

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 2065

APPLICATION OF TURBANA CORPORATION
FOR THE BENEFIT OF DSR SHIPPING CO., INC.

ORDER AFFIRMING INITIAL DECISION

Turbana Corporation ("Turbana"), an ocean common carrier, submitted an application under section 8(e) of the Shipping Act of 1984, 46 U.S.C. app. § 1707(e), for permission to refund \$46,150 and to waive collection of \$962 in freight charges. The freight charges relate to fifty-eight shipments of various commodities carried by Turbana for the shipper, D.S.R. Shipping Co., Inc. ("DSR"), between Wilmington, Delaware, and Limon, Costa Rica.

In an Initial Decision ("I.D.") served October 2, 1991, presiding Administrative Law Judge ("ALJ") Norman D. Kline granted Turbana's application. Subsequently, Great White Fleet, Ltd. ("Great White"), another ocean common carrier operating between the United States and Costa Rica, petitioned for leave to intervene in order to file Exceptions to the I.D. The Commission granted Great White's petition and accepted the Exceptions in an order served December 20, 1991.¹ Turbana filed a reply memorandum with an accompanying affidavit on January 13, 1992.

¹ Chairman Koch and Commissioner Hsu dissented.

BACKGROUND

In early 1991, Turbana was preparing to commence its service between Wilmington and Costa Rica. In February, Mr. Eugenio Mora, Turbana's special projects manager, travelled to Costa Rica to investigate the market. Mr. Mora met with representatives of several shippers, including DSR. DSR and Turbana eventually agreed that DSR would ship a minimum of 180 containers over a six-month period in return for specified "freight all kinds" per-container rates. Provisions and rates reflecting this agreement were supposed to be filed in Turbana's F.M.C. tariff by March 19, 1991. However, Turbana was new to the tariff-filing process and, although it filed many rates over the first few months of its operations, it neglected to file DSR's per-container rates. As a result, fifty-eight shipments sailed subject to higher rates before the mistake was discovered. Turbana filed a corrective tariff on August 14, 1991.

The ALJ found that the statutory requirements of section 8(e) had been met. He pointed out that the failure of a carrier to file an agreed time-volume rate "is not uncommon," I.D. at 4, and stated that "there have been at least six previous special-docket applications in which carriers have failed to file such rates at all or have filed them incorrectly." Id. (footnote omitted).

POSITIONS OF THE PARTIES

A. Exceptions

Great White first states that special docket relief can be granted only if a corrective tariff reflecting the intended rate

has been filed with the Commission before the special docket application. It alleges that, although Turbana and DSR had agreed to time-volume rates for a six-month period, the corrective tariff filed by Turbana shows a three-month period. Great White further notes that Turbana's tariff requires any shipper wishing to enter into a time-volume arrangement to post a \$50,000 security bond and give written notice of its intention to enroll in the time-volume program prior to Turbana's receipt of the first shipment. It states that the record here does not show that DSR met those requirements.

On the particular facts of DSR's application, Great White argues that "at least" fifty-two of the fifty-eight shipments did not meet the terms of the arrangement between DSR and Turbana and therefore are ineligible for the agreed rates.² Shipments 2 and 5 supposedly were made before March 19, 1991, the commencement date of the time-volume period. At least fifty shipments allegedly did not meet Turbana's general tariff definition of "freight all kinds," either because the containers contained less than the required minimum of three different commodities or because the weight of a single commodity exceeded fifty percent of the total weight of the shipment. Some of those same shipments should be disqualified on an additional ground, according to Great White, because Turbana's tariff states that the agreed time-volume rates

² Great White says "at least" because it claims that the bills of lading for the other shipments do not "provide information sufficient to make a determination as to whether [the shipments] should be excluded for this reason." Exceptions, Appendix A at 2.

apply to "[f]reight all kinds, per Carrier-provided 40-ft. Refrigerated Container"³ but the ALJ described the first category covered by the rates as "freight all kinds, refrigerated, per Carrier-provided 40-foot container;" Great White thus perceives a distinction being intended between refrigerated containers and refrigerated cargo.

Lastly, Great White contends that some of the shipments were not rated accurately under the commodity rates in Turbana's tariff that became applicable in the absence of the time-volume rates. Great White focuses on five shipments of bananas (Shipments 39-41, 50 and 51), which it says were comprised of three containers each but received a rate requiring a minimum of five containers.

B. Turbana

Turbana denies any inconsistency between its understanding with DSR and its August 1991 corrective tariff, saying that both state the agreed six-month period. It states that DSR could not have known of the notice, registration and security "technical conditions" (Reply at 2) because those were not published by Turbana until the August 1991 tariff appeared, five months after the time-volume period was supposed to have started. Turbana states that Shipments 2 and 5, cited by Great White as occurring before the March 19 commencement date, actually were carried by a vessel that sailed on March 19. With respect to the "freight all kinds" argument raised by Great White, Turbana says that it never intended its eligibility requirements for "freight all kinds" rates

³ Tariff FMC No. 1, original page 102.

to apply to time-volume rates, because there is no need to put such restrictions on containers moving under a time-volume arrangement. Turbana points out that, in order to remove any confusion, it amended its tariff in December to state that "freight all kinds" for time-volume purposes may consist of any one or more commodities.

Turbana describes as "incomprehensible" Great White's position that refrigerated cargo was not covered by Turbana's time-volume rates. Reply at 5. It submits that it clearly intended to carry and DSR clearly intended to ship refrigerated cargo. Turbana dismisses Great White's analysis of the rates actually assessed DSR's shipments in the absence of the intended time-volume rates as "irrelevant" and "de minimis." Id. at 6.

DISCUSSION

The Commission finds Great White's Exceptions to be without merit. September 15, 1991, was precisely 180 days from March 19, 1991, the intended commencement date of the time-volume period. Turbana's corrective tariff, filed August 14, 1991, thus reflected the original intention of the parties by stating the September 15 termination date. Any other date -- earlier or later -- would have failed the corrective tariff requirement because then something other than the agreed six-month time-volume period would have been established.⁴ Whatever the differences between the I.D.'s

⁴ Great White presumably derived its reference to a three-month period from the requirement in Turbana's August tariff that
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reference to "refrigerated cargo" and Turbana's tariff reference to "refrigerated containers," the evidence of record shows that Turbana and DSR agreed to rates for "Freight all kinds, per carrier provided 40 ft. refrigerated container" Affidavit of H. Eugenio Mora, Aug. 14, 1991, at 3, para. 7. Turbana's corrective tariff thus tracked the agreement exactly. The question of whether Shipments 2 and 5 took place before March 19, 1991, was first raised to Turbana by the ALJ. By a response dated September 27, 1991, supplementing its original application, Turbana showed that those two shipments were carried on the M/V STRIDER JUNO, which sailed southbound from Wilmington on March 19. Under the Commission's regulations, "date of shipment" for special docket purposes "shall mean the date of sailing of the vessel from the port at which the cargo was loaded" 46 C.F.R. § 502.92(a)(3)(iii).

Regarding Great White's assertion that most of the fifty-eight shipments in question failed to meet Turbana's generally applicable tariff definition of "freight all kinds," it is true that Turbana did not correct its tariff on that particular point until December 18, 1991, which was well after the carrier filed this

⁴(...continued)

the stated rates were subject to a minimum of ninety containers per calendar quarter. That was also part of the original understanding between DSR and Turbana and is thus part of the corrective tariff requirement as well. The quarterly minimum is not rendered inoperative by the fact that Turbana published its corrective tariff only one month before the September 15 expiration date, because the result of the I.D., now affirmed by the Commission, is to make the proffered rates available to other qualifying shippers retroactive to March 19, 1991.

special docket application on September 4. However, Turbana's August filing did set forth the per-container rates that were meant to be applied, which is all that section 8(e)(2) requires. It would frustrate the remedial purpose of the statute, Nepera Chemical, Inc. v. FMC, 662 F.2d 18 (D.C. Cir. 1981), to deny relief on the basis of the secondary "freight all kinds" matter. Turbana's assertion that the parties always intended to exempt DSR's shipments from the "freight all kinds" criteria is credible. There is no apparent commercial reason to apply "freight all kinds" cargo mix and weight safeguards to cargo moving under a time-volume rate, because as long as the cargo minimums for such a rate are met, the carrier has no need for further concern and the shipper has no motive to try to avoid individual commodity rates.

The statutory requirement that special docket relief must not result in discrimination among shippers is the chief concern with the registration, bonding and other such provisions in Turbana's tariff. It would be an empty exercise to require DSR to somehow comply with those contractual preconditions months after the contract itself has been completed. However, if the March-September time-volume rates are made available to other shippers retroactively, it arguably would be unfair to impose those specifications on other shippers, particularly the \$50,000 bond. As a solution, Turbana will be required to publish a tariff notice that waives those provisions for other shippers as well as DSR; the law empowers the Commission to impose such requirements as it sees fit on the carrier seeking special docket relief, if they are

necessary to prevent unfair treatment of the carrier's other customers.⁵ An additional waiver is necessary of some of the record-keeping and registration requirements imposed on time-volume rates by the Commission's regulations. 46 C.F.R. § 580.12.

Finally, questions regarding the billing of some of DSR's shipments were already raised by the ALJ. Shipments 39-41, 50 and 51 were invoiced and paid at erroneous rates as a result of unauthorized promises by Mr. Mora. After the ALJ brought the matter to Turbana's attention, the carrier submitted a supplementary exhibit explaining what had happened. Supplementary Affidavit of Robert Loundsbery, Sept. 27, 1991, at 2-5. The \$46,150 in refunds authorized by the I.D. is the difference between the total amount actually (albeit erroneously) paid by DSR and the total it should have paid under the time-volume rates. I.D. at 2.

THEREFORE, IT IS ORDERED, That the Exceptions are denied and the I.D. is affirmed; and

IT IS FURTHER ORDERED, That Turbana shall publish the following notice in its Tariff FMC No. 1:

⁵ Section 8(e)(3) states that the Commission may grant permission to refund or waive freight charges if . . .

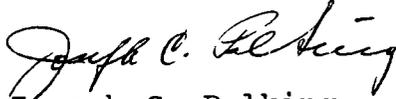
. . . the common carrier or conference agrees that if permission is granted by the Commission, an appropriate notice will be published in the tariff, or such other steps taken as the Commission may require that give notice of the rate on which the refund or waiver would be based, and additional refunds 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

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 2065, that on shipments sailing from port of loading on March 19, 1991, and continuing through August 13, 1991, the above time/volume rates were in effect. This Notice is effective for purposes of refund or waiver of freight charges on any shipments subject to the above time/volume arrangement which may have been shipped during the specified period of time. Such shipments are not subject to the notice, registration, security and bill of lading notation requirements set forth herein for time-volume programs, nor are they subject to the FMC's registration and record-keeping requirements set forth at 46 C.F.R. § 580.12.

and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.


Joseph C. Polking
Secretary