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SERVICE DATE - MARCH 24, 1998

SURFACE TRANSPORTATION BOARD[1]

DECISION

No. 41468

COLLECTIVE DISTRIBUTION SERVICE, INC. AND HASBRO, INC.—
PETITION FOR DECLARATORY ORDER—CERTAIN RATES AND
PRACTICES OF SOUTH EAST CARRIERS, INC.

Decided: March 13, 1998

South East Carriers, Inc. (SEAC), a motor common and contract carrier, is seeking undercharges from Collective Distribution Systems (CDS) and Hasbro, Inc. (Hasbro). SEAC seeks to collect the difference between the amount originally paid and the amount that it claims should have been paid for its transportation service, plus attorneys' fees for collection.[2]

The primary issue here is whether the transportation service provided by SEAC was common or contract carriage. If the service was common carriage, SEAC 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, SEAC'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 SEAC was contract carriage, and that no basis for collecting the charges claimed by SEAC under the filed rate doctrine has been demonstrated. Because we find that SEAC may not collect charges under its tariff, we will not reach the other issues raised in this proceeding.

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[1] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (Termination Act or the Act), which 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.

[2] SEAC is not bankrupt and is currently operating. It holds common and contract carrier operating authority under No. MC-191696 and MC-191696 (Sub-No. 5). As a result, section 2(e) of the Negotiated Rates Act of 1993, Pub. L. No. 103-180 (NRA) (now codified at 49 U.S.C. 13711) does not apply to this proceeding.

BACKGROUND

SEAC claims undercharges, detention charges, and attorneys' fees for services rendered and expenses incurred in transporting one shipment in December 1993 from the Port of Seattle, WA, to the facilities of consignee Target Distribution Center (Target) located in Indianapolis, IN. Arrangements for transporting the shipment were made by CDS, a licensed property broker acting on behalf of Hasbro, on December 1, 1993. SEAC apparently agreed with CDS to transport the Hasbro shipment at a flat rate of $2,000. The shipment was delivered on December 12, 1993, and SEAC submitted an invoice to CDS for the $2,000 negotiated rate. CDS did not pay the full invoiced charge, however, but sought to offset from the invoiced charge the costs it allegedly incurred as a consequence of delayed delivery.[3] CDS deducted $466.50 for its claimed costs and remitted the balance of $1,533.50 to SEAC.

SEAC demanded that CDS and Hasbro pay the balance of $466.50, but CDS and Hasbro refused. SEAC then reassessed the freight charges for the subject movement based on its common carrier tariffs.[4] As a result, it increased its basic transportation charge to $2,484.90. After crediting the $1,533.50 already paid, SEAC demanded that CDS and Hasbro pay the balance of $951.40. SEAC also claims that CDS and Hasbro must pay detention charges of $1,200.00[5] and attorneys' fees of $752.99.[6] The total amount SEAC seeks to collect is thus $2,904.39.

On May 20, 1994, SEAC filed suit in the United States District Court for the Middle District of Tennessee to collect the $2,904.39. The court referred the matter to the ICC to determine whether Hasbro's shipment moved under SEAC's common or contract carrier authority. The court also asked the ICC to determine whether the provisions of SEAC's tariffs for detention charges and attorneys' fees are lawful and applicable, and whether SEAC's filed rates are reasonable. South East Carriers, Inc. v. Hasbro, Inc. and Collective Distribution Services, Inc., Civil Action No. 1:94-0045-H (referral order dated August 1, 1994).

By petition filed September 19, 1994, CDS and Hasbro asked the ICC to determine whether the transportation service provided by SEAC was motor contract carriage. In the alternative, CDS

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[3] Delivery was originally scheduled for December 6, 1993. Because of a delay in the pickup of the shipment , the delivery date was rescheduled for December 7, 1993. The shipment was ultimately delivered to the consignee on December 12, 1993.

[4] Items 10 and 200 of ICC SECJ 400.

[5] Item 80 of ICC SECJ 400 provides for detention charges of $50 per hour after 120 minutes of free time. SEAC claims that its vehicle was detained for 26 hours on December 8 and 9, 1993.

[6] SEAC claimed attorneys' fees under Item 100 of its Rules Tariff ICC SECJ 101. Under this provision, SEAC can charge interest and attorneys' fees to collect past due accounts.

and Hasbro asked the ICC to find that the published tariff rates SEAC seeks to collect are unreasonable. By order served January 20, 1995, the ICC instituted this proceeding and set a procedural schedule.

Pursuant to the ICC's order, CDS and Hasbro filed opening statements on March 21, 1995, including verified statements and exhibits from Bram Friedman, CDS's O.S.& D.[7] manager, and David Samardak, Hasbro's contract negotiator.[8] SEAC replied on April 20, 1995. CDS and Hasbro filed a rebuttal on May 22, 1995.

In support of the opening statement of CDS and Hasbro, Mr. Friedman testifies that CDS and SEAC began their relationship in 1987, when SEAC provided CDS with a copy of its ICC contract carrier authority. He states that CDS made it clear to SEAC that it would only deal with SEAC on a contract carrier basis because price flexibility was essential to CDS. Mr. Friedman asserts that between April 1992 and October 1993, CDS tendered 20 shipments to the carrier for transportation under SEAC's contract carrier authority. Allegedly, CDS and SEAC agreed on a flat rate prior to each movement. The flat rate and other terms were confirmed in an "Equipment Contract & Confirmation" telefaxed to SEAC, containing the following terms:

> This confirmation is to serve as the "Contract to Haul" for transportation services. Receipt of this agreement constitutes acceptance . . . . Each shipment tendered . . . to Carrier on and after the date of this Confirmation shall be a tender to Carrier as a Motor Contract Carrier and shall be subject only to the terms of each Confirmation and the provisions of law applicable to Motor Contract Carriage.

Mr. Friedman asserts that CDS was contacted by Hasbro on December 1, 1993, to handle the movement of the subject shipment from Seattle. CDS then arranged for SEAC to transport the shipment. He states that a copy of the equipment contract was telefaxed to SEAC with the details of the shipment, including the negotiated flat rate of $2,000. A copy of the equipment contract submitted by Mr. Friedman (Exhibit A) shows that Hasbro's shipment was scheduled to be picked up on December 2 and delivered on December 6. According to Mr. Friedman, however, the shipment was not picked up until December 3, was rescheduled for delivery on December 7, and was actually delivered on December 12. Mr. Friedman testifies that SEAC's driver was unable to make the rescheduled delivery on December 7 and that, instead of placing the shipment in a public warehouse

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[7] "O.S.&D." is an abbreviation for Over short and damage.

[8] SEAC filed a motion to strike the verified statements of Mr. Friedman and Mr. Samardak, claiming that they falsely state that CDS operated as a freight forwarder. We deny the motion. Though the facts on record here indicate that CDS functioned here as a broker in arranging for SEAC to provide transportation service on behalf of Hasbro, CDS's operating status is not vital to the resolution of the merits of this case.

as SEAC wanted to do, CDS arranged to transfer the shipment from SEAC's vehicle to a truck operated by C.D.S. Lines, Inc. (C.D.S.), a CDS affiliate. C.D.S. held the shipment until it was delivered on December 12.

Attached to Mr. Friedman's statement as Exhibit C is a copy of an invoice dated December 16, 1993, issued by SEAC to CDS assessing CDS a flat rate of $2,000 for the subject shipment. Mr. Friedman states that CDS deducted $466.50 for expenses incurred by C.D.S. for driver layover, and for transfer of shipment expenses, and that CDS then remitted the balance of $1,533.50 to SEAC.[9]

Also attached to Mr. Friedman's statement are copies of correspondence sent to CDS by Mr. Danny C. Homan, SEAC's operations manager, contesting CDS's action in deducting $466.50 from the originally invoiced freight charge for the shipment (Exhibit G). Mr. Homan warned Mr. Friedman that the "failure to pay in full within 30 days voids all contract rates and subjects all shipments to our tariff rate provisions."

SEAC's reply includes a statement by Mr. Homan claiming that SEAC provided CDS common carrier service in transporting the Hasbro shipment. Mr. Homan contends that each shipment arranged for by CDS and transported by SEAC was individually negotiated and was subject to rates in SEAC's range tariff,[10] ICC TRME 101, a tariff that allowed SEAC to negotiate flat rates on a shipment by shipment basis. Mr. Homan further maintains that the agreed-to flat rate was to be applied so long as full payment for the invoice was made within the credit period prescribed in SEAC's Rules Tariff ICC SECJ 101. He asserts that SEAC did not enter into a contract for a series of shipments, dedicate equipment for CDS's or Hasbro's exclusive use, or provide specialized service.

Mr. Homan contends that the bill of lading issued for the subject shipment incorporates SEAC's tariffs and classifications by reference. He asserts that SEAC wanted to unload the shipment when it arrived in Indianapolis, but the consignee, Target, denied access to its facility. Mr. Homan states that SEAC's tariffs provide for assessment of detention charges when power units and trailers are detained at arrival because the consignee is unable or unwilling to unload. He further states that when CDS advised his office on December 9 that it wanted to reconsign the shipment, he instructed the driver not to release the load until Hasbro or CDS signed the bill of lading, assuring that the freight charges would be paid. Mr. Homan claims that because Hasbro and CDS failed to pay the charges in full, SEAC was permitted to assess the common carrier tariff charges as incorporated in its bill of lading, including trailer detention and attorneys' fees.

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[9] The Exhibit C invoice bears a stamped "Paid January 11, 1994" marking.

[10] A range tariff of the type applicable when this shipment moved did not establish a specific rate for a given movement, but, rather, provided that the carrier negotiates rates with a shipper within a particular range.

In rebuttal, Mr. Friedman states that CDS and SEAC did not intend that the flat rate would apply only if the invoice was paid within the credit period authorized by SEAC's rules tariff. According to Mr. Friedman, when CDS contacted SEAC about the shipment, the parties did not discuss any tariff rates or prescribed payment period to protect the negotiated rate. Mr. Friedman asserts that the shipment was tendered to SEAC to be transported under that carrier's contract carrier authority and that SEAC did not indicate otherwise.

CDS disputes SEAC's contention that the flat rate was negotiated under its range tariff ICC TRME 101. According to CDS, Items 45 and 50 of the range tariff indicate that the tariff applies only to an "excess capacity program." CDS asserts that the subject shipment did not move pursuant to that program. CDS further alleges that the range tariff requires that the bills of lading contain specific reference to the common carrier tariff item on which the agreed-to rate, in cents per mile, is based. CDS notes that none of the shipping documents on this record (those relating to prior shipments handled by SEAC and the subject Hasbro shipment) comply with the tariff's rate reference requirement.

DISCUSSION AND CONCLUSIONS

Even though the 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 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.[11] 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

[11] 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.

the shippers. 49 U.S.C. 10102(16),[12] 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 they were exempted 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).

In resolving disputes concerning whether particular services were common or contract carriage, the ICC has held that the type of commitment between the parties may determine the type of carriage provided. ZoneSkip, Inc. v. UPS, Inc. and UPS of America, Inc., 8 I.C.C.2d 645, 653-55 (1992) (ZoneSkip), pet. for review denied sub nom., ZoneSkip, Inc. v. United States, 998 F.2d 1007 (3d Cir. 1993) (Table).

To determine whether the Hasbro shipment moved in contract carriage, we must consider: (1) whether SEAC held appropriate contract carrier authority to provide the service; (2) whether SEAC and CDS, acting on Hasbro's behalf, had an agreement for transportation to be provided as contract carriage, and the shipment moved under that agreement; and (3) whether the transportation was consistent with the statutory definition of contract carriage, i.e., (a) the shipment moved under a continuing agreement, or (b) the transportation service provided was designed to meet a distinct need of the shipper. Freightliner Corp. & Mercedes-Benz Truck Co.,—Rates, 9 I.C.C.2d at 1031, 1040 (1993). aff'd sub nom., In re Transcon Lines, 89 F.3d 559 (9th Cir. 1996) (Transcon). In making such a determination, 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 intentions, the agreements, and the parties' performance thereunder. Transcon, 89 F.3d at 566.

A. Contract Carrier Authority. SEAC holds appropriate contract carrier authority to provide the service. When the shipment took place, SEAC had authority from the ICC to transport shipments for CDS, as well as all other commercial shippers or receivers of general commodities under Docket No. MC-191696, which was issued October 26, 1990. This point is not in issue.

B. Contract Carriage Agreement. The Hasbro shipment moved under the equipment contract. The terms of the contract clearly showed that the shipment was tendered to SEAC as a

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[12] This definition incorporates amendments made in the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793, 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) (Ford), 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).

contract carrier. The contract is signed by SEAC's driver indicating that SEAC accepted the terms in the equipment contract.

In addition, Mr. Friedman testifies that CDS and SEAC intended for the Hasbro shipment to be transported under SEAC's contract carrier permit. Correspondence from Mr. Homan, as well as his testimony, confirm that SEAC intended to move the Hasbro shipment under its contract carrier authority and agreed to accept the negotiated flat rate for its transportation service. The correspondence further indicates that only after CDS refused to pay the agreed-to flat rate under the contract did SEAC attempt to recharacterize the transportation service as common carriage and seek to collect freight charges under its common carrier tariffs. There is nothing on the record to confirm SEAC's contention that its range tariff (or any other published rate) was intended to be applied to the Hasbro shipment at the time it was transported.

The agreement here is similar to other carrier-broker agreements which the ICC has determined to be the basis of contract carriage. RPL Associates, Inc.—Petition for Declaratory Order—Certain Rates and Practices of Intermodal Transportation Services Inc., 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 Sep. 22, 1994); Twin Modal, Inc.—Petition for Declaratory Order—Agreements for Contract Carriage, No. MC-C-30178 (ICC served Sep. 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 Sep. 24, 1993).

C. Statutory definition. Here, considering the totality of the circumstances, it is clear that the Hasbro shipment moved under a continuing agreement between CDS and SEAC and that SEAC tailored its service to meet the needs of CDS and its clients. Testimony from Mr. Friedman shows that CDS and SEAC had a continuing contract carrier relationship since 1987. Between April 1992 and October 1993, CDS arranged for SEAC to transport 20 other shipments pursuant to its contract carrier authority. Copies of the equipment contracts for these shipments submitted in this proceeding clearly evidence an intent by the parties to provide and receive contract carrier service on a continuing basis. The Hasbro shipment was part of a pattern established by CDS and SEAC for contract carrier service. Each of the shipments referred to on the record was moved pursuant to an equipment contract that specified that "Each shipment tendered . . . on and after the date of this Confirmation shall be a tender to Carrier as a Motor Contract Carrier and shall be subject only to the terms of each Confirmation and the provisions of law applicable to Motor Contract Carriage."

Likewise, SEAC's service was tailored to meet the needs of CDS and its clients. The transportation service was provided under terms set by the equipment contracts. The rate for the shipment was negotiated on an individual basis by the parties. During the negotiations to establish the contract carrier relationship, CDS made it clear that it desired price flexibility. These factors

indicate that the subject transportation service was designed to meet the specific needs of CDS and its clients. See Ford, 9 I.C.C.2d at 911-12 (" `distinct needs' test could be met by price considerations."). SEAC failed to submit any evidence to rebut this evidence.

Moreover, SEAC has not claimed that it provided common carrier service, or sought to collect undercharges from CDS for any of the other shipments. The dispute here arose because CDS sought to offset its claimed costs for the delayed delivery against the negotiated contract rate. The parties' ensuing collection dispute does not change the underlying nature of the transportation service provided in this case. At the time this shipment moved, the parties had made a commitment to contract carriage and had performed as if bound by the agreement. See ZoneSkip; Transcon.

From the evidence on record, we find that the CDS and SEAC had established a contract carrier relationship and that the service provided by SEAC in transporting the Hasbro shipment was based on this relationship. We further find that the Hasbro shipment moved in contract carriage and did not move under SEAC's filed common carrier rates. As a result, CDS is not obligated for undercharges, detention charges, and attorneys' fees based on SEAC's filed common carrier rates.

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

It is ordered:

1. SEAC's motion to strike is denied.

2. This proceeding is dismissed.

3. This decision is effective on its service date.

4. A copy of this decision will be mailed to:

The Honorable Thomas A. Higgins
United States District Court
For the Middle District of Tennessee
Columbia Division
A-845 U.S. Courthouse
801 Broadway
Nashville, TN 37202

Re: Civil Action No. 1-94-0045-H

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary