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SERVICE DATE - NOVEMBER 22, 2000

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42013

PHILIPS ELECTRONICS NORTH AMERICA CORPORATION
DBA PHILIPS LIGHTING COMPANY—PETITION FOR DECLARATORY ORDER—
CERTAIN RATES AND PRACTICES OF DEBELLIS, INC.
AND 401 D.T., INC. DBA SPECTRUM

Decided: November 17, 2000

With respect to 401 D.T., Inc. dba Spectrum (Spectrum or respondent), we are dismissing this proceeding because an adequate record has not been developed to enable resolution of respondent's claims for additional freight charges.

BACKGROUND

DeBellis, Inc. (DeBellis), and Spectrum instituted a court proceeding against Philips Electronics North America Corporation dba Philips Lighting Company (Philips or petitioner), seeking to collect transportation charges in addition to those previously billed and paid. In the court complaint filed in the United States District Court for the Central District of California in DeBellis, Inc. and 401 D.T. Inc., dba Spectrum v. Philips Electronics North America Corporation dba Philips Lighting Company, Case No. 96-2467-DDP (RNBx), the carriers allege that Philips intentionally failed to include the weight of pallets on its bills of lading issued for shipments tendered to these carriers between October 1, 1992, and September 30, 1994. The carriers contend that the failure by Philips to include pallet weights resulted in the original assessment of charges lower than the amounts actually due and constituted fraud. Additional freight charges of approximately \$275,000, plus punitive damages, were claimed.

The court stayed the proceeding and directed the parties to submit all transportation issues to the Board for resolution. The matter was submitted to the Board pursuant to a petition for declaratory order filed by Philips on July 30, 1997.

In a decision served on May 5, 2000, we noted that, while it was apparent from the record that the two carriers were closely related and provided a comparable transportation service to Philips, they were two separate corporate entities authorized to provide motor common and contract carrier service under separate operating authorities and tariffs. DeBellis, however, no longer functioned as an operating carrier, while Spectrum continues to provide motor carrier service. We recognized that this difference in current operating status affects the legal standards to be applied in the disposition of undercharge claims and required the use of separate approaches in resolving the claims of the respective carriers.

In the matter of DeBellis, we found the efforts of that carrier to attempt to collect undercharges from Philips for transporting the shipments at issue to be an unreasonable practice under 49 U.S.C. 13711. The proceeding was discontinued with respect to the claims of DeBellis.

Resolution of the undercharge claims of Spectrum required the consideration of other issues, as that carrier was an operating carrier not subject to the provisions of section 13711. After examining issues of contract carriage,¹ tariff applicability, and tariff interpretation, we concluded that the evidence of record was insufficient to enable us to resolve the question of contract carriage or to allow for adequate consideration of Spectrum's common carrier tariff-based claims. We also concluded that Spectrum was precluded from attempting to collect additional charges for shipments transported prior to May 9, 1994, and after August 26, 1994. In an attempt to enable the parties to rectify the deficiencies in the existing record, we reopened the proceeding with respect to the Spectrum claims to allow the parties to submit supplemental evidence and clarify their positions. We further indicated that, if an adequate record was not developed, this aspect of the proceeding would be dismissed, and the court would be advised that additional charges sought by Spectrum had not been justified.

Our prior decision indicated that the record did contain some evidence lending support to the contention by Philips that the service provided by Spectrum was that of a contract carrier. Petitioner submitted correspondence received from the carriers offering to provide specialized service in transporting shipments from Philips' Bakersfield, CA distribution center. Among the items included in the record was a letter and attachments dated July 20, 1994, from Spectrum to Philips that made reference to proposed amendments to a document entitled AGREEMENT FOR MOTOR CONTRACT CARRIAGE TRANSPORTATION. Also included was a letter dated January 4, 1995, from Spectrum declining to honor a shipment damage claim based on a liability limitation provision included among the amendments discussed in the July 20th letter.

In considering the "totality of circumstances" as to whether Spectrum provided contract carrier service, we noted that the "Agreement" referred to in the July 20th letter had not been introduced into the record, nor was there any indication that it had been executed. We determined that the record did not contain testimony, correspondence, or documents clearly showing that the parties intended the transportation service provided to be contract carriage.

We then considered the tariff issues raised, noting that Spectrum's claims, as indicated in the court complaint, are predicated upon Item 3030 of tariff ICC SEUM 200-A. The rates in this item are expressed in cents per hundredweight based on mileage and five separate minimum

¹ Undercharge claims arise out of the filed rate doctrine and must be based on applicable common carrier tariffs. Should the service provided by Spectrum be determined to be contract carriage, there would be no basis for the undercharge claims of that carrier.

weight categories.² The tariff provides for a minimum charge of \$25 per shipment. Item 995 of the tariff contains the following provision:

Charges shall be assessed on the gross weight of the shipment. No allowance shall be made for the weight of pallets.

We recognized that there was no dispute regarding rate levels, product weights, or mileage used to assess freight charges, and that the only element requiring resolution was the effect, if any, that the addition of pallet weights would have in determining the proper charges to be assessed.

We observed that the record as then developed did not include a comprehensive listing of the Spectrum shipments and contained only two original freight bills and related documents issued by respondent.³ Nor did the record contain any balance due bills that calculated or detailed the amount, asserted weight shortfall, and rate to be applied to support individual undercharge claims. We also noted that Spectrum had provided no response to the Philips assertion that the originally billed freight charges for its minimum rate shipments would not necessarily be affected by increasing the originally stated shipment weights by pallet weights. These defects rendered the existing record insufficient to allow for adequate consideration of the common carrier tariff-based claims of Spectrum.⁴

In response to our May 5th decision Philips submitted a supplemental declaration from Chris Petrocelli, its current transportation manager. Mr. Petrocelli asserts that Philips no longer has access to its copies of freight bills and bills of lading for the shipments at issue and must rely on documents provided by Spectrum. He states that Spectrum did provide Philips with more than 1,000 pages of a "Freight Bill Batch Edit List" that contain certain details relating to petitioner's shipments handled by Spectrum between May 9, 1994, and August 26, 1994. Attached as Exhibit 1 to Mr. Petrocelli's supplemental statement are copies of seven sample pages of respondent's "Freight Bill Batch Edit List." An examination of the seven sample pages indicates

² The categories described in pounds consist of any quantity; 5,000; 10,000; 20,000; and 40,000.

³ Both freight bills indicated an April 30, 1994 date of shipment, with one reflecting the assessment of a \$26.50 minimum charge (the minimum charge for shipments within California included among the proposed amendments referred to in Spectrum's July 20, 1994 letter to Philips).

⁴ The record was also found to be inadequate to enable us to determine whether the originally assessed rates were in conformity with Item 3030 of tariff ICC SEUM 200-A. We noted that, while the tariff provided for a minimum charge of \$25.00, in the only minimum charge freight bill issued by Spectrum then present on the record, respondent had assessed a minimum charge of \$26.50.

that they contain information, including shipment weight and originally assessed charges, relating to 39 shipments. Of the 39 shipments, 14 were assessed minimum rate charges of \$26.50. Attached as Exhibit 2 to Mr. Petrocelli's statement are copies of six freight bills and shipping documents relating to shipments transported between April 25 to April 30, 1994. An examination of the six freight bills indicates that two of the shipments were assessed minimum rate charges of \$26.50. Mr. Petrocelli states that he has been informed and believes that these documents are representative of the Spectrum shipments transported between May 9, 1994, and August 26, 1994.

Also attached to Mr. Petrocelli's statement is an unsigned pro forma contract (Master Contract) with an undesignated carrier, prepared by Philips entitled "Agreement for Motor Contract Carriage Transportation"(Exhibit 3) and copies of letters from the carriers to Philips (Exhibit 4) that assertedly demonstrate Spectrum's intent to contract with Philips along the lines of its Master Contract. From his review of all of the documents submitted on the record, Mr. Petrocelli is led to conclude that Philips and Spectrum intended their relationship to be one of contract carriage; that though no written agreement was ever signed, the parties agreed to contract terms; and that contract carrier service was provided pursuant to those agreed-upon terms.

Spectrum failed to submit a supplemental filing.

DISCUSSION AND CONCLUSIONS

The record remains inadequate to enable us to determine whether the "totality of the circumstances" establish that the parties intended the transportation service provided to be contract carriage. The "Master Agreement" submitted by Mr. Petrocelli failed to identify a carrier party and was not executed. While the correspondence submitted into the record indicates that the parties had continuing discussions relating to transportation rates and service, it fails to provide a clear indication that a contract carrier relationship was intended. We noted in our prior decision that Mr. Petrocelli was the custodian of Philips' transportation records and that his familiarity with the transportation services provided by respondent was based on his review of transportation matters handled by his predecessor. It is apparent that he has no personal knowledge of the relationship between the parties or their intent with respect to contract carriage. We conclude that the record does not contain testimony, correspondence, or documents clearly showing that the parties intended the transportation service provided to be contract carriage.

Nor is there evidence providing specifics that would allow for an evaluation of the basis and calculation of Spectrum's common carrier tariff-based claims. The deficiencies in the record referred to in our prior decision remain, and Spectrum has apparently declined an opportunity extended to it to correct or explain them. Without an adequate record, we are unable to address the tariff issues raised by the undercharge claims of Spectrum.

Because an adequate record has not been developed, this proceeding will be dismissed. The court is advised that the additional charges sought by Spectrum have not been justified.

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

It is ordered:

1. This proceeding with respect to Spectrum is dismissed.
2. This decision is effective on the date served.
3. A copy of this decision will be mailed to:

The Honorable Dean D. Pregerson
United States District Court for the Central District of California
U.S. Courthouse
312 North Spring Street
Room 504
Los Angeles, CA 90012

Re: Case No. 96-2467-DDP(RNBx)

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

Vernon A. Williams
Secretary