

ORIGINALDecision 93521 SEP 1 1981

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Investigation on }
 the Commission's own motion into }
 the shipment rates in Lawlor Motor }
 Express Package Tariff No. 2, Cal. }
 PUC No. 2, Item 160. }

OII 92
 (Filed June 16, 1981)

Silver, Rosen, Fischer & Stecher, by
Michael J. Stecher and Ellis Ross Anderson,
 Attorneys at Law, for Lawlor Motor Express,
 Inc., respondent.
 Dunne, Phelps, Mills & Jackson, by Marshal G.
Berol, Attorney at Law, for Adams Delivery
 Service, Inc., protestant.
E. Q. Carmody, for himself, interested party.
Robert Snoda, for the Commission staff.

O P I N I O N

This proceeding was instituted on June 16, 1981 to determine whether the shipment rates contained on Original Page 11 (Item 160) of Lawlor Motor Express, Inc. (Lawlor), Package Tariff 2, Cal. PUC No. 2 comply with the Commission's motor carrier rate reregulation program enunciated in Decision (D.) 90663 dated August 14, 1979.^{1/} Lawlor was directed to show cause why the described rates should not be permanently suspended or canceled.

^{1/} Lawlor filed Rate Reduction (RR) 436 on June 12, 1981 to become effective June 16, 1981. RR 436 would have revised the shipment rates contained in Item 160. RR 436 did not become effective because no authority was granted by the Commission to publish such rates on less than 30 days' notice. (I&S) Case (C.) 10998 was instituted on petition of Adams Delivery Service, Inc. (Adams). Adams requests suspension and investigation of the rates in RR 436.

The order provided that Lawlor should show by competent evidence that the rates in issue are compensatory and otherwise reasonable and that such rates meet the needs of commerce.

Public hearing was held in San Francisco before Administrative Law Judge (ALJ) Mallory on June 26 and July 13, 1981.

At the initial hearing, evidence was presented on behalf of Lawlor and protestant Adams. Lawlor attempted to show that the shipment rates in issue were filed to meet the competitive rates of other carriers under procedures set forth in D.90663.^{2/}

2/ In a related proceeding, the Commission set forth the criteria for competitive rate filings as follows:

"In applying the reregulation program outlined in Decision 90663, it is our intent that when justification for the filing of a reduced rate is based on a motor carrier competitor's rate, that all of the circumstances and conditions applicable to the motor carrier competitor's rate shall apply to the reduced rate published to meet the competitor's rate. The rate must (1) apply to the same commodity or same group of commodities, (2) apply from and to the same origin and destination points (or from or to directly intermediate points), (3) be subject to the same minimum weight per shipment, and (4) must be subject to the same accessorial charges." (D.92640, dated January 21, 1981, in C.10924.)

That evidence, including cross-examination, developed that Lawlor's competitive rate filing did not precisely meet the rates of any three tariffs or contracts alleged to be the sources of Lawlor's reduced filing.^{3/}

At the initial hearing, Lawlor also presented cost and operating data designed to show that the reduced shipment rates were compensatory and contributed to Lawlor's profitability (Exhibits 2 and 3).

The evidence also showed that, while Lawlor had filed its reduced rate tariff in its own name, it was conducting business under that tariff in the names of Package Delivery Express and PDX.

The record shows that Lawlor's shipment rates in issue are to apply to distribution of traffic consolidated by a shipper's association for shippers located in the Los Angeles Metropolitan Area and transported from Los Angeles to Lawlor's dock in San Leandro by Di Salvo Trucking Company (Di Salvo). The record shows that Di Salvo formerly delivered this type of freight to Adams for subsequent delivery. Charles Lawlor, president of Lawlor, is also president of Di Salvo.

Between the initial and final hearing dates, Lawlor refiled the pertinent portions of its Package Tariff 2, Cal PUC No. 2. That filing was issued on July 8, 1981 to become effective on one day's notice. Revisions were made to the title page indicating that

^{3/} The tariff filings alleged to be the sources of the rates in issue were:

- (a) D.90744, dated August 28, 1979 in Application (A.) 58871, in which Adams was authorized to deviate from the rates in Minimum Rate Tariff 2 (MRT 2) for transportation of shipments of 500 pounds or less between specific Northern California points.
- (b) Western Motor Tariff Bureau, Inc. Cal PUC 51, Fifth Revised Page 110, containing rates for Small Shipment Service.
- (c) MRT 2, Item 1232, package rates on Drugs and Sundries.

Lawlor is doing business as Package Delivery Express and PDX. Item 160 was completely revised to contain the same governing provisions and points of origin and destination as set forth in Appendix A to Adam's rate deviation in D.90744, for shipments of 100 to 500 pounds. Lawlor's revised shipment rates are higher than the deviation rates of Adams.

The staff of the Commission's Transportation Division, Tariff and License Section (staff), reviewed Lawlor's revised tariff filing and accepted it. The staff representative stated at the hearing on July 13 that the staff analysis showed that the filing was in compliance with D.90663 as it met the criteria stated in footnote 2, supra.

On July 9, 1981, Lawlor filed a motion to dismiss OII 92, as its revised filing had been accepted by the Commission staff, and the original rate item, which is the subject of OII 92, had been canceled. Lawlor alleged that the issues in OII 92 are moot as Lawlor had refiled its rates.

At the further hearing on July 13, Charles Lawlor, president of Lawlor and of Di Salvo, was examined by Adams with the intent to establish that:

- (1) The revised filing does not fully meet the criteria for so-called "me-too" filings in D.90663 because Lawlor had published only part of the Adams rate deviation authority and because the specific governing provisions set forth in revised Item 160 are in conflict with the governing rules of Lawlor's Tariff 2, Cal PUC No. 2.
- (2) Adams' deviation authority granted in D.90744 was intended for a different purpose than that for which Lawlor intends to apply those rates; therefore, Adams' rates should not be permitted to apply to Lawlor's distribution traffic.

Adams also raised several issues concerning the relationship between Lawlor and Di Salvo. Adams endeavored to show that Lawlor and Di Salvo have the same stockholders and officers and, therefore, are alter ego corporations. Adams believes that we should review this alter ego relationship, particularly in the instances where the related trucking companies maintain different levels of rates for what are asserted to be the same transportation services. These same issues are raised by Adams in its complaint in C.11005, filed July 8, 1981. The answer to the complaint was filed after the close of hearing. At the hearing on July 13, the presiding ALJ ruled that the issues jointly raised in OII 92 and in C.11005 should be considered in C.11005, as those issues may be beyond the scope of the investigation in OII 92, and because the issues can be more fully developed within the context of C.11005. We affirm that ruling.

Discussion

Before the initiation of OII 92, the following actions took place:

- (a) On March 30, 1981, Lawlor filed its Package Tariff 2, Cal PUC No. 2 to become effective April 6, 1981.
- (b) The staff reviewed the tariff filing and permitted it to become effective on April 6, 1981.
- (c) After complaint to the staff by Adams that Lawlor's reduced-rate filing did not comply with the "me-too" provisions of D.90663, the staff attempted by letter dated June 3, 1981 to reject Original Page 11 (Item 160) of Lawlor's tariff.
- (d) That rejection letter had no force or effect because a common carrier tariff cannot be rejected by the Commission after the effective date of the filing.

- (e) The staff submitted to the Commission for consideration a resolution suspending the tariff page containing Item 160. That resolution was amended from an order suspending Item 160 to an order to show cause why the item should not be suspended.
- (f) The amended resolution was approved by the Commission and was docketed as OII 92.

It is clear from the above history that had time permitted an adequate analysis to be completed before the Original Item 160 provisions had become effective, those provisions would have been rejected for noncompliance with the "me-too" provisions of D.90663 and would never have become effective.

OII 92 directed Lawlor to show cause why the Original Item 160 rates should not be permanently suspended or canceled; or, as an acceptable alternative, Lawlor could refile tariff rates that would fully meet the "me-too" requirements. Lawlor initially elected to comply with OII 92 by producing evidence intended to show that the reduced rates met the criteria in D.90663, in that the rates either were properly filed under the "me-too" provisions of D.90663 or that the reduced rates were compensatory and contributed to carrier profitability.^{4/}

^{4/} We are convinced that Lawlor's original tariff filing did not comply with D.90663 "me-too" provisions. Cross-examination of the cost data supporting the rate reduction was never completed, and we are unable to state whether a finding could be made that the reduced rates contribute to carrier profitability.

After both bases advanced by Lawlor as support for the reduced rates were strongly challenged at the initial hearing, Lawlor elected to follow the alternative provided in OII 92 to refile its challenged reduced-rate tariff provisions.

The refiled Item 160 meets the requirements of the "me-too" provisions of D.90663 as explained in footnote 2. Although the provisions published by Lawlor are not identical to the provisions of Appendix A of D.90744, the provisions are more restrictive and the charges higher than those in that appendix. The specific provisions governing the rates in Item 160 set forth in that item take precedence over the general tariff rules under generally accepted rules of tariff construction. Therefore, there is no internal conflict in Lawlor's tariff as alleged by Adams.

In determining whether "me-too" provisions of D.90663 are complied with, we cannot look beyond the specific rates and rules authorized to Adams as set forth in Appendix A to D.90744. We cannot assign restrictions to the application of the rates that do not appear in the appendix even though the caption of A.58871 may indicate that the rates were intended to apply on "local transportation of packages weighing 500 pounds or less". Moreover, Lawlor's service under its Package Tariff is local service in that Lawlor performs service only from its terminal in the East Bay to points named in its tariff. The line-haul portion of the transportation from southern California to the San Francisco Bay Area is performed by Di Salvo as a separate movement under shipping documents issued by that carrier.

Lawlor's refiled Item 160 has been accepted by our staff and is in effect. The revised filing canceled and replaced Original Item 160, the subject of OII 92. Therefore, the original filing is moot, as asserted in Lawlor's Motion to Dismiss. OII 92 should be dismissed without ruling on the issues raised by Adams in (I&S) C.10998 and C.11005, which will be considered in those proceedings.

Findings of Fact

1. OII 92 directed Lawlor to show why the rates on Original Page 11, Item 160, effective April 6, 1981, in Lawlor Motor Express Package Tariff 2, Cal PUC No. 2 should not be permanently suspended or canceled. Lawlor was directed to show by competent evidence that the rates in issue are compensatory and otherwise reasonable and that such rates meet the needs of commerce.

2. Original Item 160 of Lawlor's Package Tariff 2, Cal PUC No. 2 did not meet the criteria for a competitive rate filing set forth in D.90663, as it did not match the rates, points of destination, or commodities in any of the reduced-rate tariffs or rate deviations described in Lawlor's Exhibit 1.

3. Subsequent to the initial hearing, Lawlor amended its Package Tariff 2 to show on the title page the names under which Lawlor is doing business and to substitute a revised Item 160.

4. The provisions of revised Item 160 conform, in all material respects, to the deviation rates authorized to protestant Adams in Appendix A to D.90744 for shipments over 100 and less than 500 pounds.

5. Revised Item 160 was reviewed by our staff and accepted for filing and that revised item is now in effect. That filing meets the criteria for competitive rate filings in D.90663.

6. Revised Item 160 canceled and replaced Original Item 160, the subject of OII 92.

Conclusions of Law

1. OII 92 should be dismissed.

2. The issues raised by Adams in (I&S) C.10998 concerning RR 436 should be considered in that proceeding.

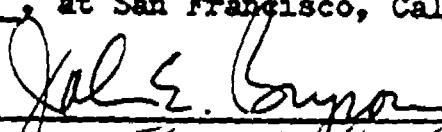
3. The issues raised by Adams in C.11005 concerning the asserted alter ego relationship between Lawlor and Di Salvo and whether different levels of rates may be maintained by those carriers for movements of the same commodities between the same points should be considered in that proceeding.


O R D E R

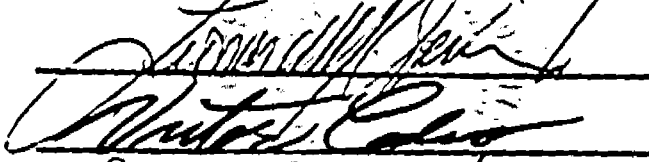
IT IS ORDERED that OII 92 is dismissed.


This order becomes effective 30 days from today.

Dated SEP 1 1981, at San Francisco, California.



President






Commissioners