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SERVICE DATE - MARCH 6, 1998

SURFACE TRANSPORTATION BOARD<sup>1</sup>

DECISION

No. 41610

REGALITE PLASTICS CORP.—PETITION FOR DECLARATORY ORDER—  
CERTAIN RATES AND PRACTICES OF R.C. FREIGHTWAYS, INC.

Decided: February 24, 1998

R.C. Freightways, Inc. (R.C.), a motor common and contract carrier,<sup>2</sup> is seeking to collect from Regalite Plastics Corporation (Regalite) the difference between the amount originally paid and the amount it alleges should have been paid for transporting a shipment from Regalite to Culligan International Corp. (Culligan). Transportation arrangements were made by American Trans-Freight, Inc. (ATF), a licensed property broker.<sup>3</sup>

R.C. filed suit against Regalite in the District Court of Newton for the Commonwealth of Massachusetts to collect freight charges of \$5,106.00 for the subject shipment based on its filed rates. R.C. acknowledges receipt from ATF of a \$415.93 payment that reduces the amount claimed in the court proceeding to \$4,690.07. The court stayed the proceeding and referred the matter to the ICC. *R.C. Freightways, Inc. v. Regalite Plastics Corp.*, No. 9412 CV 142 (referral order dated August 18, 1995).

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<sup>1</sup> The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICC Termination Act or the Act), which was enacted on December 29, 1995, and took effect on 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 Act 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 Act. 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. 13710(b). Therefore, this decision applies the law in effect prior to the Act, and citations are to the former sections of the statute, unless otherwise indicated.

<sup>2</sup> R.C. holds common and contract operating authority issued by the ICC under No. MC-152082 and MC-152082 (Sub-No. 15).

<sup>3</sup> ATF is licensed under No. MC-221460 (Sub O-B).

In a petition filed August 25, 1995, Regalite asked the ICC to determine whether the transportation service provided by R.C. was contract carriage or common carriage. Regalite also asked the ICC to determine whether it is liable for the undercharges sought by R.C. and whether the freight charges sought by R.C. are reasonable. By decision served September 8, 1995, the ICC established a procedural schedule for the submission of evidence on non-rate reasonableness issues. On November 9, 1995, Regalite filed an opening statement that included copies of shipping documents and an affidavit by ATF's president, Thomas S. Tranovich. On November 30, 1995, R.C. filed a reply statement and argument containing copies of shipping documents, correspondence, and court filings.<sup>4</sup> Regalite did not file a rebuttal.

The primary issue here is whether the transportation service provided by R.C. was common or contract carriage. If the service was common carriage, R.C. would have been required by the filed rate doctrine, which was in effect at the time of the shipment, to charge and collect the applicable common carrier tariff rate on file at the ICC. If, on the other hand, R.C.'s service was contract carriage, the filed rate doctrine would not apply and the parties would be bound by the contract rate. For the reasons set forth below, we find that the service performed by R.C. was contract carriage and that no basis for collecting the charges claimed by R.C. has been demonstrated. Because our resolution of this issue precludes R.C. from collecting undercharges, we decline to address issues relating to liability or rate reasonableness.<sup>5</sup>

#### BACKGROUND

This dispute involves the transportation of one "collect" shipment of 174 rolls of "film or sheeting" from Regalite's facility in Newton Upper Falls, MA, to Culligan's facility at Northbrook, IL. Culligan engaged the services of ATF to arrange to move the shipment. ATF, in turn, arranged for R.C. to transport the shipment.

The bill of lading indicates that Regalite tendered the shipment to R.C. on May 28, 1993. The shipment was loaded into two trailers: 90 rolls were loaded into trailer number 223883; the remaining 84 rolls were loaded into trailer number 223863. Regalite signed the section 7 non-recourse provision of the bill of lading indicating that the shipment was to be delivered to Culligan

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<sup>4</sup> On September 19, 1995, R.C. filed a complaint against Regalite in Docket No. 41617 asking the ICC to resolve the same issues that are raised in this proceeding. On October 6, 1995, Regalite filed an answer requesting that the proceedings be consolidated under No. 41610. By decision served November 8, 1995, the ICC granted Regalite's request and discontinued No. 41617.

<sup>5</sup> R.C. is not bankrupt and is currently operating. As a result, section 2(e) of the Negotiated Rates Act of 1993, Pub. L. No. 103-180 (now codified at 49 U.S.C. 13711) does not apply to this proceeding.

“without recourse” to Regalite.<sup>6</sup> Apparently the shipment was delivered on June 3, 1993. A note on the bill of lading indicates that 4 of the rolls loaded in trailer 223883 had been damaged en route.

On May 28, 1993, R.C. submitted 2 freight bills to ATF, charging a flat rate of \$625.00 per truckload. Apparently, ATF obtained the flat rate from R.C.'s dispatcher over the telephone. ATF then billed Culligan \$725 per truckload for the shipment; Culligan paid ATF by check dated July 8, 1993. However, ATF declined to pay R.C. for the transportation services at that time because it had not received the original bill of lading.

R.C. then engaged Ploger Transportation Consultants (Ploger), a transportation consulting company, to collect the unpaid freight charges. On July 30, 1993, Ploger advised ATF that the freight charges for the shipment were 60 days past due. Ploger also questioned whether ATF was a licensed broker and whether ATF had a contract with R.C. A few days later, in a letter dated August 3, 1993, Regalite advised Culligan of its intention to issue a \$1,619.66 credit to Culligan for the damaged freight.

On August 1, 1993, Ploger prepared new freight bills assessing charges of \$2,553 per trailer or \$5,106 for the shipment, based on R.C.'s common carrier tariff rates published in ICC RCSI 400C, Item 2100, and submitted them to Regalite. Apparently, Regalite disputed whether it was liable for the freight bills. Ploger then referred the bills to National Revenue Corporation (National), a collection agency. On September 2, 1993, Regalite advised National that it was unaware of any past due charge from R.C., and requested copies of shipping documents. On November 12, 1993, National forwarded the claim to its attorneys for legal action.

On December 2, 1993, ATF submitted a check to R.C. for \$415.93. ATF's payment apparently represented the difference between the freight charges originally assessed for the shipment, \$1,250.00, and the amount of the freight damage claim. On May 20, 1994, a check in the amount of the freight damage claim (\$834.07) was issued by ATF to Regalite.

#### CONTENTIONS OF THE PARTIES

Regalite contends that it is not liable for the freight charges claimed by R.C. because it did not arrange for the transportation. It maintains that Culligan employed ATF as broker to arrange for transporting the shipment, negotiate rates, handle routing, and pay freight charges. Regalite notes that R.C. originally billed ATF for the freight charges. ATF then billed Culligan, Culligan paid ATF, and ATF paid R.C. Regalite maintains that it was never presented with the original freight bills and states that R.C. sought to collect freight charges from it only after attempts to collect from ATF and Culligan were unsuccessful. Regalite further claims that, having executed the “non-

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<sup>6</sup> A shipper signing the non-recourse statement on a bill of lading absolves itself from liability for the freight charges following delivery. *See, e.g., Illinois Steel Co. v Baltimore & Ohio Railroad Co.*, 320 U.S. 508, 513 (1944) (*Illinois Steel*).

recourse” provision of the bill of lading, it is not liable for additional charges. It maintains that R.C. should seek any additional charges from ATF or Culligan.

Regalite further asserts that R.C. provided transportation service as a contract carrier under a transportation agreement with ATF, and that as a result, the common carrier rates it now seeks are inapplicable. In support, Regalite refers to Mr. Tranovich's affidavit. Mr. Tranovich indicates that ATF arranges for transportation of freight on behalf of shippers and uses the services of licensed motor carriers. According to Mr. Tranovich, ATF negotiates rates with carriers for hauling freight, ensuring pick up, delivery, and drop off from shipper facilities to final destination. ATF also pays carriers for services rendered and, in turn, bills the shipper for its and the carrier's services. Mr. Tranovich states that ATF uses a standard form agreement with carriers, which contains terms and conditions for contract carrier services.

Attached to Mr. Tranovich's affidavit is a copy of a “Contract Carrier Agreement” between ATF and R.C. dated March 8, 1991, which, he asserts, applies to the shipment at issue. The agreement initially refers to R.C.'s contract carrier authority in MC-152082 (Sub-No. 15) and ATF's broker authority in MC-221460 (Sub-No. O-P). Paragraph 1 of the agreement states that ATF will offer for shipment, and R.C. will transport with its own equipment, at least five truckloads annually in a series of shipments. Paragraph 2 confirms that R.C. has authority to operate as a contract carrier and obligates R.C. to maintain insurance for protection of the public as required by the ICC, as well as cargo insurance in the amount of \$100,000.

In paragraph 3, ATF agrees to pay R.C. for the transportation of freight moved under the agreement in accordance with the rates set forth in an appendix, which was not submitted into evidence. In addition, the agreement provides that the parties may verbally agree to reduced rates for shipments, which would be confirmed in R.C.'s billing and ATF's payment. Paragraph 3 provides that any such reduced rate paid by ATF becomes the agreed rate, unless R.C. objects, in writing, within sixty (60) days of its receipt of payment.

Paragraph 4 indicates that R.C. will provide transportation services as a contract carrier in compliance with 49 U.S.C. 10102, by assigning motor vehicles for a continuing period of time for the exclusive use of ATF or providing specialized services or equipment “designated” to meet the “distinctive” needs of ATF or the consignor. Paragraph 4 provides that R.C. agrees to transport shipments, subject only to the terms of the agreement and the provisions of law applicable to motor contract carriage.

Paragraph 6 requires R.C. to issue a bill of lading to the shipper showing the actual consignor and consignee and showing ATF as the broker. In addition, paragraph 6 provides that R.C. agree to be liable to the owner of the freight for actual loss and damage to the freight transported under the agreement while in its care or custody. ATF has the right to offset any loss or damage by the carrier against the freight invoice. Paragraph 7 requires that R.C. hold ATF harmless from any liability resulting from loss and damage to any freight transported and from personal injury or property damage arising out of carrier operations.

Paragraph 8 provides that R.C. will bill all charges for the transportation services and tender the original signed bill of lading and delivery receipt directly to ATF. In paragraph 9, R.C. agrees to support ATF's efforts in performing the agreement and to refrain from contacting or soliciting ATF's customers while the agreement is in effect and for a period of 2 years following termination of the agreement.

Paragraph 10 provides that ATF is an independent contractor, except that ATF is R.C.'s agent for collection of charges, and that R.C. will look only to ATF for payment if the billed party has paid ATF.

Mr. Tranovich states that the agreement has been used by ATF when doing business with R.C. in the past. He asserts that the freight bills originally issued by R.C. for the shipment at issue were consistent with the provisions of the contract. He further maintains that the agreement confirms that R.C. and ATF understood that the freight would be transported under the contract and R.C.'s contract carrier authority.

R.C., on the other hand, denies that it had a contract arrangement with ATF, Regalite, or Culligan. In support, R.C. submits an affidavit from Joseph H. Tulley, R.C.'s Vice President, who denies the authenticity of the contract. Mr. Tulley states that he did "not recognize the signature purporting to be an authorized signature of [an] R.C. [employee]", and that the "signature does not in any way match the signature of any employee so authorized at the time and the signature is illegible."

R.C. acknowledges that the only communication between the parties regarding the subject shipment was a telephone agreement by R.C.'s dispatcher that a \$625.00 payment per load would be accepted for the shipment. R.C. claims that, because no contract existed between the parties, Regalite is obligated to pay freight charges under its filed rates as rebilled by Ploger. It alleges that ATF's failure to pay the freight charges is a breach of the bill of lading contract. It asserts that Regalite, as beneficial owner of the freight, is thus obligated to pay the rebilled charges.

R.C. further contends that ATF improperly offset the claim for damage against the freight charges assessed, rather than filing a damage claim with the carrier.

#### DISCUSSION AND CONCLUSIONS

We will address whether the service performed was contract carriage. Even though the ICC Termination Act eliminated the distinction between common and contract carriers, new section 13710(b) gives the Board jurisdiction to resolve disputes as to whether transportation service performed by an authorized carrier prior to January 1, 1996, was provided in its common carrier or contract carrier capacity.

The Interstate Commerce Act (ICA) had recognized two types of for-hire motor carriers: common carriers and contract carriers. Common carriers offered for-hire transportation to the

general shipping public. 49 U.S.C. 10102(14). *See Regular Common Carrier Conf. v. United States*, 803 F.2d 1186, 1187-88 (D.C. Cir. 1986). To guard against carrier discrimination among shippers, the ICA required that a common carrier file public tariffs and charge only those rates contained in the filed tariffs. 49 U.S.C. 10761, 10762.<sup>7</sup> A common carrier's filed rate was the legal rate and the only rate that the carrier was permitted to charge (and that a shipper was obligated to pay) for the carriage, unless that rate was set aside by the ICC as unreasonable or otherwise unlawful. *Maislin Indus. v. Primary Steel*, 497 U.S. 116, 127 (1990).

Contract carriers, on the other hand, provided transportation services for shippers under continuing agreements by: (1) assigning vehicles for a continuing period of time for the exclusive use of such shippers, or (2) providing transportation services designed to meet the distinct needs of the shippers. 49 U.S.C. 10102(16),<sup>8</sup> *See Aero Mayflower Transit v. ICC*, 711 F.2d 224, 226-27 (D.C. Cir. 1983). The rates of contract carriers, unlike those of common carriers before TIRRA, were set and maintained privately. They could be lower (or higher) than a carrier's common carrier rates, and were exempt from the filed rate doctrine. 49 U.S.C. 10761(b), 10762(f). *See Exemption of Motor Contract Carriers from Tariff Filing Requirements*, 133 M.C.C. 150 (1983), *aff'd sub nom.*, *Central & S. Motor Freight Tariff Ass'n. v. United States*, 757 F.2d 301 (D.C. Cir.), *cert. denied*, 474 U.S. 1019 (1985).

To determine whether certain transportation moved in contract carriage, we must consider: (1) whether the carrier held appropriate contract carrier authority to provide the service; (2) whether the shipper and the carrier had an agreement for the transportation to be provided as contract carriage, and the shipments moved under that agreement; and (3) whether the transportation was consistent with the statutory definition of contract carriage, i.e., (a) it moved under a continuing agreement, or (b) the carrier met the distinct needs of the shipper. *See Freightliner Corp. & Mercedes-Benz Truck Co., -Rates*, 9 I.C.C.2d 1031, 1040 (1993) (*Freightliner*), *aff'd*, *In re Transcon Lines*, 89 F.3d 559, 567 (9th Cir. 1996) (*Transcon*).

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<sup>7</sup> By section 206 of the Trucking Industry Regulatory Reform Act of 1994, Pub. L. No. 103-311, 108 Stat. 1673, enacted on August 26, 1994 (TIRRA), most motor common carriers of property (excluding household goods) were freed from the requirement that they file and charge individually determined tariff rates. This prospective change does not affect our analysis of this case.

<sup>8</sup> This definition incorporates amendments made in the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (MCA/80), but in substance remains the definition enacted in 1957. (A recodification of the statute in 1978 changed the wording but did not change the law.) *See Ford Motor Co. v. Security Services f/k/a Riss Intl.*, 9 I.C.C.2d 892, 910 (1993), for a discussion of the statutory changes made in 1957. We note that TIRRA renumbered former paragraphs 10102(13), (14) and (15) as 10102(14), (15), and (16).

In resolving disputes concerning whether particular services were common or contract carriage, the ICC examined the “totality of the circumstances” in each case. *Transcon*, 89 F.3d at 566-67; *General Mills, Inc.—Petition for Declaratory Order*, 8 I.C.C.2d 313, 322-23 (1992), *aff’d*, *Bankruptcy Estate of United Shipping Co. v. General Mills*, 34 F.3d 1383 (8th Cir. 1994). Thus it took into account the parties’ negotiations, their intention, the agreements, and their performance under the agreements. *Transcon*, 89 F.3d at 566.

When the shipment at issue here moved, R.C. held contract authority under permit No. MC-152082 (Sub-No. 15) issued by the ICC on September 30, 1965. The permit authorized R.C. to operate as a motor contract carrier "over irregular routes, transporting *general commodities* (except classes A and B explosives, household goods, and commodities in bulk) between points in the United States, under continuing contract(s)." R.C. does not dispute that the shipment at issue could have been handled under its contract carrier authority.

The agreement is a continuing agreement for R.C. to provide transportation for ATF of at least five truckloads annually.<sup>9</sup> The terms of the agreement indicate that the service R.C. performed was tailored to meet ATF’s distinct needs in a manner consistent with the ICA. R.C. agreed to provide insurance coverage that ATF required and to accept full liability for loss and damage to the cargo. R.C. also agreed to permit ATF to offset damaged freight losses against the freight charges, and to bill ATF for freight charges rather than the shipper or consignee. R.C. agreed it would not back-solicit accounts that ATF developed. Finally, R.C. agreed to establish rates orally on short notice.

While R.C. denies that it had a contract with ATF, the performance of the parties here indicates that they intended the shipment to be handled under the contract between ATF and R.C. R.C. originally assessed the flat rate agreed to by ATF and presented the freight charges to ATF.<sup>10</sup> Subsequently, ATF paid R.C.’s originally assessed invoiced charges, but in doing so it exercised its right under paragraph 6 of the agreement to offset a pending freight damage claim against the invoiced freight charges.

On the other hand, there is nothing in the record showing that R.C. considered the transportation service it provided for the shipment at issue to be common carriage. It sought to collect common carrier rates only after the freight charges originally assessed under its contract with ATF went unpaid. All of these actions are consistent with the contract submitted by Regalite.

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<sup>9</sup> We note that, while R.C.’s claims only involve one shipment, Mr. Tranovich’s testimony indicates that ATF and R.C. had a continuing agreement for the movement of other shipments. R.C. does not deny that it moved other shipments for ATF.

<sup>10</sup> Initially Ploger, on behalf of R.C., pressed ATF for payment of the originally assessed charges. Later, Ploger made a demand upon petitioner for payment of the asserted common carrier charges.

The agreement here is similar to other carrier-broker agreements that the ICC has determined to constitute contract carriage. *RPL Associated, Inc.—Petition for Declaratory Order—Certain Rates and Practices of Intermodal Transportation Services*, No. 40966 (ICC served June 28, 1995) and cases cited therein; *Collective Distribution Services, Inc.—Petition for Declaratory Order—Certain Rates and Practices of Best Refrigerated Express, Inc.*, No. 40865 (ICC served Sept. 22, 1994); *Twin Modal, Inc.—Petition for Declaratory Order—Agreement for Contract Carriage*, No. MC-C-30178 (ICC served Sept. 21, 1994); *Ralph Herring, Individually and D/B/A Kustom Transport —Petition for Declaratory Order—Certain Rates and Practices of Rose-Way, Inc.*, No. 40758 (ICC served Aug. 31, 1994); *Twin Modal, Inc.—Petition for Declaratory Order—Certain Rates and Practices of Twin Continental, Inc.*, No. 40675 (ICC served Dec. 13, 1993); and *C.H. Robinson Company—Petition for Declaratory Order—Best Refrigerated Express, Inc.*, No. 40753 (ICC served Sept. 24, 1993). Given the totality of the circumstances, we conclude that the shipment at issue moved in contract carriage.

In light of our conclusions, there is no need for us to determine other issues raised by the parties.<sup>11</sup>

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 is discontinued.
2. This decision is effective on its service date.
3. A copy of this decision will be mailed to:

The Honorable Dyanne J. Klein  
District Court of Newton  
for the Commonwealth of Massachusetts.  
1309 Washington Street  
West Newton, MA 02165

Case No. 9412 CV 142

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<sup>11</sup> We do not decide whether Regalite is liable for the freight charges assessed by R.C. The Board has not been authorized by the ICC Termination Act to resolve liability questions. However, we note that the courts have determined that a consignor that executes the section 7 “non recourse” clause of the bill of lading is relieved from liability for freight charges. *See Southern Pac. Transp. Co. v. Commercial Metals Co.*, 456 U.S. 336, 342-43 (1982); *Illinois Steel*, 320 U.S. at 512-14; *Atchison T.&S.F. v. C-F-G Grain*, 550 F. Supp. 1021, 1023-24 (D. Kan. 1982).

No. 41610

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams  
Secretary