

ORIGINAL

Decision 87-11-055 November 25, 1987

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Athearn Transportation Consultants, )  
Inc., )

Complainant, )

v. )

ANR Freight System, Inc., )  
Cal-West Tariff Bureau, Inc., )  
Con-Way Western Express, Inc., )  
Pacific Coast Tariff Bureau, )  
Pacific Motor Tariff Bureau, Inc., )  
Viking Freight System, Inc., )  
Western Traffic Services, Inc., )  
and Willig Freight Lines, )

Defendants. )

Case 87-01-010  
(Filed January 7, 1987)

INTERIM OPINION

Complainant Athearn Transportation Consultants, Inc. charges that the defendants named in the caption of this case are (1) demanding exorbitant and unreasonable fees for subscriptions to their freight tariffs, (2) giving away their tariffs to some while charging others for them, and (3) as to one carrier defendant, refusing to post its tariff at its Oakland terminal, all in violation of the Commission's General Order (GO) 122-A.<sup>1</sup>

<sup>1</sup> GO 122-B, adopted December 22, 1986, effective March 1, 1987, supersedes GO 122-A. GO 122-B did not change the substance of the pertinent portions of GO 122-A, although certain of these provisions were renumbered. Although quotations from the complaint will refer to GO 122-A, this decision will quote GO 122-B for the substance of the general order. In recognition of the fact that complaint seeks both reparations for alleged violations during the period GO 122-A was effective and future compliance with our general order, however, the decision will in all other respects refer to alleged violations of "GO 122 series."

Complainant's prayer for relief requests that the Commission do the following:

- "a) issue an order compelling defendants to answer this complaint;
- "b) issue an order compelling defendants to answer specific questions in Appendix A and provide documents in support of their answers to these questions;
- "c) schedule a public hearing in San Francisco where evidence of violations of the California Public Utilities Code and General Order 122-A can be received;
- "d) determine what constitutes a reasonable charge for the tariff matter previously furnished and order defendants to refund all unreasonable and/or discriminatory charges collected and to pay interest on charges found to be unreasonable and/or discriminatory;
- "e) determine specific maximum charges which defendants may collect in the future;
- "f) order defendants to continue furnishing pendente lite copies of all requested tariffs and supplemental material to complainant and other interested parties until the Commission has determined a specific charge for this tariff matter and defendants have complied with all Commission orders;
- "g) take appropriate action to insure that defendants do not engage in future violations of the California Public Utilities Code and the Commission's General Order 122-A."

Defendants deny complainant's charges and, in addition, move for the dismissal of the complaint on the grounds that the Commission does not have jurisdiction to hear the case or to award the requested relief.

We believe it is important to consider the motions to dismiss before we allow the case to proceed further.

GO 122 Series

Pertinent portions of GO 122-B, effective March 1, 1987, read as follows:

"Rule 4--Tariff subscription and sales

"(a) As used in this rule, the term 'subscription' means the furnishing by a common carrier or its agent of at least one copy of a particular tariff and its amendments (including reissues of the tariff) to any party ('subscribers'). The term 'subscription' does not pertain to requests for a copy or copies of a tariff without a request for future amendments. The term 'subscriber' does not include a common carrier as to agency tariffs in which it participates or to other carriers' tariffs in which it concurs.

"(b) Fees for subscriptions shall be reasonable and nondiscriminatory.

"(c) A common carrier or its agent shall not refuse to furnish a subscription to any party upon reasonable request except for nonpayment of the applicable fee."

\* \* \*

"(e) Every common carrier or its agent shall furnish without delay one copy of any current tariff publication, or any tariff publication filed but not yet effective, to any person upon reasonable request at a reasonable charge."

Tariff Agents

Four of the defendants are tariff publishing agents:  
Cal-West Tariff Bureau, Inc., Pacific Coast Tariff Bureau, Pacific

Motor Tariff Bureau, Inc., and Western Tariff Services, Inc.<sup>2</sup> They variously claim that they are not public utilities and offer no public utility service. Hence, the Commission has no jurisdiction to entertain this complaint against them. They claim that Public Utilities (PU) Code § 1702 specifically limits the Commission's jurisdiction, for the purpose of hearing and adjudicating complaints, to actions against public utilities. PU Code § 1702 reads, in part, as follows:

"Complaint may be made by the Commission of its own motion or by any corporation or person...by written petition or complaint, setting forth any act or thing done or omitted to be done by any public utility, including any rule or charge heretofore established or fixed by or for any public utility, in violation or claimed to be in violation, of any provision of law or of any order or rule of the Commission..."

PU Code § 216(a) defines a public utility as follows:

"'Public Utility' includes every common carrier, toll bridge corporation, pipeline corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, sewer system corporation, wharfinger, and heat corporation, where the service is performed for or the commodity delivered to the public or any portion thereof."

They contend that none of the defendants' tariff issuing agents fall within the definition of a public utility as defined in PU Code § 216(a) and, therefore, they are not proper parties to this proceeding.

Complainant contends that the Legislature intended the Commission to have limited jurisdiction over agents of public utilities as witness the references to "a common carrier or its

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2 None of the four defendants who are highway common carriers are alleged to be participants in any of the agents' tariffs.

agent" in GO 122 series, as well as in PU Code § 702, which reads as follows:

"Every public utility shall obey and comply with every order, decision, direction, or rule made or prescribed by the commission in matters specified in this part, or any other matter in any way relating to or affecting its business as a public utility, and shall do everything necessary or proper to secure compliance therewith by all of its officers, agents, and employees." (Emphasis added.)

Furthermore, GO 122 series is specifically directed to "agents" of common carriers as well as to common carriers.

Complainant contends that to require it to file a complaint against the hundreds of participating carriers in the tariff agents' tariffs would place a large financial burden on complainant.

Complainant points to PU Code §§ 2110 and 2111 in an attempt to show that we have jurisdiction over the tariff agent defendants in this case. Those sections make it a misdemeanor, subject to a fine, for, among other things, an agent of a public utility to fail to comply with any order of the Commission.

For these reasons complainant contends that the Commission has jurisdiction to enforce the reasonable rate provisions against the tariff agent defendants.

The principal job of the tariff agent defendants is the compiling, printing, filing, and publication of highway common carrier tariffs at the direction of their highway common carrier members. In so doing the tariff agents are not public utilities because they do not perform any public utility service. They have no discretion as to setting the level of rates or the formulation of the rules which appear in the tariffs they print. Theirs is an administrative function carried on at the direction of their highway common carrier members.

Since our jurisdiction to hear complaints under PU Code § 1702 is limited to those concerning acts done or omitted to be done by public utilities, this complaint must be dismissed as to the tariff agent defendants because they are not public utilities. (Toward Utility Rate Normalization v. PT&T et al (1978) 83 CPUC 318.)

Although we must dismiss this complaint against the tariff agent defendants, this does not mean that these defendants are entirely beyond our jurisdiction or scrutiny. GO 122 series requires the agents of common carriers, as well as their common carrier principals, to charge reasonable rates for tariff subscriptions, and we have sufficient regulatory authority to ensure that even those who are not themselves public utilities comply with our general orders.

First, any tariff agent which fails to comply with any order of the Commission is in contempt of the Commission and is punishable by the Commission in the same manner and to the same extent as contempt is punished by courts of record (California Constitution, Article 12, § 6; PU Code § 2113).

Second, the Commission has an obligation under PU Code § 2101 to see that the provisions of the Constitution and statutes of this state, the enforcement of which is not specifically vested in some other officer or tribunal, are enforced and obeyed, and that violations are promptly prosecuted and penalties recovered. To this end, the Commission may request the Attorney General or the district attorney of the proper jurisdiction to institute and prosecute actions for the enforcement of such laws (*Id.*). As complainant points out, PU Code §§ 2110 and 2111 make it a misdemeanor, subject to a fine, for, among other things, an agent of a public utility to fail to comply with any order of the Commission. While we have no power to directly assess such penalties, we would not, in appropriate circumstances, hesitate to seek the assistance of those that do.

Third, the acts or omissions of the tariff agents would be directly relevant to a complaint alleging that a common carrier participating in any of the agents' tariffs was in violation of GO 122 series or PU Code § 702, which requires public utilities to do everything necessary or proper to secure compliance by their officers, agents, and employees with Commission orders. PU Code § 2109 states that, in construing and enforcing the above-mentioned penalty provisions, the act, omission, or failure of any agent of any public utility, acting within the scope of his official duties or employment, shall be considered the act, omission, or failure of the public utility itself. Thus, any failure of a tariff agent to comply with GO 122 series would be imputed to common carriers utilizing that agent.

Furthermore, since common carriers are responsible for any failure of their agents to charge reasonable rates for tariff subscriptions as required by GO 122 series, a complaint alleging that tariff agents failed to comply with that general order necessarily raises the issue of the participating carriers' compliance with Section 702. Only after we determined whether the tariff agents complied with GO 122 series could we determine whether the common carriers complied with their Section 702 obligation to make sure that their agents comply with our general orders. Therefore, even though tariff agents are not themselves public utilities that can be complained against under PU Code § 1702, they would nonetheless be critical participants in a complaint proceeding against common carriers using their services.

#### Highway Common Carriers

Except for one instance to be dealt with later on, defendant motor carriers do not dispute our general jurisdiction to hear a complaint against them concerning the unreasonableness of the fee they charge for subscriptions to their tariffs. They question our jurisdiction to grant declaratory relief or to award damages. This question may have arisen because of certain

statements made by complainant at the prehearing conference. We see no request in the complaint for declaratory relief or the awarding of damages, except reparations under PU Code § 734. However, to alert defendants that we will not grant such relief in this case we will point out to complainant that the Commission neither grants declaratory relief (Bayview Freight Lines v De Rue Warehouse Co. (1970) 71 CPUC 503 and cases cited therein) nor awards damages, except reparations (Schumacher v P.T.&T. Co. (1965) 64 CPUC 295).

The one instance where carrier defendants question our general jurisdiction is that they contend complainant lacks standing to bring this complaint, quoting from Demeter v. Annenson (1947) 80 Cal App 2d 48, 52, 180 P. 2d 998, in which certain cab companies complained against a railroad for its failure to properly care for the convenience of its passengers. The court said that it was not for the cab companies to vindicate the rights of passengers. We do not see where complainant is attempting to vindicate the rights of a third party but is attempting to enforce its own alleged right. We think that court case is inapplicable to the complaint as framed.

We will grant the motion of the tariff agent defendants to dismiss the complaint against them and deny the motion of the carrier defendants to dismiss the complaint against them. We will allow complainant to amend the complaint to include bureau carriers, but caution that substantive amendments to the pleadings will be required.

In light of our dismissal of the tariff agent defendants, the complainant may wish to file a motion requesting that the Commission issue an order to show cause why these tariff agents should not be found in contempt of the Commission under PU Code § 2113. Such a motion must be supported by an appropriate affidavit. We would be inclined to look favorably upon such a request, not because we have any reason to prejudge the accuracy of



complainant's allegations, but rather because we feel it is unfair to deny complainant a forum to contest the tariff agent defendants' compliance with our general order. Our inability to entertain a complaint directly against such agents does not render us powerless to make sure that those who are not public utilities comply with applicable Commission decisions and orders.

Complainant is also free to amend the current complaint, or file a new complaint, alleging that carriers participating in the defendant tariff agents' tariffs have violated GO 122 series by virtue of the imputed actions of their agents, and/or PU Code § 702, by virtue of their failure to take all steps necessary or proper to ensure that their agent complied with Commission orders.

Several of the common carrier defendants move to dismiss the complaint as to them on the grounds that certain alleged facts in the complaint are not true. The truth or falsity of such facts must be tested at the future hearing and affords no ground for dismissal at this time.

The administrative law judge assigned to the case has previously ruled on the Petitions to Intervene.

#### Findings of Fact

1. Complainant charges defendants with violating GO 122 series in that defendants are charging unreasonable fees for subscriptions to their tariffs, giving away their tariffs to some while charging others for the tariffs, and, in one instance, of a carrier defendant refusing to put its tariff at the carrier's Oakland terminal.

2. Defendants filed motions to dismiss the complaint on general jurisdictional grounds.

3. Four of the defendants are tariff agents which compile, print, publish, and file highway common carrier tariffs for their highway common carrier members.

4. The tariff agents have no discretion as to setting the level of rates or the formulation of rules which appear in the tariffs they print.

5. The tariff agents perform limited administrative functions at the discretion of their carrier members.

6. GO 122 series provides that fees for furnishing subscription to tariffs by common carriers or their agents shall be reasonable and nondiscriminatory.

7. The complaint does not seek declaratory relief.

8. The complaint does not seek damages, except reparations.

Conclusions of Law

1. PU Code § 1702 specifically limits the Commission's jurisdiction, for the purpose of hearing and adjudicating complaints, to complaints against public utilities.

2. The tariff agent defendants are not public utilities.

3. The tariff agent defendants are not proper party defendants to this proceeding.

4. The complaint against the tariff agent defendants should be dismissed.

5. The complaint, as framed, does not seek declaratory relief or damages, except reparations.

6. The complaint seeks to enforce what complainant perceives to be its individual rights under GO 122 series.

7. The motions of the highway common carrier defendants should be denied.

INTERIM ORDER

IT IS ORDERED that:

1. The motions of the tariff agent defendants to dismiss the complaint against them are granted.
2. The complaint against Cal-West Tariff Bureau, Inc., Pacific Coast Tariff Bureau, Pacific Motor Tariff Bureau, Inc., and Western Traffic Services, Inc. is dismissed.
3. The motions of the highway common carrier defendants to dismiss the complaint against them are denied.

This order becomes effective 30 days from today.

Dated November 25, 1987, at San Francisco, California.

STANLEY W. HULETT  
President  
DONALD VIAL  
FREDERICK R. DUDA  
G. MITCHELL WILK  
JOHN B. OHANIAN  
Commissioners

I CERTIFY THAT THIS DECISION  
WAS APPROVED BY THE ABOVE  
COMMISSIONERS TODAY.

  
Victor Weiss, Executive Director

Decision 87 11 055

NOV 25 1987

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<sup>1</sup> GO 122-B, adopted December 22, 1986, effective March 1, 1987, supersedes GO 122-A. GO 122-B did not change the substance of the pertinent portions of GO 122-A, although certain of these provisions were renumbered. Although quotations from the complaint will refer to GO 122-A, this decision will quote GO 122-B for the substance of the general order. In recognition of the fact that complaint seeks both reparations for alleged violations during the period GO 122-A was effective and future compliance with our general order, however, the decision will in all other respects refer to alleged violations of "GO 122 series."

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<sup>2</sup> None of the four defendants who are highway common carriers are alleged to be participants in any of the agents' tariffs.

They variously claim that they are not public utilities and offer no public utility service. Hence, the Commission has no jurisdiction to entertain this complaint against them. They claim that Public Utilities (PU) Code § 1702 specifically limits the Commission's jurisdiction, for the purpose of hearing and adjudicating complaints, to actions against public utilities. PU Code § 1702 reads, in part, as follows:

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any way relating to or affecting its business as a public utility, and shall do everything necessary or proper to secure compliance therewith by all of its officers, agents, and employees." (Emphasis added.)

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Second, the Commission has an obligation under PU Code § 2101 to see that the provisions of the Constitution and statutes of this state, the enforcement of which is not specifically vested in some other officer or tribunal, are enforced and obeyed, and that violations are promptly prosecuted and penalties recovered. To this end, the Commission may request the Attorney General or the district attorney of the proper jurisdiction to institute and prosecute actions for the enforcement of such laws (*Id.*). As complainant points out, PU Code §§ 2110 and 2111 make it a misdemeanor, subject to a fine, for, among other things, an agent of a public utility to fail to comply with any order of the Commission. While we have no power to directly assess such penalties, we would not, in appropriate circumstances, hesitate to seek the assistance of those that do.

Third, the acts or omissions of the tariff agents would be directly relevant to a complaint alleging that a common carrier participating in any of the agents' tariffs was in violation of GO 122 series or PU Code § 702, which requires public utilities to do everything necessary or proper to secure compliance by their officers, agents, and employees with Commission orders. PU Code §

2109 states that, in construing and enforcing the above-mentioned penalty provisions, the act, omission, or failure of any agent of any public utility, acting within the scope of his official duties or employment, shall be considered the act, omission, or failure of the public utility itself. Thus, any failure of a tariff agent to comply with GO 122 series would be imputed to common carriers utilizing that agent.

Furthermore, since common carriers are responsible for any failure of their agents to charge reasonable rates for tariff subscriptions as required by GO 122 series, a complaint alleging that tariff agents failed to comply with that general order necessarily raises the issue of the participating carriers' compliance with Section 702. Only after we determined whether the tariff agents complied with GO 122 series could we determine whether the common carriers complied with their Section 702 obligation to make sure that their agents comply with our general orders. Therefore, even though tariff agents are not themselves public utilities that can be complained against under PU Code § 1702, they would nonetheless be critical participants in a complaint proceeding against common carriers using their services.

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Warehouse Co. (1970) 71 CPUC 503 and cases cited therein) nor awards damages, except reparations (Schumacher v P.T.&T. Co. (1965) 64 CPUC 295).

The one instance where carrier defendants question our general jurisdiction is that they contend complainant lacks standing to bring this complaint, quoting from Demeter v. Annenson (1947) 80 Cal App 2d 48, 52, 180 P. 2d 998, in which certain cab companies complained against a railroad for its failure to properly care for the convenience of its passengers. The court said that it was not for the cab companies to vindicate the rights of passengers. We do not see where complainant is attempting to vindicate the rights of a third party but is attempting to enforce its own alleged right. We think that court case is inapplicable to the complaint as framed.

We will grant the motion of the tariff agent defendants to dismiss the complaint against them and deny the motion of the carrier defendants to dismiss the complaint against them. We will allow complainant to amend the complaint to include bureau carriers, but caution that substantive amendments to the pleadings will be required.

In light of our dismissal of the tariff agent defendants, the complainant may wish to file a motion requesting that the Commission issue an order to show cause why these tariff agents should not be found in contempt of the Commission under PU Code § 2113. Such a motion must be supported by an appropriate affidavit. We would be inclined to look favorably upon such a request, not because we have any reason to prejudge the accuracy of complainant's allegations, but rather because we feel it is unfair to deny complainant a forum to contest the tariff agent defendants' compliance with our general order. Our inability to entertain a complaint directly against such agents does not render us powerless to make sure that those who are not public utilities comply with applicable Commission decisions and orders.

Complainant is also free to amend the current complaint, or file a new complaint, alleging that carriers participating in the defendant tariff agents' tariffs have violated GO 122 series by virtue of the imputed actions of their agents, and/or PU Code § 702, by virtue of their failure to take all steps necessary or proper to ensure that their agent complied with Commission orders.

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#### Findings of Fact

1. Complainant charges defendants with violating GO 122 series in that defendants are charging unreasonable fees for subscriptions to their tariffs, giving away their tariffs to some while charging others for the tariffs, and, in one instance, of a carrier defendant refusing to put its tariff at the carrier's Oakland terminal.
2. Defendants filed motions to dismiss the complaint on general jurisdictional grounds.
3. Four of the defendants are tariff agents which compile, print, publish, and file highway common carrier tariffs for their highway common carrier members.
4. The tariff agents have no discretion as to setting the level of rates or the formulation of rules which appear in the tariffs they print.
5. The tariff agents perform limited administrative functions at the discretion of their carrier members.

6. GO 122 series provides that fees for furnishing subscription to tariffs by common carriers or their agents shall be reasonable and nondiscriminatory.

7. The complaint does not seek declaratory relief.

8. The complaint does not seek damages, except reparations.

Conclusions of Law

1. PU Code § 1702 specifically limits the Commission's jurisdiction, for the purpose of hearing and adjudicating complaints, to complaints against public utilities.

2. The tariff agent defendants are not public utilities.

3. The tariff agent defendants are not proper party defendants to this proceeding.

4. The complaint against the tariff agent defendants should be dismissed.

5. The complaint, as framed, does not seek declaratory relief or damages, except reparations.

6. The complaint seeks to enforce what complainant perceives to be its individual rights under GO 122 series.

7. The motions of the highway common carrier defendants should be denied.

ORDER

IT IS ORDERED that:

1. The motions of the tariff agent defendants to dismiss the complaint against them are granted.

2. The complaint against Cal-West Tariff Bureau, Inc., Pacific Coast Tariff Bureau, Pacific Motor Tariff Bureau, Inc., and Western Traffic Services, Inc. is dismissed.

3. The motions of the highway common carrier defendants to dismiss the complaint against them are denied.

This order becomes effective 30 days from today.

Dated NOV 25 1987, at San Francisco, California.

STANLEY W. HULETT  
President

DONALD VIAL  
FREDERICK R. DUDA  
G. MITCHELL WILK  
JOHN B. OHANIAN  
Commissioners