, both where it can charge for such service and where it cannot. Indeed, we think the "$ .X X" instruction in that paragraph clearly tells the carrier it cannot charge for exclusive use for shipments based on PM rates.

To the extent Phoenix may be suggesting that paragraph 2 sets 45,000 pounds as the minimum weight for exclusive use shipments, we see no basis at all in the paragraph's words for that position. Rather, the 45,000-pound reference establishes that the government will not pay for exclusive use where it already is paying, in effect, for the truck's full capacity on a minimum weight charge basis.

In sum, we agree with GSA and MTMC that payment for exclusive use in addition to payment on a PM basis is not appropriate. GSA's actions therefore are sustained.

Milton J. Socolar

Acting Comptroller General
of the United States