

Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

August 3, 2000

GSBCA 15223-RATE

In the Matter of ALABAMA LIMOUSINE, INC.

Cleophus Thomas, Jr. and Calvin W. Blackburn, III of Lange, Simpson, Robinson & Somerville LLP, Birmingham, AL, and Walt Adams, President of Alabama Limousine, Birmingham, AL, appearing for Claimant.

James F. Fitzgerald, Director, Audit Division, Office of Transportation and Property Management, Federal Supply Service, General Services Administration, Washington, DC, appearing for General Services Administration.

Col. James F. Quinn, Staff Judge Advocate, Headquarters, Military Traffic Management Command, Department of the Army, Falls Church, VA, appearing for the Department of Defense.

PARKER, Board Judge.

Alabama Limousine has been providing bus transportation services to the Department of Defense (DOD) since about 1980. Every few years, Alabama Limousine renewed its relationship with the Government by offering rate tenders for various routes through DOD's Military Bus Agreement solicitation process. When DOD needed to transport new recruits to various locations, it would use bus tickets which had been ordered through Government Transportation Requests (GTRs) in bulk quantities from Alabama Limousine. Unused tickets would be returned to Alabama Limousine for refunds.

In 1989, Alabama Limousine filed a public tariff with the Interstate Commerce Commission which stated that unused tickets were refundable only within thirty days of purchase. The refund provision was also contained in Alabama Limousine's 1992 and 1994 tariffs. The tenders offered to DOD, however, never contained this restriction. According to DOD, such a provision would have been unacceptable in a tender because of DOD's method of using the tickets -- DOD ordered tickets six months in advance based on estimated quantities and would never have been able to return unused tickets within thirty days.

At some point after 1989, Alabama Limousine began rejecting DOD's requests for refunds for tickets which were more than thirty days old. The denials were based on the provision in Alabama Limousine's tariff. The DOD office responsible for processing the refunds did not pursue the matter further and Alabama Limousine believed that DOD had

accepted its new policy. The DOD office which ordered and used the tickets continued to return the unused ones for refunds and was unaware that the requests were being denied.

In May 1998, as a result of a post-payment audit, the General Services Administration (GSA) determined that Alabama Limousine owed the Government \$189,941.75 for refunds of unused tickets. GSA has since raised the amount to \$328,031.00. GSA has thus far collected \$121,679.91 by setoff against amounts owed to Alabama Limousine.

Discussion

Alabama Limousine has asked the Board to review GSA's audit determinations. First, Alabama Limousine maintains that it does not owe the Government anything because its filing of a public tariff, which provided for a thirty-day refund period for unused tickets, "trumped" the tenders which it submitted to DOD as part of the Military Bus Agreement process. Second, according to Alabama Limousine, by continuing to enter into such agreements after Alabama Limousine explained why it was not providing refunds, DOD waived any right that it may have had to receive such refunds. Finally, Alabama Limousine maintains that, at worst, the Government may collect only those refunds that fall within the three-year statute of limitations for deducting overcharges, rather than the ten-year statute of limitations for offsetting other debts. As explained below, we do not agree with any of these arguments.

Generally, the Government is entitled to refunds for unused tickets for passenger transportation services. The GTRs used to procure such tickets incorporate regulations published in 41 CFR pt. 101-41. The regulations, which implement 31 U.S.C.A. § 3726(g) (West Supp. 2000)¹, contain specific provisions for obtaining refunds of unused transportation tickets. 41 CFR 101-41.210 (1999)². In the absence of a contract provision to the contrary, the terms of the GTR govern the transaction, in spite of provisions on the tickets, ticket inserts, and tariffs incorporated into the tickets by reference, which may limit the time for seeking a refund. American Airlines v. Austin, 75 F.3d 1535 (Fed. Cir. 1996).³

No contract provision limited the time in which the Government could return unused tickets for refunds. In order to become eligible for DOD's business, Alabama Limousine responded to DOD's solicitation for tender offers. A tender offer is essentially a carrier's offer to provide specific transportation services at lower rates than those contained in the carrier's public tariffs. See Tri-State Motor Transit Co., GSBCA 14169-RATE, et. al, 97-2 BCA ¶ 29,294. The solicitation required that the tendered rates include any "cancellation

¹ During most of the relevant time period, this provision was designated as 31 U.S.C. § 3726(f).

²We have cited to the 1999 version of the regulations for the sake of simplicity. At all times relevant to this dispute, the regulations said essentially the same thing.

³Although American Airlines involved refunds for airline tickets, the statutes and regulations upon which the court relied apply to all passenger transportation services furnished to the Government. See 41 CFR subpt. 101-41.2.

fees.” Alabama Limousine’s tender offer to DOD, which, when accepted, became the terms under which the requested transportation services would be provided, did not contain any cancellation fees or other limitations on the time for refunding unused tickets.

A carrier is entitled to be paid under a general tariff only where there is no applicable tender which covers the shipment. See Tri-State Motor Transit Co., GSBCA 13763-RATE, 97-2 BCA ¶ 29,098. Here, because Alabama Limousine’s tender was applicable to the tickets, the terms of its public tariff are irrelevant. Alabama Limousine knew very well how DOD was using its tickets, yet the company never changed the terms of its tender offers. It may not now claim that it had somehow changed the terms of its agreement with the Government by referring to a public tariff that was clearly inapplicable to the situation.

The Government has ten years to administratively offset amounts due for payment of transportation services never provided. 31 U.S.C. § 3716(e) (Supp. IV 1998)⁴; 41 CFR 101-41.504(b); American Airlines at 1541-42. Alabama Limousine’s argument that the Government may deduct amounts representing refunds only for tickets purchased within the last three years is simply incorrect. The three-year limitation contained in 31 U.S.C.A. § 3726(d) (West Supp. 2000)⁵ for deducting overpayments made to a carrier does not apply to the Government’s efforts to recover advance payments made to carriers for unused transportation. American Airlines at 1539. Notwithstanding Alabama Limousine’s argument to the contrary, the ten year limitation is applicable even though DOD or GSA may have inadvertently referred to the amount as an “overcharge” or “overpayment” in some correspondence.

Finally, given the terms of Alabama Limousine’s tender to DOD and the general rules regarding refunds of unused passenger transportation tickets, we find unreasonable Alabama Limousine’s argument that, by failing promptly to challenge the contractor’s explanation for refusing to provide refunds after thirty days, the Government somehow waived its right to collect them. The Government always had ten years in which to offset amounts due for unused tickets. The fact that it waited until much of that time had passed to take action did not mean that it had waived its right to collect the refunds. As Alabama Limousine knew or should have known from its years of providing transportation services to the Government, GSA routinely conducts post-payment audits long after the services have been performed and paid for.

Alabama Limousine says that DOD’s periodic renewal of its contractual relationship with the company, without challenging the company’s explanation for rejecting DOD’s refund requests, led Alabama Limousine to believe that DOD had accepted the limitation on the time limit for seeking refunds for unused tickets. If so, Alabama Limousine’s reliance on DOD’s inaction was unreasonable. During the same time frame, the DOD office which contracted for, ordered, and used the tickets continued to return the unused ones for refunds. At best, the signals were mixed and could not have provided a sound basis upon which to

⁴During most of the relevant time period, this provision was designated as 31 U.S.C. § 3716(c).

⁵During most of the relevant period, this provision was designated as 31 U.S.C. § 3726(b).

believe that the Government had waived its statutory, regulatory and contractual rights to receive refunds of unused tickets after thirty days.

Decision

For the reasons discussed above, Alabama Limousine's claim is denied.

ROBERT W. PARKER
Board Judge