

FEDERAL MARITIME COMMISSION

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SPECIAL DOCKET NO. 1721

APPLICATION OF MATSON AGENCIES ON BEHALF OF  
NIPPON YUSEN KAISHA LINE FOR THE BENEFIT OF  
CATERPILLAR, INC.

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ORDER REMANDING PROCEEDING

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Pursuant to section 8(e) of the Shipping Act of 1984, 46 U.S.C. app. § 1707(e), Matson Agencies seeks permission on behalf of its principal, Nippon Yusen Kaisha Line ("NYK"), to refund freight charges paid by Caterpillar, Inc., on shipments of roadbuilding equipment from Oakland, California, to Japan. In his Initial Decision ("I.D."), Administrative Law Judge Charles E. Morgan ("ALJ") made some minor adjustments but otherwise granted permission to refund \$280,739.96. The Commission determined to review the I.D.

BACKGROUND

NYK is a member of the Transpacific Westbound Rate Agreement ("TWRA") and participates in TWRA's tariff applying from U.S. points and ports to ports in the Far East. In August, 1988, NYK had in effect, by independent action from TWRA's tariff, a rate applicable to Caterpillar's cargo of \$81.00 per cubic meter plus currency adjustment factor ("CAF") surcharges. This rate was due to expire on August 31, 1988.

According to Mark R. Weaver of Matson Agencies, on August 19, 1988, NYK representatives in Japan concluded "face-to-face"

negotiations with Caterpillar's affiliate consignee, Shin Caterpillar Mitsubishi,<sup>1</sup> at which it was settled that the NYK independent rate would be extended beyond August 31, subject only to an upcoming TWRA general rate increase of \$5.00. Thus, the purported agreed rate for Caterpillar was to be \$86.00 per cubic meter plus CAF surcharges. However, according to Mr. Weaver, NYK failed to relay this agreement to Matson Agencies which, as NYK's San Francisco agent, is responsible for filing independent action notices with TWRA. As a result, the NYK independent rate expired as scheduled on August 31. In its place, the applicable TWRA rate was \$92.00 per cubic meter plus heavy lift surcharges as well as CAF surcharges.

On behalf of NYK, Matson Agencies issued bills of lading in San Francisco and collected prepaid freight charges from Caterpillar at the TWRA rate on September 4 (one shipment), September 12 (eighteen shipments), September 19 (twenty-six shipments), September 26 (seven shipments), October 3 (eleven shipments), October 10 (fifteen shipments), October 17 (six shipments), October 24 (three shipments) and October 25, 1988 (one shipment). Caterpillar paid \$1,392,600.62 in total freight charges on these eight-eight shipments. Mr. Weaver states that NYK realized its error on October 19 and sent a telex to Matson Agencies instructing that the negotiated rate be filed by

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<sup>1</sup> Mr. Weaver stated that "[t]he U.S. based shipper, Caterpillar Inc., and the consignee, Shin Caterpillar Mitsubishi, jointly negotiate the rates and control the cargo's routing." Weaver statement at 5. The freight charges were paid by Caterpillar, Inc. Id.

independent action from the TWRA rate. The lower rate became effective on November 2, 1988; there were no shipments received from Caterpillar between October 25 and November 2.

The ALJ found that the statutory requirements had been met. After eliminating two shipments that had been included in the application erroneously and making some arithmetical corrections, he granted NYK permission to refund \$280,739.96.<sup>2</sup>

#### DISCUSSION

Before the Commission determines whether the I.D. can be adopted, we wish to give the parties an opportunity to adduce the following evidence:

a. An affidavit from NYK's sales representative who orally agreed to the \$86.00 rate during the "face to face" negotiations;

b. An affidavit from Shin Caterpillar Mitsubishi and Caterpillar, Inc., attesting to the \$86.00 rate agreed upon during the "face to face" negotiations;

c. An affidavit from the clerical staff at NYK responsible for filing independent action notices attesting to their error;

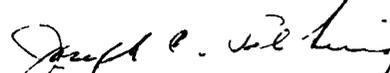
d. An affidavit from NYK staff stating who discovered the error, when they discovered the error and why they failed to notice the \$92.00 rate until October 19, 1988. Further, an affidavit attesting to when the freight invoices were paid, how they were paid and by whom might shed some light on why NYK failed to discover the error earlier.

e. An affidavit from Caterpillar, Inc., stating why it failed to notice more quickly that it was paying thousands of dollars in excess of what it had agreed to.

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<sup>2</sup> The ALJ also ordered NYK to refund an additional \$342.96, which represents overcharges he discovered had been assessed against Caterpillar under the TWRA rate.

THEREFORE, IT IS ORDERED That this proceeding is remanded to the ALJ for development of the evidence described above, any other relevant evidence, and the preparation of a supplemental I.D. By the Commission.

  
Joseph C. Polking  
Secretary