L/mbh

Decision 92-12-070 December 16, 1992

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Ecolab, Inc.,
Complainant,

v.

Sterling Transit Company, Inc.,
Defendant.

ORIGINAL

Case 92-03-034
(Filed March 17, 1992)

ORDER DENYING REHEARING

Decision 92-09-014 (D.92-09-014 or the Decision) dismissed the complaint of Ecolab, Inc. (Ecolab or the Complainant) against Sterling Transit Company, Inc. (Sterling or the Defendant) relating to shipping undercharges, on the ground that the complaint was not timely filed. An Application for Rehearing was filed by Ecolab on October 1, 1992. The Application for Rehearing alleges that we erred in our interpretation and application of the timing requirements contained in Public Utilities Code section 737.[1] A response was filed by Sterling on October 14, 1992.

Sterling transported goods for Ecolab during the period from October 6, 1987 through October 26, 1989. The parties agreed that published tariff STER 200 Item 3200 would apply. That tariff provides, among other things, that Ecolab was to annotate the bill of lading with the applicable tariff. Ecolab did not do so. The failure to annotate was discovered during an audit. Under the terms of that tariff, the tariff did not apply in the absence of the annotation. Subsequently, Sterling billed Ecolab for alleged undercharges under Tariff WMT 570, Cal. PUC #85, Item 9112. Ecolab refused to pay.

1 All statutory references are to the Public Utilities Code unless specified otherwise.

Sterling filed suit in Santa Clara County Municipal Court on October 24, 1990, seeking collection of freight charges pursuant to Sections 494, 532 and 736-738. Ecolab answered the complaint in Municipal Court. Trial in Municipal Court was scheduled for April 7, 1992. On March 17, 1992 Ecolab filed a complaint with the Commission, seeking an order finding that the actions of Sterling were unreasonable and discriminatory under Sections 451 and 453 and that therefore additional freight charges did not accrue. Ecolab also filed a motion in Municipal Court asking that the trial be continued pending action by the Commission.

The Municipal Court continued the trial to May 19, 1992 and ordered counsel for Ecolab to inquire about our procedures with respect to Ecolab's complaint. Ecolab's inquiry was answered by a letter dated April 21, 1992 from Commission Assistant General Counsel William N. Foley. The letter outlined pertinent provisions of the Public Utilities Code. No further continuances were granted by the Municipal Court and it commenced trial on May 19, 1992. The matter was taken under submission and a ruling has been stayed pending our final action.

In its answer to the complaint before the Commission, Sterling admitted the factual allegations made by Ecolab, but maintained that the alleged undercharges were due and payable. As an affirmative defense, Sterling stated that we lacked jurisdiction to hear the complaint, because it was not timely filed as required by Section 737, within 90 days of the service of the Municipal Court complaint. The Decision granted Sterling's motion to dismiss and did not address the underlying issues raised by the parties relating to the alleged undercharges.

DISCUSSION:

The Application by Ecolab requests rehearing of the Decision on the ground that the time limit for filing in Section 737 is permissive rather than mandatory. (Application for Rehearing, Ecolab, p. 2.) Ecolab further alleges that we erred insofar as the Commission is required to make a determination on

the reasonableness of a carrier's rates and practices and that failure to do so abrogates legislative and judicial mandates. Ecolab requests that it be granted the opportunity for oral argument.

Ecolab maintains that the word "may" in Section 737 signifies that the 90 day time limit therein is permissive rather than mandatory. Ecolab points to the definitions of "shall" and "may" in Section 14. Ecolab compares the use of "may" in Section 737 to the use of "may" in Section 1756 and cites Sokol v. Public Utilities Commission, 53 Cal.Rptr. 673, 676 (1966) in support of its argument.

Sterling responds that Ecolab's interpretation would render the 90 day limit meaningless, as stated in the Decision at page 6. Sterling contends that Section 737 permits the defendant in a collection action to file a complaint with either the Commission or a court of competent jurisdiction within 90 days, rather than according to the requirements contained in the California Code of Civil Procedure Sections 426 et seq., regarding compulsory and permissive cross-complaint, specifically C.C.P. Section 428.50, requiring the filing of a cross-complaint at the same time as the answer to the complaint or as otherwise permitted pursuant to leave of the court.

Section 737 states, in pertinent part:

> "...If suit for the collection of the lawful tariff charges or any portion thereof of a public utility is filed in any court in accordance with the terms of this section,or if such collection is made by the public utility without filing suit, the person against whom such suit is filed or from whom such collection is made may, within 90 days from the date of service of summons in the suit, or the date of collection, file with the commission, or with any court of competent jurisdiction, a complaint for damages resulting from the violation of any of the provisions of this part with respect to the transaction to which the suit of the public utility relates, or for

which such collection has been made." (Emphasis added.)

We find that the "may" in Section 737 is permissive with respect to the filing of a complaint with the Commission or a court by a customer after a suit has been filed or collection attempted by a public utility. It does not refer to or modify the 90 day statute of limitation.

Normally in a case of concurrent jurisdiction, the forum where a case is first filed which asserts jurisdiction maintains jurisdiction. (See 2 Witkin, California Procedure, 3d. Edition, Sec. 340 et seq.) Section 737 permits a variation from this practice and from the Code of Civil Procedure requirements. This interpretation gives effect to the 90 day limit. Otherwise, as the Decision stated, it would be meaningless.

Ecolab's reliance on Sokol is misplaced. That case interpreted Section 1733 in conjunction with Section 1756. The permitted action there was the taking of a writ to the Supreme Court after an application for rehearing could have been deemed denied but before it actually was denied by the Commission. In that case, the Supreme Court found that the choice was for the benefit of the party making the application. The writ was filed before the expiration of time from actual denial, even though it was filed after the time when it should have been filed if the "deemed denied" date was controlling.

In any event, even if the 90 day limit is permissive and the exercise of jurisdiction in the instant case is discretionary, rather than barred by the operation of the statute of limitations, we decline to exercise it. Ecolab did not file its complaint here until 16 months after the Municipal Court action was initiated. That proceeding has already progressed to the conclusion of the trial. The court has stayed the entry of judgment, pending a final ruling here at the Commission. We appreciate the deference shown to us by the Municipal Court.

However, it would be wasteful of public resources for us to commence a hearing now. Ecolab is not deprived of a forum and a hearing by the operation of the statute of limitations, nor by our discretionary decision not to exercise jurisdiction, in this case. The parties will get a ruling from the Municipal Court (a court of competent jurisdiction) on their dispute. Rather, Ecolab is prevented from unreasonable delay in exercising the choice of forum offered to it by Section 737. We are relieved of the duplication of effort which the time limit is intended, at least in part, to prevent, now that the court has invested considerable resources in processing the case.

The Decision did not address the "numerous other issues" raised by the parties. (Decision, p. 7.) We concur that it is not necessary to reach these issues, nor any additional issues raised by the Application for Rehearing.

Therefore, having considered all of the applicant's arguments, and for the reasons stated above, IT IS ORDERED that:

1. The Application for Rehearing of D.92-09-014 by Ecolab is hereby denied.
2. The request for oral argument is also denied.

This order is effective 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