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SERVICE DATE - JANUARY 25, 1999

SURFACE TRANSPORTATION BOARD¹

DECISION

No. 40900

IDEAL FORGING CORPORATION AND G.V. EADS AND CO., INC.--PETITION FOR
DECLARATORY ORDER--CERTAIN RATES AND PRACTICES OF
LEGEND FREIGHT SYSTEMS, INC.

Decided: January 20, 1999

This matter arises out of a court action in the United States District Court for the Northern District of Ohio, Eastern Division, in Legend Freight Systems, Inc. v. Ideal Forging Corp., Case No. 4:92CV1578. The court proceeding was brought by Legend Freight Systems, Inc. (Legend), a motor common carrier,² against Ideal Forging Corporation (Ideal) to collect tariff charges allegedly due for the shipment of a forging press from Atchison, KS, to Ideal's facility in Southington, CT. Also named as defendants in the court case were intervenors in this proceeding, G.V. Eads & Company, Inc., and G.V. Eads Forging Equipment Company, Inc., of Kent, CT (collectively, Eads), brokers of forging machinery and equipment that acquired the forging press for Ideal.

Legend had received \$14,921.20 for the shipment and was seeking an additional \$213,457.82 based upon its interpretation of the applicable tariff. By order dated November 24, 1992, the court granted Ideal's motion to refer the matter to the ICC to resolve questions of tariff

interpretation and allegations of unreasonable rates and practices. The court dismissed the case

¹ The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), enacted December 29, 1995, and effective January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the ICCTA provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the ICCTA. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 13709(e). Therefore, this decision applies the law in effect prior to the ICCTA, and all citations are to the former sections of the statute, unless otherwise indicated.

² Legend had operated under ICC certificate No. MC-222015. It no longer transports property, having relinquished its certificate, which was revoked on June 8, 1992.

without prejudice pending the referral and retained jurisdiction to reopen it if there are unresolved issues after issuance of this decision.

After opening, reply, and rebuttal statements were filed under 49 CFR part 1112,³ supplemental statements were authorized under the market-based approach for determining rate reasonableness adopted in Georgia-Pacific Corp.--Pet. for Declar. Order, 9 I.C.C.2d 103 (1992) (Georgia-Pacific I) and 9 I.C.C.2d 796 (1993) (Georgia-Pacific II). Ideal and Eads declined to file supplemental statements. Legend filed a supplemental statement, to which Eads responded with a motion to dismiss. Ideal subsequently filed a similar motion to dismiss. Legend replied to both motions.

As discussed below, the motions will be denied. Based on the evidence of record, we conclude that the hourly rate published in Section 3, Item 3010, of Legend's Tariff ICC LFSI 200 was applicable but unreasonable when applied to the disputed shipment. Using market-rate comparisons, we find that Legend has already received reasonable payment for the transportation service that it provided.

BACKGROUND

This proceeding involves the one-time shipment of an over-dimension forging press.⁴ Due to the size and weight of the shipment, Legend rented a special, 100-foot trailer,⁵ and made arrangements with the various states for the required vehicle escorts.⁶ It also requested the

³ Legend filed a motion to strike the rebuttal statement of Eads, to which Eads replied.

⁴ Over-dimension freight includes over-height, over-length, over-weight, and over-width shipments. Although the exact dimensions of the forging press are in dispute, the evidence of record indicates that it was over-weight and over-width.

⁵ According to Legend, because of the weight of the forging press, it was required to load it on a trailer that was at least 100 feet in length in order to keep the axle weight within the limits established by certain states for their roads and bridges.

⁶ The type and number of escorts vary by state. Some states require escorts only in the front of the vehicle, others require front and rear escorts, and still others require the addition of a local police escort.

necessary state permits in advance.⁷ According to Legend, Ideal and Eads had represented that the forging press weighed 80,000 pounds, but when loading was to begin on October 1, 1991, it actually weighed 96,000 pounds due to the fact that the connecting rod and ram were inside the machine. Because of the discrepancy in the weight, all of the requested permits were put on hold. During the delay, Legend paid a contractor \$2,015.00 to remove the rod and ram, which reduced the weight of the forging press, as shown in the final freight bill,⁸ to 83,000 pounds.

The forging press was loaded onto the trailer on Tuesday, October 15, 1991, but it did not leave Atchison until Friday, October 18, 1991, because of a change in the planned route and the need to obtain final permit authority from the various states. According to Legend, Ideal's instructions were to avoid going through Missouri because of its high permit and bridge inspection fees. As a result, Legend followed a circuitous route through Nebraska and Iowa.

En route to Southington, Legend encountered numerous delays.⁹ It waited 5 hours in Nebraska City, NE, for an Iowa permit which restricted travel to daylight hours. Accordingly, the vehicle had to remain in Council Bluffs, IA, overnight. Arriving in Walcott, IA, on Saturday, October 19, 1991, Legend waited until noon on Monday, October 21, 1991, for an Illinois permit. At Morris, IL, it was delayed until Friday, November 1, 1991, because Indiana required a route clearance from Ohio before issuing a permit. The vehicle remained in Wanatah, IN, for the weekend, because the Indiana permit restricted travel to weekdays. Arriving at the Van Wert, OH weigh station on Monday, November 4, 1991, Legend waited until Tuesday, November 5, 1991, for an escort and weighing. The vehicle was never weighed and, as a result, the permits were not revised to reflect the actual axle weight. At the next weight check on Wednesday, November 6, 1991, at Willoughby, OH, Legend was not permitted to continue because the axle weights did not conform to the permit weights. Legend had to wait until noon on Thursday, November 7, 1991, for a revised permit. Legend arrived at Southington, at 4 p.m. on Friday, November 8, 1991, and the forging press was finally unloaded by Ideal on Tuesday, November 12, 1991. The total time in transit was represented as 803 hours in the final freight bill.

The final freight bill was based on the governing tariff, Legend's Tariff ICC LFSI 200, effective August 30, 1989, which applies to general commodities (with exceptions that are not

relevant here) between all points in the United States. The tariff is divided into three basic sections:

⁷ Certain states require the axle weights of the load prior to granting a permit to transport an over-dimension shipment.

⁸ The final freight bill was a re-billing of the freight charges and canceled three prior freight bills.

⁹ According to Legend, the state-required escorts and/or police were generally not on time for the escort, and travel in many states was restricted to certain times and days.

Section 1, Specific Commodity Rates, contains rates for specific commodity movements between named points; Section 2, Mileage Commodity Rates, contains distance-based rates for freight, all kinds, in cents per 100 pounds for five minimum weight levels; and Section 3, Hourly Rates, which also applies to freight, all kinds, but only on over-dimension or over-weight shipments or shipments requiring specialized equipment to load, transport or unload, and specifies a rate of \$100 per hour (subject to a \$400 minimum charge).

Items 525, 670, and 884 are located in the tariff under Rules and Regulations and contain surcharges that are to be added to the basic freight rates, as appropriate. Specifically, Item 525, Escort Service Charges, imposes a charge of 100 cents per mile for each carrier-supplied escort, subject to a \$100 minimum; Item 670, Over-Dimension or Over-Weight Shipments, imposes surcharges of between 25% and 100% depending on the dimension and weight of the shipment; and Item 884, Shipments Tendered Under Special Conditions, imposes a 25% surcharge for movements requiring special equipment. Item 957, Tolls, Taxes and Permits, is also located in the Rules and Regulations Section of the Tariff, and governs the handling of tolls, fees, charges, and taxes on permits.

The final freight bill, which Legend submitted to Ideal on January 30, 1992, was based on the hourly rates in Section 3, Item 3010, and surcharges from Items 525, 670, and 884, as follows:

Item 3010 line haul	\$ 100.00 per hour
Item 670(e) over-weight	100.00 per hour
Item 670(d) over-width	50.00 per hour
<u>Item 884(b) special trailer</u>	<u>+ 25.00 per hour</u>
Total per hour rate	\$ 275.00 per hour
<u>Total hours of move</u>	<u>x 803</u>
Charges	\$ 220,825.00
Item 525 tolls, taxes, permits ¹⁰	2,322.42

¹⁰ Charges for tolls, taxes, and permits were itemized in a separate statement, as follows:

Tolls: Newburgh-Beacon Bridge	
Toll East	\$ 9.00
Toll West	5.00
<u>Escort #N145303</u>	<u>+ 25.00</u>
Subtotal	\$ 39.00
Permits	1,713.42
<u>Taxes (fees charged for permits)</u>	<u>+ 570.00</u>
Total	\$ 2,322.42

<u>Item 525 escorts</u> ¹¹	+ 5,231.60
Total charge	\$ 228,379.02
Less prepayment from Eads	- 4,015.00
<u>Less partial payment from Ideal</u>	- 10,906.20
Balance Due	\$ 213,457.82

DISCUSSION AND CONCLUSIONS

Motions.

1. *Motion to strike.* Legend moves to strike the rebuttal statement of Eads, contending that it is improper rebuttal because it addresses new issues concerning the shipment's height and weight to which Legend has not had the opportunity to respond. Legend notes that the new material is not relevant to the applicability and reasonableness of the rate. It argues that it has not sought additional charges for excess height and that there is no dispute as to the weight of the shipment. In reply, Eads states that the challenged material is proper rebuttal because it is responsive to assertions made in Legend's reply statement.

The motion to strike will be denied. Legend specifically asserted in its reply that the shipment was over-height, and that the charge assessed in one of the earlier freight bills was based on the shipment being over-height, over-length, over-weight, and over-width. Therefore, the challenged material is proper rebuttal, regardless of the fact that Legend's final, corrected freight bill included only over-weight and over-width charges and canceled the previous freight bill that had included over-height and over-length charges. Even if this were improper rebuttal, Legend has not been harmed because it fully responded to the challenged material in its motion to strike.

2. *Motions to dismiss.* Eads moves to be dismissed from the proceeding, asserting the small business exemption from undercharge claims set forth in former 49 U.S.C. 10701(f)(9)(A), now codified at 49 U.S.C. 13709(h).¹² While acknowledging that the determination of whether a shipper

¹¹ Charges for escorts were itemized in a separate statement, as follows:

Two company escorts (1,719 miles @ \$1.00 per mile each)	\$ 3,438.00
Ohio Department of Transportation	1,173.60
Ohio State Highway Patrol	345.00
<u>New York State Police</u>	+ 275.00
Total	\$ 5,231.60

¹² Enacted in section 2(a) of the Negotiated Rates Act of 1993, Pub. L. No. 103-180, 107 Stat. 2044, the small business exemption provides that: "... a person from whom the additional
(continued...)

qualifies as a small business concern should be made by the court in which the undercharge litigation is pending, Eads argues that we should make the determination here because the court case was dismissed with the referral. Both Legend and Ideal oppose the motion to dismiss Eads. Ideal argues, in the alternative, however, that if the small business exemption does apply, then Ideal should be dismissed from the proceeding as well.

The motions to dismiss will be denied. We are not the proper forum to address whether Eads or Ideal qualify for the small business exemption from undercharge claims. That determination can only be made by the court in which an undercharge action is pending, or by obtaining a finding to that effect from the Small Business Administration and then submitting to the court a motion to dismiss the underlying undercharge claim.¹³ The fact that the underlying court proceeding was dismissed with the referral does not deprive Eads or Ideal of the small business defense because the court specifically stated that it retained jurisdiction to reopen to address any unresolved issues. Absent a court ruling on this issue, we can resolve this proceeding on the basis of the present record.¹⁴

Tariff Applicability.

Ideal and Eads contend that, while the governing tariff is inherently ambiguous, the distance-based rates contained in Section 2 and not the hourly rates contained in Section 3 ordinarily apply to over-the-road, as opposed to local, movements. They also contend that the hourly rates are excessive, arguing in effect that the surcharges are already included in the basic freight rate. Legend, on the other hand, contends that the only reasonable interpretation of the tariff is that the hourly rates in Section 3 are applicable and the provisions of Items 670 and 884

apply as factors in conjunction with those rates.

It is well settled that ambiguities in tariffs are generally resolved against the carrier as the framer of the tariff and in favor of the shipper. See Associated Traffic Services, Inc.--Petition for Declaratory Order--Certain Rates and Practices of SAIA Motor Freight Line, Inc., STB Docket No.

¹²(...continued)

legally applicable and effective tariff rate or charges are sought shall not be liable for the difference between the carrier's applicable and effective tariff rate and the rate originally billed and paid . . . if such person qualifies as a small-business concern under the Small Business Act (15 U.S.C. 631 et seq.) . . .”

¹³ See Rauland-Borg Corporation--Petition for Declaratory Order--Certain Rates and Practices of Lifschultz Fast Freight, Inc., STB Docket No. 40559, slip op. at 4 (STB served April 24, 1998).

¹⁴ Id.

41996, slip op. at 4 (STB served May 8, 1998). In this case there is no ambiguity in the governing tariff as far as the application of the basic freight rate is concerned. It is undisputed that the forging press weighed more than 50,000 pounds, which is the tariff threshold for over-weight shipments. It is also undisputed that the forging press was over-width. Section 2 of the governing tariff specifies that the mileage or distance commodity rates of that section may be used only when no rates, other than the distance commodity rates, apply from and to the same points over the same routes. Section 3 of the governing tariff is specifically labeled hourly rates and applies only on over-dimension and over-weight shipments requiring specialized equipment to load, transport or unload. It is clear from the plain reading of the tariff that the hourly rates of Section 3 apply because the shipment was over-weight and over-width and required specialized equipment to transport and that the mileage and distance commodity rates of Section 2 cannot apply because another rate, from Section 3, is applicable.

As far as the surcharges are concerned, we find that the following items do not apply. Item 670(b) calls for a 25% surcharge on shipments measuring more than 8 feet in height. The evidence of record establishes that the forging press was exactly within the tariff's threshold limit of 8 feet. Accordingly, application of an over-height surcharge cannot be justified. Similarly, Item 670(c) calls for a 25% surcharge on shipments measuring more than 40 feet in length. According to the evidence, the forging press was only 17 feet in length and it was the special trailer that was more than 40 feet in length. Because the tariff does not provide a surcharge based on equipment length, when the shipment is not over-length, the application of the over-length surcharge cannot be justified either. Legend does not contend, nor does the evidence suggest, that either Ideal or Eads specifically requested special equipment. Rather, the evidence establishes that a 100-foot trailer was needed to accommodate the weight of the forging press and that it could not have moved without the special equipment. Because Item 884 unambiguously applies a 25% surcharge only when special equipment is specifically requested by the shipper, and not when the physical dimensions or weight of the shipment demands it, the special equipment surcharge was not applicable by its own terms.

In addition, the surcharges assessed under Items 670(d) and (e) for over-weight and over-width movements are too ambiguous to be applicable under the hourly charges of Section 3, Item 3010. While the evidence establishes that the forging press was over-weight and over-width, the corresponding surcharges, as well as the other surcharges contained in Item 670, are stated in terms that reflect mileage commodity rates. That is, they apply only in connection with rates that are subject to actual or minimum weights. The Section 3 hourly rates of Item 3010 are not

weight-based. As Legend acknowledges, once a shipment is governed by Section 3, weight is irrelevant. Thus, applying the combined 150% surcharge to the hourly rates published in Item 3010 is illogical. For that reason, and because tariff ambiguities must be construed against the carrier, the Item 3010 surcharge may not be applied.

The remaining charges are for escort vehicles and for tolls, taxes, and permits. With the following exception, Legend appears to have calculated these charges correctly in the final freight

bill.¹⁵ Under Item 525, the charge for carrier-provided escort vehicles is \$1.00 per vehicle-mile for each vehicle supplied. The breakdown provided in Legend’s separate itemized statement shows that the \$3,438.00 charge for the two company escorts is based on a mileage figure of 1,719 miles, which assertedly reflects the mileage for the actual route of movement taking into account detours and state route assignments. The direct mileage, as found in the governing mileage guide, is 1,295 miles. As acknowledged by Legend’s tariff expert, Mr. Lawrence B. Dannemiller, regardless of the actual route, neither the tariff nor the governing mileage guide authorizes computing miles on any basis other than direct movement. Accordingly, using the direct mileage of 1,295 multiplied by \$1.00 per mile for each company escort, the correct charge is \$2,590 for the two escort vehicles, and \$4,383.60 for the total escort charges.

Based upon the above discussion, we find that the applicable tariff charge (which is not necessarily reasonable) must be calculated by multiplying the hourly rate of \$100 an hour (Section 3, Item 3010) by 803 hours of transit time, and adding to that product the authorized tariff charges pertaining to such additional costs as escorts, permits, and tolls, as follows:

Hourly rate	\$ 100.00 per hour
<u>Total hours of move</u>	<u>x 803</u>
Mileage Charge	\$ 80,300.00
Tolls, Taxes, Permits	2,322.42
<u>Vehicle Escorts</u>	<u>+ 4,383.60</u>
Total Charge	\$ 87,006.02

Rate Reasonableness.

Thus, the applicable charge under the tariff is \$87,006.02. Once the applicable rate and charge for a movement are established, it is the shipper’s burden to prove unreasonableness.¹⁶ Georgia-Pacific I, 9 I.C.C.2d at 123. When a carrier seeks to collect a different (higher) rate than what was originally charged and collected for the transportation provided, we rely on Georgia-Pacific I and II principles to address motor carrier rate reasonableness. Georgia-Pacific II, 9 I.C.C.2d at 819. Under Georgia-Pacific I and II, a market-based approach was developed to make rate reasonableness determinations. Both Ideal and Eads submitted evidence under Georgia-Pacific

¹⁵ Under Item 957, over-dimension charges, and bridge, road, turnpike, ferry or tunnel charges or taxes assessed by any state are to be paid by the carrier and are billed at actual cost as a separate item on the freight bill. The Ohio and New York charges are not challenged and appear to be non-tariff charges for escort vehicles supplied by State agencies. Accordingly, we find that the Ohio and New York charges were properly assessed under Item 957.

¹⁶ Only the reasonableness of the line-haul charge is being challenged.

I and II.

Ideal submitted two tariff charges from competing carriers, as follows:

- \$ 13,959.02 Anderson Trucking Services, Inc. (Anderson), Tariff No. ICC-MHA-242-C, Machinery Haulers Association, Agent, October 1991; and
- \$ 19,439.62 Hallamore Motor Transportation, Inc. (Hallamore), Tariff No. ICC-HSC-401-A, Heavy & Specialized Carriers Tariff Bureau, Agent, October 1991.

Eads submitted three additional rate comparisons from other competing carriers, as follows:

- \$ 6,846.00 Industrial Rigging, Inc., of St. Louis, MO;
- \$ 10,000.00 Walker Crane & Rigging Corp., of New Britain, CT; and
- \$ 11,115.00¹⁷ Schneider Specialized Carriers, Inc., of Rochester, MN.

Legend challenges the rate comparisons, contending that they fail to include special expenses, are not based on actual transportation characteristics, and do not show a contemporaneous time period.

Given that the relevant market for making rate comparisons related to over-weight and/or over-dimension machinery is limited by the infrequency of their movement, bureau tariffs offer a valid and valuable guide to the rate levels held out by the industry to transport traffic of this nature.¹⁸ The Anderson tariff is a bureau tariff issued by the Machinery Haulers Association, Agent, and also applied for the following carriers at the time the forging press moved: Arnold

Bros. Transport, Ltd, Dotseth Truck Line, Inc., Hunt Transportation, Inc., and Mid-Seven Transportation Company. As such, this tariff is ideal for establishing the market-level price for the movement at issue.

The rate that Ideal used from the Anderson comparison appears correct, but the mileage computation is incorrectly based on a distance of 1,750 miles, and, as a consequence, the tariff charge is wrong. Item 156 of Anderson's Tariff 242-C refers to Machinery Haulers Tariff ICC MHA 127 for mileage calculations. Item 156(g) specifies that short-line miles are to be used when excess miles are incurred because of necessary permits. However, if actual mileage exceeds short-line mileage by more than 5%, Item 156(g) provides that an additional charge of \$1.57 per mile

¹⁷ Depending on the route, the rate quote was as high as \$12,631.00.

¹⁸ By contrast, there is no tariff authority cited for the three rate comparisons offered by Eads. We note that the quotes appear to be unduly low on their face, but in any event, we need not use them because the bureau tariffs are sufficient for our purposes.

(maximum 100 miles or \$157.00) is to be added to the short-line mileage charges.

Using 1,310 miles, which is the short-line distance from Atchison to Southington, we recalculated the base transportation charge under Anderson’s tariff. Because the actual mileage claimed (1,719 miles) exceeds the short-line mileage by more than 5% and 100 miles, we added the \$157.00 charge. In addition, we added another \$393.00 in charges because the Anderson tariff specifies a charge of 10 cents per mile for over-dimension shipments (between 8 and 10 feet in width) and a charge of 10 cents per mile per axle for trailers with more than 6 axles. Finally, we added to the base transportation charge \$6,706.02 for tolls, permits, taxes, and escorts.¹⁹ This yielded a total transportation charge of \$12,050.62, as follows:

83,000 lbs. @ \$.00441 per 100 lbs. = \$3.66	
\$3.66 x 1,310 miles =	\$ 4,794.60
Excess mileage charge	157.00
Over-dimension charge (1,310 miles x .10 per mile)	131.00
<u>8-axle trailer charge (1,310 miles x .20 per mile)</u>	<u>+ 262.00</u>
Basic transportation charges	\$ 5,344.60
<u>Special Expenses</u>	<u>+ 6,706.02</u>
Total Transportation Charge	\$12,050.62

Using the Hallamore rate comparison, we are able to establish an upper bracket to the relevant “market basket” of reasonable rates. The Hallamore tariff is a bureau tariff issued by the Heavy & Specialized Carriers Tariff Bureau, Agent. Under the Hallamore tariff, the base

transportation charge is \$14,267.70.²⁰ To that amount we added \$6,706.02 in special expenses,²¹ which produces a charge of \$20,973.72, excluding the possible addition of over-width and special equipment charges.

Therefore, the \$87,006.02 rate, while applicable under the tariff, is unreasonably high. Because the freight charges of \$14,921.20 already paid fit within the relevant “market basket” of rates established in this decision, we conclude that Ideal and Eads have already paid a reasonable

¹⁹ Ideal’s figure of \$7,554.02 for these special expenses was based on its final freight bill and separate itemized statement. As discussed in the section on Tariff Applicability, supra, we restated the amount for vehicle escorts, which reduced the total special expenses to \$6,706.02.

²⁰ Ideal mistakenly used a flatbed equipment rate of \$14.32 per 100 lbs. in arriving at its base transportation charge. Because special lowboy equipment was used to move the forging press, a rate of \$17.19 per 100 lbs. is applicable, yielding a base transportation charge of \$14,267.70.

²¹ See supra note 19.

rate for the movement of the forging press and that no additional freight charges are due.

This proceeding will be discontinued. This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Legend's motion to strike the rebuttal statement of Eads, and the motions of Eads and Ideal to be dismissed as parties to the proceeding are denied.
2. This proceeding is discontinued.
3. This decision is effective on its service date.
4. A copy of this decision will be mailed to:

The Honorable Ann Aldrich
United States District Court for the Northern District of Ohio, Eastern Division
210 United States Courthouse
201 Superior Avenue, N.E.
Cleveland, OH 44114
RE: Case No. 4:92CV1578

By the Board, Chairman Morgan and Vice Chairman Clyburn.

Vernon A. Williams
Secretary