

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1513

APPLICATION OF EVERGREEN INTERNATIONAL
(U.S.A.) CORP. FOR THE BENEFIT
OF SERVICE CONTRACT SHIPPER

ORDER ADOPTING INITIAL DECISION IN PART

On October 15, 1987, Administrative Law Judge Joseph N. Ingolia (" Presiding Officer") served an Initial Decision ("I.D.") in the above-referenced proceeding holding that the refund/waiver procedures of section 8(e) of the Shipping Act of 1984 ("1984 Act"),* 46 U.S.C. app. § 1707(e), do not

* Section 8(e), 46 U.S.C. app. § 1707(e), provides as follows:

(e) Refunds. - The Commission may, upon application of a carrier or shipper, permit a common carrier or conference to refund a portion of freight charges collected from a shipper or to waive the collection of a portion of the charges from a shipper if-

(1) there is an error in a tariff of a clerical or administrative nature or an error due to inadvertence in failing to file a new tariff and the refund will not result in discrimination among shippers, ports, or carriers;

(2) the common carrier or conference has, prior to filing an application for authority to make a refund, filed a new tariff with the Commission that sets forth the rate on which the refund or waiver would be based;

(3) the common carrier or conference agrees that if permission is granted by the Commission, an appropriate notice will be published in the tariff, or such other steps taken as the Commission may require that give notice of the rate on which the refund or waivers would be based, and additional refunds or waivers as appropriate shall be made with respect to other shipments in the manner prescribed by the Commission in its order approving the application; and

(4) the application for refund or waiver is filed with the Commission within 180 days from the date of shipment.

apply to service contracts. No exceptions to the I.D. were filed, but the Commission decided to review the I.D. on its own motion.

BACKGROUND

Evergreen International (U.S.A.) Corporation ("Evergreen") entered into a service contract to transport hay from Seattle to Japan. The signed contract was mailed to Evergreen's New York office for filing with the Commission. However, the contract was allegedly not received by that office. By the time this error was discovered, four shipments had already moved and should have been rated at the higher tariff rates. Evergreen filed an application for permission to waive collection of that amount of the freight charges that exceeded the service contract rate, pursuant to Rule 92(a) of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.92(a), and section 8(e) of the 1984 Act.

The Presiding Officer held in his I.D. that section 8(e) could not be used to afford relief from errors in service contracts. He viewed the central issue to be whether a service contract is a "tariff" for purposes of section 8(e). He concluded that a service contract is not a tariff based on: 1) the definition of "service contract," 46 U.S.C. app. § 1702(21); 2) the fact that service contracts are exempted from many of the prohibitions of the 1984 Act; and 3) language in the Conference Report to the

1984 Act stating that "[s]ection 8(a) does not require that service contracts be filed in a tariff." H.R. Rep. No. 600, 98th Cong., 2d Sess., 29 (1984).

The Presiding Officer also expressed his opinion that even if Congress had considered section 8(e) relief for service contracts, it would have rejected it. He further suggested that the Commission resist the temptation to provide some kind of relief for service contract errors because service contracts are commercial agreements. Lastly, he concluded that the Commission could not provide any such relief without the enactment of appropriate legislation.

DISCUSSION

The Initial Decision's ultimate conclusion (i.e., that the waiver/refund relief procedure of section 8(e) is not available for service contracts) is correct, and will be adopted by the Commission. Although service contracts contain rates, they are more than a mere rate offering in a tariff. Congress distinguished service contracts from tariff rates throughout the 1984 Act. Service contracts are not required to be filed in tariffs pursuant to section 8(a) of the 1984 Act, 46 U.S.C. app. § 1707(a), and many of the prohibitions of that Act that apply to tariff rate actions specifically do not apply to service contracts because of their unique nature, i.e., they may selectively favor some shippers. See H.R. Rep. No. 600, 98th Cong., 2d Sess., 40

(1984). Therefore, an error in a service contract, regardless of its nature, is not "an error in a tariff" for which section 8(e) relief can be granted.

There is nothing in the legislative history of the 1984 Act which indicates that Congress considered the question of relief from service contract errors. Nonetheless, it did carry forward intact the procedures for relief from tariff errors, while at the same time clearly indicating that service contracts were not rates in tariffs. Therefore, it appears, at the very least, that Congress did not specifically intend section 8(e) to apply to service contract errors.

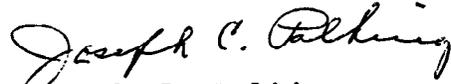
What Congress might have done had it considered the possibility of relief for service contract errors, whether the Commission can develop some alternative form of such relief, and whether additional legislation may be necessary, are all issues that are not relevant to the disposition of the application under section 8(e) and, therefore, need not be decided here. Accordingly, the Commission is not adopting those portions of the I.D. that address these issues.

THEREFORE, IT IS ORDERED, That that portion of the Initial Decision consistent with the above discussion (pages 1-9 and the first two sentences on page 10) is adopted by the Commission; and

IT IS FURTHER ORDERED, That the application for permission to waive certain freight charges filed by Evergreen International (U.S.A.) Corporation is denied; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.


Joseph C. Polking
Secretary