EP

Decision No. 65958

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of SECURITY TRUCK LINE, a corporation, for authority to partially waive collection of charges.	Application No. 43526

Handler, Baker and Mastoris, by Marvin Handler, for applicant.

Paul Porton, for Libby, McNeill & Libby; R. D. Toll, A. D. Poe and J. X. Quintrall, for California Trucking Association, interested parties.

Donald B. Day and John R. Laurie, for the Commission staff.

O P I N I O N

By this application Security Truck Line, a corporation,[1] seeks authority to waive collection of certain undercharges on shipments of canned goods transported from Sunnyvale to Sacramento during the period from May 17, 1959 to March 15, 1961, inclusive. Applicant operated under a highway contract carrier permit during the period May 17, 1959 to January 19, 1961, inclusive, and under a highway common carrier certificate during the period from January 20, 1961 to March 15, 1961, inclusive.[2] Applicant also operated as a common carrier by motor vehicle in interstate commerce between the same points under rates on file with the Interstate Commerce Commission.

1/ By Decision No. 64905, dated February 5, 1963, in Application No. 45054, Security Transportation Co. was authorized to lease Security Truck Line and to purchase the operating rights of the latter. Effective February 18, 1963 Security Transportation Co. adopted the tariffs of Security Truck Line. The aforesaid decision provided that Security Transportation Co. should assume all obligations of Security Truck Line with respect to the collection of outstanding undercharges.

2/ Applicant began operating as a California intrastate highway common carrier for the involved traffic on January 20, 1961, under tariffs filed pursuant to a certificate of public convenience and necessity granted by this Commission by Decision No. 60147, dated May 24, 1960, in Application No. 41610.

Public hearing of the application was held before Commissioner Grover and Examiner Bishop at San Francisco on February 9 and March 22, 1962. With the filing of an exhibit by applicant on April 10, 1962, the matter was taken under submission.[3/]

Evidence on behalf of applicant was introduced through its president and through Libby's manager of transportation and warehousing. Representatives of the Commission staff assisted in the development of the record.

Applicant rated the shipments in question as interstate shipments at its interstate rate of 19 cents per 100 pounds, minimum weight 36,000 pounds.[4/] The instant application stems from a directive from this Commission's staff to applicant to collect undercharges on the involved shipments on the basis that the traffic was, in fact, intrastate in character. During the period of permit operations (May 17, 1959 to January 19, 1961), the effective intrastate rates were 26 cents, subject to a minimum carload weight of 40,000 pounds, and 21 cents, minimum weight 80,000 pounds.[5/] During the period of highway common carrier operations here in issue the effective intrastate rates were class rates of 38 cents, minimum weight 36,000 pounds (January 20, 1961 to February 10, 1961) and 29 cents,

3/ In the course of the hearing memoranda of points and authorities were filed by counsel for applicant and counsel for the Commission staff.

4/ Item No. 460 of Security Truck Line's Local Freight Tariff No. 9, MF-ICC No. 4. All rates hereinafter stated will be in cents per 100 pounds.

5/ These rates were rail rates published in Pacific Southcoast Freight Bureau, Agent, Tariff 300, and authorized to be applied by highway contract carriers under the alternative rate application provisions of Item No. 200 of the Commission's Minimum Rate Tariff No. 2. The rates were increased to 26½ cents and 21½ cents, respectively, effective February 27, 1961, under authority of Decision No. 61440, dated February 7, 1961, in Application No. 42837 and related matters.

minimum weight 42,000 pounds (February 11 to February 13, 1961) and a commodity rate of 26 cents, minimum weight 45,000 pounds (February 14, 1961 to March 15, 1961). These rates were published by applicant in Pacific Coast Tariff Bureau Tariff No. 16, C. R. Nickerson, Agent.

Most of the shipments, the record shows, weighed in the neighborhood of 45,000 pounds although some weighed much more. According to the witnesses, the amount of tonnage tendered applicant by Libby on any single day for movement from Sunnyvale to Sacramento was, with possibly a few exceptions, in excess of 80,000 pounds, and on some days the tonnage exceeded 300,000 pounds. Had the shipper known that the Commission would consider the traffic in question to be intrastate in character, 80,000 pounds or more of canned goods would have been tendered on each bill of lading in order to get the benefit of the aforesaid rates of 21 and 21½ cents.

Libby is still of the opinion, the record shows, that the traffic here in issue moved in interstate commerce. It has agreed with applicant, however, to concede the jurisdiction of this Commission in the matter for the limited purpose of seeking authorization by the Commission of waiver of the alleged undercharges down to the basis of the aforesaid rates of 21 and 21½ cents. It is to this basis that applicant seeks authority by the application herein to waive undercharges. According to the record, the total amount of the alleged undercharges is approximately $18,000. The amount herein sought to be waived is approximately $13,000.

The record discloses the following facts about the canned goods movement of which the involved shipments are a part. Applicant has been engaged regularly in the transportation of canned goods for Libby from that company's canning plant at Sunnyvale to its warehouse

at Sacramento for approximately 15 years. This movement has been so large as to cause applicant to establish a terminal in Libby's yard at Sunnyvale and to maintain employees there. There is also a substantial movement by rail from Libby's plant at Sunnyvale to its Sacramento warehouse. The latter facility is a consolidation warehouse at which mixed carload shipments of canned fruits and vegetables are assembled from the canned goods tonnage which comes into the warehouse from Libby's canning plants at various California points. For example, cases of canned fruits originating at Sunnyvale may be placed in a rail car, on the warehouse track at Sacramento, with canned vegetables and other canned fruits originating at Libby's plants at Gridley, Sacramento and Selma, for shipment to eastern points. According to the record, all of the rail shipments out of the Sacramento consolidating warehouse are destined to points east of the Rocky Mountains.

The rail tariffs provide storage and consolidation-in-transit privileges at Sacramento. Under this arrangement the shipper is, in effect, refunded the inbound charges covering movement by rail from Sunnyvale and the other canning plant locations to Sacramento when the tonnage moves out by rail to said eastern destination points. This arrangement does not apply to tonnage which moves to the Sacramento consolidation warehouse by truck. For this reason, the record shows, Libby endeavors to move as much of the Sunnyvale-to-Sacramento tonnage by rail as possible. However, because of limited storage facilities at the Sunnyvale plant, Libby finds it necessary, during the canning season, to utilize the services of applicant in addition to those of the rail line serving said plant.

After the Sunnyvale shipments arrive at the Sacramento warehouse, the record shows, portions of them may remain in storage for a period of time before reshipment to eastern destinations. Also, while most of the tonnage from Sunnyvale finds its way eventually to interstate destinations, occasionally an emergency arises necessitating the diversion of some of the canned goods in question, after arrival at the Sacramento warehouse, to a California consignee. This occurs when the stock of a desired item at other Libby warehouses is temporarily exhausted.[6/] According to a late-filed exhibit, a check which Libby made of the period from April 1 to December 31, 1959 showed that the tonnage of Sunnyvale items shipped out of Sacramento to California consignees amounted to 4.5 percent of the tonnage shipped by rail and truck during the same period from Sunnyvale to the Sacramento transit warehouse.

From the time when the Sunnyvale-to-Sacramento movement began, Libby's transportation manager testified, the intent has been for all such shipments, both rail and truck, to move out of the Sacramento warehouse in the aforesaid consolidated rail cars to eastern points and, therefore, the intent has been, from the time the shipping documents were prepared at Sunnyvale, that said shipments move in interstate commerce. To this end, he said, instructions were long ago issued by Libby to its employees to place on all

6/ According to the record, truckload shipments of canned goods consigned to Libby's California customers normally are shipped directly to the latter from the warehouse of the plant at which the desired items are canned. Less-than-truckload shipments to said customers normally move from Libby's Alameda warehouse. The transportation manager pointed out that when emergency shipments are made from the Sacramento transit warehouse Libby is faced with higher transportation costs because of the combination of rates over Sacramento.

bills of lading covering shipments to the Sacramento warehouse the words "for interstate shipment". These instructions, the record indicates, were outstanding throughout the period in which the shipments here in issue were made. Occasionally, he said, the words, through oversight, have been omitted. Applicant's president testified that it was his understanding that all of Libby's canned goods shipments from its Sunnyvale plant to its Sacramento warehouse were interstate in character, including those shipments for which bills of lading did not contain words indicating movement in interstate commerce.

Counsel for applicant argued that the Commission has the power under the statutes to authorize waiver of undercharges, and that waiver to the sought compromise basis would not be discriminatory. Applicant, he said, would like to avoid the question whether the subject shipments were interstate or intrastate, in view of the diversity of decisions, even of the United States Supreme Court. Nevertheless, he referred approvingly to certain decisions of that Court which the shipper witness had cited as supporting the position that said shipments were in interstate commerce.

Counsel for the Commission's staff argued, in substance, that the traffic in question was intrastate in character; that the Commission has no power to authorize preference or discrimination; that no specific or express authority to waive undercharges is provided in either the Highway Carriers' Act or the Public Utilities Act; that if such power of the Commission exists it must be by virtue of a liberal interpretation of Sections 532, 734 and 3667 of the Public Utilities Code, that is, it must be based on the reparation power or upon the Commission's equitable discretion; that it is a

maxim of transportation that tariff rates, especially those of public utility carriers, are inflexible and must be adhered to very strictly, even when a hardship is worked; that, however, the application of said maxim does not mean that deviations from the tariff should never be allowed; and that the power to waive undercharges, if it exists, should be exercised only under exceptional circumstances.

Both counsel supported their several arguments with citations of statutes and of Commission and court decisions.

Discussion

As hereinbefore stated, Libby has consistently contended and still contends that the shipments in issue were in the course of interstate commerce when they were transported by applicant from Sunnyvale to Sacramento, although applicant and Libby are willing to concede the jurisdiction of this Commission if waiver of undercharges to the compromise basis is authorized. If the shipments were interstate in character, interstate rates were applicable and this Commission has no jurisdiction in the matter, regardless of applicant's proposal. We must first ascertain, then, whether the traffic was interstate or intrastate.

It is well established that the intent of the shipper determines whether a shipment is interstate or intrastate in character (see T.& N.O.RR. v. Sabine Tram, 227 U.S. 111). In B. & O. v. Settle (260 U.S. 166) the shipper testified in the trial court that the shipments of lumber there in issue, which were consigned from southeastern interstate points to Oakley, Ohio, were actually destined to Madisonville, Ohio, a more distant point. Although delivery was taken at Oakley and the cars held there several days by the shipper and then reshipped on new billing to Madisonville, the

Supreme Court held that the second movement was in interstate commerce. The billing procedures utilized by the shipper were for the purpose of obtaining the benefit of a combination of rates lower than the through interstate rates to Madisonville. The shipper had no customers at Oakley. So, in the proceeding here, the testimony of the Libby transportation manager that the shipments of canned goods from Sunnyvale were intended for interstate movement beyond Sacramento is significant.

The intent of interstate movement is further supported by evidence that the specific purpose of the transit or consolidation warehouse at Sacramento is to act as an assembly point and temporary depot for various kinds of canned fruits and canned vegetables, from which point they are to be shipped in mixed carloads to eastern interstate destinations. The record indicates that it is practically impossible for Libby to sell, in the eastern markets, straight carloads of particular fruits and vegetables. Therefore, it has been found necessary to designate some centrally located warehouse as the consolidation point for the various kinds of fruits and vegetables which are packed at Libby's several plants and which are intended for the eastern market. As hereinbefore stated, Libby's California customers are normally supplied directly from its canning plants, as to carload quantities, and from its Alameda warehouse as to less-than-carload quantities.

The intent of movement in interstate commerce is supported also by evidence that Libby's employees had standing instructions, dating from the inception of the transit operation on October 1, 1948, to place on bills of lading the notation "for interstate shipment", although, at times, the notation was omitted through inadvertence.

It is true that the consignee and ultimate eastern point of destination of a particular case of canned goods may not have been known when said canned goods were shipped from the Sunnyvale plant and that some of the canned goods were held in storage for longer or shorter periods. It has been held, however, that interstate transportation may commence before the sale of the property in question has been arranged and before the ultimate (interstate) destination of such property has been determined. (See, for example, Railroad Commission of Ohio v. Worthington, 225 U.S. 101; T.& N.O.RR. v. Sabine Tram, 227 U.S. 111; S.P. Terminal Co. v. Interstate Commerce Commission, 219 U.S. 498).

It has been held also that shipments are in the course of interstate commerce although subsequently, and before reaching their ultimate destinations, the commodities involved may be stopped in transit for longer or shorter periods for such purposes as grinding of cottonseed cake into meal and sacking it, processing and labeling of various grocery items, and temporary storage of various commodities awaiting completion of sales contracts, or arrival of ships into which the commodities are to be loaded, or for other purposes. (See, for example, Railroad Commission of Ohio v. Worthington, 225 U.S. 101; S.P. Terminal Co. v. Interstate Commerce Commission, 219 U.S. 498; Walling v. American Stores, 133 Fed.(2nd) 840; Mitchell v. C & P Shoe Corp., 286 Fed.(2nd) 109).

In the light of these holdings, we find that those of the shipments here in issue which were placed in the Sacramento transit warehouse and were subsequently consolidated into mixed carload shipments for rail movement to interstate destinations were in the course of interstate transportation from the time they left Sunnyvale. As

to those shipments which were loaded directly into rail cars at Sacramento from applicant's trucks, there can be even less question that they were in interstate commerce during the movement between Sunnyvale and Sacramento.

There remains the question of the status of such portions of the shipments involved herein which, subsequent to arrival in Sacramento, were shipped to California consignees. As hereinbefore indicated, these deliveries, which are in small quantities, arise from emergency situations in which the supply of the particular items at the Sunnyvale plant or the warehouse at Alameda is temporarily exhausted. The Libby witness testified that the tonnage so diverted is small and that it varies from year to year. As previously stated, the tonnage in question for a nine-month test period amounted to 4.5 percent of the Sunnyvale-to-Sacramento movement. The record shows that the intent of the shipper was that all of the traffic, both rail and truck, which was shipped from Sunnyvale to the Sacramento transit house move ultimately beyond Sacramento to interstate destinations. This included those portions which, due to emergency, were later diverted from Sacramento to California consignees. In our opinion, this latter tonnage was actually in interstate commerce when it moved on applicant's trucks from Sunnyvale to Sacramento. When that tonnage left Sunnyvale Libby did not know or intend that any of it would ultimately reach California consignees. As the United States Supreme Court said in Hughes Bros. v. State of Minnesota, 272 U.S. 469, "The mere power of the owner to divert the shipment already started does not take it out of interstate commerce if other facts show that the journey has already begun in good faith and temporary interruption of the passage is reasonable and in furtherance of the intended transportation".

That the inclusion of such tonnage in the movement from Sunnyvale to Sacramento was no device by which to secure therefor the benefit of the lower interstate rate is borne out by the fact that considerably higher charges, resulting from a combination of rates made over Sacramento, were paid by Libby on canned goods moving from Sunnyvale via its Sacramento warehouse to California consignees, than accrued on like shipments which moved from Sunnyvale directly to the same points of destination. For example, on a carload of canned goods moving from Sunnyvale to Sacramento and later reshipped to Stockton the total transportation charges were more than double the charges on a like quantity transported directly from Sunnyvale to Stockton. In addition to the transportation charges there was, of course, the expense to Libby of the warehouse handling at Sacramento.

Upon consideration, we find that the shipments embraced by the application herein were moving in interstate commerce while being transported by applicant from Sunnyvale to Sacramento, and were, therefore, beyond the jurisdiction of this Commission. The application will be dismissed.

In view of the foregoing finding, it is not necessary to consider the other questions raised by the parties.

O R D E R

IT IS ORDERED that Application No. 43526 is dismissed.

The effective date of this order shall be twenty days after the date hereof.

Dated at San Francisco, California, this 3rd day of September, 1963.

[signature] President

[signature]

George G. Grover

Commissioners

I dissent as to those items which constitute intrastate commerce. [signature] Commissioner

I dissent. Frederick B. Holoboff, Comm.