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

B-177400

November 19, 1973

Trans Country Van Lines, Inc.
3300 Veterans Highway
Bohemia, L. I., New York 11716

Attention: Larry Binenfeld
Audit Control

Gentlemen:

By your letter of July 20, 1973, you request reconsideration of our decision of June 15, 1973, B-177400, 52 Comp. Gen. _____, disallowing certain additional driver and driver overtime charges for the transportation of electrical instruments from College Point, New York, to White Sands, New Mexico, under Government bill of lading No. D-5546937, dated August 7, 1969.

In that decision, this Office held, first, that since there was no provision in the rate tenders of Trans Country Van Lines expressly providing charges for the regular driver's overtime in addition to the line-haul charges, there was no basis for the payment of overtime for the regular driver over-and-above the line-haul charges.

Secondly, it was held that the shipper need only pay extra driver charges of $5.75 per manhour of regular time and $7.75 per manhour of overtime because the higher rates of $8.00 for regular time and $12.00 for overtime--applicable when services are performed in New York City and specified counties--were not applicable for services performed between New York City (College Point) and White Sands, New Mexico.

In your letter of July 20, 1973, you state that your request for reconsideration "is solely restricted to the application of rates and charges for additional labour utilized as an additional driver." It would appear, therefore, that you are only contesting our prior determination of the appropriate labor charge for the additional driver. However, on page 2 of your request, you again question our conclusion regarding the payment of overtime for the regular driver. Furthermore, your computation of charges allegedly due includes $944 for "Additional Driver Charges as Billed." This is the same amount claimed in your letter of October 27, 1972, which included the payment of overtime for the regular driver. Thus, as we interpret your request for reconsideration, it is not "solely restricted"

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to the appropriate labor charge for the additional driver. Rather, you also seek reconsideration of our determination with regard to the overtime of the regular driver.

Section 217(a) of the Interstate Commerce Act, 49 U.S.C. 317(a), provides that every common carrier by motor vehicle is required to publish and file with the Interstate Commerce Commission tariffs setting forth its charges for all services in interstate or foreign commerce. By section 217(b), 49 U.S.C. 317(b), such a common carrier is prohibited from charging, demanding, collecting or receiving a greater or lesser or different compensation than the rates, fares or charges published in the tariffs filed with the Interstate Commerce Commission, with a proviso incorporating the provisions of section 22 of the Interstate Commerce Act, 49 U.S.C. 22, which permits transportation free or at reduced rates for the United States.

Our decision of July 15, 1973, noted that Trans Country Van Lines Government Rate Tender I.C.C. No. 50 contains no provision for the payment of overtime charges for the regular driver. Item 16, providing for Accessorial Services, does incorporate by reference Government Rate Tender (GRT) 1-series. (Item 16 actually refers to "Military Rate Tender" 1-series. However, since our Office has been unable to locate any such tender, it can only be assumed that Trans Country must have intended to incorporate GRT 1-series, issued by the Movers' and Warehousemen's Association of America, Inc., agent for Trans Country Van Lines.) However, GRT 1-V, effective May 1, 1969, is also silent on the subject of overtime charges for regular drivers.

In your request for reconsideration, you point out that the cover page of GRT 1-V states:

> "For rules and regulations governing the application of this Tender of Rates and Charges, refer to carriers' published tariff on file with the Interstate Commerce Commission or State regulatory body."

No further reference is made to any rate, charge or provision in any of the tariffs on file with the Interstate Commerce Commission.

Our Office has located Tariff No. 45, MF-ICC No. 67, effective from July 1, 1966, to February 2, 1970, filed by the agent of Trans Country Van Lines mentioned above. However, once again, we have been unable to find any rule or provision in Tariff No. 45 providing that a shipper is liable for overtime charges for the regular driver.

Thus, there is no provision in any of the rate schedules filed by Trans Country and its agent which expressly excludes the regular driver's overtime from inclusion in the line-haul rate. Nor do any of the rate tenders specifically provide charges for the regular driver's overtime in addition to the line-haul charges. We, therefore, sustain our prior decision because, absent a provision in the carrier's rate tenders, there is no basis for the payment of overtime for the regular driver in addition to the line-haul charges.

In the alternative, you now contend that because an additional driver was requested on the Government bill of lading and because time was of the essence, greater-than-normal service was impliedly requested by the shipper. In our prior decision, however, it was stated that "there is no indication on the covering bill of lading and there is no evidence in our file that either continuous service or delivery by a given date was requested as alleged by you." And you have submitted no additional evidence with your request for reconsideration.

While the shipper did authorize an additional driver in the bill of lading, such an authorization does not constitute a request for continuous, round-the-clock service. Thus, the inference which you attempt to draw--that the shipper impliedly requested the overtime service--is unwarranted, and we must sustain our earlier decision regarding the payment of overtime for the regular driver.

In your request for reconsideration, you also contend that in determining the appropriate labor charge for the additional driver, our Office misinterpreted the word "performed" contained in Item 170 of GRT 1-V. Item 170 provides for a labor charge of $5.75 per manhour of regular time and $7.75 per manhour of overtime for "all services for which no charges are otherwise provided in tender when such services are requested by the shipper (except in areas described below)." Subsequent paragraphs contain exceptions for certain areas. Among these exceptions is the provision that a rate of $8 per manhour of regular time and $12 per manhour of overtime will be payable "WHEN SERVICE IS PERFORMED IN: * * * NEW YORK: New York City and Counties of Nassau, Suffolk, and Westchester." (Emphasis added) In your request for reconsideration, you now argue that the word "performed" means furnished. You suggest that since the additional driver was furnished within New York City, the higher rate is appropriate, even though the services of the additional driver were performed between New York and New Mexico.

This argument has a certain logic, for the additional driver may have been drawn from the New York City labor force and the carrier

may have been compelled to pay a New York City wage. Nevertheless, the language of the tender itself precludes such an interpretation. Rate tenders are to be interpreted according to the language they convey and should be applied according to their plain terms. A tariff or tender, having been drafted by the carrier, should be construed as having the meaning which it reasonably would have to shippers. United States v. Missouri Pacific Railroad Co., 250 F. 2d 805, 807 (1958), cert. denied, 358 U.S. 821 (1958); A. P. West Petroleum Co. v. Atchison, T. & S. F. Ry. Co., 212 F. 2d 812, 816 (1954).

It is readily apparent that the ordinary and natural definition of the word "performed" implies something completed or finished. Kendall v. Carrell, 75 N.W. 852, 853 (1898); 43 Comp. Gen. 13 (1963). The construction of item 170 proposed by Trans Country only serves to create an ambiguity as to the meaning of the word "performed." However, it is a well-established principle of tariff interpretation that any ambiguity or uncertainty in the terms of a tariff is to be resolved against the carrier, as the author of the document, and in favor of the shipper. C & H Transportation Co. v. United States, 436 F 2d. 430 (1971); United States v. Missouri Pacific Railroad Co., supra; United States v. Strickland Transportation Co., 204 F. 2d 325 (1953), cert. denied, 346 U.S. 856 (1953); Great Northern Ry. Co. v. United States, 178 Ct. Cl. 226 (1967). Furthermore, when a rate schedule is susceptible to two possible interpretations, each producing a different rate, the shipper is legally entitled to the lower rate. United States v. Strickland Transportation Co., supra; Union Pacific Railroad Co. v. United States, 163 Ct. Cl. 473 (1963). Thus, we must affirm our prior determination that the higher rates for services "performed" in New York and counties specified do not apply to services originating in New York, but actually performed between New York and New Mexico.

There are two additional matters discussed in your request for reconsideration which deserve brief explanation.

First, you assert that this Office has contended that the shipper is not responsible "for labor charges [for the additional driver] based on excessive times of 10 hours per day." In our prior decision, we agreed to pay for 10 hours service per day by the additional driver over a period of four days. Section 395.3(a) of Title 49, Code of Federal Regulations, provides:

> "* * * no motor carrier shall permit or require any driver used by it to drive nor shall any such driver drive more than 10 hours following eight consecutive hours off duty * * *."

In your letter of October 27, 1972, you claimed that the additional driver drove during four, uninterrupted 10 hour periods. Thus, by agreeing to pay for 10 hours per day of additional driver service, this Office agreed to pay the maximum amount allowable under 49 CFR 395.3(a).

Secondly, you explain that since Department of Transportation regulations only require that driver's logs be kept for one year, you are unable to produce such logs for a shipment which took place four years ago. See 49 CFR 395.8(a). You now acknowledge, however, that our Transportation and Claims Division's suggestion that driver's logs be submitted with your bill was proper pursuant to 4 CFR 54.5. Although it is unfortunate that the driver's logs have been destroyed, the fact remains that you have submitted no evidence of any type to verify the number of hours actually driven.

Furthermore, any argument over the production of driver's logs is now irrelevant. We have held that absent a provision in a carrier's rate tender, charges for a regular driver's overtime are included in the line-haul rate. The number of overtime hours driven by the regular driver is, therefore, of no importance. Additionally, we have agreed to pay the maximum amount allowable under 49 CFR 395.3(a) for the additional driver. Production of the logs would, thus, add nothing to your claim.

Accordingly, we must affirm our decision of July 13, 1973. The overcharge of $112 you have received should be refunded promptly in order to avoid the necessity for collection by other available means.

Sincerely yours,

Paul G. Dembling

For the Comptroller General
of the United States