

JUN 20 1988

Decision 88 06 049 JUN 17 1988

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Western Motor Tariff)
 Bureau, Inc., under Shortened)
 Procedure Tariff Docket for and on)
 behalf of Pacific Motor Transport)
 Company and Pacific Motor Trucking)
 Company to amend Bureau Tariff 111)
 which results in increases.)

ORIGINAL

Application 60033
 (Petition for Modification
 of Decision 92732 filed
 August 6, 1987)

Steven J. Kalish, Attorney at Law, for
 National Small Shipments Traffic
 Conference, Inc. and Drug and Toilet
 Preparation Traffic Conference, Inc.,
 petitioners.

R. G. Moon, for Western Motor Tariff Bureau,
 Inc. and interested members thereof,
 including Pacific Motor Trucking Company
 and Pacific Motor Transport Company,
 applicants.

Ann M. Pougiales, Attorney at Law, for
 herself, interested party, and Western
 Motor Tariff Bureau, et al., applicants.

C. D. Gilbert, for California Trucking
 Association; C. E. Goacher, for Di Salvo
 Trucking Company; and Arthur D. Maruna, for
 Willig Freight Lines; interested parties.

Terrence M. Hess and Dan Walter, for the
 Transportation Division.

OPINION

Petitioners National Small Shipments Traffic Conference,
 Inc. and Drug and Toilet Preparation Traffic Conference, Inc.
 request that Decision (D.) 92732 dated February 18, 1981, in
 Application (A.) 60033 be modified by denying authority to publish
 the general commodity released value tariff item authorized to be
 published therein and for such further relief as the Commission
 deems appropriate.

The petition is opposed by Western Motor Tariff Bureau, Inc. (WMT), a tariff publishing agent, as well as Pacific Motor Transport Company and Pacific Motor Trucking Company (collectively PMT) the two highway common carriers on behalf of which WMT filed A.60033.

A hearing was held on December 9, 1987 and the matter was submitted on briefs March 7, 1988. Only petitioners and WMT filed briefs.

The tariff item in question is Item 848-3 in WMT Tariff 170, CA FUC 51, and is reproduced in Appendix A as it presently appears in the WMT tariff.

Petitioners contend that this tariff item is unlawful and that Paragraph (C)(2) of the item presents a trap for the unwary. To illustrate the item's unlawfulness, petitioners in their brief contrast certain features of an alleged lawful released value item with those of the assailed item as follows:

- "(1) A released value item for motor common carriers normally pertains to a special commodity or commodity group, but here it applies to virtually all commodities;
- "(2) A motor common carrier released value tariff item offers the shipper a choice of freight rates, with the released value tied to a lower freight rate; but here there is neither a choice of freight rates nor a reduced rate; and
- "(3) A motor common carrier released value tariff item required the shipper to exercise a written choice acknowledging its surrender of its right to the normal full value recovery, but here the limited liability applies when the shipper takes no action at all, a so-called automatic released value."

At the hearing, the witness for petitioners stated that petitioners' objection to the tariff item goes to the automatic

application of a released value provided by Paragraph (C) (2) of the item. (Transcript Page 66.)

WMT and PMT argue that the facts developed at the hearing amply demonstrate the reasonableness of the subject tariff item and that the item serves a useful public purpose. They contend that contrary to petitioners' assertion, the item does allow a choice of rates. They state that strong policy considerations support the subject tariff item. They argue that placing the burden on shippers to declare the value of shipments over \$25 per pound per package is essential if carriers are to be protected from virtually unlimited liability, and that shippers have been given notice of the released value item through its publication in the WMT tariff. Lastly, the item helps further the objectives of this Commission's reregulation program.

Furthermore, WMT and PMT contend, substantial legal precedent supports continuation of this tariff item, as the Commission has approved the subject liability limitation in at least two prior decisions and there is nothing in the scheme of intrastate regulation to indicate that motor common carriers are to be denied the protection from unlimited liability enjoyed by other regulated utilities. Additionally, the subject tariff item allows shippers a fair opportunity to obtain full carrier liability. WMT and PMT contend there is absolutely no legal bar to this Commission's approval of an automatically applicable limitation of common carrier liability and that other tribunals have had no trouble upholding similar automatically applicable limitations of carrier liability.

Discussion

The examples given by WMT of other tribunals upholding similar automatically applicable limitations of carrier liability are based on interpretations mainly of federal statutes, a case

involving a state law having to do with warehousemen,¹ and with a recitation on a bill of lading specifying the carrier's maximum liability in case of loss or damage to the shipment. These examples are not applicable here.

The liability of a highway common carrier for loss or damage to an intrastate shipment is codified in California Civil Code (CC) Section 2194.² Certain agreements limiting a carrier's liability are decreed void.³ The method by which a common carrier may and may not limit its other liabilities for freight loss or damage have been codified in CC Section 2174 (enacted in 1873) which provides as follows:

1 Hischemoeller v National Ice and Gold Storage Co. (1956) 46 Cal. 2d 318, 294, P. 2d 433.

2 CC Section 2194 reads:

"Unless the consignor accompanies the freight and retains exclusive control thereof, an inland common carrier of property is liable, from the time he accepts until he relieves himself from liability pursuant to Sections 2118 to 2122, for the loss or injury thereof from any cause whatever, except:

"An inherent defect, vice, or weakness, or a spontaneous action, property itself;

"The act of a public enemy of the United States, or of this State;

"The act of law; or,

"Any irresistible superhuman cause."

3 CC Section 2175 reads:

"Certain agreements void. A common carrier cannot be exonerated, by any agreement made in anticipation thereof, from liability for the gross negligence, fraud, or willful wrong of himself or his servants."

"The obligation of a common carrier cannot be limited by general notice on his part, but may be limited by special contract."

Paragraph (C) (2) of the assailed tariff item, in effect, states that in the event there is no special contract between PMT and the shipper then PMT's liability is limited to \$25 per pound per package. This effectively limits PMT's liability by using the general notice method which is proscribed by CC Section 2174.

A general notice in a tariff, like Paragraph (C) (2), is not a special contract, and while shippers may be held to have constructive notice of the contents of that paragraph, CC Section 2174 statutorily prohibits constructive notice from being binding on the shipper and specifically requires a special contract to limit a carrier's liability.⁴ Since the notice in Paragraph (C) (2) does not meet the requirement of CC Section 2174 as the appropriate method for limiting a carrier's liability, that paragraph is inappropriate and misleading and should be cancelled.

The assailed tariff item limits the application of rates to shipments on which a released valuation has been declared by the shipper. If a released valuation is not declared by the shipper, then there are no full value rates applicable to the shipment. There being no full value rates applicable to a shipment, PMT may not pick up a shipment on which there is no released value

⁴ See Wallace R. Muelder v. Western Greyhound Lines (1970), 8 Cal. App. 3d 319, 330; 87 Cal Rptr 297, 305, which summarized with approval the cases Fitch v. Carpenter (1945) 70 Cal. App. 2d 827, 831 and McQueen v. Tyler (1943) 61 Cal. App. 2d 263, 267 as follows:

"And a shipper was not chargeable with knowledge of the carrier's limitations on liability from the fact that they were contained in a published rate schedule approved by and filed with the Railroad Commission and from which carrier deviation was prohibited by law."

declared. Simply stated, PMT has no rates applicable to a full value shipment. Therefore, the following should be added to the tariff item as Paragraph (C)(3):

"If shipper fails or declines to annotate the bill of lading or shipping receipt as provided in subparagraph (1), the shipment will not be accepted for transportation."

This should not be difficult to police since the tariff item applies to all commodities generally. If the shipper refuses to declare a released value on the bill of lading, the carrier's pickup driver should not accept tender of the shipment.

The two decisions on which WMT and PMT rely as being legal precedent for the continuation of the subject automatic liability limitation are D.92732, which this Petition seeks to overturn, and D.91089, which also approved the subject item. However, neither decision considered the effect of CC Section 2174 in relation to the automatic limitation provision.

There are many carriers other than PMT which participate in this tariff item or which have included a like item in their tariffs. Since this case involves only PMT, we will ask the Transportation Staff to prepare for us an Order Instituting Investigation to determine the propriety of Paragraph (C)(2) of the tariff item or like paragraphs in other carriers' tariffs.

While petitioners' pleadings allege a variety of things wrong with the assailed tariff item, petitioners' witness stated that their objection went to the automatic nature of the released value provision in Paragraph (C)(2). No evidence was presented by petitioners on the reasonableness or the lawfulness of the involved rates or excess value charges.

Petitioners argue that the format of the subject item is different from the normal format of a released value item; in particular, that the item does not offer the shipper a choice of rates. We believe that the item does provide the shipper a choice of rates depending on the released value of the shipment. If the

shipper chooses to have the carrier subject to a higher level of liability, all it need do is select that level of liability and pay the additional excess valuation charges.

Motion to Dismiss

WMT filed a Motion to Dismiss the petition on the grounds that, contrary to Rule 43 of the Commission's Rules of Practice and Procedure, the petition seeks to make not a minor change but a major change, namely the cancellation of the whole subject item. The witness for petitioner clarified the intent of the petition as seeking a deletion of Paragraph (C) (2). Furthermore, Rule 43 allows petitions for modification to be filed concerning non-minor changes in "highway carrier tariff matters." The petition covers such matters. WMT's motion will be denied.

The comments to the Proposed Decision of ALJ Pilling do not warrant changing our decision.

Findings of Fact

1. Subject Paragraph (C) (2) of Item 848-3 in WMT Tariff 170 provides that if the shipper does not declare a released value on the bill of lading or shipping receipt as provided in Paragraph (C) (1) of the tariff item, then "the property shall be deemed to have been released to a value not exceeding \$25 per pound per package."

2. Paragraph (C) (2) is a general notice which seeks to limit PMT's obligation as a common carrier for freight loss and damage without benefit of a special contract.

3. The subject item requires each shipment moving at rates in tariffs made subject to the item to move at a released value.

4. PMT has no rates in its tariffs made subject to this item which are applicable to a shipment without a released value declared by the shipper.

5. No evidence was presented on the reasonableness of the involved rates or excess valuation charges.

6. Changes in the subject item over the years were not shown to have been unlawful or without proper authority.

7. The assailed item offers shippers a choice on rates.

Conclusions of Law

1. PMT's attempt to limit its liability for freight loss or damage by the method employed by Paragraph (C)(2) is contrary to CC Section 2174.

2. PMT should be ordered to flag out of Paragraph (C)(2).

3. PMT should be ordered to add the following as Paragraph (C)(3) to the subject item as applicable to itself and any other carrier wishing to participate in the paragraph:

"If shipper fails or declines to annotate the bill of lading or shipping receipt as provided in Subparagraph (1), the shipment will not be accepted for transportation."

4. D.92732 should be modified to the extent that it conflicts with this decision.

ORDER

IT IS ORDERED that:

1. Pacific Motor Transport Company and Pacific Motor Trucking Company shall, within 30 days after the effective date of this order:

a. Cancel their participation in Paragraph (C)(2) of Item 848-3 of Western Motor Tariff Bureau, Inc. Tariff 170, CA PUC 51; and

b. Insert as Paragraph (C)(3) in Item 848-3 in Western Motor Tariff Bureau, Inc. Tariff 170, CA PUC 51, as applicable to them the paragraph quoted in Conclusion of Law 3.

2. D.92732 is hereby modified to the extent that it conflicts with this order.

3. The Commission's Transportation Staff shall prepare for presentation to the Commission an Order Instituting Investigation to determine the propriety of Paragraph (C) (2) of Item 848-3 of Western Motor Tariff Bureau, Inc. Tariff 170, CA PUC 51, and like paragraphs of other tariffs.

This order becomes effective 30 days from today.

Dated JUN 17 1988, 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 Weisser

Victor Weisser, Executive Director

AB

APPENDIX A

(C) Not subject to Supplement 84

CA PUC 51

Western Motor Tariff Bureau, Inc.
AGENT

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TARIFF WMT 170

SECTION 1	RULES	ITEM
VALUATION		A 848-3
<p>(A) The released valuation provisions contained in this item will not apply where a released valuation is otherwise provided in connection with individual classes in the Governing Classification, Exception Sheet or this tariff.</p>		
<p>(B) Shipments accepted for transportation at the rates or charges in tariffs made subject to this tariff will be subject to the following:</p>		
<u>RELEASED VALUATION</u>	<u>RATE OR CHARGE</u>	
Released to a value not exceeding B \$30.00, C \$25.00 per pound per package	Applicable rate or charge as provided in tariffs made subject to this tariff	
Released to a value exceeding B \$30.00, C \$25.00 per pound per package	Applicable rate or charge as provided in tariffs made subject to this tariff	
<p>the following excess valuation charge per \$100.00 or fraction thereof by which the released value exceeds that for which the applicable rate or charge applies:</p>		
<u>EXCESS VALUATION CHARGE</u>	<u>WHEN VIA</u>	
93¢	STER	
87¢	DSAL	
86¢	CFRI, CRNT	
85¢	BRAK, COPO, #PRNGR	
78¢	FLLN, JTXI, LCAT, LGOG, POMQ, PMTC, PTLY, PUTK	
74¢	GNTL, JNJO	
68¢	CALC	
64¢	ABTP, POZA	
37¢	CABI, ECLN	
<p>(C)(1) Except as otherwise provided in Subparagraph (2), the shipping order or bill of lading shall be annotated with a provision reading substantially as follows:</p> <p style="padding-left: 40px;">"Unless a greater value is declared herein, the shipper agrees and declares that the value of the property is released to a value not exceeding B \$30.00, C \$25.00 per pound per package."</p>		
<p>(2) In the event the shipper fails to annotate the shipping receipt or bill of lading in the manner set forth in Subparagraph (1), the property shall be deemed to have been released to a value not exceeding B \$30.00, C \$25.00 per pound per package.</p>		
<p>A—Applies only via ABTP, BRAK, CABI, CALC, CFRI, CRNT, COPO, DSAL, ECLN, FLLN, GNTL, JNJO, JTXI, LCAT, LGOG, POMQ, PMTC, POZA, PTLY, PUTK, #PRNGR, STER.</p>		
<p>B—Applies only via ABTP, COPO, POZA, #PRNGR.</p>		
<p>C—Applies only via BRAK, CABI, CALC, CFRI, CRNT, DSAL, ECLN, FLLN, GNTL, JNJO, JTXI, LCAT, LGOG, POMQ, PMTC, PTLY, PUTK, STER.</p>		
<p># Effective August 17, 1987. Issued on ten (10) days' notice under authority of CA PUC Certificate of Public Convenience and Necessity File T-149,684; and pursuant to Rule 7-6, General Order 147-A.</p>		
ISSUED: July 27, 1987		EFFECTIVE: September 8, 1987 (EAN)
disc		ISSUED BY R. G. MOON, ISSUING OFFICER
Correction: 2749		P.O. BOX 1907 • 8042 CECILIA ST., SOUTH GATE, CALIF. 90280
GM/080		141

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