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ORIGINAL

Decision No. 80717

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Folger Athearn, Jr.

Complainant.

vs.

Associated Freight Lines,

Defendant.

Case No. 9334
(Filed February 22, 1972)

Folger Athearn, Jr., for himself, complainant.
Daniel Baker, Attorney at Law, and R. D. Davis, for defendant.

O P I N I O N

Complainant is a freight traffic consultant engaged by General Electric Company. Defendant is a highway common carrier. The complaint alleges that on March 31, 1969, and on August 14, 1969, defendant charged General Electric Company and received from it a greater compensation for the transportation of property than the applicable rates and charges specified in defendant's tariff schedules filed and in effect at the time. Defendant denies the allegations.

At prehearing conference held May 8, 1972, before Examiner Thompson at San Francisco, the parties agreed to certain facts and stipulated that the matter be taken under submission on the agreed facts subject to briefs. Briefs were filed September 11, 1972 and the matter is ready for decision.[1/]

1/ The matters agreed to are set forth in Memorandum of Prehearing Conference dated May 12, 1972, and in Amendment to Memorandum of Prehearing Conference dated June 2, 1972.

The only issues in this complaint are the alleged overcharges involving shipments described in defendant's Freight Bill No. 222091, dated March 31, 1969, and Freight Bill No. 299548, dated August 14, 1969. The issues concern only whether defendant charged and collected the rates maintained by it in Western Motor Tariff Bureau, Inc., Local Tariff No. 111 in effect at the times of shipment. The lawfulness of the tariff rates are not in issue here; any action in connection therewith with respect to the shipments here involved being barred by Section 735 of the Public Utilities Code.

The gravamen of the alleged offenses is the application by defendant of charges set forth in Item No. 311 of Western Motor Tariff Bureau Tariff No. 111 (hereinafter designated WMTB 111), set forth below.[2/] We now set forth the facts of the causes of action individually.

2/ EXCLUSIVE USE OF CARRIER'S EQUIPMENT

When exclusive use of carrier's equipment is required due to excessive length, width or height or by nature of the commodity the equipment cannot be loaded to its legal capacity or when shipper requests that carrier's equipment be used in exclusive use, charges (see Note 1) will be computed at the rates and minimum weights published in this tariff, applicable to the shipment without reference to this item, subject to the following minimum charge:

Lineal Loading Space of Each Unit of Carrier's Equipment (See Note 2)	Minimum Charge
Not Over 28 feet	20,000 Pounds at Class 55 Rate
Over 28 feet	40,000 Pounds at Class 35 Rate

Note 1: The term "charges" or "minimum charges" as used in this item means linehaul transportation charges and does not include accessorial charges of any kind, which shall be assessed in addition thereto.

Note 2: Unit of carrier's equipment shall not be loaded beyond its legal weight carrying capacity.

Freight Bill No. 222091

Defendant provides regular daily pickup service at General Electric Co.'s place of business at Burlingame. Following its normal routine, on or about March 31, 1969 defendant dispatched from its terminal two unladen 27- or 28-foot semi-trailers in tandem and dropped off one of them identified as PIE Van 90-1694 at General Electric Co. and the other at the place of business of another customer of defendant's in the area. PIE Van 90-1694 had a lineal loading space of not over 28 feet. Twenty-seven refrigerators and freezers, weighing a total of 6,156 pounds, were loaded in the van and occupied the entire bed space of the van. Appliances tendered to defendant by General Electric Co. may not be stacked and must be loaded for transportation with a designated side in an upright position. Defendant has been instructed by General Electric Co. not to load other freight on top of appliances. Defendant took the van to its local terminal, then transported it to its Sacramento terminal and then delivered the shipment to Housing Authority Warehouse at Sacramento. In performing line haul operations defendant usually, but not always, transports two 27-foot or 28-foot semi-trailers in tandem between terminals. With respect to this shipment neither complainant nor defendant has knowledge that the circumstances in line haul transportation were different from the normal operations conducted by defendant. Defendant charged and collected from General Electric Co. the sum of $99.70, which charge was computed by applying the Class 55 Rate to 20,000 pounds and adding the applicable surcharge.

Freight Bill No. 299548

On or about August 14, 1969, General Electric Co. tendered to defendant at its Major Appliance and Hotpoint Division at Sacramento a shipment consisting of refrigerators, freezers, ovens, dryers, air conditioners, furnaces and other articles weighing a total of 17,887 pounds, consigned to its place of business in Burlingame. Defendant provides regular daily pickup service at

General Electric Co.'s Major Appliance and Hotpoint Division at Sacramento. More than one 27-foot semi-trailer ordinarily is not dispatched to perform such pickup service unless defendant is notified by one of its employees or by an employee of General Electric Co. that the freight to be picked up will exceed one trailer load. When freight to be picked up exceeds one trailer load, upon being so notified, a second tractor-trailer unit is dispatched to complete the pickup, which was done with respect to the shipment involved herein. 10,220 pounds were loaded into a 27-foot van which completely occupied the loading space in said van. The remaining 7,667 pounds were loaded into a second van, the lineal loading space of which did not exceed 28 feet, and the freight therein occupied approximately 3/4 of the loading space in that van. The two vans were moved in tandem from the Sacramento terminal to Burlingame. General Electric Co. did not request exclusive use of any trailer. Defendant charged and collected from General Electric Co. the sum of $195.70 which was computed by assessing the rate on 20,000 pounds for the freight in the first van and considering the 7,667 pounds in the second van as a separate shipment.

Discussion

Complainant contends that because a unit of carrier's equipment is defined in the tariff as "any combination operated as a single unit", and two 27-foot trailers were operated between terminals with a tractor by defendant, neither shipment fully utilized the capacity of the carrier's equipment; and since exclusive use was not requested by the shipper the provisions of Item 311 do not apply.

Defendant takes the position that in the cases of the two shipments involved, the unit of equipment for which minimum charges are provided in Item 311 refers to each fully laden trailer.

In letters dated July 8, 1971, and July 22, 1971, addressed to complainant and signed by the Secretary of the Commission, there is an opinion of the Commission staff regarding the

application of rates to the shipment described in F/B 299548 to the effect that the minimum charge prescribed in Item 311 for equipment with lineal loading space of over 28 feet should have been assessed because "approximately 47 feet of lineal loading space of the unit of carrier's equipment was used for this shipment. By nature of the commodities the carrier's equipment could not be loaded to its legal weight carrying capacity and the minimum charge provided in Item 311 was applicable." The staff apparently concluded that because the two 27-foot trailers moved in tandem with a tractor between terminals the entire combination constituted the unit of equipment upon which the minimum charge should be based. It is readily apparent that the facts which were the basis for the staff's opinion are not the same as the facts of record herein. The two trailers involved (totaling 54 lineal feet of loading space) were not loaded to capacity as a result of the shipment tendered.3/

A common carrier tariff, like a statute, is binding upon carrier and shipper alike. Tariffs are to be construed according to their language irrespective of the intentions of their framers. The provisions of a tariff are to be construed so as to be consistent with other provisions thereof and with the tariff as a whole as well as the customs and usages of the trade. When the provisions of the tariff permit more than one interpretation of an item, some of which may result in an unlawful rate and others which would result in a lawful rate, the interpretations providing for a lawful rate are to be preferred. When a reasonable doubt exists as to the meaning of a tariff item, that doubt is to be resolved against the carrier and in favor of the shipper.

3/ It was stipulated that only one trailer was fully loaded and that the other trailer was 3/4 loaded. The following statement in defendant's brief at page 4 is also noted:

> "In the handling of the shipment transported by the second trailer under F/B 299528 (sic), LTL rates were assessed due to the fact that that trailer was not loaded to capacity and in fact actually had other freight on board."

An examination of Item 311 discloses that it has application when the carrier's equipment is in exclusive use by reason of (1) shipper request, or (2) the equipment cannot be loaded to its legal capacity for the stated reasons. The minimum charges prescribed therein are predicated upon the lineal loading space of each unit of carrier's equipment. Item 250(z) (14th Revised Page 38 of WMTB 111) provides:

> "Unit of carrier's equipment means one or more pieces of carrier's equipment (as defined in Paragraph (B) hereof) physically connected so as to form a complete unit."

Paragraph (B) of Item 250 (10th Revised Page 37 of WMTB 111) states:

> "Carrier's equipment means any motor truck or other self-propelled highway vehicle, trailer, semi-trailer, or any combination of such highway vehicles, operated as a single unit."

The term legal capacity is not defined in the tariff. The shipments were transported in van-type semi-trailers normally utilized by defendant in the transportation of property over public highways. Excessive length, width or height of the commodity transported is not involved. It is readily apparent that for the two shipments involved herein legal capacity means the maximum weight permitted to be transported in the equipment on the public highways. This is consistent with other language of Item 311 and the tariff as a whole. It is also consistent with the operations, rates and practices of carriers generally; the semi-trailers operated by carriers usually having lengths of 24 feet, 27 feet, 28 feet and 40 feet; the legal maximum weight that may be transported with a tractor and the semi-trailers of the 24- to 28-foot range ordinarily being in excess of 20,000 pounds, and the legal maximum weight that may be transported with a tractor and 40-foot semi-trailer or tractor and two semi-trailers in the 24- to 28-foot range being in excess of 40,000 pounds.

With respect to the shipments in question, Item 311 may be paraphrased as follows: If by nature of the commodity the loading space of carrier's equipment is so completely occupied by a shipment so as to prevent the addition of other lading, and the weight thereon is not sufficient to make the gross weight of carrier's equipment equal to the gross weight permitted for that equipment on the public highway, the charge for the shipment shall be computed at the applicable rates and minimum weights published in the tariff, provided, however, that such charge shall not be less than the charge resulting from the application of the Class 55 rate to a weight of 20,000 pounds when the unit of carrier's equipment has a lineal loading space of not over 28 feet, and shall not be less than the charge resulting from the application of the Class 35 rate to a weight of 40,000 pounds when the lineal loading space of the unit of carrier's equipment is over 28 feet.

With respect to the shipment represented by F/B 222091, the evidence shows that by reason of the nature of the commodity as represented in the instructions of General Electric Co. to defendant, the shipment completely occupied the loading space of PIE Van 90-1694 so as to prevent the addition of other lading. The weight loaded thereon was not sufficient to make the gross weight of carrier's equipment, including said van, equal to the gross weight permitted for that equipment on the public highway. The evidence shows that at the time defendant took custody of the shipment at General Electric Co., Burlingame, the unit of carrier's equipment consisted of a tractor and PIE Van 90-1694 which then went to the defendant's local terminal. From the evidence there is a reasonable inference that at the terminal PIE Van 90-1694 was separated from that tractor and was coupled with a line-haul tractor, a converter gear and another 27-foot semi-trailer into what is known in the trade as a double-header. The double-header remained intact at least between the local terminal and the terminal in Sacramento. The question is whether the double header or the local tractor and PIE Van 90-1694 constituted the "carrier's equipment."

We are of the opinion that with respect to the shipment the local tractor and PIE Van 90-1694 comprised the "carrier's equipment" for the purpose of Item 311 and the double-header did not. The principal reasons for that determination are: (1) Item 311 provides a minimum charge for the shipment[4/] and therefore only the freight comprising the shipment may be considered in the determination of the minimum charge; and (2) an interpretation of Item 311 which considers the double-header operated by defendant between its terminals would result in the minimum charge provided in Item 311 being either applicable or inapplicable by an action wholly within the managerial discretion of the carrier. As a bailee of the shipment of goods the duty of the carrier to the shipper after taking custody thereof is to deliver the goods to the consignee designated by the shipper in the same condition in which they were received within the time provided in its time schedules and without undue delay. In the performance of that duty the carrier has the right as a bailee to exercise managerial discretion of the manner in which the duty is to be performed provided such actions are not inconsistent with the duty, are not inconsistent with its obligations under its tariff, and are not inconsistent with the requirements of law. From the facts in this case we can find no provision of the contract of carriage nor any provision in the tariff under which defendant was required to include, or restrained from including, PIE Van 90-1694 with another semi-trailer for transportation between terminals.

4/ This is clearly stated in Item 311. It may have been, and it may be, the carrier's intention that a minimum charge be made applicable to each fully laden trailer-load; however, that is not what Item 311 provides.

A comparable situation is that a shipper, in tendering a carload to a railroad, may not prescribe the location of his carload in a train nor the number of cars to be included in that train. The railroad may exercise its managerial discretion in that regard subject to regulations prescribed by governmental power. (For instance, regulations governing the location of cars containing explosives.) The State has prescribed regulations which prevent defendant from including more than two 27-foot semi-trailers with a tractor for movement over the public highways. It was within the discretion of management to determine whether PIE Van 90-1694 would be taken alone by a tractor between terminals or be included with another semi-trailer. If it determined the latter, it was within its discretion to determine which other semi-trailer should be coupled with PIE Van 90-1694. If we were to accept the contention that for purposes of application of the charges in Item 311 the unit of carrier's equipment was that operated by defendant on the public highways between its terminals, then defendant by exercise of managerial discretion, after it had accepted and assumed its duty as a bailee, could have made the charges in Item 311 either applicable or inapplicable by including PIE Van 90-1694 or not including it with another semi-trailer for movement. It is also readily apparent that General Electric Co. could have no knowledge of whether PIE Van 90-1694 was physically connected to another semi-trailer or not for movement between terminals and therefore under such interpretation could not determine what its charges would be under defendant's tariff. These circumstances do not appear when "carrier's equipment" or "unit of carrier's equipment" are considered to be the vehicles forming a single complete unit which are furnished the shipper at the time of tender. The tariff of defendant is a part of the contract of carriage. If the equipment furnished by defendant is unsuitable from a tariff standpoint to the shipper, the latter may refuse to tender the shipment.

Under the rules of tariff interpretation described above, Item 311 is applicable to the shipment described in F/B 222091 and the charge to be assessed and collected for the shipment is that equal to 20,000 pounds at the Class 55 rate plus the applicable surcharge, which total charge amounts to $99.70. That is the amount assessed and collected by defendant from the shipper.

With respect to the shipment covered by F/B 299548, the facts show that by reason of the nature of the commodities in the shipment exclusive use was required of one 27-foot semi-trailer and only partial use was required of a second 27-foot semi-trailer. The evidence does not show whether at the time of tender each semi-trailer was physically connected to a separate tractor or whether both semi-trailers were connected to a single tractor so as to form a single complete unit. It makes no difference with respect to this particular shipment because in either case the applicable charge to be assessed is $103.70. If at the time of tender both semi-trailers were part of a single complete unit furnished the consignor, then exclusive use of carrier's equipment was not required and Item 311 was not applicable; the rate at the time was 51¢ subject to a minimum weight of 20,000 pounds plus $1.70 surcharge. If at the time of tender each semi-trailer was part of separate units of carrier's equipment then Item 311 would have applied; however, the charge under Item 311 is that applicable to the shipment without reference to Item 311 or the charge for 20,000 pounds at the Class 55 rate, whichever is the higher. The charge for 20,000 pounds at the Class 55 rate is not in excess of the charge applicable to the shipment.

Defendant charged and collected $195.70 for this shipment which was computed by considering the amount of weight in each trailer as a separate shipment. Item 311 does not provide for that method of assessing rates nor is there any other provision in the tariff which would authorize defendant to consider a single shipment as two or more shipments for the purpose of applying rates higher than

those which would be applicable to the single shipment. Defendant charged $92.00 in excess of the charges specified in its tariff for the transportation described in F/B 299548.

Even though it had been agreed that the lawfulness of the tariff rates is not an issue in this proceeding, complainant and defendant in their briefs made representations concerning the reasonableness of the charges that would result from tariff interpretations advocated by the adverse party. We do not consider such arguments because they concern an issue not within the scope of this proceeding. We make no finding concerning the reasonableness or lawfulness of the charges we have found herein to be applicable to the shipments. In determining the application of Item 311 we hold that a tariff rule which would provide for the application of charges at the managerial discretion of the carrier is unreasonable, per se, regardless of whether the charges may otherwise be reasonable.

Findings

1. On or about March 31, 1969, defendant transported as a highway common carrier, twenty-seven refrigerators and freezers from Burlingame to Sacramento for which it charged and collected from General Electric Co. the sum of $99.70, which sum is the applicable charge specified in defendant's tariff filed and in effect at the time.

2. On or about August 14, 1969, defendant transported, as a highway common carrier, a mixed shipment of various commodities weighing a total of 17,887 pounds from Sacramento to Burlingame for which it charged and collected from General Electric Co. the sum of $195.70, which sum is in excess of the applicable charge of $103.70 specified in defendant's tariff filed and in effect at the time, with a resulting overcharge of $92.00.

Conclusions

1. With respect to the cause of action represented by defendant's freight bill No. 222091, complainant and General Electric Co. should take nothing by reason of this complaint.

2. With respect to the cause of action represented by defendant's freight bill No. 299548, defendant did, on or about August 14, 1969, charge, demand, collect, and receive a different compensation for the transportation of property than the applicable rates and charges specified in its schedules filed and in effect at the time in violation of Section 494 of the Public Utilities Code.

3. With respect to the cause of action represented by defendant's freight bill No. 299548, General Electric Co. is entitled to recover the overcharge plus interest, and defendant should be directed to refund the sum of $92.00 plus interest at 7 percent per annum.

O R D E R

IT IS ORDERED that:

1. Associated Freight Lines, a corporation, shall refund within one hundred and eighty days after the effective date of this order to General Electric Company, Major Appliance and Hotpoint Division, the overcharge of $92.00 plus interest at seven (7) percent per annum from the date of payment of the overcharge by General Electric Company.

2. Within ten days after payment of the refund, Associated Freight Lines shall notify the complainant and the Commission in writing of the amount refunded and the date and manner in which refund was accomplished.

3. Except as otherwise provided herein, the relief sought in this complaint is denied.

The Secretary shall cause a copy of this order to be served upon Associated Freight Lines, and the effective date of this order shall be twenty days after such service.

Dated at San Francisco, California, this 14th day of NOVEMBER, 1972.

President

Commissioners