EX PARTE NO. 346 (SUB-NO.14A)

RAIL GENERAL EXEMPTION AUTHORITY--MISCELLANEOUS AGRICULTURAL COMMODITIES--PETITION OF G&T TERMINAL PACKAGING CO., INC. TO REVOKE CONRAIL EXEMPTION

Decided December 2, 1996

Carrier procedures for inspecting delivered freight found not shown to constitute an unreasonable practice. Petition for revocation of exemption denied.

BY THE BOARD:[1]

This case concerns a petition for revocation of an exemption from regulation under 49 U.S.C. 10505 involving the transportation of potatoes. G&T Terminal Packaging Company, Inc., and affiliated produce dealers operating in the New York City area (G&T) alleged that Consolidated Rail Corporation (Conrail) and certain of its connecting carriers abused their market power and discriminated against G&T by imposing a rate surcharge on G&T's traffic. G&T also suggested that Conrail committed an unreasonable practice by encouraging its agents to file fraudulent inspection reports concerning the condition of potatoes delivered by the carrier.

[1] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICC Termination Act), which was enacted on December 29, 1995, and which took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain ICC functions to a newly created Surface Transportation Board (Board). Section 204(b)(1) of the ICC Termination 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 new law. 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. 10702 (reasonable practices) and 49 U.S.C. 11706 (liability for damage). Therefore, this decision generally applies the law in effect prior to the ICC Termination Act, and citations are to the former sections of the statute, unless otherwise indicated.

The ICC denied the petition for revocation in *Rail Exemption Misc. Agricultural Commodities*, 8 I.C.C.2d 674 (1992). The ICC found no evidence to support a finding that Conrail or its connections had market power over this transportation, much less that they had abused it. The ICC also concluded that petitioners had failed to show that Conrail had engaged in conduct that would amount to discrimination under the Act. Finally, the ICC, like the various courts that had already addressed the issue, found that G&T had not shown that any inspection reports were fraudulent. In making that finding, the ICC noted that the fraud allegations, which are relevant in particular loss and damage claims, did not involve the types of activities that it had traditionally considered in the context of its unreasonable practice jurisdiction.

In Mr. Sprout v. United States, 8 F.3d 118 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 2674 (1994) (*Mr. Sprout*), the United States Court of Appeals for the Second Circuit affirmed the ICC's decision rejecting G&T's claims concerning abuse of market power and discrimination. However, concluding that the fraud claims fell within the ambit of the ICC's traditional unreasonable practice jurisdiction, the court remanded the case so that the ICC could rule on the allegation that the exemption should be revoked, or that some other remedial action should be taken, on the ground that the inspection reports of Conrail's agents are fraudulent or otherwise constituted an unreasonable practice. The ICC reopened the proceeding in response to the court's decision.

DISCUSSION AND CONCLUSIONS

A. *The Request For Further Proceedings Before An ALJ.* At the outset, we will address G&T's motion to assign this matter to an Administrative Law Judge (ALJ) so that a further record can be developed in this case. G&T's position is that further hearings before an ALJ would assist it in demonstrating the type of fraud that would support its request for federal supervision of Conrail's claims investigation process. G&T's request will be denied.

In its order reopening these proceedings, the ICC noted that an extensive factual record had already been assembled. Accordingly, the ICC sought argument, but not further evidence, on the question raised on remand, indicating that it would accept new evidence only if it is relevant and non-cumulative. The ICC stated that:

If complainants believe that remedial action is appropriate, they must do more than simply assert that the exemption should be revoked. Rather, they should address specifically how Conrail's actions constitute an unreasonable practice; what actions they want us to take; and how those actions would resolve whatever problems they see.

Rail Exemption Misc. Agricultural Commodities, 9 I.C.C.2d 1124, 1125-26 (1993) (*Reopening Order*).

In response to the *Reopening Order*, G&T asked the ICC to postpone the date on which opening pleadings were due (December 13, 1993). The basis of G&T's request was that it would need more time to develop evidence, which it claimed was already in its possession, of several "fraudulent reports, or reports which show unreasonable practices." G&T's Petition For Deferral, Etc., filed November 24, 1993, at 3. The ICC granted G&T's request. Yet, nearly 9 months later, G&T had not yet developed the evidence it had earlier claimed was in its possession. Rather, in a pleading that it called a "Re-petition," filed August 9, 1994, G&T simply reiterated the claims that it has made many times before: that an ICC ALJ, in an initial decision, found that Conrail's inspection practices increased transportation costs, apparently by promoting litigation rather than settlement of claims; that Conrail should not instruct its agents to report only observable facts, rather than opinions, as to how a loss was caused; and that the reports of Conrail's inspection agencies are fraudulent because they sometimes conflict with reports prepared by employees of the United States Department of Agriculture (USDA), which G&T uses for guidance in claims disputes.

We will not reopen this proceeding to permit G&T to present additional evidence. Even assuming that G&T has the evidence that it claims to have, and that there is some valid (although yet unexplained) reason why it did not present the evidence earlier, there is no basis for assigning this case to an ALJ. The evidence that G&T purports to have would plainly be cumulative, and, as discussed further later, would not prove a violation in any event. Moreover, it is well settled that a party is not entitled to a hearing before an ALJ unless matters of material fact are in dispute and an adequate proffer of evidence has been made. *See, e.g., Southern Union Gas Co. v. FERC*, 840 F.2d 964, 970 (D.C. Cir. 1988). Therefore, G&T's request will be denied. We will decide this proceeding on the basis of the evidence already in the record.[2]

[2] G&T seems to confirm our conclusion that any further evidence it might present would be cumulative. *See, e.g.*, Re-petition at 9 ("Petitioners have met their burden of proof").

B. *The Merits*. This dispute focuses on the inspection reports prepared by Conrail's agents to assess the condition of potatoes that have become the subjects of loss and damage disputes. Conrail uses the inspection agencies to assist it in determining whether it should pay or contest loss and damage claims concerning these potatoes. Conrail also uses the reports prepared by its agents as evidence if contested claims are ultimately litigated. As explained below, G&T has failed to demonstrate that Conrail's practices, or the practices of Conrail's inspection agencies, are unreasonable.[3]

G&T's first claim is that the way in which Conrail uses its inspection agencies increases the cost of processing claims. *See*, Re-petition at 9 and Exhibit H at 2-3. We disagree. G&T's point is apparently that, if Conrail were less aggressive in defending itself, more claims would be settled. G&T's position is without merit.[4]

It is, of course, a given that claim processing costs would be lower if either party to a dispute were willing to give in. But as the ICC and the courts have recognized, G&T is quite litigious; if Conrail were to settle, rather than litigate, G&T's claims, its processing costs would go down, but its claims payment costs would skyrocket. These increased claim payments would normally be recovered through rate increases to G&T itself, the party occasioning the increased costs. *See, Mr. Sprout*, 8 F.3d at 126-27. Thus, it would appear that, even if Conrail did change the way it investigated claims, the costs associated with G&T's claims would not likely go down, because they are not the product of any practice of Conrail or its inspection agents. Rather, because G&T's claims costs are the product of G&T's own litigious behavior (*see*, 8 I.C.C.2d at 692), they would likely continue, and would likely be allocated to G&T regardless of Conrail's conduct in defending itself.

The ICC recognized (8 I.C.C.2d at 690) that a carrier's allocation of loss and damage expenses to a particular shipper might be found to be unreasonable in a given case. Here, G&T argues that Conrail commits an unreasonable practice

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[3] The Board's regulations governing the processing of loss and damage claims (49 CFR 1005), as here pertinent, establish how claims are filed; they require carriers to acknowledge and investigate claims; and they provide time limits within which carriers must pay, decline, or offer to settle damage claims.

[4] The ALJ in his initial decision (7 I.C.C.2d at 1120) vaguely alluded to unidentified but "extensive evidence showing unreasonable buildup of claims processing costs." He stated that "Conrail encourages this cost buildup" by "[a]ctively avoiding early and accurate identification of the cause of damage." We disagree with the ALJ's conclusion that Conrail's actions in seeking to defend itself in litigation initiated by G&T are unreasonable.

by insisting that its inspection agencies' employees report only observable facts about the condition of freight, rather than attributing fault when loss occurs. We find nothing remarkable or unreasonable about that practice; there is no reason why Conrail cannot assign objective factfinding to an outside party, as its agent, while reserving to itself the far more subjective matter of faultfinding (that is, litigation strategy). We conclude that practices such as these -- involving a party's determinations whether to settle loss and damage claims, and if so, at what price -- are, as a rule, within management's discretion, and that we would not upset them absent a strong showing that they are not in the public interest.[5]

G&T contends that Conrail's relationship with its agents is not in the public interest because the reports produced by the inspection agencies are fraudulent. To prove fraud, however, G&T simply asserts that some of the reports prepared by Conrail's inspection agencies are inconsistent with the reports prepared by employees of the USDA.

Assuming that G&T is factually correct, it has not proven fraud. There are many factors that can account for inconsistent factual conclusions.[6] A simple showing that some of the reports prepared by the USDA personnel are different from those prepared by Conrail's agents does not, standing alone, suggest misbehavior of any sort, and it certainly does not prove that Conrail has committed fraud or otherwise engaged in an unreasonable practice.

G&T has raised the fraud argument in the various lawsuits it has prosecuted against Conrail over the years, but it has never been successful, because it has been unable to show fraudulent intent on Conrail's part or detrimental reliance on its own part. *See, e.g., G&T Terminal Packaging Co. et al. v. Charles Smith*, Supreme Court, N.Y. County, Index #14383/83--002:

> This is not a case where plaintiffs have been misled by being induced to rely on faulty documents. Rather, it is a case where plaintiffs have failed to make out a record of anything indicative of wrongdoing. Plaintiffs are unable to point to any particular report involving produce shipped by

[5] In its prior decision (8 I.C.C.2d at 693 and n.46), the ICC noted G&T's view that "the inspection agencies slanted reports in the railroads' favor." We do not believe, however, that a policy of reporting observable facts rather than conclusions as to liability constitutes a slant at all. Moreover, as discussed later, it certainly is not fraud, nor does it otherwise constitute an unreasonable practice.

[6] For example, two reports on a given shipment might be different because of differences in the perceptions of the individual inspectors; differences in the times of day when the reports were done; or differences in the type of access to the shipment that the shipper or consignee affords the inspector. We note that Conrail has claimed in this proceeding that G&T has not always cooperated in providing adequate access to Conrail's inspectors.

any plaintiff that has been fraudulently altered, or to any claim that any plaintiff failed to file, or withdrew, in the face of a bogus [report by Conrail's agent].

Here, it is undisputed that G&T uses the USDA reports, not the reports of Conrail's agents, in determining whether to file loss and damage claims with Conrail, and in litigating loss and damage lawsuits. Moreover, G&T is free in any individual lawsuit to cross examine Conrail's agents as to the veracity of their reports, and as to any instructions Conrail may have given them as to how to prepare the reports. If USDA's reports or personnel, or any other reports or data on which G&T chooses to rely, are more persuasive than Conrail's, then they will be given more weight during the trial. But the fact that different reports by different inspectors may be different in some cases does not prove fraud.

In its decision on remand, the court directed the ICC to determine whether the inspection report preparation and procedure is fraudulent and hence constitutes an unreasonable practice. G&T, in response, has not addressed any of the matters put into issue in the *Reopening Order*. We find that G&T has failed to show that Conrail has engaged in fraud or any practices that would violate the laws that we administer, including the requirement that carrier practices be reasonable. Therefore, we will not revoke the exemption.[7]

It is ordered:

1. The petition to reopen is denied.
2. The petition for revocation is denied, and this proceeding is dismissed.
3. This decision is effective on January 15,1997.

By the Board, Chairman Morgan, Vice Chairman Simmons, and Commissioner Owen.

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[7] In *Mr. Sprout*, 8 F.3d at 128-29, the court found that the ICC had jurisdiction over the processing of loss and damage claims in light of the rail transportation policy objectives of promoting efficient transportation and preventing unreasonable discrimination. Here, we find no basis on which to conclude that Conrail's practice of directing its inspection agencies to report only observable facts contravenes these transportation policy objectives.