DECISION

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

8528

FILE: B-193029 DATE: December 7, 1978

MATTER OF: Mercury Motor Express, Inc.

DIGEST:

Where carrier's rate tender for "Freight All Kinds" specifies a single factor rate and a minimum weight per [illegible]ad, tender is complete and unambiguous on its face and l[illegible]n of liability provision for specific item in Nationa[illegible]or Freight Classification, inextricably tied into classification ratings for specific item, cannot be incorporated by reference into tender under so-called omnibus clause.

Mercury Motor Express, Inc. (Mercury), through its attorney, requests review of our Claims Division's Settlement Certificate dated July 13, 1978 (claim No. Z-2793467), in which the Division disallowed Mercury's claim for $8,123.36. 4 C.F.R. 30.1(b)(1978). The amount claimed was collected by administrative setoff from Mercury to liquidate the Government's claim for the value of a radio lost from a shipment of miscellaneous freight tendered to Mercury in August 1974 on a Government bill of lading (GBL) for transportation from Dover Air Force Base, Delaware (Dover), to Warner Robins Air Force Base, Georgia (Warner Robins).

The shipment tendered to Mercury at Dover without exception was described on GBL No. K-5677203 as 28 pieces of "FREIGHT ALL KINDS", weighing a total of 7,742 pounds. The bill of lading bore on its face the notation "MERCURY ICC 604 (3-10-74)", a reference to a rate tender issued by Mercury. When unloaded at Warner Robins, the shipment was short one piece, later identified as a radio weighing 126 pounds and valued at $8,123.36 (including unearned freight). These facts establish a prima facie case of carrier liability for the value of the lost radio. Missouri Pacific R.R. v. Elmore & Stahl, 377 U.S. 134 (1964). The carrier does not deny liability for the loss but argues that the measure of its liability is limited to a released value of $1.50 per pound or $189 for the 126-pound radio.

The rate admittedly applicable when the shipment was transported is contained in Supplement 3 to Mercury's Section 22 Quotation I.C.C. 604 (Tender 604), effective March 10, 1974, and referred to on the GBL. It names on shipments of "FREIGHT ALL KINDS" transported by Mercury between Warner Robins and Dover a single factor rate of $1.77 per one hundred pounds, subject to a minimum weight of 30,000

pounds per vehicle used. Among other things, Tender 604 provides in item 15 (the so-called omnibus clause), entitled "Classifications and Exceptions," that:

> "Unless otherwise specifically stated herein, the services, rates, or charges shown herein are subject to the rules of the freight classification or exceptions thereto which at the time of movement would govern the applicable class rates from and to the points and via the routes provided in this tender."

The "freight classification" in effect at time of shipment was National Motor Freight Classification 100-A, ICC NMF 100 A (NMFC 100-A). Mercury contends that item 62822 of NMFC 100-A is an "inadvertent acceptance rule" that absolutely limits a carrier's liability to $5 per pound.

Item 62822 is a note referred to in item 62820; they read:

"Item	ARTICLES	CLASSES LTL	CLASSES TL	MW
	* * * * *			
62820	Radio, Radio-telephone or Television Transmitting or Transmitting and Receiving Set, or other Radio Impulse or Wireless Audio (Sound) Impulse Transmitting or Transmitting and Receiving Sets, separate or combined, in boxes, crates or Package 231, see Note, item 62822:			
Sub 1	Released value not exceeding $1.50 per pound	100	(85 (65 (55	12.2 18.2 24.2
Sub 2	Released value exceeding $1.50 per pound but not exceeding $3.00 per pound.....	125	(100 (70 (60	12.2 18.2 24.2
Sub 3	Released value exceeding $3.00 per pound but not exceeding $5.00 per pound.....	175	(125 (100 (85	12.2 18.2 24.2
62822	NOTE--The released value must be entered on shipping order and bill of lading in the following form: 'The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding_____per pound.'			

"If the shipper fails or declines to execute the above statement or designates a value exceeding $5.00 per pound, shipment will not be accepted, but if shipment is inadvertently accepted, charges will be assessed initially on the basis of the class for the highest value provided. Upon proof of lower actual value, the freight charges will be adjusted to those that would apply if the shipment had been released to the amount of its actual value.

* * * * *"

(Because of a standard condition in the GBL [see 41 C.F.R. 101-41.302-3 (e)] providing that the shipment moves at the released value which results in the lowest rate, unless otherwise indicated on the face of the GBL, Mercury states that its liability would be reduced to $1.50 per pound).

Mercury also contends that 53 Comp. Gen. 747 (1974), a similar case relied on by the Claims Division, is inapplicable as a precedent because it did not involve an "inadvertent acceptance rule."

Finally, Mercury contends that C & H Transportation Co., Inc. v. United States, 436 F.2d 480 (Ct. Cl. 1971), also relied on by the Claims Division is distinguishable because the rate tender in the C & H case contained specific released valuation provisions.

Quotations of freight rates, such as Tender 604, are made to the United States pursuant to Section 22 of the Interstate Commerce Act, 49 U.S.C. 22, made applicable to motor carriers by Section 217(b) of that Act, 49 U.S.C. 317(b) (Supp. V, 1975). 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, supra. 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).

As traditional contract rules do apply, a carrier may incorporate by reference any or all provisions contained in other documents if the provisions incorporated do not conflict with the terms of the tender or quotation. See Union Pacific R.R. v. United States, supra; 54 Comp. Gen. 610 (1975). And the United States Court of Claims, in cases of claimed incorporations by reference through so-called omnibus clauses of section 22 quotations or tenders has stated that, in order to combine a section 22 quotation with another

quotation, or with a regular tariff provision, the intention of the parties to accomplish this purpose must be apparent either by express provision or by necessary inference. Gulf, Mobile & Ohio R.R. v. United States, 312 F.2d 921 (Ct. Cl. 1963). See also Great Northern Ry. v. United States, 312 F.2d 901 (Ct. Cl. 1962); Union Pacific R.R. v. United States, 287 F.2d 593 (Ct. Cl. 1961); Great Northern Ry. v. United States, 312 F.2d 906 (Ct. Cl. 1963); Pennsylvania R.R. v. United States, 165 Ct. Cl. 1 (1964).

Mercury offered in Tender 604 to transport freight all kinds at a specific rate and specific minimum weight. When Mercury issued the bill of lading prepared by the Government, the offer ripened into a contract of carriage which appears complete and unequivocal on its face because the rate the parties contracted for is specifically stated and it is not necessary or appropriate to go beyond the face of that contract for the applicable rate. Mercury's tender, like most tenders involving freight all kinds, did not at the time of shipment contain a list of excepted commodities; it therefore appears that it was Mercury's intention to transport all commodities, without exception, at the one stated rate and to assume on those commodities its full common law liability.

Mercury states that item 15 of its tender incorporates by reference the rules of NMFC 100-A, and that those rules provide a released valuation of $5 per pound for radios. However, there is nothing in the rules of NMFC 100-A relative to released valuation.

NMFC 100-A contains in separate sections lists of participating carriers, an index to articles, an index to rules, the rules themselves and a list of articles showing the classes or ratings and minimum weights assigned to them.

Item 62822, the "inadvertent acceptence rule" relied on by Mercury, is not a rule of NMFC 100-A; it is a note in the list of articles section of NMFC 100-A to be used with three classes or ratings to determine rates on articles called radios, etc., rates which are dependent upon whether the shipper releases the articles at one of three separately stated values in the classification. The three classes or ratings are published in Item 62820, Sub 1, Sub 2 and Sub 3. In fact, to show that the three ratings are inextricably linked with the note, Item 62820 states ". . . see Note, item 62822."

Only by granting its customers a fair opportunity to choose between higher or lower liability by paying a correspondingly greater or lesser charge can a carrier lawfully limit recovery to an amount less than the actual loss sustained. New York, N.H. &

N.R.R. v. Nothnagle, 346 U.S. 128, 135 (1953). The decisions in this area are based on the premise that the shipper should receive consideration in the form of a lower rate for the correspondingly greater risk of loss that he must bear. Here, the parties contracted for one specific rate, and this rate was the only one offered to the Government.

It is clear that Mercury did not limit its liability on shipments transported under the rate in Tender 604 nor did it lawfully limit its liability by offering its customer the choice between higher or lower rates corresponding to higher or lower liability as required by the Nothnagle case, supra.

Assuming that Mercury's contention is correct, question arises as to how to apply a released valuation clause (the "inadvertent acceptance rule") that results in different classification ratings when Tender 604 provided only one rate. This illustrates the inherent ambiguity which would arise from the incorporation of Item 62822 into the tender. It is a cardinal principle of contract law that ambiguities are resolved against the drafter of the agreement (i.e., tender). See, e.g., Hughes Transportation Inc. v. United States, 169 Ct. Cl. 63, 68 (1965).

Our decision in 53 Comp. Gen. 747 is not inapposite because the so-called "inadvertent acceptance rule" is not a rule but is a note inextricably linked with three released value ratings similar to the ratings involved in that decision.

Mercury's reference to the C & H case, supra, seems misplaced because the court found that "None of the provisions of Tender 100-I stated that the rates quoted on radar equipment were contingent upon a declaration or release of value by the shipper." C & H case, supra, 483.

Finally, we note that effective March 27, 1976, Mercury by Supplement 6 amended Tender ICC 604 by listing certain excepted commodities and by including this sentence: "Any article or articles tendered which exceed a value of $5.00 per pound are hereby released to a value not exceeding $5.00 per pound." We think that this demonstrates that before March 27, 1976, Mercury did not intend the rate in Tender ICC 604 to be tied to articles released to any particular valuation. See Trans Ocean Van Service v. United States, 426 F.2d 329, 336 (Ct. Cl. 1970).

Our Claims Division's Settlement Certificate dated July 13, 1978, is not otherwise shown to be erroneous and is sustained.

Acting Comptroller General
of the United States