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SERVICE DATE - MARCH 14, 2001

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42048

PETITION FOR DECLARATORY ORDER—NANCY HALL v. ALOHA INTERNATIONAL MOVING SERVICES, INC., ALLIED VAN LINES, INC., VIP TRANSPORT, INC., AND ALLIED INTERNATIONAL N.A., INC.

Decided: March 9, 2001

By petition filed September 13, 1999, Ms. Nancy Hall (Hall or petitioner) seeks a declaratory order to resolve issues concerning tariff applicability, rates, and the reasonableness of rates for the transportation of household goods. The matter is before the Board on referral from the United States District Court for the District of Minnesota, in Case No. 98-1217 (MJD/JGL), Nancy Hall v. Aloha International Moving Services, Inc., Allied Van Lines, Inc., VIP Transport, Inc., and Allied International N.A., Inc. The court's referral order, dated June 30, 1999, stayed the court proceedings pending the Board's determination of the issues.¹ By decision served November 2, 1999, the Board instituted a declaratory order proceeding and established an evidentiary schedule for the submission of statements.

BACKGROUND

This case involves the movement of petitioner's household goods from Honolulu, Hawaii to Eden Prairie, MN, in 1997. In May of that year, Hall contacted Aloha International Moving Services, Inc. (Aloha)² about moving her belongings after she saw an advertisement in a local

¹ Petitioner instituted her court proceeding on April 21, 1998, as an enforcement action for loss and damage to household goods, unreasonable delay, and for other relief. The court referral order asks the Board to address the following issues: (1) what, if any, tariff applies to the transportation at issue; (2) what rate applies to Ms. Hall's shipment; and (3) whether the applicable rate, if any, is reasonable.

² At the time of petitioner's shipment, Aloha was authorized by the Hawaii Public Utilities Commission, in certificate No. 204-C, to transport household goods on the islands of Oahu, Kauai, and Hawaii. Aloha was not authorized to conduct any interstate operations at that time. It subsequently obtained a freight forwarder permit (Permit No. FF-2791P) from the Federal Highway Administration (FHWA) in July 1998.

telephone book identifying Aloha as an agent of Allied Van Lines, Inc. (Allied).³ After Aloha's sales agent viewed the items to be shipped, he and Hall agreed on an origin-to-destination rate of \$1.10 per pound for an estimated shipment weight of 1,000 pounds, plus an additional \$90 for excess value insurance. Hall subsequently asked Aloha to include additional furniture items in the shipment and, based on Hall's description of the items, Aloha estimated that the additional cost would be \$500, which petitioner agreed to pay.

Petitioner's goods were packed and picked up by Aloha on May 20, 1997, and petitioner paid Aloha \$937.50 at that time. The next day Aloha informed Hall that the actual weight was more than double the original estimate, and requested payment of an additional \$840 before the shipment would leave Hawaii, and \$1,000 more upon delivery. Petitioner states that, after she objected to this additional cost and protested the disparity between it and the original estimate, Aloha reduced the rate from \$1.10 to \$1.03 per pound. Hall then agreed to pay the additional \$840 as soon as she could, which she did on about June 10, 1997, and agreed to pay the balance upon delivery.

After receiving petitioner's payment, Aloha arranged for Matson Navigation Service to provide transportation for Hall's goods from Honolulu to Baltimore, MD.⁴ Aloha also arranged for VIP Transport, Inc. (VIP)⁵ to transport the shipment by motor carrier from Baltimore to its final destination, Eden Prairie, MN. VIP temporarily stored Hall's belongings at its warehouse after their arrival in Baltimore, and then delivered them to Eden Prairie on August 15, 1997. Petitioner paid the remaining balance due on her freight charges at that time, but also noted significant loss and damage to her goods. After discussions with Aloha and VIP about these damages proved fruitless, petitioner began the court action which resulted in the instant petition for declaratory order.⁶

³ Allied is authorized to transport household goods in interstate commerce, excluding Hawaii, as a common and contract carrier (ICC Docket No. MC-15735). Allied also holds broker authority and is affiliated with Allied International N.A., a registered freight forwarder engaged in interstate commerce. In the court case, Allied denies that Aloha acted as its agent.

⁴ Matson handled its segment as an intermodal movement partly by water to the Port of Los Angeles, CA, and the remainder to Baltimore by rail arranged by its affiliate, Matson Intermodal.

⁵ VIP is an authorized agent for Allied.

⁶ In the interim, petitioner settled her claim with IRIS, the insurance company that provided the excess value coverage, for \$3,275. (V.S. Hagglund, Exhibit No. 2, copy of petitioner's amended court complaint, at 12).

Hall contends that Aloha held itself out as both a freight forwarder and a motor carrier of household goods for this transportation because Aloha (1) made arrangements for through transportation and issued through bills of lading, and (2) also provided motor vehicle transportation for compensation. Petitioner maintains that neither Aloha nor any of the carriers involved in the Hawaii-to-Minnesota movement of her belongings produced applicable interstate tariffs. Therefore, she argues that none of their bill-of-lading provisions may be enforced, including limited liability provisions for loss and damage and storage-in-transit charges.

Petitioner also argues that, because there was no applicable tariff, she is entitled to restitution from Aloha of the total shipping charge. Petitioner also claims that the shipping charge was unreasonably high because the actual charge of \$2,967.60 was 57% higher than the estimated charge of \$1,700. Petitioner argues that, if she is not given a complete refund, she should only be required to pay the \$1,700 original estimate. Hall further alleges that, with respect to the Baltimore-to-Minnesota movement, she paid the highest rate when compared with the rates charged two other individuals with similar movements of household goods.

The defendants in petitioner's Minnesota court case – Aloha, Allied, VIP and Allied International N.A. (collectively referred to as respondents) – dispute Hall's allegations. Respondents first move to dismiss the petition on the grounds (1) that Hall failed to contest the charges within 180 days of receiving the bill, as required by 49 U.S.C. 13710(a)(3)(B), and (2) that the issue of whether Aloha was required to be licensed as a freight forwarder is a threshold jurisdictional question that must be answered by FHWA, not by the Board. Respondents further argue that we should not address the tariff and rate issues because the Board has exempted freight forwarders in the noncontiguous domestic trade from tariff and rate reasonableness regulation.⁷ Finally, as to Hall's argument that the freight charges were unreasonable, respondents contend that petitioner failed to provide a valid basis of rate comparison.

RESPONDENTS' MOTIONS

Motion to strike. By motion filed March 1, 2000, respondents move to strike specified portions of petitioner's rebuttal statement, reproduced and attached to the motion as Appendix A and Appendix B, relating to current and 1997 rate quotations from unidentified employees of moving companies in Hawaii. Respondents maintain that the rate quotations are inadmissible hearsay and that counsel's argument based on the statements must also be stricken. Petitioner responds that the challenged statements are not offered to prove the truth of the matter asserted, but to corroborate other testimony supporting the declaratory relief sought. This is an

⁷ See Exemption of Freight Forwarders in the Noncontiguous Domestic Trade from Rate Reasonableness and Tariff Filing Requirements, STB Ex Parte No. 598 (STB served Feb. 21, 1997).

administrative agency, not a court of law. It is within our discretion to accept this evidence and we will do so. We will take respondents' arguments into account in weighing the evidence. Accordingly, the motion to strike will be denied.

Motion to dismiss. Respondents contend that the petition should be dismissed because: (1) petitioner failed to contest the charges within 180 days of receiving the bill; and (2) the Board does not have jurisdiction to determine whether Aloha was required to be licensed. Petitioner replied.

Respondents' motion ignores the fact that this case is here on referral from a court, not pursuant to Hall's petition. The court has sought guidance from us on three questions. Respondents have offered no reasons why the court should not make inquiries of this agency or why we should not respond to such inquiries.

In any event, the motion is not persuasive. In considering a motion to dismiss, we must construe the factual allegations in a light most favorable to the complainant or the prosecuting party. We dismiss proceedings only when we find that there is no basis on which we could grant the relief sought. See Sierra Pacific Power Co. And Idaho Power Co. v. Union Pac. R.R., STB Docket No. 42101 (STB served Jan. 26, 1998); Grain Land Coop v. Canadian Pacific Limited et al., STB Docket No. 41687 (STB served Dec. 8, 1999).

Under 49 U.S.C. 13710(a)(3)(B), a shipper must contest the original or subsequent bill within 180 days of receipt of the bill. A shipper may contest the charges by a document faxed or mailed to the carrier. See National Assoc. of Freight Transp. Consultants Petition for Decl. Order, STB Docket No. 41826 (STB served Apr. 21, 1997). The evidence of record indicates that petitioner complied with this provision. As attachments to petitioner's February 10, 2000 verified statement, Hall submitted copies of a letter dated October 15, 1997, addressed to each respondent from her former attorney, claiming specific damages and reparations (including the freight charges she paid) for the Hawaii to Minnesota shipment of petitioner's household goods at issue here. The letter was sent 60 days after the August 15, 1997, delivery of petitioner's goods and receipt of the bill – well within the 180 days specified in section 13710(a)(3)(B) – and provided adequate notice that Hall was contesting the charges.

As for the other jurisdictional issue respondents attempt to raise, the court has not asked us to determine whether Aloha should have been licensed by FHWA. Rather, the court asks us to address issues of tariff applicability and rate reasonableness with respect to Aloha's transportation at issue, matters that, under 49 U.S.C. 13701, 13702, and 13710, we clearly have authority to resolve.

DISCUSSION AND CONCLUSIONS

Petitioner contends that Aloha held itself out as a motor carrier acting as an agent of Allied, and that the laws and regulations applicable to household goods motor carriers are controlling here. Petitioner also claims that Aloha was a household goods freight forwarder, and that it was required to be registered in that capacity as well.⁸ It is apparent, however, that Aloha performed the services of a freight forwarder of household goods rather than those of a motor carrier here.⁹ Aloha issued a through bill of lading,¹⁰ undertook all arrangements for transportation from origin to destination, and, in turn, dealt with the underlying carriers as a shipper. Thus, the statute and regulations applicable to household goods freight forwarders are controlling here.

Respondents maintain that, if Aloha acted as a freight forwarder, it was not subject to any tariff or rate regulatory requirements because the Board in Ex Parte No. 598, supra (see 49 CFR 1319.1 effective March 30, 1997), exempted freight forwarders in the noncontiguous domestic trade from tariff and rate reasonableness regulation. The entire focus of the Ex Parte No. 598 proceeding, however, was on freight forwarders that carry commercial freight, not household goods. We did not intend that our Ex Parte No. 598 exemption would deregulate household goods freight forwarders in the noncontiguous domestic trade. Household goods shippers, given their particularly vulnerable position, have always been treated differently from shippers of

⁸ We do not address the registration issue here, as the responsibility for the licensing (registration) of motor carriers, brokers, and freight forwarders was transferred from the ICC to the Secretary of Transportation by the ICC Termination Act of 1995 (ICCTA). See 49 U.S.C. 13901-08. We note, however, that respondents admit that Aloha did not have interstate authority to operate either as a motor carrier or as a freight forwarder.

⁹ Under 49 U.S.C. 13102(8), a freight forwarder is defined as a person that “(A) assembles and consolidates, or provides for assembling and consolidating, shipments and performs or provides for break-bulk and distribution operations of the shipments; (B) assumes responsibility for the transportation from the place of receipt to the place of destination; and (C) uses for any part of the transportation a carrier subject to jurisdiction under this subtitle.”

¹⁰ It does not appear that Aloha was acting as an agent of Allied, even though Aloha advertised itself as such, because, among other things, Aloha issued Hall’s bill of lading under its own name and did not refer to Allied. However, we need not determine whether there was an agency relationship, or even whether Aloha was itself a motor carrier, in order to resolve the issues referred to us by the court. Even if we were to conclude, as petitioner argues (rebuttal at 8), that Aloha was a motor carrier under the circumstances involved here, Hall would not be entitled to any greater relief than we find here.

general freight, and the ICCTA continued to differentiate the two categories of shipper. Indeed, at about the same time as the Ex Parte No. 598 exemption proceeding was moving forward, we were adopting tariff filing regulations for all carriers of household goods, which we intended to embrace household goods freight forwarders. See Household Goods Tariffs, STB Ex Parte No. 555 (STB served Feb. 4, 1997).¹¹ See also 49 CFR 1310. Therefore, freight forwarders of household goods, such as Aloha, are required to maintain tariffs and reasonable rates.

Respondents admit that Aloha did not have a tariff applicable to petitioner's interstate shipment, and that, accordingly, there was no legally applicable rate. Petitioner argues that this admission precludes Aloha from retaining any of the freight charges previously paid, citing 49 U.S.C. 13702(c)(3), which specifies that "[a] tariff which does not comply . . . may not be enforced" Hall claims that this evinces a Congressional intent "that the 'contract' between Aloha and Ms. Hall be null and void," and that this provision was to be "an incentive for individual shippers to root out violations of the Act."

The result advocated by petitioner does not comport with ICC/Board precedent and court precedent. Aloha's failure to maintain a tariff would not, under that precedent, preclude it from collecting reasonable freight charges for the services rendered, or entitle petitioner to free transportation. Where transportation has been provided, but without a tariff applicable to the movement, the carrier has been found to be entitled to a reasonable charge for its service, and "in no event would [the amount] be zero." Chicago and North Western Trans. Co.—Petition for Declaratory Order—Movement of New Empty Tank Cars, Docket No. 40158 (ICC served Apr. 3, 1989) slip op. at 7, n. 8. Similarly, the court in Fry Trucking Co. v. Shenandoah Quarry, Inc., 628 F.2d 1360 (D.C. Cir. 1980), rejected the shipper's claim that it was entitled to a refund on freight charges, holding that the carrier was not obligated to refund the agreed-upon payment for service provided to areas in which the carrier had neither ICC authority nor an established tariff.¹² Also, in a motor carrier undercharge proceeding, Intermetro Industries Corp.—Petition for Declaratory Order—Certain Rates and Practices of Zurek Express, Inc., No. 40713 (ICC served May 30, 1995) slip op. at 10, the ICC found that, where a shipper has withheld payment for

¹¹ Respondents argue that, while the Board stated in Ex Parte No. 598 that freight forwarder rates in the non-contiguous domestic trade are not subject to the reasonableness requirements, it did not specifically address whether freight forwarder rates on household goods are subject to reasonableness requirements or exclude them from the exemption. Respondents conclude that, logically, the Board's exemption in Ex Parte No. 598 extends to household goods freight forwarders, and the reasonableness of the rates at issue here is beyond our jurisdiction. This inference is unwarranted, particularly given our contemporaneous action adopting household goods tariff regulations.

¹² See also Valley Freight Systems, Inc. v. Trailer Marine Transport Corp., No. MC-C-30017 (ICC served July 13, 1988) slip op. at 6.

transportation provided without an applicable rate on file, the agency should make a quantum meruit determination of reasonable compensation so that the carrier is not forced to provide free service.

Petitioner has not cited any legislative history for ICCTA which indicates that Congress intended a different result for household goods freight forwarders, and we see no basis upon which to depart from established precedent on this issue involving carriers that were regulated under similar “filed-rate” doctrine requirements. However, we note that, because Aloha had no published tariff applicable to the transportation of petitioner’s goods, it may not enforce any ancillary loss-and-damage limitations or any other tariff limitations it is seeking to apply to petitioner’s shipment. See 49 CFR 1310.2(c).

Turning to the reasonableness issue, petitioner has not presented probative evidence that the \$2,967.60 amount billed by Aloha and paid by petitioner was unreasonable. Petitioner’s shipment moved from Hawaii to Los Angeles by water, from Los Angeles to Baltimore by rail, and from Baltimore to Minneapolis by truck. Petitioner’s evidence principally consists of a comparison of motor carrier rates for the Baltimore-to-Minnesota segment of the shipment. Petitioner has not provided evidence of the prevailing rates available for the entire movement, nor is there evidence that the amount paid was significantly outside a cluster of actual market rates. Georgia-Pacific Corp.–Pet. for Declar. Order–Oneida Motor Freight, Inc., 9 I.C.C.2d 103, 158 (1992). Respondents, on the other hand, referring to published tariffs by authorized water and motor carriers, construct intermodal scenarios involving substantially higher transportation charges (\$5,708.70 and \$5,172) for a 2,640-pound shipment from Honolulu to Eden Prairie, MN, during the May to August 1997 time period. While we realize that the higher tariff charges may not have been competitive enough to move the traffic, the amount paid by petitioner is substantially less than those amounts.¹³ We conclude that petitioner has not shown that the rates she paid were unreasonably high.

In summary, in response to the court’s referral, we have determined that there was no tariff applicable to petitioner’s shipment and, concomitantly, no legally applicable rate. Nevertheless, based on our assessment of the record, the rate charged and collected was not unreasonable and need not be refunded.

¹³ Hall states that, in an effort to determine the prevailing competitive rates at the time of her shipment, she later contacted several other local shipping companies and was quoted rates of \$1.10 to \$1.40 per pound for movements to Minnesota. These rate quotations were in line with the \$1.10 originally quoted by Aloha and the \$1.03 ultimately charged. It appears that petitioner’s real complaint here is with the weight estimate, and not with the reasonableness of the rate applied to the weight.

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

It is ordered:

1. Respondents' motion to strike and motion to dismiss this proceeding are denied.
2. The petition for a declaratory order is granted to the extent discussed in this decision.
3. This decision is effective 30 days from the date of service.
4. A copy of this decision will be mailed to:

The Honorable Michael J. Davis
United States District Court - District of Minnesota
Warren E. Burger Federal Building
316 North Robert Street
St. Paul, MN 55101

By the Board, Chairman Morgan, Vice Chairman Clyburn, and Commissioner Burkes.

Vernon A. Williams
Secretary