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MAIL DATE  
8/14/95

Decision 95-08-057

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of UNITED PARCEL  
SERVICE, INC: filing tariff pages  
that reflect increases in parcel  
rates without authorization from  
this Commission and using an out-  
dated Decision No. 89-09-014 dated  
September 7, 1989, as the authority  
to increase rates effective  
February 24, 1992.

Case 92-02-026  
(Filed February 13, 1992)

**ORIGINAL**

And Related Matter.

ORDER DENYING REHEARING OF DECISION 95-03-044

Decision (D.) 95-03-044 denied rehearing and modified D.94-11-066, which dismissed with prejudice a request by Cal Pak Delivery, Inc. (Cal Pak) for refunds from United Parcel Service, Inc. (UPS) after finding that the complaint neither sought reparations nor established damages resulting from UPS' charging between February 24, 1992 and February 3, 1993 a rate which was unlawful since it had not been authorized by the Commission.

Cal Pak applied for rehearing of D.95-03-044 on the grounds that the Commission: 1) should clarify whether it intended to divest the Superior Court of jurisdiction to award damages; and 2) should not use Steiger Terra Cotta v. Southern Pacific Company [D.2524] (1915) 7 C.R.C. 288 as the standard for proof of damages.

UPS responded that: 1) Cal Pak's third application for rehearing represents an unprecedented refusal to accept the judgment of the Commission; 2) the Commission is entitled to determine when to assert jurisdiction over matters relating to public utility regulation; and 3) Public Utilities Code section 734 gives the Commission discretion to determine that automatic

refunds are not appropriate and that under the unique regulatory circumstances presented here, shippers must show they have been damaged in order to be entitled to a refund.<sup>1</sup>

We have carefully reviewed every allegation of error raised in the above application and considered the response thereto, and are of the opinion that insufficient grounds for granting rehearing have been shown.

### Jurisdiction

At the time the application for rehearing was filed, Cal Pak was a plaintiff in Cal Pak v. United Parcel Service, Inc. (Case No. 951103), a proposed class action filed in the San Francisco Superior Court pursuant to section 2106.<sup>2</sup> Cal Pak sought overcharge damages for unlawful rates it paid between February 24, 1992 and February 3, 1993. Cal Pak claims that 165,000 of UPS' customers paid \$40 million in overcharges during this period.

Cal Pak claims that UPS asserted in a related action in the San Francisco Superior Court, TODD-AO Corporation v. United Parcel Service, Inc., and would assert in the class action, that by D.95-03-044 the Commission intended to preclude UPS customers from seeking overcharge damages in the courts, and mandated that each shipper must file its claim before the Commission.

Cal Pak claims that if UPS prevails, UPS shippers will be denied any real relief, and UPS will be rewarded for its unlawful actions, even though the Commission twice held that UPS'

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1. All statutory cites will be to the Public Utilities Code.

2. Section 2106 states that any public utility which does or permits any unlawful act, or omits to do something required by the law or by Commission order, shall be liable to the person or corporations affected thereby, and that an action to recover damages may be brought in any court of competent jurisdiction.

rates were unlawful and damages warranted. Since the average overcharge was less than \$250, shippers are unlikely to file claims with the Commission.

Cal Pak argues that in an overcharge case where all regulatory issues have been resolved by a Commission judgment, the Commission cannot divest the court of its concurrent jurisdiction. Cal Pak cites California Adjustment Co. v. Atchison, Topeka & Santa Fe (1918) 179 Cal. 141 for the principle that where there is no need for the Commission to determine whether a utility has charged an excessive or discriminatory amount, a plaintiff seeking damages has a choice of forums. Cal Pak claims that under California Adjustment legal liability vests, and the measure of damages is fixed, the moment a customer pays a utility rate which is illegal.

Cal Pak claims that the court in the UPS overcharge case need take no regulatory action, and need only correctly apply the principles of collateral estoppel to the Commission's final judgment. Cal Pak contends that in D.94-11-066 the Commission itself held that where an overcharge is paid, concurrent jurisdiction exists where no regulatory action is required (D.94-11-066, slip op., pp. 5 and 7). Cal Pak asserts that the Commission did not in D.95-03-044 purport to divest the courts of their concurrent jurisdiction over illegal overcharges.

UPS responds that Cal Pak's jurisdictional arguments have already been rejected by the Commission, which continues to assert jurisdiction over overcharge complaints. UPS notes that San Francisco Superior Court Judge William Cahill, in Todd A-O Corporation v. UPS, supra, recently concluded that the Commission had exclusive authority over any claims filed by UPS' shippers. UPS claims that the rapidly changing regulatory environment distinguishes this from other overcharge cases, and that only the Commission can evaluate facts unique to this case.

Cal Pak's jurisdictional argument is wide of the mark. D.95-03-044 states that:

"UPS has requested that we reiterate that significant public policy issues require continued Commission jurisdiction over the subject matter of this complaint. We find this request compelling, and will reverse our dismissal of the remainder of this consolidated proceeding. We have a strong regulatory interest in maintaining jurisdiction over any complaints seeking refunds for any overcharges. ... Our continuing jurisdiction over the consolidated proceeding is consistent with our statutorily and constitutionally mandated duties, will ensure the integrity of our regulatory programs, and will facilitate the orderly development of the law. In short, such jurisdiction is in the public interest."  
(pp. 12-13.)

As Cal Pak itself points out, D.95-03-044 does not purport to divest the courts of their concurrent jurisdiction over illegal overcharges. As Cal Pak further points out, D.94-11-066 addresses the issue of concurrent jurisdiction and cites Carnation Company v. Southern Pacific Company (1950) 50 Cal.P.U.C. 345 to the effect that "the Commission is vested with jurisdiction in all reparations cases, and the courts have concurrent jurisdiction where no regulatory action is required." (D.94-11-066, p. 7.)

Cal Pak's real concern appears to be that UPS might use our discussion of our decision to maintain continuing jurisdiction over the portion of the consolidated proceeding remaining after Cal Pak's dismissal with prejudice to argue in the Cal Pak class action that we intended to divest the Court of its concurrent jurisdiction and preclude 165,000 UPS customers from recovering overcharge damages in the courts. Indeed, San Francisco Superior Court Judge Cahill has now dismissed the two pending UPS overcharge cases before it on the ground that under

section 1759 the Commission has exclusive jurisdiction over the subject matter of those cases.<sup>3</sup>

On April 21, 1995, the Court sustained UPS' demurrer to Todd A-O Corporation's first amended complaint without leave to amend, stating that "[p]ursuant to Public Utilities Code section 1759, the Public Utilities Commission possesses exclusive jurisdiction over the subject matter of this action and this Court is w/o [sic] jurisdiction to decide the disqualification of counsel motion."<sup>4</sup>

On May 12, 1995, Judge Cahill dismissed Cal Pak's action against UPS after sustaining UPS's demurrer to Cal Pak's complaint. The Court's order sustaining the demurrer states in part that:

- "1. Pursuant to Public Utilities Code section 1759, the Public Utilities Commission possesses exclusive jurisdiction over the subject matter of this action.
2. The Public Utilities Commission has dismissed Cal Pak's claim with prejudice, and this Court is deprived of jurisdiction to 'review, reverse, correct, or annul' the Commission's ruling pursuant to Public Utilities Code section 1759.

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3. Section 1759 states that: "No court of this State, except the Supreme Court to the extent specified in this article, shall have jurisdiction to review, reverse, correct, or annul any order or decision of the commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain, or interfere with the commission in the performance of its official duties, except that that the writ of mandamus shall lie from the Supreme Court to the commission in all proper cases."

4. Although the Superior Court documents discussed here are not part of the official record of this proceeding, we can, and hereby do, appropriately take official notice of the decisions and orders of the Superior Court referenced in this decision.

3. Accordingly, defendant's demurrer to plaintiff's complaint is sustained without leave to amend."

By asking us to dismiss its complaint so that it could pursue its Superior Court action (which was stayed until we completed our proceedings on the rehearing encompassed by D.93-05-018 [D.94-11-066, Finding of Fact 10]), and by erring in estimating the Court's response, Cal Pak seems to have run out of venues for its overcharge complaint. Whether or not the Superior Court might reasonably have reached a different jurisdictional conclusion, Cal Pak must now live with the results of its litigation strategy.

We note that on May 12, 1995, Judge Cahill also granted a motion by UPS to disqualify Michael Khourie as class counsel in the putative class action then known as Cal Pak v. UPS, stating that "Michael Khourie is hereby disqualified as class counsel in, and is barred from any further participation in the prosecution of, this case. Michael Khourie is also hereby prohibited from receiving any fees (directly or indirectly) in connection with his representation of this case." (Order Granting Motion by United Parcel Service to Disqualify Michael Khourie, p. 2.) The basis for Mr. Khourie's disqualification was his "admitted ethical misconduct in proceedings pending before this Court." (Id.) The Court found that declarations submitted with regard to the disqualification motions in this case and in Todd A-O Corp. v. UPS, supra, establish that "Mr. Khourie proposed dismissing this case against UPS in exchange for an \$8-10 million payment to himself. Mr. Khourie thereby engaged in misconduct which was contrary to the interests of the absent members of the proposed

class." (Id.)<sup>5</sup>

In sum, in D.95-03-044 we appropriately asserted our own jurisdiction over the UPS overcharge cases, and in D.94-11-066 we appropriately discussed the fact that in certain circumstances the courts may have concurrent jurisdiction. Any shippers, other than Cal Pak, wishing to make overcharge claims against UPS are free to file claims with the Commission. No legal error has been shown. There is no need to say more on this issue.

#### Damage standard

Cal Pak argues that the Commission erred in adopting the Steiger, supra, requirement that shippers must present evidence of special damages. Cal Pak asserts that in Steiger, the charge complained of was lawful when paid, whereas in the present overcharge case, the tariff charged by UPS was unlawful when paid. Cal Pak claims that Steiger found United States Supreme Court interpretations of the Interstate Commerce Act to be controlling authority for section 734 claims, and that Pennsylvania R.R. v. International Mining (1913) 230 U.S. 184 holds that in unlawful overcharge cases the difference between the proper charge and the unlawful charge is all that need be proved to establish damages.

Cal Pak cites California Adjustment, supra, Southern-Pacific Co. v. Darnell-Taenzer Lumber (1918) 245 U.S. 531, Carnation Company v. Southern Pacific Co., supra, and a number of other cases following the Pennsylvania R.R. damage standard. Cal Pak concludes the Commission should in this UPS overcharge matter

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5. UPS states that "[w]hen appropriate, UPS intends to file a motion with this Commission to disqualify Mr. Khourie and to request sanctions for violation of Rule 1 of the Rules of Practice and Procedure of the Commission." (UPS Response, p. 2, footnote 2.)

adopt the rule announced in California Adjustment, rather than Steiger, as its controlling authority regarding damages.

UPS counters that Cal Pak's argument regarding California Adjustment, supra: 1) has previously been rejected both by the Commission and the San Francisco Superior Court; and 2) ignores the Commission's express discretion under section 734. UPS claims that California Adjustment, supra, is inapposite since it dealt with damages for violation of the then-mandatory long-haul/short-haul provisions in the California Constitution, and not with section 734.

Cal Pak appears to misunderstand D.95-03-044. Cal Pak apparently believes that D.95-03-044 requires a showing of special damages before rate refunds may be granted. This is not correct. D.95-03-044 notes that UPS asked us to amend D.94-11-066 to declare that a strong showing of special damages will be required before refunds are awarded, but does not in fact amend D.94-11-066 to require a strong showing of special damages. Citing Steiger, Ordering Paragraph 1(e) replaces Finding of Fact 12 of D.94-11-066 with the following:

"This Commission has held that a person seeking reparations under PU Code § 734 (formerly Section 71(a)) should be required to show that the payment of such a rate has resulted in damage or other economic harm to him. Steiger Terra Cotta v. Southern Pacific Company [D.2524] (1915) 7 C.R.C."

Finding of Fact 12, as amended, does not require shippers to show special damages. It only requires shippers to show that the payment at issue resulted in damage or other economic harm. This is a very broad window for a shipper's claims regarding overcharges.

Cal Pak's own claim was rejected with prejudice not because Cal Pak failed to show special damages, but rather because Cal Pak failed to even offer any proof of the amount of any overcharge it paid. For example, we state in D.95-03-04:



"D.94-11-066 states that no refunds should be awarded here since no one, including Cal Pak, has offered any proof of damages as a result of UPS' rates. (Slip op., pp. 6-7, 9.) D.94-11-066 notes that Cal Pak has not offered proof of the amount of any overcharge it was subjected to, or shown any other proof of harm. As D.94-11-066 further notes:

'The point of there being no claim for refunds or showing of damages was made by the Transportation Division Staff in its brief of July 10, 1992 (page 9):

"Cal Pak alleges in C.92-02-026 that UPS' rate increases harmed it but failed to cite a shred of evidence in support of its contention. Hence, there is no basis for relief for the past rate increase as to Cal Pak. None of the individual shippers who may have been subjected to the improper rate is before the Commission. In the event that those shippers sought relief, damages would be warranted." (Slip op., p. 6.)" (D.95-03-044, p. 13.)

We are hardly being unreasonable in requiring that, in the unique regulatory circumstances presented in this proceeding, parties seeking rate refunds (also called reparations) must first show damages or other economic harm. No legal error has been shown.

Having considered all of the allegations of legal error raised and having found them without merit, we will deny rehearing.

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THEREFORE, good cause appearing,  
IT IS ORDERED that Cal Pak's Application for Rehearing  
of D.95-03-044 is denied.

This order is effective today.

Dated August 11, 1995, at San Francisco, California.

DANIEL Wm. FESSLER  
President  
P. GREGORY CONLON  
JESSIE J. KNIGHT, JR.  
HENRY M. DUQUE  
Commissioners

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

*Wesley Franklin*  
Acting Executive Director