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Decision 91-11-012 November 6, 1991

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Yuba Trucking, Inc.,

Complainant,

vs.

A & R Bertolini Farms,
and Brian Bertolini,

Defendant.

And Related Matters.

ORIGINAL

Case 91-02-045
(Filed February 4, 1991)

Case 91-02-049
(Filed February 4, 1991)

Case 91-02-050
(Filed February 4, 1991)

Michael Lindeman, for Yuba Trucking,
complainant.

Brian Bertolini, for Brian Bertolini,
defendant.

James R. Panella, for the California Public
Utilities Commission.

OPINION ON REHEARING

Background

These three complaints by Yuba Trucking, Inc. (complainant) allege that A & R Bertolini Farms and Brian Bertolini (defendants) quoted rates lower than those named in Minimum Rate Tariff (MRT) 7-A, assertedly in violation of Item 180 of the tariff. MRT 7-A names rates for the transportation of commodities in dump truck equipment. Complainant and defendant are dump truck carriers. Complainant requested that the Commission institute an investigation with respect to defendant's rate quotation practices.

By Decision (D.) 91-05-041 dated May 22, 1991, we dismissed the three complaints because no transportation had been performed at any of the quoted rates at the time the complaints were filed. The decision concluded that none of the provisions of MRT 7-A, including Item 180, had been violated. Complainant filed application for rehearing of D.91-05-041 and by D.91-08-035 dated August 7, 1991, we granted limited rehearing of D.91-05-041, "...to the extent that a prehearing conference (PHC) shall be held to determine whether the complaints present at this time any issues requiring resolution or a public hearing."

A PHC was held before Administrative Law Judge (ALJ) John Lemke in Marysville on August 23, 1991. The ALJ had issued a ruling setting the PHC for the purpose of determining whether there were issues requiring an evidentiary hearing, and inviting the parties to present oral arguments during the conference and proposing to submit this proceeding upon those arguments. The parties agreed at the PHC to argue the question of whether the mere quotation of a rate lower than the correct rate stated in MRT 7-A is a violation of the tariff.

During the course of the PHC, complainant withdrew two of its three complaints, Cases (C.) 91-02-045 and 91-02-050, because the lower-than-minimum rates quoted had become proper due to the expiration of certain previously applicable surcharges. Complainant also agreed to the dismissal of A & R Bertolini Farms as a named defendant in the remaining complaint, C.91-02-049. The remaining complaint involves the quotation of lower-than-minimum rates on the transportation of black top and base rock from the plant of Baldwin Contracting Co. at Hallwood, and from Arbuckle Sand & Gravel to a project near Williams (Colusa County).

Item 180 of MRT 7-A states:

"UNITS OF MEASUREMENT TO BE OBSERVED"

"(a) Rates or accessorial charges shall not be quoted or assessed by carriers based upon a unit of measurement different from that in

which the minimum rate and charges in this tariff are stated for the type of shipment being rated.

"(b) Where rates in Section 4 are applicable, zone rates in cents per ton shall be quoted and assessed.

"(c) If there is no zone rate provided in Section 4, rates in Sections 2 or 3 shall be quoted and assessed."

D.91-05-041 reasoned that Item 180 had not been violated by defendant's mere quotation of a rate lower than that named in MRT 7-A, relying principally upon the heading to the item, and the wording appearing in paragraph (a) of Item 180.

Yuba argues that the wording stated in paragraph (c) of the item is the language which should be considered the basis for its complaint. Defendant agrees with complainant that it should be unlawful to even quote an improper rate; however, in the case before us, he states, he had quoted a rate based upon a prospective application for a deviation from the named MRT 7-A rates. He applied for and received the deviation authority which permitted the rate he had earlier quoted, although he never performed the transportation. (Ironically, the actual transportation was performed not by defendant, but rather by complainant.) Defendant argues that a carrier should be able to quote a rate lower than a named tariff rate if it intends to apply to the Commission for permission to assess the lower rate.

There appear to be two questions before us in this remaining complaint case: (1) whether it is a violation of the provisions of Item 180 to quote an incorrect rate, and (2) if so, whether it is nevertheless permissible to quote a rate lower than the applicable rate named in the minimum rate tariff when a deviation application is contemplated by the carrier quoting the lower rate.

Discussion

The Commission has apparently never investigated the quotation practices of a highway carrier operating under its jurisdiction. The minimum rate enforcement cases generally involve the actual assessment of unlawful charges, not the mere quotation of incorrect rates. This may be because carriers, especially those who daily quote a great many rates, are subject to the human element of error, and will occasionally and unintentionally misquote rates. (Indeed, during the conduct of the PHC, defendant's representative stated that complainant quoted the shipper a rate less than the MRT 7-A minimum rate on this same job, an allegation which complainant did not deny.)

Defendant stated that he had received a telephonic endorsement by a member of the Commission's Transportation Division staff indicating that it would be permissible to quote the lower rate, since he planned to apply for deviation authority to assess the rate. Defendant ultimately did receive such authority under the Commission's Simplified Deviation Procedure. Under this procedure a carrier may propose a rate that is 90% or more of the applicable minimum rate. A proposed rate at that level is presumed to be reasonable and no cost showing is required. The carrier must submit its latest available balance sheet and an income statement; its identity and the identities, signatures and telephone numbers of the shipper and subhaulers involved; a description of the transportation; the applicable minimum rate and the proposed rate, using the same unit of measurement as shown in the applicable minimum rate tariff; a copy of its application for a Biennial Inspection of Terminal by the California Highway Patrol; and a letter of support from the shipper.

A review of the history of Item 180 reveals clearly the Commission's intent in adopting the particular language now contained in the item. All of the minimum rate tariffs issued by the Commission over the past several decades have contained wording

identical to that shown in paragraph (a) of Item 180. D.69567, dated August 17, 1965 in C.5437, Order Setting Hearing (OSH) dated April 21, 1964, discusses the reason for adopting the present wording contained in paragraphs (b) and (c). Before the issuance of D.69567, MRT 7 (the predecessor to MRT 7-A) contained distance-tonnage, hourly, and zone rates, as it does now. However, at that time the hourly rates named in Section 4 of the tariff alternated with the zone rates set forth in Section 3. One of the purposes of the OSH was to consider rules governing alternation of rates. In D.69567, the Commission adopted the wording contained in the present tariff item, and commented as follows (mimeo., pp. 12, 13):

"The record is clear that zone rates, where applicable, reflect more closely the costs and other economic factors surrounding the specific commodities to which they apply than do hourly rates applicable to all commodities governed by Minimum Rate Tariff No. 7. Moreover, zone rates can be more accurately and simply determined than hourly rates, inasmuch as the factors necessary to determine zone rates do not vary with each haul as they do with hourly rates.

"We find that the proposed nonalternation of zone rates with hourly rates will result in reasonable minimum rates and charges. In the circumstances, we find that the zone rates heretofore described as within the scope of this proceeding should not alternate with hourly rates prescribed within Southern Territory."

The above discussion serves to remove any uncertainty regarding the interpretation to be placed upon the wording in Item 180. If there is uncertainty, or ambiguity, such must be resolved against the framer of the tariff. (U.S. v. GN Ry, 337 F2d 243.) The entire purpose of the current rule is to emphasize that zone rates in Section 4 are to be applied when applicable, and that where Section 4 rates are not applicable, rates in Section 2 or 3 must apply; in other words, zone rates no longer alternate with

hourly rates in the Southern Territory. To place the interpretation on Item 180 urged by Yuba would mean that any carrier who inadvertently quoted an incorrect rate would be subject to complaint. That is clearly not, and has never been the Commission's purpose in placing "UNITS OF MEASUREMENT TO BE OBSERVED" rules in its minimum rate tariffs.

It may be useful to refer to applicable provisions of the Public Utilities (PU) Code in order to further justify our decision here. PU Code § 3667 provides, in pertinent part, that no highway permit carrier shall "charge, demand, collect, or receive for the transportation of property...rates or charges less than the minimum rates and charges..." (Emphasis added.) We believe that a mere quotation of a rate does not go as far as charging or demanding a rate for a transportation service. Both terms, it seems to us, contemplate the presentation of a bill for services rendered, not simply a quotation of a rate which may or may not be assessed in the future.

Moreover, in the case before us, it would be pointless to investigate the rate quotation practices of a carrier who had quoted a lower than minimum rate in anticipation of applying for and receiving authority to assess that rate under established deviation procedures. Such investigations would frustrate the Commission's purpose in adopting these liberalized procedures. The complaint should be dismissed.

Yuba asked that defendant be investigated "with regard to quoting illegal rates on the project in question." The issuance of an order instituting investigation by this Commission is discretionary, and the complaint may also be dismissed on that basis alone, because we find no need for an investigation regarding defendant's quotation practices.

Yuba requested that the ALJ file a proposed decision on this rehearing. The ALJ indicated that while a proposed decision

is not required in connection herewith (Rule 77.1, Rules of Practice and Procedure), he would nevertheless grant the request. The ALJ's proposed decision was filed September 30. No comments were submitted.

Findings of Fact

1. Yuba alleged in its complaint that defendant violated Item 180 of MRT 7-A, by quoting a rate less than the applicable rate shown in the tariff, and has requested that the Commission institute an investigation of defendant's practice of quoting illegal rates on the project in question, involving the hauling of black top and base rock from Baldwin's plant at Hallwood and from Arbuckle Sand & Gravel to the jobsite, near Williams on Interstate Route 5.

2. The language presently contained in paragraphs (b) and (c) of Item 180 was adopted by D.69567 in order to emphasize the Commission's intent that zone rates and hourly rates would no longer alternate in the Southern Territory.

3. Defendant quoted a rate lower than the applicable minimum rate in anticipation of applying for and receiving authority to apply a lower than minimum rate pursuant to a simplified deviation procedure.

4. The institution of an investigation by the Commission is an action which may or may not be undertaken at the Commission's discretion.

Conclusions of Law

1. The mere quotation of a rate lower than the applicable minimum rate, as long as the quotation is on the same unit of measurement as the applicable minimum rate, does not constitute a violation of Item 180, when Item 180 is considered in light of the Commission's intent in adopting the language presently shown in the item as indicated in Finding 2 above.

2. Not to allow the quotation of a rate lower than the applicable minimum rate based upon the anticipated filing of a request to assess such lower rate would frustrate the Commission's

purpose in adopting the expedited deviation procedures presently in effect pursuant to D.89-09-104.

3. No useful purpose would be served by granting complainant's request to institute an investigation of defendant's practice relating to the quotation of rates on the project in question.

4. Yuba has requested that Cases 91-02-045 and 91-02-050 be dismissed.

5. An evidentiary hearing is not required.

6. The three complaints should be dismissed.

O R D E R

IT IS ORDERED that the complaints in Cases 91-02-045, 91-02-049, and 91-02-050 are dismissed.

This order is effective today.

Dated November 6, 1991, at San Francisco, California.

PATRICIA M. ECKERT
President
JOHN B. OHANIAN
DANIEL Wm. FESSLER
NORMAN D. SHUMWAY
Commissioners

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


NEAL J. SHULMAN, Executive Director