

## Board of Contract Appeals

General Services Administration  
Washington, D.C. 20405

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September 8, 2004

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GSBCA 16353-RATE

In the Matter of MENLO WORLDWIDE FORWARDING, INC.

Ralph L. Kissick of Zuckert Scoutt & Rasenberger, L.L.P., Washington, DC, 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.

Lt. Col. Robert M. Reist, Chief, Acquisition and Fiscal Law Division, Office of the Staff Judge Advocate, Air Mobility Command, Department of the Air Force, Scott Air Force Base, IL, appearing for Department of the Air Force.

**PARKER**, Board Judge.

The General Services Administration (GSA) has asked for reconsideration of the Board's decision in Menlo Worldwide Forwarding, Inc., GSBCA 16353-RATE (May 21, 2004). In that decision, the Board granted the claim of Menlo Worldwide Forwarding, Inc. (Menlo), formerly known as Emery Worldwide, a CNF Company (Emery). The Board agreed with Menlo that GSA's Audit Division, Office of Transportation and Property Management, improperly applied alternation of tender rates to abrogate the payment provisions of an agreement made in 1999 by the depot at Hill Air Force Base, Utah (Hill), to obtain guaranteed priority air freight transportation services from Emery. Because GSA's motion fails to provide a valid basis for reconsidering the decision, we deny it.

The underlying facts, which are fully set forth in the Board's decision on the merits, may be summarized as follows. In early January 1999, Emery introduced an airfreight delivery service called "Gold Priority Guaranteed Service." This new service provided Emery's customers with guaranteed delivery times for both small package deliveries (up to 150 pounds), which a few carriers including Emery had been offering, and heavyweight shipments (up to 10,000 pounds), which no company then offered. Subject only to very limited exceptions (for weather, air traffic control, and the like, but not for equipment failures), if the guaranteed delivery times were not met, all related shipping charges would be refunded by Emery. Previously, if a delivery arrived late, the customer still paid shipping charges based on whenever the shipment was actually received.

In February 1999, Emery representatives contacted John Wojciechowski, the Transportation Officer at Hill, which was one of Emery's largest government customers. Emery already was providing Hill with its regular freight-all-kinds (FAK) service, but that service did not include guaranteed delivery times. After reviewing a brochure describing Emery's Gold Priority Guaranteed Service and being briefed about its benefits, Mr. Wojciechowski said Hill would be interested in using the service.

After discussing the new service with representatives of the Department of the Air Force's Air Mobility Command (AMC), Emery filed a new tender with AMC to authorize use of the Gold Priority Guaranteed Service at Hill. This tender, Emery No. 1003, stated that it only applied at Hill. It was priced with rates slightly higher than those in the company's general FAK tender then in effect, in order to reflect the value added service that would be provided to Hill with the Gold Priority Guaranteed Service. Further, as required by AMC's guidance, Emery No. 1003 made no mention of an Emery service guide or other publication. Emery No. 1003 was approved by AMC with an April 1, 1999, effective date. The approved tender and its rates were then loaded into the Department of Defense's (DoD's) Global Freight Management System and Power Track for use by Hill, invoicing by Emery, and payments by DoD.

Following AMC's approval of Emery No. 1003, Emery had its Salt Lake City Senior Account Manager responsible for Hill, Bryce Worthington, meet with Hill's Transportation Officer, Mr. Wojciechowski. That meeting took place at Hill on or about March 5, 1999. Mr. Worthington discussed the Gold Priority Guaranteed Service in detail with Mr. Wojciechowski, including going over the brochure explaining the service that Emery previously had provided him. Mr. Worthington also gave Mr. Wojciechowski a copy of Emery No. 1003, then approved by AMC, and discussed the rates in that tender with him. Mr. Wojciechowski said he was interested in a customized version of Emery's guaranteed service. For Hill, which already could obtain guaranteed small package delivery service (through a GSA government-wide contract), Mr. Wojciechowski wanted the guarantee of delivery times for Hill's heavyweight shipments, coupled with a commitment from Emery to give those shipments boarding priority over Emery's commercial traffic. At the March 5, 1999, meeting, the two men eventually agreed on a series of benefits and preferences that Mr. Wojciechowski requested, tailored to Hill's specific needs. The rates would be those specified in Emery No. 1003. In short, the Hill Transportation Officer followed up on AMC's approval of Emery's Gold Priority Guaranteed Service and tender rates, and negotiated to obtain additional benefits at no added cost to the Government.

By notices issued in July 2003, the GSA Audit Division alleged that Emery overcharged DoD a total of \$198,491.88 (with interest) on 1160 guaranteed priority shipments originating at Hill during the period from January 31, 2001, to January 25, 2002. In each case, the Audit Division cited AMC Freight Traffic Rules Publication No. 5, Item 215(3), "Alternation of Rates - DoD Tenders," as the basis for the overcharge notice, asserting that Emery's Hill site-specific tender for the guaranteed delivery services and Emery's lower-priced FAK tender covering non-guaranteed services are subject to alternation of rates, on the assumption that the two tenders cover the same services. By agreement with GSA, Emery paid \$271.97 under protest in response to three of the

overcharge notices, and on October 14, 2003, it hand-delivered a protest/request for reconsideration (dated October 9, 2003) to GSA using these three notices as test cases. On October 31, 2003, GSA issued a three-page decision maintaining that alternation is proper. Since that decision, GSA has been issuing overcharge notices based on the same alternation premise with respect to the similar agreements Emery has at six other locations, as well as for additional Hill shipments, bringing the total amount in dispute to almost \$1,000,000 and counting. GSA already has offset over \$140,000 from funds otherwise owed Emery, in addition to the \$271.97 that Emery paid in protest on the three test cases. Emery sought review of GSA's decision by this Board.

Upon review, the Board agreed with Menlo that GSA's actions were without a legal basis. We held that alternation of rates did not apply to the situation because the Gold Priority Guaranteed Service provided under Emery No. 1003 was not the same as the FAK service that was the subject of another tender because the latter did not include guaranteed delivery. We compared GSA arguments to the contrary to maintaining that a Honda Accord with a premium package of options must be sold at the same price as a Honda Accord without the options package because both vehicles are Honda Accords. Menlo, slip op. at 6.

The Board also rejected GSA's argument that Emery No. 1003 was invalid because it failed to comply with DoD's tender rules. We held that Emery No. 1003 was valid and, further, that there was nothing in the tender rules that would prohibit Emery/Menlo from agreeing with Hill to provide additional services at no additional charge to the Government. Menlo, slip op. at 6.

GSA's motion for reconsideration merely raises the same arguments rejected by the Board. It is well-settled that "[m]ere disagreement with a decision or re-argument of points already made is not a sufficient ground for seeking reconsideration." Rule 307 (48 CFR 6103.7 (2003)); Alabama Limousine, Inc., GSBCA 15223-RATE, 01-1 BCA ¶ 31,181 (2000). Accordingly, GSA's motion must be denied.

With regard to the first issue -- whether the services provided under Emery No. 1003 were the same as those provided under Emery/Menlo's FAK tender and, thus, subject to alternation of rates -- GSA does not dispute either that the services were different or the rule that alternation of rates does not apply where the services provided are different. Instead, GSA again argues that, because GSA apparently could not tell during its electronic audit that the services in the two tenders were different, the Board should let GSA ignore the actual facts and uphold GSA's argument for alternation of rates. This is not the law, however. Both the Court of Appeals for the Federal Circuit and the Board have made it clear that GSA auditors can and should where necessary inquire beyond the tariff or tender document. See Sea-Land Service, Inc. v. Danzig, 211 F.3d 1373 (Fed. Cir. 2000) (ocean transportation case stating, "In order to determine whether prices are discriminatory, it is essential to assess the nature of the service provided for the price in question. As the Supreme Court has explained, rates 'do not exist in isolation. They have meaning only when one knows the service to which they are attached. . . .' American Tel. & Tel. Co. v. Central Office Tel., Inc., 524 U.S. 214, 223, 141 L.Ed. 2d 222, 118 S.Ct. 1956 (1998)."); Alaska Cargo Transport, Inc., GSBCA 14510-RATE, 99-1 BCA ¶ 30,301, reconsideration denied,

00-1 BCA ¶ 30,885 ("Regardless of the bare language of the tariffs, which are similar in nature, an examination of the facts applicable to the services demonstrate[s] that the services were not fully covered by the FMC [Federal Maritime Commission] tariff."); Tri-State Motor Transit Co., GSBCA 13895-RATE, 98-1 BCA 29,509 (1997).

We said in Menlo that Emery/Menlo was providing a new service that by all accounts is fairly priced and for which its customer, Hill, is happy to pay. We refuse to reconsider our holding that GSA may not keep its head in the sand in order to justify an unfair offset of monies otherwise due Menlo.

GSA also devoted a great deal of its motion to explaining how the Board was wrong when it held that Emery No. 1003 complied with DoD's tender rules and that Hill acted properly when it entered into an agreement with Menlo to provide additional services at no additional cost to the Government. We see no need to rehash here either the arguments or the Board's analysis. We do point out, however, that, even if the Board were to reconsider these issues, Menlo would still prevail. GSA's asserted basis for offsetting funds from monies otherwise due Menlo, alternation of rates, was improper because the services provided were different and alternation of rates only applies where the services are the same. Because GSA's actions were without a legal basis, Menlo must prevail.

#### Decision

GSA's motion for reconsideration is denied.

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ROBERT W. PARKER  
Board Judge