

(FEDERAL MARITIME COMMISSION)
(SERVED OCTOBER 2, 1991)
(EXCEPTIONS DUE 10-24-91)
(REPLIES TO EXCEPTIONS DUE 11-15-91)

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 2065

APPLICATION OF TURBANA CORPORATION FOR THE
BENEFIT OF D.S.R. SHIPPING CO., INC.

Application for permission to refund \$46,150 and to waive collection of \$962 in freight charges granted.

INITIAL DECISION¹ OF NORMAN D. KLINE,
ADMINISTRATIVE LAW JUDGE

By application filed September 4, 1991, as later supplemented and clarified, Turbana Corporation seeks permission to refund \$46,150 and to waive collection of \$962 in freight charges for the benefit of the shipper, D.S.R. Shipping Co., Inc. These freight adjustments relate to 58 shipments of fruits, vegetables, and other commodities carried by Turbana between Wilmington, Delaware and Puerto Limon, Costa Rica, during March through June 1991, with the first shipment sailing from Wilmington on March 19, 1991. The application was filed on the 169th day after the date of this first shipment, which date is within the

¹This 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).

statutory 180-day period, the new, corrective tariff was filed on August 14, 1991, and there is no evidence of other affected shipments or of discrimination among shippers, ports, or carriers.

Turbana actually collected a total of \$158,400 for the 58 shipments. These payments were incorrectly calculated and were based on rates which had been quoted to the shipper by a Turbana agent but were never authorized by Turbana. (See Supplementary Affidavit of Robert S. Lounsbery, Vice President, Operations.) When Mr. Lounsbery learned that these rates had been quoted and that the shipper had been billed under them, he disavowed them and took steps to ensure that Turbana would never again bill shippers under quoted but unfiled rates. (*Id.*) Nevertheless, the shipper, D.S.R., has already paid under those rates. Had Turbana not failed to file its intended time/volume rates, which it now seeks to apply to the shipments, D.S.R. would only have had to pay \$112,250. Therefore, D.S.R. has overpaid in the amount of \$46,150 (\$158,400 less \$112,250). Turbana therefore seeks permission to refund this money. Furthermore, on one shipment (No. 9), Turbana collected freight under the sought time/volume rate. Therefore, for this shipment, Turbana is actually asking to waive collection of the additional freight that would be due under the higher, applicable rate, which freight amounts to \$962.² (See Exhibit A, the freight calculation table, and clarifications to the Exhibit shown in a letter dated September 27, 1991, from counsel to Turbana, and in the Supplementary Affidavit of Mr. Lounsbery, cited above.)

The application is well prepared and amply supported with detailed documents relating to each of the 58 shipments and with supporting affidavits of Turbana's Vice

²See the documents for shipment No. 9 attached to the application. As shown in those documents, the applicable freight was \$3,162 for the one 40-foot container involved whereas the sought time/volume rate is \$2200. The difference is \$962, which Turbana wishes to waive because the shipper paid freight under the lower amount. See also Exhibit A, table of freight calculations, and explanatory letter of September 27, 1991, from Turbana's counsel, at page two.

President of Operations, D.S.R.'s President, Turbana's sales agent, and with other relevant documentary evidence. This evidence shows that Turbana commenced a common carrier service between Wilmington, Delaware and Costa Rica and filed its first tariff, effective March 14, 1991, but in the midst of starting up its operations, it neglected to file time/volume rates under an arrangement which it had reached with the shipper, D.S.R.

At the end of January 1991, Mr. Eugenio Mora, Special Projects Manager for Turbana, was requested by Turbana to investigate potential cargo billings for Turbana's new service. (See Mora Affidavit.) In early February of 1991, Mr. Mora traveled to Costa Rica and met representatives of various shippers, including D.S.R. (*Id.*) In mid-March 1991, Mr. Mora met with a D.S.R. representative in Costa Rica, Mr. Peter Rondinone, regarding D.S.R.'s willingness to commit a certain volume of containers to move northbound and southbound. Earlier that month, Mr. Mora had met with a Mr. Greg Catner in D.S.R.'s New Jersey office. (*Id.*) As a result of these meetings and after several telephone conversations with D.S.R. personnel, D.S.R. and Turbana agreed that D.S.R. would ship a minimum of 180 containers in Turbana's Costa Rica service over a six-month period and would in return receive the following rates: freight all kinds, refrigerated, per carrier-provided 40-foot container - \$2200 northbound and \$750 southbound; freight all kinds, per shipper-provided 40-foot container - \$1100 northbound and \$800 southbound. This agreement was to be final by March 19, 1991. (*Id.*, and Affidavit of Mr. Peter Rondinone, President of D.S.R.)

Turbana was just starting up its operations as a common carrier and was not familiar with tariff filing. Thus, although Turbana filed many commodity rates in the first few months of its operations, it neglected to file the rates encompassed in the time/volume agreement it had entered into with D.S.R. (Mora Affidavit.) Therefore, the 58 shipments,

which qualified for the time/volume rates, became subject to higher, applicable tariff rates and, as noted, Turbana further compounded the error by billing D.S.R. at different, unauthorized rates.

The error described, namely, the failure of a carrier to file time/volume rates it had agreed to do for a shipper, is not uncommon. Indeed, there have been at least six previous special-docket applications in which carriers have failed to file such rates at all or have filed them incorrectly.³ The error can be remedied under section 8(e) of the Shipping Act of 1984, 46 U.S.C. app. sec. 1707(e), and the Commission's regulations, 46 CFR 502.92(a), and the application satisfies the other statutory conditions, as found earlier. Accordingly, the application is granted, and Turbana shall make the refund and waiver as discussed, and adjust freight-forwarder compensation, if applicable.

Turbana shall also file the following notice in its tariff (FMC No. 1):

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 2065, that on shipments sailing from port of loading on March 19, 1991, and continuing through August 13, 1991, the above time/volume rates were in effect. This Notice is effective for purposes of refund or waiver of freight charges on any shipments subject to the above time/volume arrangement which may have been shipped during the specified period of time.



Norman D. Kline
Administrative Law Judge

Washington, D.C.
October 1, 1991

³The sixth such application was in SD 1984, *Application of ACL for SCM Chemicals* (I.D. August 14, 1991, F.M.C. notice of finality, September 18, 1991). The five previous such applications were in SD Nos. 1875, 1840, 1059, 1060, and 1061.