(S E R V E D)
(October 5, 1992)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 2249

APPLICATION OF NYK LINE (NORTH AMERICA) INC.
ON BEHALF OF NYK LINE AND TRANSPACIFIC
WESTBOUND RATE AGREEMENT FOR THE
BENEFIT OF IMPERIAL IMPORTS CO.

ORDER ON REVIEW OF DECISION OF SPECIAL DOCKETS OFFICER

This proceeding is before the Commission upon its determination to review the July 14, 1992 decision of Special Dockets Officer Vera K. Genovese, denying a special docket application. The carrier/applicant, NYK Line, had sought permission, pursuant to section 8(e) of the Shipping Act of 1984, 46 U.S.C. app. § 1707(e), and the Commission's implementing regulations at 46 C.F.R. § 502.92, to waive and refund portions of the applicable freight charges on a shipment of luggage, N.O.S., from Bangkok to Honolulu. The total amount of charges in issue is $2913.28, $2810.86 of which NYK Line requested be waived and $102.42 be refunded.

In its application, NYK Line explained that on December 26, 1991, it advised its agent in San Francisco to file a $110/M rate. On January 9, 1992, it followed up with a status request. The agent responded that the filing instruction had been received but was misplaced, and the $110 rate was being filed effective January 10, 1992. The cargo in question, however, had been received by the carrier on January 8, 1992. Under the Commission's

rules, tariff charges are applicable on the date the cargo is received by the carrier. 46 C.F.R. § 580.5(d)(3). Therefore, the $110 rate for that cargo did not apply, and the higher applicable rate was charged.

Attached to the application is a copy of the telex from NYK Line to its agent requesting the filing of the $110 rate. Exhibit A, page 1. That document also reflects a message from the carrier to its loading agent in Bangkok, stating:

> DUE TO CHRISTMAS SEASON, WE CANNOT EXPECT WHEN IS THE EARLIEST POSSIBLE DATE FOR EFF. ONE THING FOR SURE IS THAT THIS RATE WILL NOT BE IN EFF ON 26 DEC. PLS DO NOT LOAD THIS CARGO TILL YOU RECEIVE A CONFIRMATION OF EFF. DATE FR NA CONF.

The decision of the Special Dockets Officer ("Decision") relied on this exhibit as evidence that the carrier knew the rate would not be promptly filed because of the holiday rush, and that the carrier was on notice not to accept the cargo until the new tariff filing was confirmed. The Decision concluded:

> [T]here was no error in the tariff in effect at the time NYK took delivery of the shipment. The error consisted of NYK's taking delivery of the goods before receiving notice that the rate had been filed . . . . The mistake therefore was in NYK's conduct of its operation and not one in the tariff itself, an error for which section 8(e) provides no remedy.

The Decision therefore denied the application.

The Commission issued a Notice to Review the Decision on August 3, 1992. NYK then submitted, on August 12, 1992, an additional document "in defense of" its original application and requesting that it be granted. NYK's August 12 filing is too late to constitute exceptions. 46 C.F.R. § 502.227. However, the

Commission and its designated Special Dockets Officers may at their discretion accept supplementary documents and other information to clarify a special dockets application when necessary, and the Commission has determined to consider NYK's filing as part of its review.

NYK Line argues three points:

1. Contrary to the Special Dockets Officer's characterization, it was not the agent which advised NYK Line of the delay in filing and to await confirmation, but rather the Tokyo office of NYK Line which so advised its Bangkok loading agent.

2. This difference is allegedly important because the Bangkok loading agent "would under normal circumstances expect the filing to be duly performed by San Francisco within 3 working days of the instruction (our absolute in-house standard)." Thus, the acceptance of the cargo so long afterwards was consistent with "normal business practices."

3. The filing instruction was misplaced by the San Francisco office. This is argued clearly to be a filing error, even though "the 8(e) situation would not have occurred if Bangkok had waited for written confirmation of the filing . . . ."

DISCUSSION

Special docket relief is available only if there is (i) an error in the tariff of a clerical or administrative nature, or (ii), as is relevant here, an error due to inadvertence in failing to file a new tariff. See 46 U.S.C. app. § 1707(e)(1); 46 C.F.R.

§ 502.92(a)(1). Errors in operation have been found by the Commission not to be errors for which the statute authorizes relief; only tariff-related errors qualify for section 8(e) applicability under the explicit terms of both the statute and the regulations. See, e.g., Special Docket No. 1345, Application of GEFA and Sea-Land for Biotech Corp., 23 S.R.R. 401 (1985), adopted in relevant part, 23 S.R.R. 786 (1986).

Here, the nature of the mix-up as originally detailed in the application appeared to be that the cargo was prematurely accepted by the carrier, although it was on notice not to do so until the tariff could be filed. It was on the basis of these representations that the Special Dockets Officer denied the application, stating that this was an operational rather than a tariff-filing error.

The supplemental information now offered by the applicant, however, lends greater support for its argument that the failure to file the tariff was the major cause of the applicability of an unintended rate. NYK's policy, as explained in its August 12 submission, is that three days are the "absolute" maximum amount of time that the filing of a tariff is expected to take. The Bangkok loading agent's acceptance of the cargo on January 8, 1992 (thirteen days after the December 26, 1991 instructions, and ten days more than the maximum three-day expected delay), was therefore consistent with normal operating procedure and was not an error per se. The Commission is now satisfied on the basis of the augmented record that the cargo was accepted on the premise that the company

standard of three days' grace for filing would be adhered to. The misplacement of those filing instructions by the San Francisco office and its resulting failure to file the tariff constituted the main cause of NYK's predicament, and meet the statutory requirements for providing relief under section 8(e) from the $2913.28 of unintended applicable charges.

Accordingly, the application is granted. NYK Line shall waive the collection of $2810.86 and refund $102.42 as sought and shall file the following notice in its tariff (No. 151):

> Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 2249, that effective December 29, 1991, and continuing through January 9, 1992, the rate on Luggage, N.O.S. from Thailand to Ports in Hawaii was $110.00 M. 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.

By the Commission.

Joseph C. Polking
Secretary