

ORIGINAL

Decision No. 78458

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

HAROLD S. SMALL,)
)
 Complainant,)
)
 vs.)
)
 BEKINS MOVING & STORAGE CO., a)
 corporation,)
)
 Defendant.)

Case No. 9105
(Filed August 14, 1970)

Harold S. Small, for himself and
Susan Small, complainant.
Wyman C. Knapp, Attorney at Law, of Knapp,
Gill, Hibbert & Stevens, for Bekins
Moving & Storage Co., defendant.
Charles P. Barrett, for the Commission staff.

O P I N I O N

The complaint alleged that defendant's performance in connection with complainant's move from San Francisco to San Diego was unsatisfactory.

Hearing was held in San Diego on November 19, 1970, before Examiner Gilman. At the hearing, defendant offered an amendment to clarify its status. The amendment was filed on December 3, 1970. Complainant and his wife testified. Defendant adduced testimony from an officer of the corporation and a San Diego based employee.

Defendant is a household goods carrier subject to the provisions of the Household Goods Carriers Act. The allegations set forth in paragraph 2, 3a, 3b, 3c, 3d, 3h and 5 of the complaint do not constitute a cause of action within the statute or the Commission rules and regulations governing household goods carriers.

Paragraph 3c of the complaint regarding the failure to give appropriate notice of delivery delays within our authority under the provisions of Sec. 5138, Public Utilities Code. The Commission has

exercised this authority by Item 165 of Minimum Rate Tariff 4-B, which requires notification when delivery cannot be made at the time specified in the shipping documents.

In exhibits 3 and 5 delivery was promised not later than June 19. Delivery was made on June 18 and thus no notice was required.

Mrs. Small testified that the drivers at time of pickup had orally represented that the goods would be delivered earlier; however, such oral representations under the terms of the tariff do not enlarge or modify the carrier's responsibilities for notification which must be determined solely on the written representation of delivery time.

Paragraphs 3l and j deal with Bekins' alleged inefficiency and bad faith in arriving at a settlement for the items allegedly damaged. However, there was no showing that carrier delayed beyond the time limits allowed by Item 34, MRT 4-B for acknowledging damage claim (30 days) or paying, rejecting or making a firm compromise offer (120 days). Consequently, we cannot find any injury to complainant as regards this segment of the complaint.

The subject matter of paragraphs 3f and g is generally within our jurisdiction, since provisions of Minimum Rate Tariff 4-B govern weighing procedures as an incident of rate regulation.

The evidence shows that defendant was not entitled to charge for reweighing the shipment, since the difference between scale weights was more than 100 pounds on a shipment of less than 5,000 pounds.

We conclude that authority to order refund of overcharge is necessarily implied in our powers to fix and enforce rates. This issue was not raised by the pleadings; nor was a refund expressly

sought, however, the matter was expressly recognized as an issue during the course of hearing and defendant has not claimed surprise nor asked us to refrain from decision.

As to overcharges for packing services (paragraph 4 of the complaint) it is admitted that the parties have settled the issue.

The Amendment to Answer

Complainant asserts that because of the state of the pleadings at the date of hearing, we should nevertheless hold defendant to all of the obligations of a public utility common carrier.

The complaint alleged that defendant was a public utility, implying rather than directly alleging, that it was acting as such in its dealings with complainant.

Defendant admitted it was a public utility, which is literally true, since it performs utility services for other customers as a warehouseman. The original answer did not dispel the not unreasonable, but incorrect, inference that defendant had served complainant as a public utility.

Not until hearing, did defendant present an amendment to clarify the relationship between the parties. The record abundantly displays the injurious surprise imposed upon complainant by the unexplained and unexcused delay.

Our Rule 8 contemplates that material amendments are normally to be made sufficiently in advance of hearing to permit the parties to meet any new issue introduced and allows a presiding officer to reject a late-filed amendment if no justification is advanced for the delay. However, in this instance, rejection of the amendment would have been an empty act unless we were prepared to hold defendant to the higher substantive standards of conduct imposed

on carriers governed by the Public Utilities Act. This we could not do without exceeding our legislative mandate (cf. §5112, Public Utilities Code) and without violating the general proposition that jurisdiction cannot be created by estoppel.

Relief Sought

Complainant seeks no individual redress but rather a broad scale investigation of defendant and correction of service deficiencies found.

The Commission presently is hearing a proceeding (Case No. 5330, OSH 49) to determine whether the estimating rules of Minimum Rate Tariff 4-B, applicable to all household goods carriers, should be modified. In view of the pending proceeding no broad scale investigation of the defendant is warranted. If defendant fails to comply with any statutory requirements, the Commission will take appropriate steps to insure compliance.

Findings

1. Defendant is a household goods carrier.
2. Complainant was given written assurance of delivery before June 19, 1970. Delivery was made on June 18.
3. There was no showing that defendant did not acknowledge complainant's damage claim within 30 days or pay, reject, or make a firm compromise offer within 120 days.
4. When informed of complainant's complaint that defendant had misweighed the shipment, defendant afforded complainant an opportunity to reweigh on a public scale. Defendant computed the rate on the lower of the two weights.
5. The initial weight was 3,320 pounds. The reweight was 3,460 pounds.
6. Complainant and defendant have settled for alleged overcharges for packing services.

Conclusions

1. Defendant's only obligations to complainant under the Public Utilities Code are those of Sec. 5101 through 5319 and those additional obligations imposed by Minimum Rate Tariff 4-B adopted by the Commission pursuant to those sections.

2. Defendant did not violate Item 162 of Minimum Rate Tariff 4-B.

3. Defendant did not violate Item 34 of said tariff.

4. Defendant violated Item 120 by charging \$20.00 for reweighing when the shipment weighed less than 5,000 pounds and the difference between scale weights is more than 100 pounds.

5. Aside from those issues referred to in Conclusions 2 through 4 and the settled matter of packing overcharges, the remainder of the complaint deals with matters not within our jurisdiction.

O R D E R

IT IS ORDERED that within twenty days after the effective date of this order, defendant shall pay to complainant \$20.00, together with interest at 7% annum from June 18, 1970.

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

Dated at San Francisco, California, this 23rd day of MARCH, 1971.

[Signature]
Chairman

[Signature]
[Signature]

[Signature]
Commissioners

Commissioner William Symons, Jr., being necessarily absent, did not participate in the disposition of this proceeding.