**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Trism Specialized Carriers, Inc.

File: B-260604.2

Date: April 18, 1996

DIGEST

The Department of Defense (DOD), as a shipper, is not directly liable to a carrier for the charges incurred by a DOD authorized shipper agent where the record indicates the carrier knew prior to performing services that a government bill of lading relationship existed between DOD and the shipper agent which did not include the carrier as a party to that contract, and where, in addition the relationship between DOD and the shipper agent was one in which: DOD paid the shipper agent in accordance with the shipper agent's charges and without regard to the charges of the underlying carrier; DOD held the shipper agent liable for any loss and damage and did not view the shipper agent as a mere conduit for recovery from the underlying carrier; the shipper agent had substantial authority to select the underlying carrier; and DOD did not organize or substantially control the shipper agent, a for-profit business which generally provided similar service for customers other than DOD.

DECISION

Trism Specialized Carriers, Inc. (Trism), requests our review of the General Services Administration's (GSA) settlements disallowing its claims against the Department of Defense (DOD) for services it performed in connection with several government bill of lading (GBL) transactions. The issue presented is whether the government is directly liable to a carrier for unpaid charges incurred by an approved shipper agent of the DOD under item 11 of the Military Traffic Management Command's Freight Traffic Rules Publication No. 1A (MFTRP 1A). We affirm GSA's settlement.

BACKGROUND

Our review of Trism's submissions indicate that between December 1992 and June 1993, DOD tendered several shipments in the Province of Quebec to Roadair Feeder Service, an authorized shipper agent of DOD, for transport to various points in the

United States.[1] DOD prepared GBLs for each shipment, and each GBL indicated that Roadair Feeder Service was the transportation company to which DOD tendered the shipment. Roadair Feeder Service was a for-profit business enterprise that, independent of DOD, selected Trism to perform the line-haul of the freight. Trism's documentation indicates that it billed Roadair Feeder Service for the services it performed, and there is no dispute that Roadair Feeder Service failed to pay Trism for the services involved. The government did pay Roadair Feeder Service for the services, when Roadair Feeder Service failed to pay Trism for the services it performed, Trism billed DOD.

Essentially, it is Trism's position that DOD is directly liable to Trism because Roadair Feeder Service was an approved shipper agent of DOD. Trism points out that Roadair Feeder Service had neither common carrier nor broker authority, and it suggests, therefore, that the United States cannot empower such an agent to solicit transportation services from Trism or any other underlying carrier without becoming directly liable to the carrier for the services that the agent obtained. Trism says that notwithstanding the listing of Roadair Feeder Service as a broker in the National Motor Freight Traffic Association's directory, the firm did not hold such a certificate.

GSA denied Trism's claim, relying on the standards of payment set forth in title 41, Code of Federal Regulations (C.F.R.), Section 101-41.310-4, which generally states that payment can be made only to the last carrier or forwarder in privity with the contract of carriage as evidenced by the covering GBL. In response, Trism notes that DOD tendered the GBLs and shipments to its drivers despite the statement on the GBLs that each shipment was tendered to Roadair Feeder Service, and Trism notes that various notations on the GBLs indicated that Trism was the involved underlying carrier (e.g., data on some of the GBLs related to the pickup specifically cite "TRISM").

DISCUSSION

The cited regulations and established judicial precedent support GSA's position. The label of "shipper agent," "shipper association," "forwarder," or "broker," is not as significant for the purpose of shipper liability to the underlying carrier as the type of control over the agent that the shipper was authorized to exercise. When the agent is a not-for-profit organization in which the shipper, either individually or in association with others, has the ability to control the agent's daily operations, the shipper is liable for the unpaid transportation services rendered by the carrier

[1]Typical commodities included semitrailer tank refueler vehicles and fire trucks.

which benefited the shipper. See Central States Trucking Co. v. J.R. Simplot Co., 965 F.2d 431 (7th Cir. 1992), citing Southern Pacific Transp. Co. v. Continental Shippers Ass'n, 642 F.2d 236 (8th Cir. 1981). In these cases, the shipper's liability depended on whether there was, in fact, a principal-agent relationship. In comparing the by-laws of the agent in Southern Pacific with those in the case before it, the decision in Central States noted five factors that it thought were significant in holding the shipper directly liable for the association's obligations: (1) the agent was not responsible for the shipper's freight charges; (2) the agent acted as an agent in processing claims for loss and damage against the carrier; (3) the agent processed shipments only upon the shipper's instructions; (4) the agent was controlled and supervised by a board of directors made up of shippers' employees; and (5) the agent was organized as an authorized agent of each member.

Here, the relationship between the shipper and the agent does not meet the test described in Central States. At the time of this shipment, there was no record of any specific written agreement between the Military Traffic Management Command (MTMC) and Roadair Feeder Service other than the GBL. But, the record indicates the following: DOD paid Roadair Feeder Service and similar firms in accordance with the agent's published rates, not those of the underlying carrier; Roadair Feeder Service generally was free to select the underlying carrier; and DOD held Roadair Feeder Service, not the underlying carrier, liable for any loss or damage. There is no indication that DOD intended to pursue any loss and damage claims against the underlying carrier, and it is evident that DOD had no interest in the rates and charges of the underlying carrier(s).[2] Roadair Feeder Service had to follow the instructions on the GBL which DOD prepared, as would a carrier had a carrier been named as a party on the GBL. Roadair Feeder Service otherwise was not controlled by DOD and was free to pursue other business to the extent allowed under the laws of the Dominion of Canada or of the United States (when applicable). No specific amount of business was ever guaranteed by DOD. Thus, the relationship between Roadair Feeder Service and DOD was substantially different from those relationships between shipper and agent in which the courts found the shipper to be liable to the carrier for the obligations of the agent. The label "shipper agent," even in conjunction with DOD approval, does not necessarily make the shipper a guarantor of the underlying carrier's charges, and the shipper is not necessarily liable for all of the actions of its shipper agent.

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[2]A specific written agreement for shipper agents now exists and is set forth in 32 C.F.R. Part 619, Appendix F. It states, among other things, that MTMC can direct an agent not to use specific carriers, including those which are debarred, suspended or placed in non-use. It also provides that the agent must file its own through rates in a rate tender with MTMC and that the agent is generally liable for loss and damage.

Additionally, the record indicates that Trism knew prior to performing services that DOD had prepared the GBL without showing Trism as a party in interest to this contract. Trism chose to deal directly with Roadair Feeder Service, and it is charged with knowledge of GSA's published regulations. If the notation on the GBL which stated that the shipment was tendered to Roadair Feeder Service was not correct, and if Trism wanted a direct relationship with the government before performing service, it had the duty to ensure that the bill of lading was corrected to show the proper relationship between it and the government. See 52 Comp. Gen. 211 (1972). It is well settled that since privity of contract generally does not exist between the government and subcontractors, such firms have no legally permissible way to bring claims directly against the government. Compare General Services Administration, 62 Comp. Gen. 633, 634 (1983).

We affirm GSA's settlements.

/s/Seymour Efros
for Robert P. Murphy
General Counsel