C. 10581 - T/avm ALT.-T-NM

Decision No. 91934 JUN 17 1980

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

LENNOX INDUSTRIES, INC., a corporation, Complainant, v. CALIFORNIA CARTAGE COMPANY INC., a corporation, Defendant.	Case No. 10581 (Filed May 30, 1978)

Bob Baker, for complainant.
Russell, Schureman & Hancock, by Theodore W. Russell, Attorney at Law, for defendant.

O P I N I O N

By this complaint, Lennox Industries, Inc. (complainant) alleges that (1) on August 19, 1977, complainant submitted to California Cartage Company, Inc. (defendant) 55 claims in the total amount of $5,059.19 for overcharges on shipments of rooftop heating-cooling-ventilating units transported for it by defendant; (2) on January 3, 1978, complainant received a check for $1,903.13 from defendant with a notation thereon that this payment for 20 of the overcharge claims concluded the matter; (3) the 35 denied claims amount to $3,156.06; (4) each denied claim concerned an interpretation of Item 296 of Western Motor Tariff Bureau (WMTB) Tariff 111 in which defendant is a participant; (5) the item describes charges based on "length of loading space", and it is complainant's interpretation that since 35 of the units shipped were approximately 26 feet in length, each of these 35 shipments should have been billed at the 30,000-pound minimum weight which applies to loading space

"over 20 but not over 35 feet"; (6) in its denial of the claim, defendant stated that it interprets this term as referring to the length of the equipment it supplied rather than to the length of the item being shipped, and that since it furnished 40-foot equipment, it correctly based its charges on the 40,000-pound minimum weight which the item provides for loading space "over 35 feet"; (7) in response to complainant's request, the Commission staff, on February 3, 1978, issued an informal ruling to complainant which it interprets as agreeing with it; however, the ruling did state that if there had been a specific request by complainant's employee Lohr, who ordered the equipment from defendant, for equipment with 40 lineal feet of loading space, complainant would be bound to pay at the higher 40,000-pound minimum weight provided for "over 35 feet" loading space; and (8) it was Lohr's practice in ordering equipment from defendant to forward a warehouse release to it stating the particular unit to be shipped by model and serial number, and at no time did he select the particular vehicle for the job or make any request to or agreement with defendant regarding vehicle size. Complainant seeks an order from the Commission directing defendant to pay it $3,156.06 for the 35 denied overcharge claims, plus 9-3/4 percent interest.

In its answer, defendant alleged as follows: (1) the 35 undercharge claims in issue were denied on the basis of its interpretation of the "Full Utilization of Carrier's Equipment" provisions in Item 296 of WMTB Tariff 111; (2) in answer to its request for an interpretation of this item, the Tariff Issuing Officer and General Manager of WMTB agreed with it that the term "length of loading space" as used in Item 296 for determining the minimum weight for a shipment refers to the length of equipment required by the nature of the commodity transported and not the space utilized for the shipment; (3) during the time the transportation in question moved, defendant had 24-and 40-foot trailers only;

(4) while it is true that complainant's employee Lohr did not specifically specify the length of vehicles to be used, he did instruct defendant that the units to be transported were 26 feet 4 inches in length and that, because they could be subject to damage, there should be no overhang of the units beyond the end of the equipment; (5) the complainant was aware that 40-foot equipment was used for transporting these units for a period of years prior to the period covered by the overcharge claims as evidenced by its acceptance and payment of defendant's bills for 40-foot equipment; (6) by memo letter dated February 6, 1970 addressed to Lohr, defendant furnished complainant with various tariff pages, including the page on which Item 296 is published, and it also had various telephone conversations with complainant prior to the transportation herein regarding this item; (7) the only reference to partial load in Item 296 is in connection with overflow freight which partially loads the last trailer unit; and (8) defendant's interpretation is based upon a fair and reasonable construction of Item 296. Defendant requests that the complaint be dismissed.

Public hearing was held before Administrative Law Judge Arthur M. Mooney in Los Angeles on October 12, 1978, on which date the matter was submitted.

Issue

The single issue for our determination in this proceeding is the interpretation to be placed on the words "length of loading space" as used in Item 296 of WMTB Tariff 111. If the answer is that this statement refers to the lineal feet of loading space occupied on the carrier's equipment by the freight shipped, as advocated by complainant, the requested relief will be granted. If, on the other hand, it refers to the length of the loading space of the carrier's equipment furnished, as advocated by defendant, the complaint will be denied.

We will first set forth Item 296 in its entirety. This will be followed by a summation of the evidence and statements presented by complainant and by defendant at the hearing, an interpretative analysis of the lawfulness of Item 296, and our discussion of the issue at hand.

Item 296

Item 296 of WMTB Tariff 111 reads in its entirety as follows:

"FULL UTILIZATION OF CARRIER'S EQUIPMENT

"(A) If the nature of the commodity transported is such that the equipment used cannot be or at the shipper's option is not loaded to its legal capacity, then charges shall be assessed by applying the class 35 rate, subject to the following minimum weights and conditions:

Length of Loading Space	Minimum Weight in Pounds
Not over 20 feet	20,000
Over 20 feet but not over 35 feet	A 36,000 B 30,000
Over 35 feet	40,000

"(B) If higher charges will result than those provided in Paragraph (A) from the application of the actual weight of the shipment at the class rate or rates applicable thereto, then such higher charges will apply in lieu of the charges provided for in Paragraph (A).

"(C) On overflow freight which only partially loads the last trailer unit of carrier's equipment provided for the shipments, charges for such overflow freight will be at the actual weight of said overflow freight, at rate or rates applicable thereto as if said overflow freight was a separate shipment.

"A - Will not apply via California Cartage Co.
"B - Applies only via California Cartage Co."

Complainant

Evidence on behalf of complainant was presented by its traffic manager. His testimony regarding the background of and the reasons for filing the complaint was substantially similar to the statements in the complaint summarized above and will not be repeated. He introduced in evidence copies of all of the 55 overcharge claims. The 35 that were denied related to shipments of the 26-foot 4-inch multi-zone airconditioning units that were transported during the period December 1974 through April 1977. According to the documentation, the units each weighed approximately 7,000 pounds.

The complainant witness testified as follows regarding the units and the procedure for handling them: (1) The units were manufactured at a plant in Columbus, Ohio and shipped by rail to defendant's warehouse in Wilmington where they were stored until needed; (2) the units have an extruded aluminum frame and are covered with galvanized sheeting; (3) although they are somewhat fragile and do not have a great deal of strength, they are not structurally weak; (4) the units are lifted from the top by cable slings provided by complainant for unloading, and they are loaded by either the slings or heavy forklifts; (5) when they are to be shipped to a jobsite, such as a school, complainant will notify the warehouse which arranges for the transportation; and (6) there was never any employee of complainant at the warehouse to specify the particular size vehicle to be used for the transportation. The traffic manager asserted that he had no knowledge of anyone in his company ever agreeing with the defendant as to the size of equipment to be used. He stated that defendant had handled this movement for complainant for 10 years and that complainant is now using other carriers for this transportation.

The traffic manager asserted that even if the term "length of loading space" in Item 296 were to be interpreted as the length of the carrier's equipment, with which he does not agree, it would be the carrier's responsibility to furnish the appropriate size equipment shown in the item for the shipment. In this regard, he pointed out that the item provides for lengths of "not over 20 feet", "over 20 feet but not over 35 feet", and "over 35 feet" and minimum weights of 20,000, 30,000, and 40,000 pounds, respectively, for these lengths. It is his position that since defendant participates in this item, it thereby holds itself out to furnish these lengths of equipment and that since the units are approximately 26 feet in length, defendant was obligated to furnish equipment not over 35 feet in length and to apply the 30,000-pound minimum weight to the shipments in question. The witness stated that under any interpretation of the rule, the relief requested in the complaint should be granted.

In his closing statement, the traffic manager asserted that any meetings or conversations between a member of his company and defendant were concerned with the methods to be used in handling the airconditioning units only and that the evidence clearly supports his position.

Defendant

Evidence on behalf of defendant was presented by its warehouse superintendent, its sales manager, and its president. Much of their testimony was substantially similar to the statements in the answer to the complaint summarized above, and this, likewise, will not be repeated. Additionally, they testified that: (1) The same procedure initially set up for handling complainant's deliveries was continued for the 10 years that defendant had the transportation account; (2) each unit was stored at the warehouse until complainant advised defendant of the place, date, and time it was to be delivered; (3) the timing of deliveries was of the essence;

(4) the units were fragile and had no skids or packing around them, and they were very susceptible to damage if care was not used in loading, unloading, and transporting them; (5) originally, hourly rates were applied to the transportation, but they proved unsatisfactory and rates based on Item 296 were applied shortly thereafter and continued to be used while defendant had the account; (6) other than possibly spare parts, the airconditioning unit was the only cargo transported on the trailer; (7) there was, therefore, full utilization of the carrier's equipment by complainant; (8) defendant has applied Item 296 in the same manner as here in connection with transportation for other shippers, and no one else has ever questioned its interpretation of the item; and (9) the overcharge claims that were paid involved the transportation of smaller size airconditioning units on equipment that was larger and took a higher minimum weight than other available equipment that could have been used to provide the transportation.

The president further testified as follows regarding the history and defendant's interpretation of Item 296: (1) Full utilization of carrier's equipment rules have been published by common carriers for 50 years; (2) defendant has participated in Item 296 since 1970; (3) the reasons for the various loading space brackets in Item 296 is that historically the longest double trailer was 20 feet and the longest single trailer was 35 feet; whereas, the lengths of these trailers have been continually increased to the extent that single trailers are now up to 45 feet in length; (4) the purpose of the item is to take care of the customer who has something out of the ordinary to ship and requires full utilization of the carrier's equipment and to compensate the carrier for such service, including any unused space on its equipment furnished for the transportation; (5) the term "length of loading space" as used in Item 296 is not ambiguous and clearly refers to the length of the loading space of the

equipment furnished; and: (6) while transportation under the provisions of Item 296 is compensatory, this would not be so under complainant's interpretation of the item.

In his closing statement, defendant's attorney, in addition to summing up his client's evidence, urged that the Commission find his client's interpretation of Item 296 to be correct and that the requested relief be denied.

Interpretative Analysis

Although the scope of this proceeding is limited to the singular issue that both the complainant and the defendant have asked us to decide; namely, the meaning of the words "length of loading space" as that term is used in Item 296, the applicability of Item 296 when considered in its entirety should be discussed. Testimony introduced into this proceeding shows that a single airconditioning unit was the only freight transported on the carrier's equipment. However, there is nothing in the evidence to indicate that the complainant requested the exclusive use of the carrier's equipment to perform the transportation involved. Had the complainant specifically requested exclusive use of carrier's equipment then the provisions of Item 290 of Tariff 111, which is set forth below, would have been applicable. We find nothing especially esoteric about the meaning of the term exclusive use. A shipper's request for exclusive use of the carrier's equipment is a request that his freight "ride alone". When such a request is made the minimum weights shown in Item 290 clearly would apply to the length of the carrier's equipment provided.

EXCLUSIVE USE OF CARRIER'S EQUIPMENT	ITEM
When exclusive use of carrier's equipment is requested by shipper or consignee charges shall be assessed by applying the applicable class or commodity rates or combination thereof as provided herein, subject to the following minimum weight:	(1) (3) 290

(2) Length of Equipment in Lineal Feet	Min. Wt. in Lbs.
Not over 22 feet ----------	20,000
Over 22 feet but not over 35 feet ----------	30,000
Over 35 feet ----------	40,000

(1) Applies only via Calc.
(2) Means loading space.
(3) Issued under authority of Cal. P.U.C. Decision No. 72632.

Exclusive use service could not have been provided under Item 296 as this item does not provide a means for assessing rates for exclusive use of equipment. This brings us to the question of the meaning of "Full Utilization of Carrier's Equipment", which is the title of Item 296, and whether, or under what circumstances, the provisions of Item 296 could have been used for the involved shipment. We believe that the answer lies in paragraph (a) of Item 296 which reads in part as follows, "...if the nature of the commodity transported is such that the equipment used cannot be ...loaded to its legal capacity..." The term legal capacity is not defined in the tariff. However, based solely upon the above language the provisions of Item 296 would apply only if the physical shipping characteristics of the airconditioners were such that the loading of additional increments of any other freight into the carrier's equipment was prevented even though additional space, within legal loading limits, was available. Any other interpretation, such as full utilization meaning only that the loading of an additional airconditioner unit was prevented, or that the loading of any additional freight, of any kind, for the account of Lennox only was prevented, would allow the carrier the opportunity to apply Item 296 at its discretion. This would be unreasonable, per se, regardless of whether the charges may otherwise be compensatory. Although not at issue here, whether Item 296 could have been applied to the transportation involved in this

proceeding would have been a question of fact depending upon the conditions surrounding the loading of the carrier's equipment in conjunction with the meaning given the term "Full Utilization of Carrier's Equipment", which is not defined in the carrier's tariff. It would appear from the evidence introduced here that additional freight could have been legally loaded into the carrier's equipment. Therefore, based upon the meaning that we have given to the term "Full Utilization of Carrier's Equipment", Item 296 would not have been applicable for the transportation in question because the carrier's equipment was not fully utilized. In any event, it is quite clear that without a precise definition of the terms "Full Utilization of Carrier's Equipment" and "Legal Capacity" that the tariff rule is sufficiently ambiguous to allow the carrier to apply such rule at its discretion; in other words in a discriminatory manner. Under such conditions it has been held that interpretations of a carrier's tariff must be made in favor of the shipper. Burrus Mill and Elevator Co., vs. C.R.I. & P. Ry., (1942) 131 F. 2d 532 at 535. It would thus appear that there is a strong possibility that Item 296, as well as other "Full Utilization of Carrier's Equipment" rules in Tariff No. 111 of Western Motor Tariff Bureau, Inc. are in violation of Section 494 of the California Public Utilities Code. We recommend that an Order Instituting Investigation into the lawfulness of these rules be ~~instigated~~ issued at some future date.

Full utilization of equipment and/or exclusive use of equipment rules are designed to compensate a carrier with a minimum revenue when transporting freight which is out of the ordinary, usually freight which is of a light, bulky or fragile nature. When applied, these rules remove the application of the rates otherwise applicable in the carrier's tariff, which in turn are based upon higher classification ratings that are designed to adequately compensate the carrier when transporting this type of freight. In

the present case a 40,000-pound minimum weight was assessed for the transportation of a 7,000-pound airconditioner. In these circumstances, we believe that extreme care must be taken with the publication of these rules to insure that they are understandable and that they cannot be used discriminatorily.

Discussion

It is a general tariff tenet that tariff ambiguities are to be resolved in favor of the shipper and against the tariff maker. Tariffs should be construed according to their language irrespective of the intentions of their framers. The term "length of loading space" as used in Item 296 is not defined in the tariff. A plain reading of these words could mean the length of the space occupied by the commodity on the carrier's trailer as advocated by the complainant, the length of the trailer provided for the exclusive use of the shipper as advocated by the defendant, or for that matter the length of the loading space required for the commodity, exceeding the length of the commodity but less than the full length of the trailer, to allow for blocking, dunnage or necessary air space. Shippers are justified in relying upon tariffs as they are worded, provided their interpretation is reasonable and will not result in an absurd situation. We are of the opinion that if it were the intent of the carrier that the minimum weights shown in Item 296 were to apply to the length of the trailer supplied, that appropriate wording to that effect, such as "Length of the Trailer Required by the Nature of the Commodity Transported" or "Length of Carrier's Equipment in Lineal Feet" could easily have been used. The shipper's interpretation of the meaning of the words "Length of Loading Space" as used in Item 296 of Tariff 111 of Western Motor Tariff Bureau, Inc. is reasonable. The reasonable doubt involved in the complaint will be resolved in favor of the shipper.

Findings of Fact

1. During the period December 1974 through April 1977 defendant transported a number of multi-zone airconditioning units from its warehouse in Wilmington to various job sites for complainant.

2. On August 19, 1977, complainant submitted 55 overcharge claims in the total amount of $5,059.19 to ~~complainant~~ defendant in connection with this transportation. 55

3. On January 3, 1978, complainant received a check from defendant in the amount of $1,903.13 with a notation that 35 of the claims were denied and that the check was for the claims with which defendant agreed. The 35 denied claims amount to $3,156.06.

4. Each of the 35 denied claims involved the transportation of units that were 26 feet 4 inches in length and were concerned with the interpretation of the phrase "Length of Loading Space" in Paragraph A of Item 296 of WMTB Tariff 111, under which the transportation was rated.

5. It is complainant's interpretation that the above-quoted phrase in Finding 4 refers to the length of the loading space occupied by the commodity shipped, and it is defendant's position that this phrase refers to the length of the loading space on the equipment furnished by the carrier to provide the transportation.

6. The term "length of loading space" as used in the tariff rule in question is sufficiently ambiguous to allow its application at the discretion of the carrier.

7. The complainant's interpretation that length of loading space means the space occupied by the commodity transported is reasonable.

8. The defendant is a participant in both Item 290 (an exclusive use rule) and Item 296 (a full utilization of carrier's equipment rule) of Tariff No. 111 of Western Motor Tariff Bureau, Inc.

9. Had complainant requested exclusive use of defendant's equipment the provisions of Item 290 of the defendant's tariff would have been applicable. Item 296 of the defendant's tariff does not provide a means for assessing rates for the exclusive use of carrier's equipment. The terms "Exclusive Use of Equipment" and "Full Utilization of Equipment" are not synonymous.

10. The term "Full Utilization of Carrier's Equipment" is not defined in the defendant's tariff. In the absence of a specific definition of this term in the tariff a reasonable interpretation would be that the carrier's equipment must be actually loaded to full visible cubic capacity for the equipment to be fully utilized. It appears that additional increments of freight could have been loaded into the defendant's trailer and that the trailer was not fully utilized.

11. Without a precise definition of the terms "Full Utilization of Carrier's Equipment" and "Legal Capacity" in the defendant's tariff the opportunity exists for the defendant to apply the provisions of Item 296 discriminatorily.

12. Defendant's use of the 40,000-pound minimum weight for the transportation of each of the units in issue was inappropriate.

13. Defendant did, during the period December 1974 through April 1977, charge, demand, collect, and receive a different compensation for the transportation of property than the applicable rates and charges specified in its schedules filed and in effect at the time in violation of Section 494 of the Public Utilities Code.

14. Lennox Industries, Inc. is entitled to recover the overcharge plus interest, and defendant should be directed to refund the sum of $3,156.00 plus interest at 9-3/4 percent per annum.

Conclusion of Law

SS 1. The relief sought by complainant should be granted.

O R D E R

IT IS ORDERED that:

1. California Cartage Company, Inc., shall refund within one hundred and eighty days after the effective date of this order to Lennox Industries, Inc. the overcharge of $3,156.06 plus interest at 9-3/4 percent per annum from the date of payment of the overcharge by Lennox Industries, Inc.

2. Within ten days after payment of the refund, California Cartage Company, Inc. shall notify the complainant and the Commission in writing of the amount refunded and the date and manner in which refund was accomplished.

The Executive Director shall cause a copy of this order to be served upon California Cartage Company, Inc., and the effective date of this order shall be twenty days after such service.

Dated JUN 17 1980, at San Francisco, California.

President

Commissioners

Commissioner Richard D. Gravelle, being necessarily absent, did not participate in the disposition of this proceeding.