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SEP 14 1988

Decision 88 09 005 SEP 14 1988

ORIGINAL

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 Tariff Services, Inc., and)
Willig Freight Lines,)

Defendants.)

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

Folger Athearn, Jr., and Jerome F. Marks, for
Athearn Transportation Consultants, Inc.,
complainant.

Ronald C. Chauvel, Attorney at Law, for ANR
Freight System, Inc. and Pacific Coast
Tariff Bureau; LaVine & Shain, by Robert L.
LaVine, Attorney at Law, for Willig Freight
Lines; Skaff & Anderson, by Andrew Skaff and
Dwight Donovan, Attorneys at Law, for Con-Way
Western Express, Inc.; and Ann M. Pougiales,
Attorney at Law, and James E. Dellamaggiore,
for Viking Freight System, Inc.; defendants.

OPINION

Complainant Athearn Transportation Consultants, Inc.
charges that defendants ANR Freight System, Inc. (ANR), Con-Way
Western Express, Inc. (Con-Way), Viking Freight System, Inc.
(Viking), and Willig Freight Lines (Willig), highway common
carriers, are each charging and demanding of complainant exorbitant
and unreasonable fees for subscriptions to their individual freight

tariffs in violation of the Commission's General Order (GO) 122 series and requests that the Commission order them to refund to complainant the difference between the charges collected from complainant and \$.08 per page.¹ Complainant also charges one of the defendants with giving away its tariffs free of charge to preferred persons. The case was heard February 1, 2, and 3, 1988 and the matter submitted May 2, 1988 upon the filing of briefs. ✓

GO 122 series contains rules governing public inspection, subscription, and sale of tariff schedules of common and contract carriers subject to Commission jurisdiction. Rule 4(b) of GO 122 series states that "Fees for subscription shall be reasonable and nondiscriminatory" and Rule 4(a) describes a subscription as 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')." ✓

Complainant is a transportation consultant for profit. It provides freight bill auditing, management consulting, and other transportation-related services, representing primarily shipper interests. Its services cover all four modes of inter- and intrastate transportation, i.e. motor, rail, air, and water. Approximately 85% to 90% of its revenues are generated from freight bill auditing work. It finds it necessary to maintain a library of intra- and interstate carrier tariffs covering all four modes. It claims that its yearly expenses in maintaining its tariff library have increased from \$10,943 in 1976 to \$96,787 in 1985, but it had no idea of the extent to which that increase was attributable to

1 Decision (D.) 87-11-055 in the herein case dismissed the complaint against Cal-West Tariff Bureau, Inc., Pacific Coast Tariff Bureau, Pacific Motor Traffic Bureau, Inc., and Western Tariff Services, Inc., all of which are tariff publishing agencies, on the basis that the Commission had no jurisdiction over them in the matter, being that they were not public utilities.

the cost of purchasing highway common carrier tariffs subject to Commission's jurisdiction or the annual cost to it for such tariffs.

Complainant contends that the reasonableness of subscription fees should be based on the incremental costs of paper and printing supplies used to produce additional copies for regular subscribers, plus postage. Complainant evaluated the reasonableness of defendants' charges for tariffs by proffering numerous exhibits relating to various purchase prices per page of rail, motor, and air tariffs, volumes of "The 100 Greatest Books Ever Written," copying costs incurred by The Explorers Club, and the price list of an office equipment and furniture vendor which sells copier paper. From this evaluation he concluded that the subscription fee should be based only on the cost of paper, printing supplies, and postage, which would equal about \$.08 per tariff page. Complainant testified that the Interstate Commerce Act provides that only these three costs should be taken into consideration in a highway common carrier setting its subscription fees. Complainant contends that the Public Utilities Commission should follow suit.

Complainant showed that in 1986, the average yearly flat subscription fee to complainant, reduced to a per page basis, to each of five Con-Way tariffs was \$1.07, \$.746, \$.245, \$1.92, and \$5.00.

In 1985 and 1986, the average yearly flat subscription fee to complainant, reduced to a per page basis, to each of 6 Willig's tariffs was \$.153, \$.320, \$.617, \$.470, \$.355, and \$.527.

In 1985 and 1986, the average yearly flat subscription fee to complainant, reduced to a per page basis, to each of 12 Viking's tariffs was \$.348, \$.667, \$.116, \$.373, \$.467, \$1.72, \$2.50, \$6.67, \$.250, \$12.50, \$.434, and \$.89. A yearly subscription to the Viking tariff with the greatest number of pages--2,164 pages--cost \$.116 per page while the tariff with the

least number of pages--2 pages--cost \$12.50 per page. In 1986 Viking received and filled 97 subscriptions and in 1987 received and filled 106 subscriptions.

Complainant did not engage in any discovery or attempt to obtain information from defendants as to their tariff production costs. Complainant alleged that such costs were "quite irrelevant" to this case. Except as to Viking, complainant did not introduce any information or facts in an effort to substantiate its allegations that some subscribers get free tariffs. Also, no evidence was introduced by complainant that the subscription fees asked by defendants were not cost based.

Defendants contend that since complainant did not offer any evidence, statistics, or cost analysis with respect to any of defendants' tariffs the complainant has failed to sustain its case and the complaint should be dismissed.

Concerning complainant's statement in the complaint that defendant ANR omitted to include all pages in an ANR tariff subscribed to by complainant, ANR stated that subsequent to the filing of the complaint and upon clarification from complainant as to which sheets were missing ANR transmitted the missing sheets to complainant.

The publisher of Con-Way's four individual tariffs presented evidence on the cost of producing and maintaining those tariffs during calendar year 1986. Those costs included the following: employee labor for 29 separate mailings, approximately 30 minutes per mailing; paper costs for 1,039 pages at 38 copies each; postage costs associated with the mailings referenced above; envelopes associated with the same mailing; xerox maintenance costs of 4-1/2¢ per impression, 1,039 pages at 38 copies each; 4 printing plates at \$1 per plate; storage space of \$25 per month for stock pages and paper stock storage; and 5 hours of annual labor for pulling tariffs in connection with subscription updates. Con-Way's total annual expense in connection with the above was \$2,946.47

(Exhibit 15) or \$2.84 per page. Each of the costs included in the calculation of Con-Way's annual expense of \$2,946.47 was a direct cost related to the reproduction, maintenance, labor, and paper expense associated with maintaining a source of intrastate tariffs for distribution to those, like complainant, who request copies and subscribe to the tariffs. These "direct" costs do not include the \$48,000 in costs billed Con-Way by the tariff publisher during 1986 for all of the costs of preparing and printing its intrastate tariffs. Con-Way contends that in light of this total amount, the amount of revenues derived by Con-Way from the distribution of its intrastate tariffs--\$3,080--seems, if anything, to be grossly under what could, and perhaps should be charged.

The Viking witness testified that Viking does not give out tariff subscriptions free of charge. However, the witness stated that where Viking has instituted a rate item for a shipper Viking will furnish a copy of the tariff pages covering such rate item.

Complainant disagrees with defendants that the fees should be fully cost based. Complainant's rationale for the prohibition against passing on allocated overhead costs is threefold. First, the carrier's primary business is providing a transportation service and tariff publication is incidental to providing this public service. Second, public policy has been that the carrier is obligated to inform the public of its rules, regulations, and charges by posting copies of its tariffs at all terminals. This requirement usually has been waived when the carrier has been willing to furnish interested parties with copies of tariffs upon request. By sending copies of tariffs direct to subscribers, rather than posting them at terminals, the carrier has been relieved of all of the other costs, including labor and office space, of maintaining these copies. When furnishing copies of tariffs to transportation consultants the carrier avoids other costs. A carrier is relieved of the expense of mailing many more

copies to the consultants' clients and is also relieved of many requests for rate information which are directed to the consultant rather than to the carrier's terminal. Third, if the carrier has no tariff subscribers all of the costs associated with tariff publication must be absorbed in toto into general overhead.

Discussion

Defendants contend that the reasonableness of their subscription fee should be gauged largely on their actual costs in producing and handling their tariffs, including the cost of postage, and since complainant did not show, and did not make any effort to obtain, information on any of defendants' costs, the complaint should be denied. Complainant's position, on the other hand, is that a reasonable subscription fee should be no more than defendants' incremental cost of paper and printing supplies used to produce additional copies for regular subscribers, plus postage. But even if we adopt complainant's position, complainant did not show any of defendants' incremental costs and did not show that it was unable to or prevented from securing such costs from defendants. Complainant, therefore, has failed to show defendants' subscription fees were unreasonable even when measured in accordance with complainant's theory of the case. This complaint seeks to have defendants pay money to complainant. We will not order this requested reparation based upon the sales price or cost per page to persons other than the defendants, such as to The Explorers Club. Hence, the complaint will be denied.

There is no prohibition in the GO 122 series against basing a fee on fully allocated production costs. However, if we had meant that a subscription fee should be based only on incremental costs we would have so specified in the GO instead of employing the word "reasonable" as a measure of the acceptability of the fee as the word "reasonable" implies that the fee must be fair to both the subscriber and carrier. Certainly, the word "reasonable" does not mean that a carrier must practically give

away its tariffs. Public Utilities Code § 451 requires that "all charges demanded...by any public utility...for any product or commodity furnished...or any service rendered...shall be just and reasonable." We think defendants' position that it may charge a fee based on fully allocated costs is more in keeping with the spirit of that section than complainant's contention that it should be able to subscribe to all tariffs at the alleged incremental rate of \$.08 per page. We do not wish to indicate that a reasonable fee is a fee that only includes fully allocated production costs. There may be reasons that a reasonable fee would not include all such costs or would include other nonproduction costs.

Comments to the Administrative Law Judge's proposed decision were received from various parties and their contents noted. Complainant's comments were late filed but were accompanied by a motion that its comments be accepted for filing. Certain defendants urged that complainant's comments be rejected and/or stricken.

Findings of Fact

1. Complainant alleges defendant highway common carriers with charging complainant exorbitant and unreasonable fees for subscriptions to their individual freight tariffs in violation of GO 122 series and requests the Commission to order them to refund the difference between what complainant has paid them and \$.08 per page.

2. Complainant also charges defendants with giving away subscriptions free of charge.

3. Complainant is a transportation consultant for profit and finds it necessary to maintain a tariff library to do freight bill auditing work, among other things.

4. Complainant contends that the reasonableness of subscription fees should be based on the incremental costs of paper and printing supplies used to produce additional copies of the tariffs for regular subscribers, plus postage.

5. Complainant did not engage in any discovery or attempt to obtain information from defendants as to their incremental costs.

6. Complainant did not show that it was unable to or prevented from securing defendants' incremental costs.

7. Complainant has not shown that defendants' subscription fees are unreasonable.

8. Complainant has not shown that any of the defendants give out free subscriptions.

Conclusions of Law

1. Interim D.87-11-055 should be made final.
2. Case (C.) 87-01-010 should be denied.

ORDER

IT IS ORDERED that:

1. Interim D.87-11-055 is made final.
2. C.87-01-010 is denied.
3. Complainant's motion to accept its late-filed comments for filing is granted, and motions to reject or strike such late-filed comments are denied.

This order becomes effective 30 days from today.

Dated SEP 14 1988, at San Francisco, California.

STANLEY W. HULETT
President

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

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



Victor Weisser, Executive Director

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Findings of Fact

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3. Complainant is a transportation consultant for profit and finds it necessary to maintain a tariff library to do freight bill auditing work, among other things.
4. Complainant contends that the reasonableness of subscription fees should be based on the incremental costs of paper and printing supplies used to produce additional copies of the tariffs for regular subscribers, plus postage.
5. Complainant did not engage in any discovery or attempt to obtain information from defendants as to their incremental costs.
6. Complainant did not show that it was unable to or prevented from securing defendants' incremental costs.
7. Complainant has not shown that defendants' subscription fees are unreasonable.

8. Complainant has not shown that any of the defendants give out free subscriptions.

Conclusions of Law

1. Interim D.87-11-055 should be made final.
2. Case (C.) 87-01-010 should be denied.

O R D E R

IT IS ORDERED that:

1. Interim D.87-11-055 is made final.
2. C.87-01-010 is denied.

This order becomes effective 30 days from today.

Dated _____, at San Francisco, California.