



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

October 24, 2008

CBCA 1074-RATE

In the Matter of UNION PACIFIC RAILROAD

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Janet D. Kaminski, Office of the Staff Judge Advocate, Military Surface Deployment and Distribution Command, Department of the Army, Fort Eustis, VA, appearing for Department of Defense.

GILMORE, Board Judge.

Claimant, Union Pacific Railroad (UP), has asked the Board to review the decision of the General Services Administration (GSA) denying UP's claim of \$459,859.46 for additional transportation costs stemming from a mistake it made in entering the rates for tender number 702073 into the Global Freight Management (GFM) system. UP transported eleven shipments of ammunition for the Department of Defense (DOD) under this tender. There were seven shipments in May of 2007, and four in August of 2007. For the reasons set forth below, we deny UP's claim.

Background

Under Defense Transportation Regulation (DTR) 4500.9-R, Part II (Sept. 2007), the Military Surface Deployment and Distribution Command (SDDC) is the DOD command

responsible for accepting tenders (offers) under 49 U.S.C. § 10721 from rail carriers who offer to provide commercial transportation services to DOD for free or at discounted rates. SDDC is the interface between the DOD shippers and the commercial carriers.

SDDC has two primary methods under which carriers can submit tenders - the voluntary method and the negotiated method. The voluntary method involves an electronic system through which qualified carriers can submit rates for transportation into a database system without negotiating any special terms. The SDDC uses the GFM system for the electronic filing of tenders. Voluntary tenders include the 700,000 tender series numbers. The day following a tender entry, that entry is posted and distributed by the GFM system for use by DOD freight offices. Voluntary tenders are accepted and entered into the GFM system without review by SDDC personnel.

The negotiated method involves SDDC soliciting special rates from rail carriers for a particular shipment that generally has unique requirements or involves a volume movement. SDDC reviews the offers and often negotiates the tender rates and terms with the carrier prior to accepting the tender for filing into the GFM system. Negotiated tenders are assigned the 500,000 series number. A carrier making a voluntary tender cannot use a 500,000 series number. At the time of the filing of this claim, there were 495,447 tenders on file, of which 41,357 were active tenders. UP had approximately 1700 negotiated tenders and 2000 voluntary tenders in the GFM system.

Military Standard Tender Instruction Publication (MSTIP) No. 364-D, in Items 200 (C), 300, and 500, provides detailed instructions on how to enter the tenders into the GFM system. These instructions caution the carrier to use extreme care in the preparation of a tender and explicitly state that it is the carrier's responsibility to ensure the accuracy of all coded data.

In the instant case, on May 15, 2007, the freight rate specialist at the Tooele Army Depot in Tooele, Utah, e-mailed UP, requesting UP to quote a tender and rate for DOD ammunition shipments from Tooele, Utah, to Sunny Point, North Carolina. That same day, UP e-mailed the freight rate specialist the following notice: "UP tender 702073, Tooele AD to Sunny Point, was submitted into GFM this morning (5/15). The rate is \$17.66 pcwt [per hundredweight], with a rate of \$9.99 pcwt for excess of 100,000 lbs. The tender is effective until August 15, 2007."

When UP entered tender number 702073 into the GFM system, it inadvertently entered a wrong number in one of the weight columns on the data entry form. The actual tender entered stated a rate of \$17.66 pcwt, with a rate of \$9.99 pcwt for weight in excess of one lb., not 100,000 lbs., which UP meant to enter into the GFM system. At this point, UP

did not know it had entered incorrect data into the GFM system. UP made seven ammunition pick-ups between May 17 and 19, 2007, using tender number 702073. Tender number 702073 was entered on the commercial bills of lading (CBLs) under which the shipments were moving. When UP later billed DOD, it requested payment based upon the rate quoted to the freight rate specialist on May 15, 2007. An SDDC auditor advised UP that tender number 702073 established the controlling rate, and that rate was \$9.99 pcwt for weight in excess of one pound. UP told the auditor that UP had mistakenly entered a wrong number on the tender data form and that the correct rate was the rate quoted in the May 15, 2007, e-mail message. Around the middle of July 2007, UP submitted a request for payment of the difference between the rates in tender number 702073 and the rates UP quoted to the freight rate specialist, which at that time, for the seven shipments in May, totaled \$285,181.01.

While this dispute was ongoing, UP made attempts to change the incorrect tender in the GFM system, but it did not enter the correct date needed for the system to accept the change. The governing provisions in MSTIP, Item 500, state: “**If a tender increases rates or charges, or reduces or cancels a service in that tender, the effective date must allow at least 15 days’ advance notice, computed from date of receipt by AMC/SDDC.**” Because UP did not enter the correct date, the rate change never became effective. In August, when DOD needed to make additional shipments, tender number 702073 was still an active tender. It was used for shipments on August 14 and 15, 2007. UP again requested the difference between the amount due based upon tender number 702073 and the amount due using the rate quoted to the freight rate specialist on May 15, 2007. The difference, with the later August shipments, now totaled \$459,859.46. An audit was subsequently performed by GSA, and GSA determined that tender number 702073 was an active tender on the pick-up dates in question; that the rate in the tender in effect at the time of pick-up is the controlling rate; and that the carrier is responsible for the accuracy of the tender it files into the GFM system. GSA issued settlement certificates denying the additional costs claimed by UP under the eleven CBLs in question. UP asked us to review GSA’s determination.

Discussion

UP argues that the Board should apply the Federal Acquisition Regulation applicable to mistake in bids, found at 48 CFR 14.407 (2007). UP contends that the May 15, 2007, e-mail message to the freight rate specialist established the rate it offered to transport the ammunition for DOD, and that the freight rate specialist should have been on constructive notice that the tender stated on the CBLs was a mistake, since it did not reflect the rate quoted in the e-mail message.

UP is asking us to apply general principles of contract law. These principles cannot overcome, however, the extremely specific, detailed rules established for the situation before

us. *See Strickland Transportation Co. v. United States*, 334 F.2d 172, 178 (5th Cir. 1964) (“Whether this makes sense is beside the point. It all depends on what kind of sense is being made -- abstract, contractual interpretation sense, or transportation-railroading sense.”).

In this case, UP entered a voluntary tender or offer into the GFM system, not a negotiated tender. The SDDC office does not review voluntary tenders to determine if the actual tender reflects a quote provided to a freight rate specialist. A rate quote is not binding on either party. Under the voluntary system, a carrier can provide one quote to the freight rate specialist and then decide to enter another rate into the GFM system. The tender that the carrier actually enters into the GFM system becomes an active tender that applies to movement of goods under that tender. A tender is accepted into the GFM system and active the next day, unless there is an obvious irregularity, such as a patent ambiguity in the data submitted, which the system automatically rejects. When the Government accepts transportation services under a particular tender, the tender entered on the CBL establishes the contract rate, and that is the rate binding on the parties.

Although UP made a mistake in the submission of its tender, the submitted data created an unambiguous offer. There is no obligation on the part of the SDDC to confirm, or even view, voluntary tenders entered into the GFM system. As the General Services Board of Contract Appeals explained in *Available Shippers, Inc.*, GSBCA 15071-RATE, 00-2 BCA ¶ 30,960, at 152,786:

It is the carrier’s responsibility in the first instance to prepare an accurate, unambiguous tender. The carrier’s subjective intent does not control the interpretation of the tender; rather, ambiguities are construed against the carrier issuing the rate tender. *Consolidated Freightways, Inc.*, B-226378 (Aug. 15, 1988); *Tri-State Motor Transit Co.*, B-192689 (Jan. 24, 1979). . . . Additionally, the carrier is responsible for the content and accuracy of the GBL, even when prepared by the shipper. *See C.I. Whitten Transfer Co.*, GSBCA 13893-RATE, 97-2 BCA ¶ 29,060.

UP could have revoked the tender by giving at least a fifteen-day written notice as required in the applicable provisions. UP’s attempt to revoke the offer did not comply with the notice requirements and, thus, was not effective. This again was due to a mistake on the part of UP. Certainly UP should have been aware of the notice requirements since it had 1700 negotiated tenders and 2000 voluntary tenders in the GFM system at that time. In light of the above, we conclude that tender number 702073 used by DOD for shipments under the subject CBLs was an active and lawful tender on the pick-up dates and binding on UP.

Decision

GSA's settlement actions on the eleven shipments in question are sustained. UP's claim is denied.

BERYL S. GILMORE
Board Judge