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Decision 92-12-041 December 16, 1992

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

CAL PAK DELIVERY, INC.,
 Complainant,
 vs.
 UNITED PARCEL SERVICE, INC.,
 Defendant.

ORIGINAL

Case 91-10-054
(Filed October 10, 1991)

INTERIM OPINION

Background

On October 31, 1991, Cal Pak Delivery, Inc. (Cal Pak) filed this complaint alleging that defendant United Parcel Service, Inc. (UPS) is in violation of various Commission decisions and General Orders (GOs) with its Hundredweight Service. Hundredweight Service rates apply to multiple package shipments when the following conditions are met:

1. Packages must be addressed to a single consignee at one location from a single shipper at one location on the same date.
2. No single package may exceed 70 pounds, 130 inches in length plus girth, or 108 inches in length.
3. The actual aggregate weight of each shipment must be 200 pounds or greater.

The rates are assessed per hundred pounds of weight and vary according to which of the four California zones the shipment is destined.

Issues

Cal Pak alleges the following violations by UPS in its Hundredweight Service.

1. UPS is not, and has not been in compliance since October 12, 1989, with GO 147-B, now -C, and GO 80-C for special contracts in Hundredweight Service.
2. UPS does not have a Hundredweight Service tariff on file with the Commission.
3. Transportation Division (TD) refuses to enforce Commission decisions and rules, in particular Decision (D.) 91-07-020 and GO 147-C.
4. The Commission has been negligent in enforcing GO 147-B Rule 7.4.

Cal Pak requests that the Commission order UPS to cease and desist their Hundredweight Service operations.

Defendant's Answer

UPS in its answer filed on December 5, 1991 asserts:

- a. UPS' Hundredweight Service rates are in conformance with rules and GOs to the extent they are applicable.
- b. Cal Pak is estopped from asserting the claims set forth in the complaint, since the issues raised were earlier raised and resolved in decisions issued in Case (C.) 89-11-021. Cal Pak petitioned the California Supreme Court for writ of review, which was denied. Thus, D.91-03-015 as modified by D.91-07-020 in that case, is final and effective.

Other Filings

Cal Pak filed an amendment to the complaint on December 10, 1991. The amendment essentially answers UPS' assertions in its answer to the complaint, and expands the allegations of violations to also include non-compliance with GOs 80, 84, 100, and 123.

On May 29, 1992, UPS filed a motion to dismiss the complaint as to common carrier Hundredweight Service on grounds of collateral estoppel, and a motion to stay adjudication of the complaint with regard to contract carrier Hundredweight Service.

Cal Pak responded on August 24, 1992 with a filing alleging "protectionism" of UPS by TD and repeating the allegations of the complaint.

On July 20, 1992, UPS filed a motion requesting cancellation of the scheduled hearings and objecting to the testimony and questions propounded to it by Cal Pak as being argumentative and strictly legal in nature, as well as irrelevant by virtue of having been decided previously by the Commission, and exceeding the allowable scope of a complaint.

On August 24, 1992, Cal Pak filed a motion requesting cancellation of the scheduled hearings because Cal Pak is unable to receive a fair and equitable hearing when the defendant is UPS due to protectionism by TD and the Commission toward UPS.

The scheduled hearings were cancelled by Administrative Law Judge (ALJ) Ruling dated August 25, 1992, which indicated that the pending motions would be considered to determine whether hearings or ex parte treatment of the complaint would be appropriate.

Finally, on September 4, 1992, UPS responded to the August 22 Cal Pak motion, agreeing that hearings should be cancelled, but opposing use of pleadings as evidence and to Cal Pak's attempt to expand the complaint into an investigation into TD and the ALJ. UPS further requested an early decision by the Commission.

Decisional History

Of particular relevance are the decisions in C.89-11-021 in which UPS' Hundredweight Service rates were challenged by Cal Pak as being unjust, unreasonable, and unduly preferential. In D.91-03-015, dated March 13, 1991, in C.89-11-021 we dismissed the

complaint of Cal Pak, finding that UPS' Hundredweight Service rates were not unreasonable and did not violate any PU Code sections. The decision further found that Hundredweight Service rates were exempt from economic regulation by virtue of being in competition with the U.S. Postal Service.

D.91-07-020 dated July 2, 1991, in the same case, denied rehearing sought by Cal Pak, but modified D.91-03-015 to conclude that Hundredweight Service rates are not exempt from economic regulation. However, the Hundredweight Service rates were found to be just and reasonable, compensatory and well above the floor price set forth in GO 147-B.

As indicated above, Cal Pak's petition for writ of review to the California Supreme Court was denied.

Discussion

It is obvious by the number of filings that this is a contentious matter. However, the basic issues are not complex. Upon review of the numerous filings, it is apparent that evidentiary hearings are not warranted, and would only serve to reiterate the arguments already propounded. The positions of the parties are clear, and the matter may properly be handled by ex parte decision. The validity of Cal Pak's contentions may be determined by examining the referenced decisions and GOs. In addition, both parties agree that no hearings should be held.

We now address the various contentions of the complaint.

Compliance with General Orders

First, Cal Pak contends that since late 1989 UPS has not been in compliance with various GOs for special contracts in Hundredweight Service. UPS in its May 29 motion requested a stay of adjudication of this issue pending disposition of its petition for modification of D.89-09-014.

If UPS is granted the modification it requests this issue could become moot, at least prospectively, since that would exempt all Hundredweight Service from economic regulation by the

Commission. The only remaining consideration would be whether UPS had been previously in violation as argued by Cal Pak. We will grant UPS' request to defer this issue until the petition is handled; hearings in that proceeding are scheduled in early 1993.

Tariff Compliance

The second issue is whether UPS has a valid Hundredweight Service tariff on file at the Commission. Cal Pak argues that UPS has no such tariff on file, since its local freight tariff 1 rules and rates do not apply to Hundredweight Service, and that is the only tariff on file for exempt parcel common carrier service. UPS added items 320 and 330 for Hundredweight Service to its CA PUC 22 tariff, which Cal Pak believes assumed that Hundredweight Service rates were exempt from economic regulation, as are parcel rates by virtue of competing with the U.S. Postal Service. Item 320 was the standard Hundredweight Service tariff, while item 330 was the expedited Hundredweight Service tariff. Both have been changed; the current tariffs for those Hundredweight Service classifications are now found in CA PUC 23, items 300 and 310, respectively.

UPS believes the legal principles of res judicata and/or collateral estoppel apply to this complaint, except for the contract carrier issue addressed above. UPS argues that the same issues were raised by Cal Pak in complaint C.89-11-021 which was decided by D.91-03-015 as modified by D.91-07-020.

"The doctrine of res judicata gives certain conclusive effect to a former judgement in subsequent litigation involving the same controversy. It seeks to curtail multiple litigation causing vexation and expense to the parties and wasted effort and expense in judicial administration." 7 Witkin, California Procedures (3rd Ed.) Judgement, Section 188, page 621.

Collateral estoppel may apply where "in a new action on a different cause of action, the former judgement is not a complete merger or bar, but...it is conclusive on issues actually litigated

between the parties in the former action." 7 Witkin, California Procedures (3rd Ed.) Judgement, Section 188, page 623.

These doctrines apply to Commission proceedings. See People v. Western Airlines (1954) 42Cal.2nd 621, 630.

In this complaint "Cal Pak believes the Commission was unaware of the specific Rule 7.4 VARIABLE COST FLOOR in GO 147-B, now -C, that specifies specific procedures a carrier must do to meet this rule. UPS has not complied with this rule prior to or after the date D.91-07-020 on July 2, 1991 order was issued for it's Hundredweight Service."

In C.89-11-021 Cal Pak stated "The acceptance of CJ89-546 is in direct violation of GO 147-A and PUC Codes 452 and 453."

Both complaints refer to GO 147, in the then current form. While the other references are somewhat different, that is necessarily true since the referenced decisions in the current case were not yet issued at the time of the earlier complaint filing.

In both cases Cal Pak raised the same issue and asked for the same Commission action:

C.89-11-021, "Whereas, Cal Pak prays the Commission issues and ex parte order to cancel UPS Hundredweight Service rates as UPS has no authority from the Commission."

C.91-10-054, "Wherefore Cal Pak prays the Commission issue an ex parte order immediately to UPS to cease and desist their Hundredweight Service operations."

We conclude that Cal Pak is barred by the principle of res judicata from again raising this issue, it having been finally decided in C.89-11-021.

We further note that prior to issuing D.91-07-020 we had not determined that Hundredweight Service was not exempt from economic regulation. We also stated in D.91-07-020 "...we find that the Hundredweight Service rates are in compliance with applicable rules and general orders." Cal Pak argues that D.91-07-020, by virtue of determining that Hundredweight Service

was no longer exempt from economic regulation, required UPS to withdraw its then existing tariffs and refile to conform to that change. D.91-03-015 did not require UPS to refile tariffs, nor did D.91-07-020 in modifying that decision.

Therefore, even if res judicata did not apply, we would conclude that Cal Pak's argument that UPS has no valid tariffs in effect and is in violation of various GOs and rules is without merit. The Commission has considered those issues and disposed of them.

Transportation Division Enforcement

Cal Pak argues at length about "substantial shipper obligations", contending that UPS' contracts do not comply. Cal Pak accuses TD of not enforcing decisions and rules, and not enforcing substantial shipper obligations by taking out of context language in D.90-02-021 ... "services covering more than intrastate or exempt carriage; and so forth."... (35CPUC 2nd 363) as a basis for concluding that UPS has substantial shipper obligations in its Hundredweight Service. Cal Pak argues that the contracts provide for only one shipment of \$30 per week, which in its view is not a meaningful relationship.

The language TD cited is properly from the decision that set forth the definition of meaningful shipper obligations.

D.90-02-021 states:

2. The meaningful shipper obligation can be met by either of the following conditions:
 - A. A minimum of \$1000 per month of delivered transportation services, or
 - B. Other obligations not described above but which call for a substantial shipper obligation of a type not found in common carrier tariffs. Examples are plant security arrangements; unusual scheduling agreements; guaranteed demand; services covering more than intrastate operations; such as interstate or exempt carriage; and

so forth. We warn carriers that staff investigation of these unusual obligations may trigger 30-day contract suspensions by the Executive Director. Meeting the \$1000 minimum will be easier to determine within the 20-day effective date period.

The Commission specifically provided that by meeting either option A or B a shipper may meet the meaningful shipper obligation. TD's cite acknowledges that UPS is also an interstate carrier. D.90-02-021 further states, in this regard:

"As well, we will not insist that service be provided in every month, provided that the average level of service to date is greater than \$1000 per month or other meaningful obligations are continued." (Mimeo. rev. p. 98.)

We have no evidence that UPS has in any way circumvented the conditions set forth in D.90-02-021. TD has raised no concern with UPS' contracts in this regard. Cal Pak offers no examples of violations, it merely alleges that the UPS contracts do not satisfy D.90-02-021, based on its own interpretation of how the decision should be enforced.

We therefore conclude that Cal Pak has not adequately supported its contention of UPS' shippers' failure to meet the requirements of meaningful shipper obligations or of TD's laxity in enforcement.

We deny these contentions.

Commission Negligence

Cal Pak further states in its complaint that it believes the Commission was unaware of GO 147-B Rule 7.4 that specifies procedures required of a carrier. Having no further elaboration by Cal Pak on why it believed we were unaware, we consider the rule, which in relevant part requires common carriers to certify that their rates established or decreased are no lower than the variable cost floor (VCF). For UPS, we found its Hundredweight Service

rates to be compensatory and above the VCF in D.91-03-015, wherein we stated, "Thus, even though the Commission has determined that UPS' Hundredweight Service is not covered by the historical exemption granted to parcel delivery service, the rates in question are found to be just, reasonable, and compensatory under GO 147-B standards." (Mimeo. p. 9.) We further stated that the rates ... "clearly exceed floor price charges by amounts so great as to remove any question of their propriety under the Commission's current regulatory framework applicable in connection with the transportation of general commodities as set forth in GO 147-B." (Mimeo. p. 10.)

We find Cal Pak's contention to lack merit. UPS' rates clearly are above the VCF.

Motions

The May 29, 1992 motion of UPS is granted in part; adjudication of the complaint with regard to contract carrier Hundredweight Service is stayed pending resolution of the Pending Petition to Modify D.89-09-014. The principle of res judicata applies to the validity of Hundredweight Service tariffs.

The July 20, 1992 motion of UPS was handled by the ALJ Ruling of August 25, 1992.

The August 24, 1992 motion of Cal Pak is handled in part by the August 25 ALJ Ruling which cancelled the hearings, and by this decision denying the contention of protectionism.

Findings of Fact

1. The issue of UPS' compliance with Commission GOs with regard to Hundredweight Service special contracts may become moot for the future after disposition of UPS' petition for modification of D.89-09-014.

2. Cal Pak is barred by res judicata from again raising the issue of whether UPS has a valid Hundredweight Service tariff on file at the Commission.

3. Cal Pak has not adequately supported its contention that TD has been lax in enforcement of Commission decisions and GOs.

4. Cal Pak has not adequately supported its contention that UPS' shippers in Hundredweight Service do not meet the requirements of meaningful shipper obligations.

5. UPS' Hundredweight Service rates have previously been found to clearly exceed the VCF.

Conclusions of Law

1. The issue of compliance with Commission GOs of UPS' Hundredweight Service special contracts should be deferred pending disposition of UPS' petition for modification of D.89-09-014.

2. In all other regards, this complaint has no merit and should be denied.

INTERIM ORDER

IT IS ORDERED that:

1. The issue of compliance with General Orders of United Parcel Service, Inc. (UPS) Hundredweight Service special contracts is deferred pending disposition of UPS' petition for modification of Decision 89-09-014.

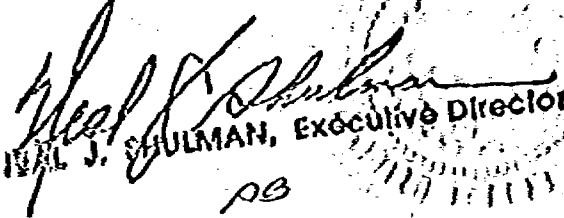
2. Except for the issue deferred above, the complaint in Case 90-10-054 is denied.

This order becomes effective 30 days from today.

Dated December 16, 1992, at San Francisco, California.

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

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


NEAL J. SHULMAN, Executive Director