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DECISION



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

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FILE: B-192689

DATE: January 24, 1979

MATTER OF: Tri-State Motor Transit Company

DLG 00747

DIGEST:

Where carrier's rate tender provides for separate charges "for each man required," Government request for two drivers and an armed guard requires carrier to furnish three people to perform the services in order for the Government to be obligated to pay the charges.

Tri-State Motor Transit Company (Tri-State), in a letter dated August 17, 1978, requests the Comptroller General of the United States to review the General Services Administration's (GSA) action on 44 of its bills for transportation charges. See 49 U.S.C. 66(b) (Supp. V, 1975), and 4 C.F.R. 53.3 (1978). GSA, after auditing the bills, notified Tri-State of overcharges that in the absence of refund were collected by deduction from subsequent bills. A deduction constitutes a reviewable settlement action [4 C.F.R. 53.1] and Tri-State's letter complies with the criteria for requests for review of that action. 4 C.F.R. 53.3 (1978).

The bills in dispute cover 44 shipments of various types of ammunition and explosives transported by Tri-State in 1975 and 1976 on Government bills of lading (GBL) between places in the United States.

GBL No. M-3080146 covers a typical shipment; it was issued on September 13, 1976, and shows that Tri-State transported a pallet of rocket ammunition with explosive projectiles weighing 700 pounds from Tooele Army Depot, Utah, to Fort Polk, Louisiana. The bill of lading contains these annotations authorizing protective, security and surveillance services:

"ARMED GUARD REQUESTED"; "DUAL DRIVER PROTECTIVE SERVICE (DDPS) REQUESTED"; "PROTECTIVE SECURITY SERVICE REQUESTED"
"EXCLUSIVE USE OF VEHICLE FOR GOVERNMENT USE."

Tri-State collected transportation charges of \$2,801.25 on the shipment. The truckload line-haul charges were \$1,950.40; the charge for the armed guard was \$309.40; the charge for dual driver protective service was \$232.05; and the charge for the protective security service was \$309.40.

[REQUEST FOR REVIEW FOLLOWING
Audit]

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Attached to Tri-State's bill for the transportation charges are a Signature and Tally Record showing the signatures of persons accepting custody of the shipment during transportation and a signed form letter on Tri-State's stationery stating "WE HEREBY CERTIFY THAT EXCLUSIVE USE AND DUAL DRIVER OPERATION (TWO-MAN OPERATION) WERE PROVIDED ON SHIPMENT WHICH MOVED ON GBL M3080146." GSA audited Tri-State's bill, deleted the charge for the armed guard service, and notified the carrier of an overcharge of \$309.40 which in the absence of refund was collected by deduction. 49 U.S.C. 66(a) (Supp. V, 1975).

Tri-State's transportation charges on this shipment are derived from its Government Rate Tender I.C.C. No. 815-E, effective April 2, 1976. The provisions of Tender 815-E relevant to this dispute read:

"Armed Guard and Escort Car Service:

When carrier is required to furnish armed guard and/or escort car service, the following charges will be assessed in addition to all other charges applicable to the shipment.

"(a) Armed Guard and/or Escort Car Driver: Charges will be 20¢ per loaded mile traveled for each man required. Minimum charge \$50.00 per man per day.

* * * * *

"DUAL DRIVER PROTECTIVE SERVICE (DDPS)

A Signature Security Service (SSS) plus continuous attendance and surveillance of the shipment through the use of dual drivers. The vehicle containing the shipment must be attended at all times by one of the drivers. A vehicle is "attended" when at least one of the drivers is in the cab of the vehicle, awake and not in a sleeper berth or is within 10 feet of the vehicle. Subject to Notes (1) and (2) [Note (1) not here involved].

"Note (2) CHARGES FOR DUAL DRIVER PROTECTIVE SERVICE

(a) The charge for an extra driver (two-man operation) shall be 15¢ per loaded mile, subject to a minimum charge of \$75.00, in addition to all other applicable charges."

GSA contends that since the armed guard service and the extra driver service were performed by the same person (a fact apparently

admitted by Tri-State), the charges for the armed guard service are not applicable. GSA believes that Tri-State is required by Tender 815-E to furnish an armed guard in addition to the two drivers for the armed guard charge to apply. GSA points out that the armed guard charge is "for each man required" and that while Tri-State certified that two drivers were used the record contains no proof that an armed guard was used.

Tri-State says that it provides various types of physical security and protective services for freight shipments requiring special protection and that charges for these services are set forth in Government rate tenders like Tender 815-E. It contends that the GBL authorized and that Tri-State furnished and billed for two protective services, Dual Driver Protective Service and Armed Guard Surveillance.

Tri-State relies in part on a Department of Defense Manual (DOD 5100.76-M) and Army Regulation No. 190-49, both including provisions dealing with the physical security of arms, ammunition and explosives while being transported. It quotes paragraph 2-4(2)(a) of AR 190-49:

"Commercial [motor freight] carriers will move truckload shipments under continuous armed surveillance (driver and one other person, one of whom is armed) in a lock and sealed, exclusive-use vehicle."

Tri-State contends that since DOD requested that the "one other person" be a driver, it brought about an additional charge for a second service, and claims that the two employees it furnished performed all the requested services.

Rate tenders, such as Tender 815-E, are made to the United States pursuant to Section 22 of the Interstate Commerce Act, 49 U.S.C. 22. They are considered to be continuing offers to perform transportation services at the quoted rates subject to the terms and conditions contained in the offers. C & H Transportation Co. v. United States, 436 F.2d 480, 481 (Ct. Cl. 1971). They are the same as any other offer made by a party seeking to form a contract and their interpretation is subject to traditional rules of contract law. Union Pacific R.R. v. United States, 434 F.2d 1341, 1345 (Ct. Cl. 1970).

One rule of contract law specifies that "the parties to a contract should be able to rely on their contract's express language." Artisan Electronics Corporation v. United States, 499 F.2d 606, 611 (Ct. Cl. 1974). Tender 815-E states that charges for armed guard service will be assessed in addition to all other charges "for each man required." Similarly, the tender provides for a separate charge for an extra driver, when requested. These provisions appear to

require that an additional person be furnished for each additional service in order for the Government to be obligated to pay these charges. According to this interpretation, Tri-State would have been required to furnish three persons for the additional charges for both the extra driver and the armed guard services to apply. We believe that GSA's interpretation of Tri-State's tender is reasonably correct.

An ambiguity arises when the language of the tender is construed with that of the Army Regulation and the DOD manual, upon which the tender presumably is based. The regulation and manual, quoted above, seem to allow a driver to act as armed guard but the tender arguably is ambiguous because it does not clearly show that two drivers could perform the three services requested by the Government. It is a principle of contract law that ambiguities are resolved against the drafter of the agreement (i.e., the tender). See, e.g., Hughes Transportation Inc. v. United States, 169 Ct. Cl. 63, 68 (1965). For this reason also, we must agree with GSA's settlement action.

In addition, Federal Motor Carrier Safety Regulations establish maximum driving and on-duty time restrictions. See 49 C.F.R. 395.3 (1977). The purpose of this regulation is to insure that fatigued drivers are not operating motor vehicles on the public highways. The object of having an extra driver is to move the shipment quickly. Thus one driver should be sleeping while the other is driving. In this situation, an extra driver could not also perform armed guard services. Three persons would be required to perform the services of driver, extra driver, and armed guard.

Finally, even if the tenders could be construed to allow two drivers to perform driving and armed guard services, we would uphold GSA's settlement action. While the record clearly shows that dual drivers were provided, by virtue of signed statements to that effect, Tri-State has not furnished any proof that armed guard service was provided.

The burden of proof of claims against the Government is upon parties presenting them. United States v. New York, New Haven & Hartford R.R., 355 U.S. 253 (1957). The fact that the rate tender provides a basis for the charge and that the Government bill of lading establishes that the service was requested does not establish actual performance of the armed guard service. See 52 Comp. Gen. 945, 948-49 (1973). Pacific Intermountain Express Co. v. United States, 167 Ct. Cl. 266 (1964). This would be tantamount to attempting to prove performance of a contract solely by existence of the contract itself. As there is no evidence to establish performance of the armed guard service, the United States cannot be liable for the corresponding charges.

Based on the present record, GSA's settlement action on Tri-State's 44 bills is correct and is sustained.


Deputy Comptroller General
of the United States