(S E R V E D)
(November 26, 1991)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1958

APPLICATION OF TRANSPACIFIC WESTBOUND RATE AGREEMENT AND AMERICAN PRESIDENT LINES, LTD., FOR THE BENEFIT OF EASTMAN KODAK COMPANY

ORDER GRANTING PERMISSION TO REFUND FREIGHT CHARGES

The Pacific Coast Tariff Bureau ("PCTB") filed Exceptions to the Initial Decision ("I.D.") of Chief Administrative Law Judge Charles E. Morgan ("ALJ") issued in this proceeding. The ALJ denied the application of the Transpacific Westbound Rate Agreement ("TWRA") and American President Lines, Ltd. ("APL"), filed pursuant to section 8(e) of the Shipping Act of 1984, 46 U.S.C. app. § 1707(e) ("1984 Act"), for permission to refund $40.00 of the freight charges collected from Eastman Kodak Company on two shipments of photographic equipment, which moved via rail and ocean vessel from Windsor, Colorado, to Kobe, Japan.

BACKGROUND

A. The Initial Decision

Based on the application as originally filed, which constituted the record before him, the ALJ found as follows:

On October 22, 1990, APL, a member of TWRA, filed a notice of independent action effective November 1, 1990, to establish a photographic equipment rate of $2,490 per 40-foot container from Windsor, Colorado, to base ports in Japan. TWRA duly forwarded the

notice to PCTB, its tariff publisher. At the time, APL already had an independent action rate in effect of $2,510; it thus wished to reduce that rate by $20. TWRA's rate was $3,550 per container.

On November 2, 1990, PCTB published the $2,490 rate. However, it mistakenly filed the rate as a group (or conference) rate. An individual carrier independent action rate takes precedence over agreement rates[1] and must be followed regardless of whether it is higher or lower than the conference rate.[2] Thus, although the new mistaken "conference" rate of $2,490 went into effect immediately as a reduction from TWRA's rate of $3,550, the lawfully effective rate for shipments carried by APL remained at $2,510. That rate was applied to the two Eastman Kodak shipments, which sailed for Japan on November 15 and 29, 1990.

APL and TWRA sought to refund to Eastman Kodak the $20-per-container difference between the intended rate of $2,490 and the applied rate of $2,510. The ALJ denied the application, however, because he found that one of the jurisdictional requirements of section 8(e) had not been met, i.e., that "the common carrier or conference has, prior to filing an application for authority to make a refund, filed a new tariff with the Commission that sets forth the rate on which the refund or waiver would be based . . . ." 46 U.S.C. app. § 1707(e)(2). The ALJ noted that,

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[1] See section 5(b)(8) of the 1984 Act, 46 U.S.C. app. § 1704(b)(8).

[2] TWRA Rule No. 2-A-1-a provides: "Specific rates established by individual carriers between the same two points or ports take precedence over agreement rates * * * irrespective of whether such independent rate is higher or lower than the agreement rate."

effective December 1, 1990, APL reduced its photographic equipment rate to $2,470 per 40-foot container by another notice of independent action, but found that the intended rate of $2,490 had never been published as an APL rate.

B. The Exceptions

In its Exceptions, PCTB concedes that the sketchy information provided to the ALJ made the result of the I.D. "understandable," Exceptions at 4, but now offers "a better explanation of the facts and the introduction of some new evidence." Id. at 1. On the first point, it argues that, notwithstanding the clerical error that resulted in the intended rate of $2,490 being filed as a TWRA group rate, the fact remains that the rate was published, which should be enough to satisfy the requirements of section 8(e).

The new information set forth by PCTB is intended to show alternately that the intended rate of $2,490 was published by APL prior to the filing of this special docket application, but published in an adjusted form due to intervening rate increases. It states that, throughout most of 1990, APL's rate for photographic equipment from Colorado to Japan had been $2,650 per 40-foot container, which included a Fuel Adjustment Factor ("FAF"), as well as other surcharges. This rate remained constant regardless of fluctuations in the FAF.

APL decided to change its approach and to start charging a rate that did not include the FAF. However, it also wanted to avoid any change in the total cost to the shipper. On October 20, 1990, APL published a new photographic equipment rate of $2,510

with an additional TWRA-set FAF of $140, thus maintaining the total cost to the shipper at $2,650.

When TWRA voted to set the November FAF at $160 per 40-foot container, APL knew that, in order to maintain its total cost of $2,650, it needed to reduce its base rate by $20. Hence, on October 22, APL filed the independent action notice that is the basis of this proceeding, whereby it intended to publish a new base rate of $2,490 effective November 1 ($2,490 + $160 = $2,650).

TWRA then voted to increase the December FAF by another $40 to $200 per 40-foot container. When APL moved to make the counterbalancing $40 reduction in its photographic equipment base rate, it applied the reduction to the only rate appearing in its tariff, i.e., $2,510. The result, however, was an unknowing breach of APL's intended total cost of $2,650, since the new rate of $2,470 plus the $200 FAF yielded a new total cost of $2,670.

All the rates published by APL during this period had expiration dates of December 31, 1990, because APL planned to implement rate increases at the start of 1991. In mid-December, APL reached an agreement with the shipper to increase the Colorado-Japan rate by 3 percent. Applied to APL's intended 1990 total shipper cost of $2,650, this meant a new 1991 total cost of $2,729.50, which APL rounded down to $2,725. In the meantime, TWRA had voted to reduce the January FAF to $180 per 40-foot container. To meet its 1991 total cost target, APL filed a notice of independent action with TWRA that its new base rate, effective January 1, 1991, was to be $2,545 ($2,545 + $180 = $2,725), which

was said to be "based on current levels plus increase for 1991." Exceptions at 3. This rate went into effect without mishap.

Based on this chain of events, PCTB argues that "we can trace that the rate filed on January 1st, namely $2,545 plus FAF, is a logical derivative from the intended rate for November 1st, namely $2,490 plus FAF." Exceptions at 4. It contends that this should be sufficient to meet the requirements of section 8(e)(2) of the 1984 Act.

DISCUSSION

The new information provided by PCTB in its Exceptions regarding the relationship between the January 1 rate of $2,545 and the intended rate of $2,490 provides sufficient grounds for granting this refund application.[3] In Nepera Chemical, Inc. v. FMC, 662 F.2d 18, 22 (D.C. Cir. 1981), the court ruled that the special docket procedure is "unquestionably remedial" in nature and ought to be construed to bring about "relief of shippers from the burdens of carrier negligence . . . ." The Commission accordingly has accepted new tariff filings that are different from the intended rate, as long as the record contains substantial evidence of the parties' original intention and a satisfactory explanation

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[3] This result makes it unnecessary for the Commission to resolve PCTB's alternative argument that the erroneous publication of APL's intended rate as a group rate was sufficient to meet section 8(e). We note, however, that this argument does not appear to be sound. At a minimum, the statute's reference to a "new tariff" seems to contemplate some corrective tariff activity by or on behalf of the individual carrier affected by the clerical or administrative error; as discussed above, the rate published by PCTB applied for all the TWRA carriers except APL.

of why that intention cannot practicably be reflected in the current tariff. See generally Application of Ricoh International Systems, Inc. for the Benefit of Ricoh Co., Ltd., ___F.M.C. ___, 24 S.R.R. 557, 560 (I.D.), adopted, No. 1570 (F.M.C. Dec. 1, 1987). There are a number of precedents granting applications for waivers or refunds where the subsequent tariff was higher than the intended rate because of intervening rate increases. Id. at 560-61 n.6. PCTB's recitation of the tariff events between October 1990 and January 1991 and its proposition that APL's January 1st base rate of $2,545 should be accepted as the corrective filing covering its originally intended rate of $2,490 bring the instant proceeding within this line of authority. It should be noted that the refund permitted continues to be based on the $2,490 rate.

THEREFORE, IT IS ORDERED, That within 30 days APL shall file the following notice in an appropriate place in its tariff (Transpacific Westbound Rate Agreement Westbound Local and Intermodal Freight Tariff FMC No. 8):

> Notice is hereby given as required by the decision of the Federal Maritime Commission in Special Docket No. 1958 that, effective November 1, 1990, and continuing through November 30, 1990, the rate for American President Lines, Ltd., on Photographic Equipment (Item No. 99-2640) from Windsor, Colorado, to Japan Base Ports, was $2490 PC40, including CY Receiving Charge and CAF surcharges, store door pickup permitted, in straight or mixed loads, but excluding FAF 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 APL shall refund $40.00 in freight charges to Eastman Kodak Company; and

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

By the Commission.

Joseph C. Polking
Secretary