

( FEDERAL MARITIME COMMISSION )  
( SERVED JANUARY 30, 1990 )  
( EXCEPTIONS DUE 2-21-90 )  
( REPLIES TO EXCEPTIONS DUE 3-15-90 )

FEDERAL MARITIME COMMISSION

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SPECIAL DOCKET NO. 1811

APPLICATION OF PUERTO RICO MARITIME SHIPPING AUTHORITY  
FOR THE BENEFIT OF TROPICANA SHIPPING

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Application for permission to waive collection of \$260.88 in freight charges denied.

Shipper requested that a rate on farm-type tractors moving to the Dominican Republic be restored to the tariff. The Conference, however, mistakenly filed the rate as applicable to roadbuilding tractors moving to Haiti, and when filing the new tariff, only corrected the destination. The failure to file a correct, new tariff is a jurisdictional defect that cannot be waived.

Kevin J. Keelan for applicant.

INITIAL DECISION<sup>1</sup> OF NORMAN D. KLINE,  
ADMINISTRATIVE LAW JUDGE

By application filed November 16, 1989, the Puerto Rico Maritime Shipping Authority (PRMSA), a member of the U.S. Atlantic & Gulf/Hispaniola Steamship Freight Conference (the Conference), seeks permission to waive collection of \$260.88 in freight charges

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<sup>1</sup>This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 227, Rules of Practice and Procedure, 46 CFR 502.227).

in connection with a shipment of a farm-type tractor which PRMSA carried from Elizabeth, New Jersey to Boca Chica, Dominican Republic, on a ship sailing from Elizabeth on May 26, 1989. The requested waiver would benefit the shipper, Tropicana Shipping. The application was filed within the 180-day period required by law (November 16, 1989 being only 174 days after May 26, 1989). There is no evidence of other affected shipments or of discrimination among ports or carriers. However, there is a serious problem concerning the new, corrective tariff that was filed on June 5, 1989, and a consequent question as to possible discrimination among shippers if the application is granted based on that new tariff. Furthermore, as of the time of the filing of the application, the shipper had not paid any freight at all on the shipment. Applicant states that "Tropicana Shipping has refused to pay any freight for this shipment due to the erroneous tariff filing." (Affidavit of W. D. Hannah, Manager of Foreign Pricing, at para. 8.)

The evidence consists of the original application with a supporting affidavit of Mr. Hannah, minutes of a Conference meeting, relevant tariff pages, bill of lading, and supplemental explanations and correspondence between the Conference and the shipper, furnished by applicant's counsel in response to my inquiries. This evidence shows that PRMSA and the Conference committed tariff-filing errors in the following manner.

### The Tariff Errors

On April 25, 1989, the shipper, Tropicana, requested that the Conference file special rates in its tariff for two different types of tractors: (1) a "Tractor (Road Builder)," which weighed approximately 4,000 lbs. and measured 2,288 cubic feet. This tractor sat on its own flat bed trailer and had a digger at one end and a shovel at the other end; (2) a "1970 Farm Type Tractor, complete with R.O.P.S., open cab," which weighed 6,000 lbs. and measure 1,200 cubic feet and did not sit on a flat bed. The shipper requested a rate for these two commodities for shipments moving to the Dominican Republic. (See Tropicana letter, dated April 25, 1988.)

In response to the shipper's request, the Conference filed two rates, one, a rate of \$2850 A.I. (all-inclusive), for the road-builder type tractor, and a rate of \$2550 A.I. for the farm-type tractor, effective May 19, 1988 through June 19, 1988. (See tariff, 5th revised page 131-D, attached to letter of counsel dated January 9, 1990.) Tropicana shipped the road-building tractor but not the farm-type in 1988. On May 3, 1989, the shipper requested the Conference to "reinstate #88-170 that was originally granted on May 13, 1988." The shipper explained that it had "not been able to move the cargo do (sic) to unforeseen (sic) problems and difficulties with the tractor repairs." (Tropicana letter, dated May 3, 1989.) Unfortunately, Tropicana did not specify which type of tractor that it had in mind, and its reference to "#88-170" was to an earlier Conference letter dated May 13, 1988, which notified

Tropicana that the Conference would file the \$2850 A.I. rate for the roadbuilding tractor and \$2550 A.I. for a "Tractor (Not Farm) Not on Flatbed." (See May 13, 1988 letter cited.)

According to counsel, "[a]pparently, the Conference Staff was unsure which tractor Tropicana planned to ship in 1989, and mistakenly described the \$2550.00 A.I. rate as applicable to road building tractors." (Letter of counsel, dated January 9, 1990, third paragraph.) According to Mr. Hannah, Manager of Foreign Pricing for PRMSA, "[a]s a result of an inadvertent error on the part of the Conference Staff, the Members of the Conference approved the rate to Haiti, rather than the intended destination of the Dominican Republic." (Affidavit of Hannah, para. 4.) Mr. Hannah refers to minutes of the Conference meeting of May 11, 1989, which specify a rate of \$2550 for a "Tractor, Roadbuilding Rate All Inclusive," and refer to tariff page 109A, which is a page for cargo moving to Haiti, not the Dominican Republic. Therefore, Mr. Hannah states that the Conference and PRMSA committed two errors, first, by filing the rate for tractors moving to Haiti, not the Dominican Republic, and second, by filing an incorrect commodity description, namely, "Road Building Tractor," instead of the correct farm-type tractor. On May 12, 1989, such a rate of \$2550 A.I. was filed in the Haiti tariff with the two errors described. (See tariff, 1st revised page 109-A.) Mr. Hannah states that the shipper had requested a rate for "Farm Type Tractors, not Roadbuilding Tractors," and that the bill of lading correctly described the commodity (as a "Model 970 Diesel Farm Type

Tractor"). (See Hannah Affidavit at para. 5, and bill of lading for the shipment, dated May 26, 1989.)

Mr. Hannah states that "PRMSA, the Conference and the shipper, Tropicana Shipping, all contemplated the tariff rate of \$2,550.00 A.I. for this shipment," but that "as a result of inadvertent error, the rate was entered in the wrong tariff and the commodity was misdescribed in the tariff. Had the Conference and PRMSA realized the mistake at an earlier date, the tariff rate of \$2,550.00 A.I. would have been filed in the correct tariff with the correct commodity description which would have entitled the shipper to that rate." (Hannah Affidavit at para. 7.) He further states that the error was not discovered until after the bill of lading had been issued and the tractor was on board the vessel, and the tractor was therefore rated under the applicable, higher tariff rate (\$2405 plus incidental charges) which resulted in additional freight of \$260.88, that PRMSA wishes to waive. As mentioned, the shipper has paid nothing "due to the erroneous tariff filing." (Id. at para. 8.)

The above facts show that tariff-filing errors occurred when the Conference's staff, which apparently prepared the agenda for the May 11, 1989 meeting of the Conference, made two mistakes. The first mistake was to list the rate to be discussed as applicable to a roadbuilding tractor. The second mistake was the staff's listing the destination to Haiti rather than the Dominican Republic, by specifying a tariff relating only to shipments moving to Haiti. It is not clear why the staff made the two errors or why

PRMSA did not catch the mistakes in time to prevent the Conference from filing the mistaken commodity item and incorrect destination in the wrong tariff on May 12, 1989. However, it is clear from the shipper's request that the shipper was not requesting a rate of \$2550 A.I. for roadbuilding tractors moving to Haiti, and it is apparent that the shipper was instead asking the Conference to restore a previous rate that had expired in 1988 (\$2550 A.I.) that had been applicable to farm-type tractors moving to the Dominican Republic. Furthermore, there had apparently never been a rate of \$2550 A.I. on roadbuilding tractors moving to Haiti, a fact that further shows that the Conference's filing of such a rate was a mistake. The problem with this application, however, is not whether there occurred a bona fide tariff-filing error. The problem is rather that the Conference filed a new tariff that failed to correct one of the above errors, namely, the description of the tractor as a farm-type rather than as roadbuilding. The question therefore is whether the filing of such an incorrect "new tariff" complies with the requirements of law so that the application can be granted.

#### The New Tariff Requirement

Section 8(e)(2) of the 1984 Act (46 U.S.C. app. sec. 1707(e)(2)) provides, among other things, that the Commission may grant application such as the instant one if:

(2) 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.

The Commission has consistently held that this filing requirement is jurisdictional and cannot be waived and, if not satisfied, disables the Commission from granting applications. See e.g., A. E. Staley Mfg. Co. v. Mamenic Line, 20 F.M.C. 642, 643 (1978), confirming 20 F.M.C. 385; Louis Furth, Inc. v. Sea-Land Service, Inc., 20 F.M.C. 186, 187 (1977); Application of APL for Ficks Reed Co., 24 SRR 164, 165-166 (1987); Oppenheimer Intercontinental Corp. v. Moore-McCormack Lines, Inc., 15 F.M.C. 49, 52-53 (1971); Application of OOCL-SEAPAC for Asian Food Industries, 23 SRR 559, 560 (I.D., adopted, 23 SRR 791 (1986); Application of American President Lines for Amoco Chemicals Corp., 24 SRR 887, 890-891 (I.D., F.M.C. notice of finality, April 25, 1988).) As the Commission stated in A. E. Staley Mfg. Co. v. Mamenic Line, cited above, 20 F.M.C. at 643:

This requirement [i.e., filing the new tariff prior to filing the application] cannot be waived, and as much as the Commission might wish to grant relief in situations such as we have here, where the consequences of subsequent errors by the carrier fall upon the shipper, the Commission, whose jurisdiction is strictly limited by statute, has no power to grant the relief requested.

Because the new tariff filed on June 5, 1989, long before the application was filed on November 16, 1989, showed that the rate of \$2550 A.I. applied to a "Tractor, Road Building," rather than to the intended farm-type tractor, I notified counsel for applicant of the new-tariff requirement and invited comments. (See my letter

dated December 21, 1989.) In reply, counsel contends that the filing of the new tariff, as described above, is a "slight technical variation, which, under the remedial nature of Section 8(e) should not be an absolute bar to relief." (See letter of counsel, dated January 9, 1990, at page 2.) Counsel cites several cases in which the filed new tariffs contained some discrepancies from rates previously negotiated but nevertheless represented the intentions of the parties so that the applications could be granted. Counsel also argues that there will be no discrimination among shippers because no other shipments were involved and that the sought rates had previously been placed in a charitable rates section of the tariff in 1988. (Id.) I wish I could agree with counsel.

Because the special-docket law is remedial, every effort is made to interpret it in a way to allow applications to be granted. (See Application of OOCL-SEAPAC, cited above, 23 SRR at 560.) Therefore, in numerous cases involving questions as to the legal validity of a new tariff filing, the Commission has shown flexibility and liberality. Most commonly in such cases, a new tariff is filed in which the rate specified therein is not exactly the same as the earlier intended rate that had not been filed prior to shipment because of bona fide error. Usually the new tariff rate is changed from the earlier negotiated rate because of an intervening general rate increase or because of some operational or commercial problem requiring that the earlier unfiled rate be filed in a different amount. In such cases the Commission

considers that the new tariff rate has subsumed the earlier negotiated rate, even if the new tariff rate sometimes differs from the earlier rate in significant amounts. (See Application of Gulf Container Line for Amtrol, Inc., 24 SRR 797, 802-804 (I.D., F.M.C. notice of finality, March 17, 1988); see also the discussion and examples cited in Application of Ricoh International Systems, Inc. for Ricoh Co., Ltd., 24 SRR 557, 560-561 (I.D., F.M.C. notice of adoption, December 1, 1987); Application of OOCL-SEAPAC, cited above, 23 SRR at 560-561, and cases described in note 2; Nepera Chemical, Inc. v. Federal Maritime Commission, 662 F.2d 18 (D.C. Cir. 1981).)

The Commission has therefore gone to considerable lengths to find that new tariffs satisfy the jurisdictional requirements of section 8(e)(2) of the 1984 Act, notwithstanding discrepancies, if the new tariffs show an attempt to correct the previous error and show the current status of the rate, including various changes that have occurred over time. Furthermore, even if an application is filed but applicant has forgotten to file the new tariff, the Commission has permitted the applicant to file the new tariff and an amended application, provided that the amended application is still filed within the required 180-day period after shipment. (See Application of the East Asiatic Co., Ltd. for Black & Veatch International, 20 SRR 1608, 1610-1611 (I.D., F.M.C. notice of finality, October 16, 1981).) Perhaps the most liberal of these decisions permitting a new tariff to qualify under the statute notwithstanding a mistake in the filing is SD 1236, Application of

Lykes Bros. for the Benefit of Port and Lighthouse Administration, 22 SRR 1301 (1984) (I.D., F.M.C. notice of finality, December 17, 1984), a case cited by applicant's counsel. In the cited case, applicant carrier had intended to file a commodity rate in its eastbound tariff for shipments moving to Alexandria, Egypt, but erroneously filed the rate in its westbound tariff. The carrier noticed the error and attempted to correct it by filing the intended rate in the proper tariff, i.e., the eastbound tariff to Alexandria. The carrier did actually file the new tariff rate in the correct tariff. However, it erroneously filed the rate as applicable to shipments "From: Alexandria, Egypt." (22 SRR at 1302.) Despite this obvious mistake in direction of shipments, the rate and commodity description were correct, and the application was granted. However, the presiding judge specifically stated that the decision was "limited to the facts of this case without reliance on the precedent set by Nepera, however that precedent may develop." (22 SRR at 1303.) Furthermore, the rationale of the decision was based on an objective test in reading tariffs, i.e., it was found that "[a]ny reasonable person reading the new tariff, especially in its entirety, covering cargo from U.S. Ports to Mediterranean and Black Sea Ports would know that the From Alexandria designation must necessarily be wrong and that it had to be To Alexandria." (22 SRR at 1302; emphasis in the original.) Also, because the new tariff did contain the correct rate, the decision found the mistake in the new tariff to be "in the nature of a typographical error, purely technical in nature." (Id.)

I find that there is a significant distinction between the situation in SD 1236 and the situation in the instant case. In SD 1236, the commodity description in the new tariff was correct, and the only mistake was one that was obvious to anyone reading the tariff, namely, that the rate was intended to apply to shipments moving eastbound to Egypt, not westbound to the United States. That was because the entire tariff in which the new rate was filed was an eastbound tariff and the many other, perhaps hundreds or thousands of rates, in that tariff all applied in the single eastbound direction. Even so, the decision specifically states that it was to be limited to the facts of that case and was not supposed to establish a new precedent under the Nepera doctrine. In the instant case, however, the new tariff does not describe the farm-type tractor at all. Instead, it describes a "Tractor, Road Building." (See Conference Tariff, FMC No. 6, 15th revised page 100-A.) As noted earlier, the two types of tractor are quite different in dimensions, configuration, and purpose, and both the shipper and Conference had treated the two as different commodities when requesting and filing rates for them in 1988. There is therefore no way that an objective reader of the tariff could interpret a "Tractor, Road Building" to be the same commodity as a "Model 970 Diesel Farm Type Tractor," as the tractor actually shipped was described in the bill of lading. What happened, as I have discussed, is that the Conference had made two errors, one regarding destination, and the other regarding commodity description, but the Conference failed totally to correct the

second error when filing the new tariff. Furthermore, the erroneous new tariff was filed on June 5, 1989, but the application was not filed until November 16, 1989, only six days before the 180-day period of limitation expired. Had applicant been more timely, it would perhaps have been possible to have had it correct the erroneous description in the new tariff and file an amended application within the 180-day period so that the application could have been granted, as happened in Application of the East Asiatic Co., Ltd. for Black and Veatch International, cited above, 20 SRR at 1610-1611. By waiting so long after the error, however, applicant has prevented the Commission from assisting it to make the necessary corrections to the new tariff. On the other hand, apparently the shipper has refused payment of any freight until the present matter is resolved. However, there is no warrant for a shipper to refuse payment of freight, at least as calculated under the sought rate. In the typical applications for waivers, shippers at least pay freight on the basis of the lower sought rate.

Applicant argues, however, that the erroneous description in the new tariff is merely a "slight technical variation," i.e., it is a typographical error that is technical in nature, and that the requested waiver is based on the rate and description originally intended by the parties. However, I find that filing a totally different commodity description in a tariff is not the same thing as publishing "From" instead of "To" in a tariff when everyone can see that the entire tariff means only "To." Furthermore, if an applicant is allowed to recover freight based on the unpublished

intentions of the parties, this is no different than charging secret rates for commodities that are not published in the tariffs at all, a flagrant violation of basic tariff law. (See section 10(b)(1) of the Shipping Act of 1984, 46 U.S.C. app. sec. 1709(b)(1).) Furthermore, in the special-docket context, the Commission has specifically rejected the argument that an application should be granted even if the new tariff was not correctly filed so long as the carrier and shipper had agreed on the rate. (See A. E. Staley Mfg. Co. v. Mamenic Line, cited above, 20 F.M.C. at 642 (shipper "concedes that Mamenic Line may not have filed the \$70.00 W rate but points out that it and the carrier had nevertheless agreed on that rate for Dextrin.")

In other cases, applications have been denied when what might arguably be merely typographical errors were actually substantive in nature, as in the instant case. Thus, in the Staley case, 20 F.M.C. 385, affirmed on reconsideration, 20 F.M.C. 642, cited above, the carrier filed a rate of "\$70 W/M" on a commodity known as "Dextrine," although it had negotiated and intended to file the rate as "\$70 W." and the carrier never filed the new tariff showing the intended rate of "\$70 W." The failure to delete the "M" from the rate resulted in \$361.38 in additional freight that the shipper had to pay. Also, the fact that the carrier files a new tariff which sets forth the base rate in the correct amount is not sufficient if the description of the shipment is incorrect. Thus, in Henry I. Daty v. Pacific Westbound Conference, 20 F.M.C.390 (1978), the carrier applicant wanted to charge a shipment of clay

in containers under a rate of \$56 per kilo ton rather than the applicable rate of \$98 per kilo ton because of a mistaken filing which resulted in an unintended rate increase. However, the application had to be denied because the new tariff which the Conference and carrier applicants had filed, although showing the intended \$56 per kilo ton rate, also described the shipments as requiring a minimum weight of 40,000 pounds per 20-foot container. The shipments in question could not meet the minimum weight per container requirement, and it was therefore held that the applicants had failed to file the correct new tariff that could apply to the shipment. (20 F.M.C. at 394.) The failure to file the correct new tariff meant that the shipper had to pay additional freight amounting to \$1,966.53. (20 F.M.C. at 392.)<sup>2</sup>

#### Ultimate Conclusions

It is never pleasant to deny an application submitted under a remedial statute even if the amount in controversy is relatively small in the instant case (\$260.88) and even if the shipper has

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<sup>2</sup>A recent case illustrates the principle that a carrier cannot file an agreed-upon rate with an incorrect commodity description, and simply charged the rate anyway. In Special Docket No. 1708 - Application of Fritz Transportation International for the Benefit of Costco Wholesale Corp., Order of Adoption of Initial Decision, January 16, 1990, the Commission adopted an initial decision granting an application. The applicant carrier had erroneously filed an agreed-upon rate under a "Kitchenware" description rather than the correct "Electrical Goods and Parts" description. The carrier has to file a correct, new tariff showing the rate under the intended "Electrical Goods" description, which it did. The carrier could not simply charge the shipments of electrical goods under an agreed-upon rate that had been erroneously filed as a kitchenware rate.

inexplicably refused to pay any freight at all until the matter is resolved. Nevertheless, the Commission has time and again denied applications when one of the basic jurisdictional conditions set forth in section 8(e) of the 1984 Act has not been satisfied, namely, the requirement that a carrier applicant file a correct, new tariff prior to filing the application.

The Commission has shown flexibility in dealing with this new-tariff requirement, allowing new tariffs to be filed when the rates therein differed from the earlier intended rates because of intervening changes in rates or commercial conditions, and even when it is obvious on its face that the new tariff contains a typographical error by specifying a westbound direction in an entirely eastbound tariff. However, the Commission has never granted an application when the new tariff does not correct the initial error, such as in the instant case, when the new tariff fails to apply the sought rate to the correct type of tractor. It simply is not enough to file the correct amount of the rate or the correct destination. The commodity description must also be corrected, as was not done in this case. To allow a shipment to be charged a rate for a roadbuilding tractor, as the tariff specifies, when the commodity is a quite different type of tractor, i.e., farm-type, violates a fundamental principle of tariff law designed to prevent discrimination among shippers. This is so because one shipper would be given the benefit of a special rate on its farm-type tractor, although that type of tractor was not specified in the tariff. In other words, the subjective intent of

the carrier and shipper would override what the public sees printed in the tariff. Such a happening would, in my opinion, constitute discrimination and favoritism among shippers and render the new-tariff requirement of section 8(e) a virtual nullity.

Accordingly, the application is denied. Applicant shall report to the Commission on the action taken to recover the full freight under its applicable tariff rate at such time as the Commission shall announce in a separate notice if the Commission, on review or otherwise, affirms this initial decision.

*Norman D. Kline*

Norman D. Kline  
Administrative Law Judge

Washington, D. C.  
January 30, 1990