

*** NOT FOR PUBLICATION ***

NO. 24319

IN THE SUPREME COURT OF THE STATE OF HAWAII

CLERK OF APPELLATE COURTS
STATE OF HAWAII
MARIANNO

2005 JUL 29 AM 8:53

FILED

In the Matter of

KAUAI VETERANS' EXPRESS CO., LTD.

To Answer a Complaint and Summons Regarding an Alleged Violation of the State Motor Carrier Law.

APPEAL FROM THE PUBLIC UTILITIES COMMISSION
(CITATION ORDER NOS. 289 and 294)

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, Nakayama, Acoba, and Duffy, JJ.)

The appellant Kauai Veterans' Express Co., Ltd. [hereinafter, "the Appellant"] appeals from the appellee Public Utility Commission's (PUC) March 16, 2001 Citation Order No. 289, which (1) adopted the PUC hearings officer's November 2, 2000 findings of fact (FOFs), conclusions of law (COLs), and recommended decision and order as the PUC's final order, (2) found and concluded that the Appellant violated Hawai'i Revised Statutes (HRS) §§ 271-20 (1993) and 271-21 (1993), (3) assessed a civil penalty of \$20,000 against the Appellant, (4) ordered the Appellant to cease and desist any and all activities that violate one or more provisions of HRS chapter 271 and other applicable motor vehicle carrier laws, rules and regulations, and (5) stated that the Appellant should amend its tariff if it wishes to charge per load rates instead of per hour rates and incorporate a fuel surcharge as part of its rates, in accordance with HRS chapter 271. The Appellant alleges that the PUC's FOFs Nos. 6, 7, and 13 and COLs Nos. 4, 5, and 7, entered in the November 2, 2000 FOFs,

*** NOT FOR PUBLICATION ***

COLs, and recommended decision and order, were erroneous. It is noteworthy that, although the Appellant's notice of appeal states that the Appellant appeals from both Citation Order No. 289 and the May 4, 2001 Citation Order No. 294, the Appellant asserts no points of error as to Citation Order No. 294. Thus, we do not address the Appellant's "appeal" from Citation Order No. 294. See Hawai'i Rules of Appellate Procedure (HRAP) Rule 28(b)(4) (2001) (stating that "[p]oints not presented in accordance with this section will be disregarded").

On appeal, the Appellant asserts as follows: (1) that it "cannot intentionally violate the spirit of the motor carrier laws by charging its customers a known unjust and unreasonable rate"; and (2) that the "use of a per-load charge formula does not violate [HRS §] 271-21(c) and is not a different rate."

The PUC responds as follows: (1) that its "finding that Appellant charged a \$58 per load rate to Goodfellow [Bros., Inc., [hereinafter, "Goodfellow"]] for Appellant's hauling services between July 15, 1999 and January 12, 2000, is supported by the evidentiary record"; (2) that its "finding that Appellant's \$58 per load rate charged to Goodfellow for Appellant's hauling services between July 15, 1999 and January 12, 2000, was not specified in Appellant's tariff, is supported by the evidentiary record," inasmuch as, (a) "even if the \$59.05 per hour rate set forth in Appellant's tariff was a typographical error, it is undisputed that its \$58 per load rate was not specified in its tariff," (b) "even if Appellant's correct hourly

***** NOT FOR PUBLICATION *****

rate was \$59.59, it is undisputed that neither this rate, nor its \$58 per load rate, were specified in its tariff," and (c) "a per load rate is different from a per hour rate"; (3) that its "conclusion that Appellant violated HRS §§ 271-20 and 271-21 because it charged per load rates that were not specified in its tariff or approved by the [PUC], is correct"; (4) that its "mixed finding/conclusion that Appellant's per load rate could have and should have been specified in its tariff, is supported by the evidentiary record"; (5) that its "conclusion that Appellant violated HRS § 271-20 because Appellant's actions in establishing a \$51 per load rate resulted in undue or unreasonable advantage to [the Appellant], and disadvantage to the dump truck subcontractors, is correct"; and (6) that its "finding that between July and October 1999, Appellant charged [Denis J. Souza, dba DJS Truck Rentals [hereinafter, "DJS"]] \$58.42 per hour to haul bagasse and \$65.99 per hour to haul tractor/lowboy equipment, plus an additional 2 percent fuel surcharge, and that such hourly rates and fuel surcharge were not specified in Appellant's tariff, is supported by the evidentiary record."

The Appellant replies as follows: (1) that "the PUC's strict interpretation of HRS §§ 271-20 and 271-21 . . . is an absurdity, and a violation of the purpose and spirit of the Motor Carrier Law, HRS Chapter 271, as set for[th] in HRS § 271-1" (1993); (2) that, "for public policy reasons," the Appellant "should [not] be sanctioned and penalized for failing to use an incorrect tariff rate that had never been approved by the PUC simply because it was published"; and (3) that, "in a commercial

*** NOT FOR PUBLICATION ***

transaction between two businesses dealing at arms-length," "the publication of the 'hourly' tariff rate [does not] prohibit the conversion of that figure into another form of measurement[.]"

Upon carefully reviewing the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised, we hold that the PUC did not err in entering the March 16, 2001 Citation Order No. 289 adopting, inter alia, FOF Nos. 6, 7, and 13 and COL Nos. 4, 5, and 7 of the November 3, 2000 FOFs, COLs and recommended decision and order. Accordingly, we affirm Citation Order No. 289.

FOF No. 6 provides that, "[b]etween July 15, 1999 and January 12, 2000, [the Appellant] engaged in the transportation of property . . . to and from the project site at a rate of \$58 per semi-dump trailer load, and such per load rate was not filed and published in accordance with [HRS] chapter 271" FOF No. 7 provides that "[t]he \$58 per semi-dump trailer load rate charged to Goodfellow[] for [the Appellant's] hauling services between July 15, 1999 and January 12, 2000 was not specified in [the Appellant's] August 1, 1998 tariff in effect at that time." (Emphases added.) The Appellants do not dispute that they utilized a \$58 per semi-dump trailer load rate. The Appellant's "Tariff 1" does not list \$58 as the semi-dump trailer load rate. Instead, the tariff provides a \$59.05 rate or a \$69.44 rate, depending on the hours of service. That being the case, notwithstanding the Appellant's arguments to the contrary, the PUC's FOF Nos. 6 and 7, as a matter of fact, are not "[c]learly

***** NOT FOR PUBLICATION *****

erroneous in view of the reliable, probative, and substantial evidence on the whole record[.]” In re Gray Line Hawai‘i Ltd., 93 Hawai‘i 45, 53, 995 P.2d 776, 784 (2000) (internal quotation signals and citation omitted).

FOF No. 13 states (1) that, “[b]etween July and October 1999, [the Appellant] . . . charged DJS \$58.42 per hour to haul bagasse and \$65.99 per hour to haul tractor/lowboy equipment plus an additional 2 [percent] fuel surcharge” and (2) that “[t]he hourly rates and additional fuel surcharge were not specified in [the Appellant’s] August 1, 1998 tariff.” (Emphasis added.) The Appellant’s Tariff 1 does not specify any of the aforementioned rates. As such, FOF No. 13 is not clearly erroneous.

With regard to the challenged COLs, HRS § 271-20(c) states in relevant part that “[a]ll charges made for any service rendered by any common carrier by motor vehicle in the transportation of . . . property . . . shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof; is prohibited and declared to be unlawful.” (Emphasis added.) HRS § 271-20(c) also deems it “unlawful for any common carrier by motor vehicle to make, give, or cause any undue or unreasonable preference or advantage to any particular person, locality, region, district, island, or description of traffic, in any respect whatsoever[.]” (Emphasis added.) It is important to note that HRS §§ 271-20(d) and (e) provide for a complaint and hearings process for common carriers to contest tariffs that they believe are “in violation of this section or of [HRS] section 271-21.” HRS § 271-20(d) further

***** NOT FOR PUBLICATION *****

states that "[w]henever, after hearing, upon complaint or an investigation of its own initiative, the commission shall be of the opinion that any individual rate . . . demanded, charged, or collected by any common carrier . . . is or will be unjust or unreasonable, . . . it shall determine and prescribe the lawful rate"

HRS § 271-21(b) is more specific in its mandate, providing that "[n]o common carrier by motor vehicle shall charge or demand or collect or receive a greater or less or different compensation for transportation or for any service in connection therewith between the points enumerated in the tariff than the rates, fares, and charges specified in the tariffs in effect at the time[.]" (Emphases added.) Furthermore, HRS § 271-21(d) states that "[n]o common carrier by motor vehicle shall engage in the transportation of . . . property unless the rates . . . upon which the same are transported by the carrier have been filed and published in accordance with this chapter."

COL No. 4 provides as follows: (1) that, "between July 15, 1999 and January 12, 2000, [the Appellant] . . . charged per load rates, which were not specified in its tariff in effect at that time and not approved by the [PUC], in violation of HRS §§ 271-20 and 271-21"; and (2) that, "between July and October 1999, [the Appellant] charged hourly rates and an additional 2 [percent] fuel surcharge, which were also not specified in its tariff in effect at that time and not approved by the [PUC], in violation of HRS §§ 271-20 and 271-21." Because HRS § 271-20 provides for a complaint and hearings process by which the

*** NOT FOR PUBLICATION ***

Appellant could have challenged the tariff rates as unjust and unreasonable, the Appellant's contention that its only options were to use its conversion formula or charge the "incorrect" rate listed in the tariff is unavailing. Moreover, insofar as HRS §§ 271-21(b) and (d) expressly prohibits common carriers from charging "different compensation" than the rates specified in the tariffs and from transporting property without first having filed and published with the PUC the rates "upon which the same are transported," the Appellant cannot persuasively claim that its conversion of the hourly rate into a per-load charge, resulting in a different and unpublished rate, does not violate HRS § 271-21. Thus, COL No. 4 is not affected by any error of law.

The Appellant's arguments as to COL No. 5 are similarly flawed. COL No. 5 states that, "in light of the finding that the dump truck subcontractors were compelled by [the Appellant] to charge a lesser rate than [the Appellant's] per load rate for hauling aggregate material for Goodfellow[], . . . [the Appellant's] actions in establishing a \$51 per load rate resulted in undue or unreasonable advantage to itself and disadvantage to the dump truck subcontractors, in violation of HRS § 271-20." As discussed supra, although the Appellant asserts that its conversion formula is consonant with "the spirit and intent of [HRS] Chapter 271," the Appellant's employment of the formula circumvented the complaint and hearings process of HRS §§ 271-20(d) and (e), as well as directly violated HRS § 271-21(b).

Further to the foregoing, the Appellant's allegation that there is no evidence that their formula resulted in their

***** NOT FOR PUBLICATION *****

unfair advantage misconstrues the relevant burden of proof, as set forth in HRS § 271-20(e): "At any hearing involving a change in a rate . . . the burden of proof shall be upon the carrier to show that the proposed changed rate . . . is just and reasonable." Although the Appellant failed to follow the proper complaint and hearing procedure, the foregoing burden of proof nonetheless indicates that the Appellant cannot simply claim that there is no evidence of disadvantage because it carries the evidentiary burden. Moreover, the Appellant has failed to allege any error as to FOF No. 11, which states that the Appellant "compelled the dump truck subcontractors to charge a \$51 per semi-dump trailer load rate rather than the hourly rates set forth in WMTB's November 3, 1997 tariff or the \$58 semi-dump trailer load rate that [the Appellant] charged Goodfellow." See Okada Trucking Co., Ltd. v. Bd. of Water Supply, 97 Hawai'i 450, 458-59, 40 P.3d 73, 81-82 (2002) ("unchallenged factual findings are deemed to be binding on appeal"). COL No. 5 is therefore adequately supported by the binding FOFs and is not affected by any error of law.

COL No. 7 provides that, because "the \$58 per semi-dump trailer load rates utilized for the Goodfellow's project were devised on or about March 8, 1998 by [the Appellant's] formula[,] "such per load rates could have and should have been specified in [the Appellant's] filed and approved tariff, which was issued on June 29, 1998 and became effective on August 1, 1998." The Appellant's claim that "there are too many variables in calculating a per-load tariff rate making such a rate

*** NOT FOR PUBLICATION ***

calculation extremely difficult if not impossible" does not effectively address HAR § 6-63-10(11), which requires that every tariff "explicitly state[the rates] in cents or in dollars and cents, per 100 pounds, per mile, per hour, per cubic foot, per net ton of 2,000 pounds, per gross ton of 2,240 pounds, per truckload (of stated amount), or other definable measure commonly used and understood in the trade." (Emphasis added.) In other words, the fact that the Appellant found the per-load tariff rate calculation "extremely difficult" does not render nugatory HAR § 6-63-10(11). COL No. 7 is consistent with HAR § 6-63-10(11) and is not affected by any error of law. Therefore,

IT IS HEREBY ORDERED that the PUC's March 16, 2001 Citation Order No. 289 is affirmed.

DATED: Honolulu, Hawai'i, July 29, 2005.

On the briefs:

Matt A. Tsukazaki
of Torkildson, Katz,
Fonseca, Jaffe, Moore
& Hetherington,
for appellant
Kauai Veterans' Express
Co., Ltd.

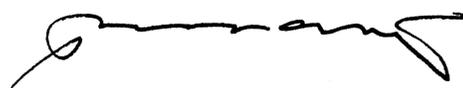
Kevin M. Katsura,
for appellee
Public Utilities Commission

Lori K. Aquino
of Van Bourg, Weinberg,
Roger & Rosenfeld, for
The Hawaii Operating
Engineers Industry
Stabilization Fund



Steven A. Levinson

Pamela A. Takemura



Pamela A. Takemura