

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1873

APPLICATION OF NEDLLOYD LINES (U.S.A.) CORP.
FOR THE BENEFIT OF ATLAS POWDER CO.

ORDER GRANTING PERMISSION
TO REFUND FREIGHT CHARGES

Pursuant to section 8(e) of the Shipping Act of 1984, 46 U.S.C. app. § 1707(e), Nedlloyd Lines, Inc. ("Nedlloyd"), seeks permission to refund \$16,374.28 in freight charges paid by Atlas Powder Co. ("Atlas") on a shipment of mining machinery from Norfolk, Virginia, to Sweden.¹ In his Initial Decision ("I.D."), Administrative Law Judge ("ALJ") Norman D. Kline denied Nedlloyd's application. Nedlloyd filed Exceptions to the I.D.

BACKGROUND

A. The Record Below

Nedlloyd is a member of the U.S.A. - North Europe Rate Agreement ("Rate Agreement"), which publishes and files rates for its members in a common tariff. On June 7, 1990, one of Nedlloyd's agents in Portsmouth, Virginia, sent a telex to the carrier's office in Atlanta. The telex stated that Atlas had booked two

¹ Nedlloyd's original application sought to waive collection of \$17,211.67 from Atlas, but the record showed that Atlas had paid the full freight under the applicable--but allegedly erroneous--tariff. The difference between the \$17,211.67 cited by Nedlloyd and the \$16,374.28 actually refundable stems from overseas charges that are unaffected by the purported tariff error.

containers of mining machinery onto the vessel Sea-Land Commitment, which was scheduled to sail from Norfolk on June 11 or 12. The agent further advised that Atlas, through its freight forwarder, was requesting that Nedlloyd charge a rate that would be competitive with another carrier, such as a per-container rate, rather than the relatively high measurement rate that was in effect.

Nedlloyd's Atlanta office was agreeable to Atlas's request and on the same day (June 7) sent a request to the Rate Agreement asking for approval of a per-container rate of \$2140 (exclusive of applicable surcharges). On June 12, Atlanta advised Portsmouth that the Rate Agreement had approved the requested rate, which was filed in the Agreement tariff effective the same day. However, Atlas's mining machinery had already sailed on the Sea-Land Commitment on June 11, under the higher rate still in effect on that date.

Before the ALJ, the president of Nedlloyd's agent, Nedlloyd Lines (USA) Corp., said that Nedlloyd "had requested that the booking for the vessel sailing on June 12, 1990 be delayed until the following vessel a week later . . .," statement of J. Th. Teeuw at 4, because Nedlloyd was "expecting difficulty in obtaining the necessary approval from the Conference member lines" Id. However, he proceeded to state, there was "a breakdown in communication" between Nedlloyd, Atlas and Atlas's forwarder, which resulted in the cargo being shipped on the earlier voyage of the Sea-Land Commitment.

The ALJ found that the error described in Nedlloyd's application was not one that permits special docket relief to be granted, because it was a booking error committed by the shipper (or possibly its forwarder) and not a tariff-filing error committed by the carrier. He cited extensive Commission precedent denying applications "which involved mistakes other than tariff-filing or tariff printing, i.e., *** misquotations, misreadings, or misinformation about tariff rates, mistakes of business judgments, mistakes of shippers, and operational mistakes" I.D. at 6. He explained that "[a]n operational error occurs when a carrier loads a shipment on a wrong, earlier sailing or on a wrong ship or furnishes the wrong equipment, and these mistakes cause the shipment to be subjected to higher rates in the tariffs effective at the time of the shipments. These mistakes are regrettable but they are not tariff-filing errors and in such cases the Commission has had to deny the applications." Id. (citations omitted). The same rule applies, the ALJ continued, whenever the error was committed by the shipper. As examples, he cited Application of the Inter-American Freight Conference and United States Lines (S.A.) for the Benefit of RCA Corp., ____ F.M.C. ____, 22 S.R.R. 1572 (I.D., F.M.C. notice of finality Feb. 13, 1985) (shipper neglected to negotiate new rate after expiration of previous rate); Application of Moore McCormack Lines, Inc. for the Benefit of Celanese Corp., ____ F.M.C. ____, 21 S.R.R. 1106 (I.D., F.M.C. notice of finality Sept. 7, 1982) (shipper failed to request conference to extend rate beyond expiration date); Homasote Co. v.

United States Lines, Inc., 19 F.M.C. 89 (1976) (shipper neglected to ask carrier to file new, reduced rate). The ALJ concluded:

It is clear from a reading of the cases cited *** that the instant application does not qualify under the special-docket law for the reason that neither Nedlloyd nor the Rate Agreement can be found on the facts presented to have made a tariff-filing error. The record in the instant case shows that the Rate Agreement took exactly the action that it was requested to take, namely, to file the negotiated rate *** by June 12, 1990. It was not Nedlloyd's or the Agreement's fault that the subject shipment moved too soon to enjoy the benefit of the new rate. Rather the record indicates that the shipper or someone acting on its behalf, i.e., the freight forwarder, failed to heed the advice of Nedlloyd to postpone the shipment until the following week.

Id. at 9.

B. Nedlloyd's Exceptions

Nedlloyd's Exceptions present a different explanation of the events surrounding Atlas's shipment. It submits a sworn statement by Edward F. Reardon, its Pricing Manager, supported by a statement by Jorge Reyes-Montblanc, a Rate Agreement official. Nedlloyd agrees that the ALJ's denial of relief was the correct result "based on the facts as misrepresented by Nedlloyd Lines in its original application." Reardon statement at 1. That mishap is attributed to "the inexperience of Nedlloyd's filer of the Application and the improper and incomplete investigation of the facts pertaining to this case . . .," id., and the unavailability due to illness of Mr. Reyes-Montblanc, who is the Rate Agreement official ordinarily responsible for preparing special docket applications.

Mr. Reardon states that the Rate Agreement has a rate initiative program that is designed to be responsive to the needs

of the shipping public. Under the program, a rate proposed by an Agreement member can be submitted to the entire membership either by telephone poll, which can be completed immediately if there is no objection to the rate proposal, or by placing it on the agenda of the next Agreement meeting.

Nedlloyd has submitted a copy of its June 7, 1990, telex from Atlanta to the Rate Agreement requesting approval of the rate it had negotiated with Atlas. The telex begins "PLS RUN THIS TOMORROW" and also states "SHIPMENT READY TO GO FORWARD ON NL VESSEL SAILING WEEK OF JUNE 10, 1990." Reardon statement, att. 2. Mr. Reardon submits that the telex "clearly reflects the desire for an immediate telephone poll to be run and to have the sought rate filed to become effective on June 10, 1990." Reardon statement at 2. However, he states, an inexperienced Rate Agreement clerk instead scheduled the rate for a regular agenda meeting on June 12, at which it was approved promptly and without objection. By that time, the cargo had sailed under the old, higher rate. Nedlloyd argues that the processing mistake made by the Agreement clerk constitutes an error correctable under section 8(e) of the 1984 Act and that it should be allowed to make the requested refund to Atlas.

DISCUSSION

The new description offered on Exceptions by Messrs. Reardon and Reyes-Montblanc of the error made by the Rate Agreement clerk provides sufficient grounds for granting relief under the relevant

precedents. In D.F. Young, Inc. v. Compagnie Nationale Algerienne de Navigation, 21 F.M.C. 730 (1979) ("Young"), the Commission established that where a conference carrier, after negotiating a rate with a shipper, inadvertently fails to notify its conference of the new rate so that the conference cannot vote on the rate before the cargo sails, this constitutes a clerical or administrative error within the statute, the only condition being that the conference must ratify the new rate and publish it in its tariff before the application for relief is filed. Id. at 731. Young has been followed in many subsequent decisions. E.g., Application of Lykes Bros. Steamship Co., Inc. for the Benefit of Dunlop Industrial, Inc., _____ F.M.C. _____, 24 S.R.R. 187, 189 (I.D., FMC notice of finality July 2, 1987) and cases cited therein; Application of Nordana Line for the Benefit of Pecten Chemicals, Inc., _____ F.M.C. _____, 23 S.R.R. 451 (I.D., F.M.C. notice of finality Oct. 11, 1985); Application of Lykes Bros. Steamship Co., Inc. for the Benefit of Harbert-Jones Co., _____ F.M.C. _____, 22 S.R.R. 1582 (I.D., F.M.C. notice of finality Feb. 1, 1985). The purpose of the Young rule is simply to ensure that conference carriers (and their shippers) are not penalized for their conference membership and denied special docket relief that would be easily available for independent carriers. See 21 F.M.C. at 731 n.5 and accompanying text. If the conference members give their post-sailing approval to the proposed rate, the Commission has been willing to infer from that fact that, if the rate had been

submitted for a vote before sailing as intended, timely approval would have been forthcoming.²

Nedlloyd's Exceptions contain all the necessary elements for an order permitting a refund to Atlas. The error made by the Rate Agreement clerk was "clerical or administrative" within the Young line of cases. The Rate Agreement approved Nedlloyd's rate at its post-sailing meeting and published it in the Agreement tariff. Per Mr. Reyes-Montblanc, the Agreement has joined in the Exceptions, thus concurring in Nedlloyd's application for special docket relief as now required by the Commission's regulations. See 46 C.F.R. § 502.92(a)(3)(i).³ Procedurally, there is no bar to the Commission's treating Nedlloyd's Exceptions as a new application and deciding this case de novo. Because special docket proceedings are not adversarial, there are no due process problems inherent in such an approach. Viewed as a new application, the Exceptions were filed well within section 8(e)'s 180-day deadline from the date of shipment. 46 U.S.C. app. § 1707(e)(4). Accordingly, Nedlloyd's application, as now represented by the Exceptions, is granted.

² The passage of the 1984 Act with its provision for independent action permits a variation on Young. Now, even if the conference disapproves the proposed rate after sailing, special docket relief still can be granted if there was enough time between the original rate request and the sailing date so that the individual carrier could have implemented its intended rate through independent action. See Application of Neptune Orient Lines for the Benefit of Klenco PTE, Ltd., _____ F.M.C. _____, 24 S.R.R. 583, 584-85 (I.D., F.M.C. notice of finality Nov. 13, 1987) ("Klenco").

³ In Klenco, n. 2 supra, a similar letter obtained from a conference official was appraised by the administrative law judge as "actually more useful" than the usual "perfunctory or ministerial" concurrences. 24 S.R.R. at 586.

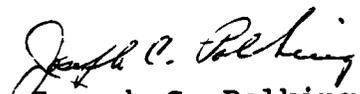
THEREFORE, IT IS ORDERED, That within 30 days Nedlloyd shall file the following notice in an appropriate place in its tariff (USA-North Europe Rate Agreement Intermodal Freight Tariff FMC No. 10):

Notice is hereby given as required by the decision of the Federal Maritime Commission in Special Docket No. 1873, that effective June 10, 1990, and continuing through June 11, 1990, the rate for Nedlloyd Lines on Mining Machinery to Tanumshede, SW, was \$2140 PC, O/D, exclusive of terminal handling charges, bunker surcharges and CAF surcharges. This Notice is effective for purposes of refund or waiver of freight charges on any shipments of the commodity described which may have been shipped during the specified period of time.

IT IS FURTHER ORDERED, That within 30 days Nedlloyd shall refund \$16,374.28 in freight charges to Atlas Powder Co. and adjust freight forwarder compensation as necessary;

IT IS FURTHER ORDERED, That within five days thereafter Nedlloyd shall furnish the Secretary with evidence of refund and a copy of the prescribed tariff notice.

By the Commission.


Joseph C. Polking
Secretary