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Decision 90 06 067 JUN 20 1990

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of Right-O-Way, Inc., for authority to depart from the terms and provisions of Sections 494 and 532 of the California Public Utilities Code and to dispense with the requirements that overcharges be paid to Rubin Postaer and Associates for the transportation of freight at rates greater than its published rates.	Application 89-12-002 (Filed December 1, 1989)

Miles L. Kavaller and Milton W. Flack, Attorneys at Law, for Right-O-Way, Inc., applicant.
Kathleen Yates, Attorney at Law, for State of California Department of General Services, Traffic Management Unit, protestant.
Christopher C. Foley, Attorney at Law, for California State Lottery, and Barrett W. Francis, Attorney at Law, for Rubin Postaer and Associates, interested parties.
Kenneth Koss, for the Transportation Division.

O P I N I O N

Applicant, Right-O-Way, Inc. (ROW), seeks authority to deviate from the terms of §§ 494 and 532 of the Public Utilities (PU) Code so that it may retain $58,415.49 in overcharges collected from Rubin Postaer and Associates (RPA). The State of California Department of General Services, Traffic Management Unit (TMU), and the Commission's Transportation Division protest. The matter was submitted for decision based upon stipulated facts.

Those facts are, and we find: Applicant operates as a highway common carrier pursuant to a certificate of public convenience and necessity issued in Decision (D.) 82-08-055, under T-162,386, and participated, at all times during the transportation

in question, in the rates and charges set forth in Cal. PUC Nos. 2, 3, and 22 published by Cal-West Tariff Bureau, Inc.

In August of 1985 the California State Lottery (CSL) contracted with Needham Harper Worldwide, Inc., the predecessor in interest of RPA, for advertising and promotional services. The contract provided, in part, for reimbursement of charges incurred in the transportation of advertising and promotional materials. In October of 1985 applicant was engaged by Needham Harper Worldwide, Inc. to provide the transportation services, and until July of 1986, the services were provided by applicant to Needham Harper Worldwide, Inc. and its successor, RPA, at rates and charges pursuant to applicant's tariffs then published and on file with this Commission. However, due to the special handling and services required by RPA and CSL it became apparent to applicant that the transportation was not compensable for the services being rendered, and that applicant was sustaining a loss. Applicant informed RPA of the loss. Thereafter, applicant proposed a new and higher rate structure to compensate applicant for the special services, which was accepted by RPA. The new rate structure was confirmed by applicant to RPA in writing by letter dated July 8, 1986. Subsequently, applicant and RPA agreed to rates at rate breaks at 5,000 and 10,000 pound levels. This latter agreement was also confirmed by letters dated October 17 and October 24, 1986. (See Exhibit 5 to the application.)

In entering upon the agreement for increased rates with RPA, applicant believed that it had the necessary operating authority to enter into a contract with RPA, and that it was lawful to enter into the increased rates as long as the rates were in excess of the Commission's approved minimum rates, without obtaining authorization from the Commission.

During the period from July through December of 1986, applicant provided transportation services to RPA at the increased rates, for which RPA incurred transportation charges for such

services in the sum of $194,681.77 which it paid. RPA thereafter requested reimbursement of these transportation charges from CSL. On or about May 20, 1987, the Department of General Services of the State of California, acting on behalf of the State of California and CSL informed RPA that the sum of $70,699.13 in transportation charges incurred for services performed by applicant would be disallowed. The Traffic Management Unit of the Department of General Services had undertaken a review of the freight bill invoices issued by applicant to RPA and determined that the charges billed and collected exceeded the rate levels in Transition Tariff 2. Based on that review CSL refused to reimburse RPA for transportation charges paid to applicant in the sum of $70,699.13. The administrative claim submitted by RPA on July 7, 1988, seeking reimbursement of those charges, together with interest, was rejected. On August 11, 1988, RPA filed a suit against CSL and applicant in Los Angeles Superior Court, Case No. C-695353. In its complaint RPA is seeking reimbursement from CSL for the indicated transportation charges and in an alternative cause of action is seeking from applicant reimbursement of the overcharges.

Although the freight charges billed and collected by applicant were above the rate levels established by the Commission's Transition Tariff 2, as observed by the audit of the Department of General Services, and also above the rate levels established in applicant's published rates, applicant's charges were consistent with the letter agreements with RPA, except to the extent of $2,748.05, which sum, together with interest, has been repaid by applicant to RPA. The rate level in applicant's published tariff was approximately 9% greater than that published in the Commission's Transition Tariff 2.

The parties to the Superior Court proceeding have entered into a Settlement Agreement and Stipulation for Dismissal Without Prejudice, which provides, among other things, as follows:

(1) that the difference between the published tariff rates then on file by applicant with the Commission and the rates set forth in the letter agreements amount to $58,415.49; (2) that applicant would file this application (referred to in the Settlement Agreement and Stipulation as a "Petition"); (3) that all of the parties to the the Settlement Agreement and Stipulation would be bound by the decision of the California Public Utilities Commission; (4) that should the Commission grant applicant's Petition, CSL will reimburse RPA for the excess charges, or alternatively, should the Commission reject applicant's Petition, applicant will pay RPA the excess charges; and (5) that the Petition will be deemed denied for purposes of the Settlement Agreement and Stipulation unless the Petition was determined by the Public Utilities Commission within nine months from the deadline for the filing of the Petition. This application is being filed within the required 30-day period.[1] On November 17, 1989, a Request for Dismissal Without Prejudice of the Superior Court action was filed with the Los Angeles County Superior Court.

Prior to and during all times mentioned herein applicant was engaged in the business of providing and arranging transportation services as an air freight forwarder as well as that of a motor carrier. These services as an air freight forwarder encompassed the transportation of freight which, by its very nature, required expedited services, timed and scheduled deliveries.

RPA, and its predecessor Needham Harper Worldwide, Inc., had entered into a contractual relationship with CSL to provide promotional and advertising materials consisting generally of

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1 The nine months expire August 31, 1990. According to the Commission's current schedule the only meeting in August is on August 8, so as a practical matter this application must be decided no later than August 8.

printed matter and posters in quantities ranging anywhere from under 100 pounds to over 20,000 pounds. The products were picked up from various printers to be delivered to 12 cities throughout California. CSL required expedited service, timed and scheduled deliveries, and inside delivery and liftgate trucks. Because of weight factors, and pick up and deliveries to and from airports, transportation by air was not deemed feasible or economically efficient. Applicant and RPA in effect agreed to a substituted air transportation service where applicant would provide not only door-to-door service, but also reduced delivery times. In addition, RPA required that applicant provide inside delivery and liftgate truck service, sometimes on an expedited basis, as well as certain expedited services. All of these special services were provided by applicant so that RPA would comply with its contractual commitments to CSL. Applicant provided these special and extraordinary services at costs which were in excess of the normal costs for ordinary surface transportation. In effect, and in actual practice, applicant was providing a substituted air service at reasonable and compensable rates.

During all times herein mentioned applicant has, in good faith, applied and charged to RPA rates which it believed were in compliance with the Commission's rules, regulations, and general orders, even though the rates were in excess of the Commission's transition tariffs. Applicant believed that it had the ability to enter into an agreement with RPA for the transportation of freight on a contractual basis and at an agreed rate which would be not less than that contained in the Commission's transition tariffs.

Discussion

PU Code § 494 provides in part:

> "No common carrier shall charge, demand, collect or receive a different compensation for the transportation of...property, or for any service in connection therewith, than the applicable rates...and charges specified in its schedules filed and in effect at the time...."

PU Code § 532 provides in part:

> "Except as in this article otherwise provided, no public utility shall charge, or receive a different compensation...for any service rendered or to be rendered, than the rates...and charges applicable thereto as specified in its schedules on file and in effect at the time... The commission may by rule or order establish such exceptions from the operation of this prohibition as it may consider just and reasonable as to each public utility." (Emphasis added.)

Taken together, these code sections require that the common carrier charge and collect no more or less than the rates and charges set forth in its tariff on file with the Commission. However, these code sections also authorize the Commission to grant relief from these sections where special circumstances have been shown to exist and to avoid inequitable and unjust results.

The parties have not directed us to any case in which this Commission has permitted a carrier to collect more than its authorized filed tariff or contract rate. The cases that have been cited have, almost without exception, enforced the filed tariff rule or its equivalent in the minimum rates. Our independent research is in accord.

The leading case is Carnation v Southern Pacific Co. (1950) 50 CPUC 345 where the defendant published a tariff rate of 36 cents/milk can without approval of the Commission. After paying the rate complainant sued for reparation. The Commission found that 30 cents was the approved rate, that the Commission had not authorized the increase, and that defendant should refund the difference to complainant. Carnation has been followed in, among other cases, Cal-Dak v Delta Lines (1962) 59 CPUC 378 and Re Orange Coast Sightseeing (1969) 70 CPUC 479, 490.

Although overcharge cases are few, undercharge cases, where carriers charge less than their filed tariffs or the minimum rates, are legion. And almost without exception the Commission

holds that undercharges are a preference and discriminatory and must be prevented. The usual remedy is to require the undercharges to be collected from the shipper and paid to the Commission by way of fine. We do not give a windfall to the carrier who has violated its own tariffs. (Re Cooper and Sons Trucking (D.86-04-060 in I.84-11-016).) On occasion, however, we have found special circumstances to exist and, to avoid an inequitable and unjust result, we have waived the undercharges. (Investigation of S. J. Steel Transportation Co. (1976) 81 CPUC 26.)

Applicant argues that in recent years the regulatory climate, both federal and state, has changed drastically and that the old cases have lost some of their effectiveness and timeliness. Applicant contends that during the past decade, this Commission has considered and adopted and then reconsidered a program of reregulation of motor carriers. Most recently the Commission conducted hearings in I.88-08-046, in the Matter of the Regulation of General Freight Transportation by Truck. In D.89-10-039 as modified by D.90-02-021, in I.88-08-046, we stated:

> "This decision finds that a workable competitive market exists in the general freight trucking industry and adopts a flexible regulatory program which allows the efficiencies of the marketplace to determine transportation rates.
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> "We believe this approach provides the benefits of competition with the control of regulation only where needed. Carriers will be able to openly compete for customers, but not allowed to discriminate without justification. Shippers will be free to have service tailored to their needs, and the trucking industry will be able to respond to market pressures rather than regulatory nechanisms." (At p. 2.)

On the other hand, that same decision continues to provide that:

> "Common carrier service can only be provided at common carrier filed tariff rates." (At p. 84.)

The Interstate Commerce Commission (ICC) adopted a policy statement in NITL--Pet. to Inst. Rule on Negotiated Motor Car., 3 I.C.C. 2d 99 (1986); 5 I.C.C. 2d 623; 1986 Fed.Car.Case (CCH) P37,348 at page 47,348; 1989 Fed.Car.Case CCH P37,694 at page 47,851 (hereinafter Negotiated Rates), in which it concluded that while it would not adopt a rule recognizing and enforcing negotiated but unpublished motor carrier rates, it invited references from the various courts which were entertaining suits for the collection of freight undercharges for the purpose of determining whether the motor common carrier would be engaged in an unreasonable practice in seeking to collect published tariff charges where the parties had negotiated, charged, and collected lower rates. Thus, the ICC departed from its longstanding position of strictly enforcing the filed rate doctrine and has carved out an exception which recognizes equitable considerations in post-shipment litigation.

ROW seeks to have authorized a deviation from its published tariff charges in view of the rates it negotiated with RPA. ROW contends that approval of its application under these circumstances would be consistent with the substantial changes in regulatory attitude to permit greater carrier-shipper flexibility. The changes in the filed rate doctrine on the interstate level resulting from the modification of the ICC's policy with reference to negotiated rates were based on the special transactions between carrier and shipper. ROW argues that this Commission is authorized to provide to the carrier and shipper similar equitable relief from the filed rate doctrine. (PU Code §§ 494 and 532, Investigation of S. J. Steel Transp. Co., supra.) The Department of General Services, Traffic Management Unit, and the Transportation Division say that the rates charged to RPA are discriminatory and that applicant has not shown any special circumstances which would support a departure from precedent.

Applying the theory of the undercharge cases to this application is not appropriate. In an undercharge case the shipper, by definition, has been given a preference. Whether or not the carrier makes a profit on the shipment, the shipper's competitors are harmed and the carrier's competitors are harmed. Often, in undercharge cases, the shipper has used its economic leverage to coerce the carrier into transporting goods at a noncompensatory rate; a result not present here.

The Commission cannot condone common carriers' failure to comply with their filed tariff rates. Still, in light of the highly unusual circumstances present here, we believe the relief requested by ROW should be granted.

The fact situation in this case has never before been presented to us for decision and we would expect that a future occurrence would be as rare. That unique fact situation is: A knowledgeable shipper and a knowledgeable carrier enter into an agreement to transport goods at the carrier's filed tariff rate; after nine months of service both shipper and carrier agree that in light of the special services required by the shipper the tariff rate is too low and agree in writing to a higher rate, which is charged and paid. The carrier, for whatever reason, fails to obtain Commission approval of the higher rate.

From the agreed facts, it is clear that had ROW timely filed for approval, not being opposed by the shipper, we would have expeditiously granted the increase; had ROW timely applied for a contract carrier permit to serve this shipper, we would have issued the permit. To penalize ROW some $58,000 for its inadvertence seems unjust and unreasonable.

This application differs from Carnation because here the shipper agreed to the higher rate, knowing the filed tariff rate, and agreeing that the filed tariff rate was not compensatory for the higher quality of service that the shipper required. In none of the overcharge cases which we have reviewed had the shipper

negotiated a higher rate knowing that the lower filed tariff rate was not compensatory for the special services desired. In this application there is no discrimination--no one else is being charged a higher or lower rate; no advantage is being taken of the shipper--the shipper is knowledgeable; the carrier is not exercising leverage--there are other carriers equipped to perform the same service.

Section 532, by authorizing us to grant exemptions to the filed tariff rule, recognizes that unique situations occur which require special treatment. For the reasons stated above, we believe in this case we may properly apply our exemption authority.

Comments

This decision was issued as a proposed decision of the presiding Administrative Law Judge. Comments have been received from the Transportation Division staff, TMU, and the applicant. Applicant's comments, of course, support the decision in its entirety. The Transportation Division has requested that should we grant the application we modify the wording in the conclusions of law and the ordering paragraph to refer to "overcharges" rather than to "rates" or "charges". We will comply with that request.

TMU objects to the characterization of the services rendered to RPA by ROW as "special", "extraordinary", and "expedited". TMU argues that although it stipulated to the facts set forth in the pleadings, it did not agree that those services constituted any thing other than routine services provided by highway common carriers with PUC filed tariffs. We do not agree. All parties stipulated that the facts set forth in the application would be accepted as evidence in lieu of an evidentiary hearing. The words in the application, "Applicant provided these special and extraordinary services at costs which were in excess of the normal costs for ordinary surface transportation" (see application, Page 7, Lines 5-7), are understood by us in their ordinary factual sense. In a letter attached as Exhibit 5 to the application the

shipper, RPA, writes "Rubin Postaer, with approval of CSL required that Right-O-Way provide inside delivery and lift gate truck services, sometimes on an expedited basis, as well as certain expedited services." That letter was part of the stipulation by TMU and to us it shows that applicant performed expedited services.

Finding of Fact

The findings of fact are set forth above on pages 1 through 5, up to the "Discussion" section.

Conclusion of Law

It is just and reasonable to exempt ROW from refunding to RPA overcharges which were charged and collected by ROW between July 1986 and December 1986, which exceeded ROW's rates then on file with the Commission.

O R D E R

IT IS ORDERED that Right-O-Way, Inc. is not required to repay any transportation overcharges to Rubin Postaer and Associates for transportation performed during the period from July 1986 through and including December 1986.

This order is effective today.

Dated _____, at San Francisco, California.

FREDERICK R. DUDA
STANLEY W. HULETT
JOHN B. OHANIAN
PATRICIA M. ECKERT
Commissioners

President G. Mitchell Wilk, being necessarily absent, did not participate.

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

NEAL J. SHULMAN, Executive Director