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Decision No. 90845

SEP 25 1979

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Hunt-Wesson Foods, Inc.,
Complainant,

v.

The Atchison, Topeka and Santa Fe
Railway Company and Southern
Pacific Transportation Company,
Defendants.

Case No. 10754
(Filed June 11, 1979;
amended June 28, 1979)

ORDER OF DISMISSAL

The facts are not disputed. During August and September, 1976, Hunt-Wesson Foods, Inc. (complainant) moved eight (8) shipments of corn syrup, in tank cars, via the lines of defendants, The Atchison, Topeka and Santa Fe Railway Company (Santa Fe) and Southern Pacific Transportation Company (Southern Pacific) from Oakdale to Davis and Hayward, all in California. For such transportation complainant paid \$16,546.59 and has been assessed additional sums totalling \$657.67 by undercharge notices.

The legal rates in effect at the time of the shipments in question as published in Pacific Southcoast Freight Bureau Tariff 1016, were the Class 35 rates of \$1.16 per 100 pounds for shipments destined for Hayward and \$1.22 per 100 pounds for shipments destined for Davis.

Complainant contends, and defendants admit, that the charges were excessive, unreasonable, and otherwise unjustified, and that complainant is entitled to reparations of \$10,627.75, and to waiver of \$657.67 of undercharges. The reparations are calculated based on a reduced rate of 41 cents per 100 pounds published by defendants in Supplement 66 to Pacific Southcoast Freight Bureau

Tariff 300-B, Item 18440, which was effective May 21, 1978.

Although defendants admit the allegations of the complaint, they both assert that the Commission lacks jurisdiction to order them to make the reparations because the claim is barred by the statute of limitations. This defense is raised by the motion to dismiss filed by Santa Fe on July 5, 1979. Southern Pacific in its answer filed July 13, 1979, adopted Santa Fe's defense by reference.

The statute of limitation to which defendants refer is found in Public Utilities Code Section 735 which states in pertinent part:

"All complaints for damages resulting from a violation of any of the provisions of this part, except Sections 494 and 532, shall...be filed with the commission...within two years from the time the cause of action accrues, and not after."

According to Section 738 of the Public Utilities Code, "the cause of action shall accrue upon delivery or tender of delivery of the shipment...with respect to which complaint is filed or claim made."

Since the shipments in question were made in August and September, 1976, and since the complaint was filed June 11, 1979, more than two years later, the claim is barred by the statute of limitations. The statute of limitations cannot be waived.

Although the Motion to Dismiss was filed July 5, 1979, complainant has filed no responsive pleading in opposition thereto. Moreover, in a telephone conversation with complainant's transportation services manager, who signed the complaint, Administrative Law Judge Robert T. Baer inquired if complainant would need additional time to respond to the Motion to Dismiss and was informed that complainant would not file a response and did not have any defense to the assertion of the statute of limitations.

Conclusions of Law

1. The complaint is barred by the statute of limitations.

2. The complaint should be dismissed.

IT IS ORDERED that the complaint in Case No. 10754 is dismissed with prejudice.

The effective date of this order shall be thirty days after the date hereof.

Dated SEP 25 1979, at San Francisco, California.

John E. Bayne
President
Vernon L. Ferguson
Richard D. Howell
Charles J. ...
Lawrence J. ...
Commissioners