

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1811

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

ORDER ADOPTING INITIAL DECISION

Puerto Rico Maritime Shipping Authority ("PRMSA"), a member of the U.S. Atlantic & Gulf/Hispaniola Steamship Freight Conference ("Conference"), has filed an application pursuant to section 8(e) of the Shipping Act of 1984 ("1984 Act"), 46 U.S.C. § 1707(e), seeking permission to waive collection of \$260.88 in freight charges applicable to a shipment of a farm-type tractor from Elizabeth, New Jersey to Boca Chica, Dominican Republic. The proceeding is before the Commission on PRMSA's Exceptions to the Initial Decision ("ID") of Administrative Law Judge Norman D. Kline ("ALJ") denying the application.

BACKGROUND

In April, 1988, at the request of Tropicana Shipping ("Tropicana"), the Conference filed rates for two different types of tractors: (1) a rate of \$2850 for a "Tractor (Road Builder)" which sits on its own flat bed trailer; and (2) a rate of \$2550 for a "1970 Farm Type Tractor complete with R.O.P.S., open cab." Both rates were for movement to the Dominican Republic.¹

¹ U.S. Atlantic & Gulf/Hispaniola Steamship Freight Conference FMC No. 1 ("Tariff"), 5th rev. page 131-D, effective May 19, 1988.

On May 5, 1989 Tropicana asked the Conference to reinstate the \$2550 rate originally filed to the Dominican Republic. Tropicana concedes that the request was somewhat ambiguous in that it did not specify the type of tractor it intended to ship. The Conference staff submitted for approval a \$2550 rate under the description "Road-Building" tractor, with a Haiti destination. As a consequence, the rate, as approved by the Conference, was published under the wrong description, in the wrong tariff. Unaware of the error, Tropicana shipped one farm-type tractor on May 26, 1989.

On June 5, 1989 the Conference, in an attempt to correct its earlier error, made a new filing in the Dominican Republic section of the tariff.² Again, however, the rate shown in that tariff mistakenly applied to a road-building, not a farm-type tractor.³

² Section 8(e) provides that, where there is an error in the tariff, the Commission may authorize a carrier to waive collection of a portion of the freight charges if

(2) the common carrier or conference has, prior to filing an application . . . , filed a new tariff with the Commission that sets forth the rate on which the refund or waiver would be based;

* * *

(4) the application for refund or waiver is filed with the Commission within 180 days from the date of shipment. 46 U.S.C. app. §§ 1707(e)(2) and (4).

Date of shipment is the date of sailing of the vessel from the port at which the cargo was loaded. Rule 92(a)(3)(iii) of the Rules of Practice and Procedure, 46 C.F.R. § 502.92(a)(3)(iii).

³ Tariff, 15th rev. page 109-A, effective June 5, 1989 through July 5, 1989.

In his Initial Decision the ALJ denied the application for Tropicana's failure to file within the time allowed by statute a corrected tariff showing the rate on which the waiver would be based.⁴ The ALJ pointed out that while the Commission had gone to considerable lengths to find that new tariffs satisfy the jurisdictional requirements of the 1984 Act, notwithstanding discrepancies, the Commission has also consistently held that the tariff filing requirement is jurisdictional and cannot be waived.⁵ He rejected Tropicana's argument that the description of the tractor in the tariff was an insignificant technical variation. In his opinion, no objective reader could interpret the "Tractor, Road Building" to be the same as the "Model 970 Diesel Farm Type Tractor" described in the bill of lading.

On Exceptions PRMSA maintains that the ALJ erred both on the facts and on the law. PRMSA maintains that, inasmuch as it was not apparent from the shipper's request what type of tractor it intended to ship in 1989, the ALJ misinterpreted the facts when he concluded that

[I]t is clear from the shipper's [Tropicana's] request that the shipper was not requesting a rate of \$2550 A.I. for road-building tractors moving to Haiti, and it is

⁴ In a letter dated December 21, 1989 to PRMSA, the ALJ had earlier pointed out the error in description in the June 5, 1989 tariff, and advised that because the 180-day limit had elapsed he had no authority to grant the application. In its reply, PRMSA argued that the issue is not a failure to file a new tariff but rather concerns a "slight technical variation, which under the remedial nature of section 8(e), should not be an absolute bar to relief."

⁵ The ALJ cited in particular A. E. Staley Mfg. Co. v. Mamenic Line, 20 F.M.C. 642 (1978).

apparent that the shipper was instead asking the Conference to restore a previous rate that had expired in 1988 (\$2,500 A.I.) [sic] that had been applicable to farm-type tractors moving to the Dominican Republic.

We find no error of fact in the ID. As mentioned, PRMSA had published in 1988, at the request of Tropicana, a \$2850 rate for road-building tractors and a \$2550 rate for farm-type tractors. The ALJ, therefore, properly concluded that Tropicana's request for the "reinstatement" of the \$2550, without further explanation, referred to the rate on farm-type tractors.

PRMSA also argues that the ALJ erred as a matter of law in holding that it was necessary for the Conference to file a corrected tariff description of the tractor to comply with section 8(e) of the Shipping Act of 1984. In support of its argument PRMSA refers to the numerous cases cited in the ID that indicate that the Commission had granted relief even though the new tariff contained an error. Citing Nepera Chemical, Inc. v. Federal Maritime Commission, 662 F.2d 18, 21 (D.C. Cir. 1981), PRMSA contends that, to the extent the new tariff reflected the rate intended by both shipper and carrier, the requirement of section 8(e)(2) of the 1984 Act was satisfied. Consequently, PRMSA asks that the ID be reversed.

DISCUSSION

A specific commodity rate, by its terms, may only apply to the corresponding specific commodity description.⁶ The tariff filed

⁶ The Commission's rules governing the publication of tariffs provides that when commodity rates are established, the description of the commodity must be specific. Rates may not be applied to analogous articles. 46 C.F.R. § 580.6(h).

in May 1988 contained different descriptions and rates for the two types of tractors Tropicana intended to ship. However, the tariff filed on June 5, 1989, which should have set forth the rate on which the waiver would be based, contains only a rate for a road-building tractor, and not a rate for the diesel farm tractor described in the bill of lading.

In Special Docket No. 1703, Application of Westwood Shipping Lines for the Benefit of Wabash Alloys, 25 SRR 140 (1989), the shipper had requested the carrier to reinstate a rate on aluminum ingots, previously agreed upon, which had expired before a shipment of ingots moved. In that case, as here, the carrier inadvertently filed a rate with the wrong description, i.e., a rate applicable to aluminum sheets and coils instead of ingots. Later, the carrier filed corrective tariffs. However, these were filed beyond the statutory 180-day limit. The administrative law judge held that he had no authority to grant the application. 25 SRR 140. The Commission affirmed, rejecting the carrier's argument that it should disregard "a slightly different classification". 25 SRR 141.

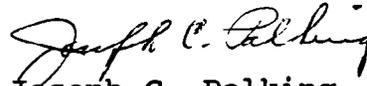
Here, Tropicana made an ambiguous rate request. The Conference compounded the matter by filing the wrong description in the wrong section of the tariff and by repeating the error in description in the new tariff filed to comply with section 8(e)(2). When the error was discovered, the 180-day limit for publishing a new tariff and refileing the application had elapsed.

As mentioned, section 8(e)(2) provides that the Commission may grant a refund or waiver only if, before applying for relief, the carrier has filed a new tariff which sets forth the rate on which the refund or waiver would be based. This jurisdictional requirement was not met in this case.

THEREFORE, IT IS ORDERED That the Exceptions of Puerto Rico Maritime Shipping Authority are denied;

IT IS FURTHER ORDERED, That the Initial Decision issued in this proceeding is adopted by the Commission;

FINALLY, IT IS ORDERED That this proceeding is discontinued.
By the Commission.


Joseph C. Polking
Secretary