

ORIGINAL

Decision No. 66026

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation into the operations,)
rates, and practices of Gem Freight)
Lines, a California corporation.)

Case No. 7006

Anthony Travers and Edwin Brown, for
Topco Associates, petitioner.
Louis Spector, for Scherman Bros.,
petitioner.
William C. Bricca and George Kataoka,
for the Commission staff.

OPINION ON REHEARING

Case No. 7006 was instituted by this Commission in November, 1960 to investigate the operations, rates and practices of Gem Freight Lines (Gem), which operates under the jurisdiction of this Commission as a highway permit carrier. A hearing was held at San Francisco on January 31, 1961. Neither Topco Associates, Inc. (Topco), nor Scherman Bros. (Scherman), petitioners herein, were parties to said proceeding, nor did either make an appearance. In Decision No. 61735, issued March 28, 1961, we found that Gem had charged and collected rates less than the minimum rates established by Commission Minimum Rate Tariff No. 2 (MRT 2). The decision states:

"The basic cause for the undercharges was the carrier's rating of these shipments as split pickup shipments and multiple-lot shipments without regard to the time limit imposed by Items 160 and 85 of Minimum Rate Tariff No. 2. The result of this failure to observe the time limit requirements necessitated the split pickup and parts of the multiple-lot shipments being rated separately, producing a higher charge than collected by the carrier."

Gem was ordered to collect the undercharges set forth in the decision and to take action, including court action if necessary, to collect other undercharges which might be disclosed by further examination of its records.

Topco and Scherman, both alleging to be shippers adversely affected by Decision No. 61735, filed petitions for rehearing stating that they first became aware of Case No. 7006 as a result of action taken by Gem after the decision; that they wished to offer evidence in defense; and that the undercharges, as to them, should be waived.

Topco and Scherman, in separate petitions, made essentially the same allegations concerning the merits of our original decision. They allege: (1) that as to certain shipments the evidence showed that they substantially complied with the documentation requirements of Items 85-C (multiple lots) and 160-P (split pickup) of MRT 2; and (2) that the time limit within which pickups should have been made, as required by Items 85-C and 160-P, was disregarded by Gem without the knowledge of petitioners; that this was done solely for Gem's convenience; that it was not caused by any action of petitioners; that it did not benefit petitioners; and that therefore petitioners should not be liable for such omission of the carrier.

We granted the petitions, and rehearing was held March 28, 1962 before Examiner Fraser at San Francisco. All parties referred to testimony taken at the original hearing, and for the purposes of this decision we incorporate into this record the original hearing record as far as it concerns petitioners.

The documentation provisions of Items 85-C and 160-P are in large part the same. They require: (1) that the carrier shall not transport a shipment unless prior to or at the time of the initial pickup written information has been received from the consignor describing the kind and quantity of property which will constitute the shipment, and (2) that at the time of or prior to the initial pickup, the carrier shall issue to the consignor a single document for the entire shipment, and (3) that an additional document shall be issued for each pickup (including the initial pickup) which shall give reference to the single document governing the entire shipment. (All references herein to Items 85-C and 160-P are to the versions in effect at the time of the shipments in question.)

The split pickup rule (Item 160-P) is a tariff innovation established to give motor carriers additional flexibility in their operations by making an exception, under special circumstances, to the usual method of pickup. (41 C.R.C. 671, 705 (1938).) The multiple lot exception (Item 85-C) was adopted in order that property tendered as a shipment might, at the option of the carrier and for his convenience, be transported in more than one physical movement. (Decision No. 46778, Case No. 4808 (1952).) Both of these rules permit certain shipments that would otherwise travel at higher rates to be combined at a lower rate. To safeguard against abuse of these rules, the documentation requirements were promulgated. Essentially they require the consignor to identify, prior to shipment, the goods that he intends to tender for transportation. This requirement was designed to guard against loose arrangements and vague or incomplete instructions; otherwise the consignor would

have time to forward shipping instructions (for the lower rate) as his needs arise rather than as part of the single transaction contemplated by the rules.

The evidence adduced by Scherman shows a violation of the documentation requirements of Item 85-C (multiple lots). Gem transported a shipment of baled waste paper from Scherman on Tuesday, February 2, 1960, and a shipment on Friday, February 5, 1960. No holiday intervened. Both shipments were carried on individual bills of lading, there was no master bill of lading covering the entire shipment, and the individual bills of lading did not refer to each other. A witness for Scherman testified that the "issuance of this particular pickup was done orally by myself. There was no written instructions as far as the pickup or shipping instructions. This was all done orally by myself." Scherman expected Gem to transport these two shipments as a multiple lot shipment and relied on Gem to prepare the master bill of lading. A witness for Gem testified that both shipments were tendered at the same time, prior to the first pickup, but that they were not transported within the time limits imposed by Item 85-C because Gem diverted its truck to perform a more valuable movement.

To accede to Scherman's theory of the case would negate the whole purpose of the documentation requirements; under such an approach, shippers and carriers could look over their records to determine which shipments were transported within the time limits of Item 85-C and then agree to the lower combined rate on the ground of a claimed prior oral request.^{1/} Moreover, if oral instructions

1/ Scherman is actually asking us to overlook two tariff violations: (1) the documentation requirement, and (2) the time limit requirement on pickups. In view of our holding on the question of documentation requirements, it is immaterial when the pickups were made.

are to be permitted, it should be done by tariff amendment; the present provisions expressly require written documents. We hold that the oral information given by Scherman to Gem in this case, even though prior to initial pickup, was not substantial compliance with the documentation requirement of Item 85-C.

The evidence brought forward in support of the Topco petition involves a different phase of the documentation requirements of Items 85-C and 160-P. Topco is concerned with thirteen shipments involving claimed undercharges by Gem. Our review of these shipments on rehearing shows that Parts 1 and 11 had the documentation required by the tariff for the split pickup rate; with respect to those shipments, the component parts that were picked up on the same calendar day should be combined for such lower rate. Significantly, Item 85-C(b) (multiple lots) states (in part): "If any of the property described in the single multiple lot document is picked up without complying with the foregoing provisions, each such pickup shall be rated as a separate shipment...." (Emphasis added.) One of the "foregoing provisions" (Item 85-C(a)3) is the requirement that "at the time of or prior to the initial pickup, the carrier shall issue to the consignor of a single multiple lot document for the entire shipment." Item 160-P (split pickup), on the other hand, provides:

"(d) The carrier shall not transport a split pickup shipment unless prior to or at the time of the initial pickup, written information has been received from the consignor showing the name of the consignor, the points of origin and the kind and quantity of property in each component part of such shipment.

"(e) At the time of or prior to the initial pickup, the carrier shall issue to the consignor a single split pickup document. It shall show the name of the consignor,

points of origin, date of pickup, name of the consignee, point of destination and the kind and quantity of property of the entire shipment....

"(f) If split delivery is performed on a split pickup shipment or a component part thereof, or if written information does not conform with the requirements of Paragraph (d) hereof, or if all of the component parts are not received by the carrier during one calendar day, each component part of the split pickup shipment shall be rated as a separate shipment under other provisions of this tariff, except that those component parts which do conform with the requirements of this item shall constitute a separate split pickup shipment or shipments."

In short, the tariff provides that in multiple lot shipments, if the carrier does not issue a single multiple lot document at the time of, or prior to, the initial pickup, each pickup must be rated separately, but in split pickup shipments, if the carrier does not issue a single split pickup document at the time of, or prior to, the initial pickup, each pickup need not be rated separately. Paragraph (f) of the split pickup item, although requiring that paragraph (d) be complied with, makes no mention of paragraph (e). It can be argued that the two items should be construed to operate in the same way, but in view of the difference in language we believe such a result may best be accomplished by tariff amendment.

It is not necessary to discuss whether or not the other eleven parts relating to Topco contain the necessary documentation, for in our view of the evidence Topco has not shown itself entitled to any relief even with the proper documentation. In addition to the documentation provisions of Items 85-C and 160-P, these items require the carrier to pick up the goods within certain designated times. Item 85-C(a)4 provides: "The entire shipment shall be picked up by the carrier within a period of two days computed from 12:01 a.m. of the date on which the initial pickup commences,

excluding Saturdays, Sundays and legal holidays. Exception: Split pickup shipments must be picked up during one calendar day." Item 160-P(f) provides that if "all of the component parts are not received by the carrier during one calendar day, each component part of the split pickup shipment shall be rated as a separate shipment under the provisions of this tariff, except that those component parts which do conform with the requirements of this item shall constitute a separate split pickup shipment or shipments."

It is agreed by all parties that the time limits imposed by the above quoted items were not complied with by the carrier. It is alleged by petitioners, and we find, that the carrier's failure to comply was for its sole benefit, was without the knowledge of the consignor, and was to the detriment of the consignor. Notwithstanding these circumstances, it is our opinion that petitioner is not entitled to relief.

In the usual business transaction, the seller desires a high price and the buyer a low one; the parties are free to agree on price, and in the event of any inquiry into the circumstances, the self interest of one or both of them will ordinarily result in disclosure of the relevant facts. In the case of a transaction governed by one of our minimum rate tariffs, however, both parties may favor a low rate, for the carrier may desire to gain thereby a competitive advantage over other carriers. A full disclosure might be disadvantageous to both parties, and for this reason, strict enforcement of tariff requirements, particularly the documentation provisions, may be the only means by which the Commission can satisfy itself that there has been no attempt to gain unfair advantage over competing carriers or otherwise to violate the law.

Once it has been established, therefore, that the terms of a minimum rate tariff have not been strictly followed, a heavy burden of explanation rests upon the parties.

The essence of petitioner's defense is that petitioner is in no way responsible for the carrier's failure to comply with the tariff requirements regarding time of pickup; that the pickup could have been made within the required time; and that the failure to do so did not constitute an effort to evade the tariff but was solely a matter of convenience to the carrier. Such a defense may be accepted, if at all, only upon a showing that the shipper satisfied all of the tariff requirements which were in its power to perform or for which it was responsible. (Cf. Julius Heyman Co. v. A.T.&S.F. Ry. Co., 6 Cal.R.C. 243, 245.) In this case no competent evidence was introduced to the effect that the component parts of these shipments were actually ready to be picked up within the specified time limit. The requirement that all the component parts must be available to the carrier for immediate transportation at the time of the first pickup is explicitly set forth in Item 85-C(a)1 (multiple lot).^{2/} It is implicit in the term "shipment" as used in Item 160-P(d) (split pickup).^{3/} "Shipment" is defined in Item 11(k) as "a quantity of property physically tendered by one consignor...." Therefore, unless all the property to be transported is "physically tendered" to the carrier prior to the first pickup it is not a "shipment" and the conditions of Item 160-P have not

^{2/} 85-C(a)1: "The entire shipment shall be available to the carrier for immediate transportation at the time of the first pickup."

^{3/} 160-P(d): "The carrier shall not transport a split pickup shipment...."

been fulfilled. We hold that one of the requirements that must be met in order to obtain the benefits of Items 85-C and 160-P is that all property to be transported be physically tendered and available for pickup within the prescribed time. No evidence was introduced on this subject and we find that this requirement was not met.^{4/}

Topco is under the misapprehension that our order in Decision No. 61735 required Gem to collect from Alpha Beta the undercharges involved in shipments to Alpha Beta. Our order stated that Gem "is hereby directed to take such action as may be necessary, including court proceedings, to collect the amounts of undercharges set forth in this decision, together with any additional undercharges found after the examination required by paragraph 3 of this order, and to notify the Commission in writing upon the consummation of such collection." No mention is made of collecting from Alpha Beta. It is expected that the carrier will collect undercharges from the persons who are liable for the carriage. In the case of the shipments involving Alpha Beta, it appears that Topco contracted for them and may well be the party liable for the undercharges. However, we make no finding on this issue, as it is within the province of the appropriate court in the event collection proceedings are instituted.

ORDER ON REHEARING

IT IS ORDERED that:

1. Finding No. 2 of Decision No. 61735 is amended to show that: (1) for Freight Bill No. 6432, the correct charge is \$363.36

^{4/} We do not necessarily suggest that petitioner would have been granted relief had this requirement been met; that fact situation is not before us. Serious questions are involved.

and the undercharge is \$42.38; (2) for Freight Bill No. 6371, the correct charge is \$242.34 and the undercharge is \$40.11; and (3) the undercharges total \$2,017.58 rather than \$2,124.70.

2. Except as modified in Paragraph 1 of this Order, Decision No. 61735, dated March 28, 1961, in Case No. 7006, is affirmed.

The Secretary of the Commission is directed to cause personal service of this order to be made upon Gem Freight Lines, upon Topco Associates, Inc., and upon Scherman Bros. The effective date of this decision as to each party shall be twenty days after the date of said service upon such party.

Dated at San Francisco, California, this 17th day of September, 1963.

William M. Burnett
President

George T. Grover

Frederic B. Holcomb
Commissioner's

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I concur in
the order.

Commissioner