1972

# American Express Co. v. Utah Feathers, A Division Of Miller Ski Company : Brief of Appellant

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# In The Supreme Court of the State of Utah

AMERICAN EXPRESS CO.,
*Plaintiff and Respondent,*

-vs-

UTAH FEATHERS, a division of MILLER SKI COMPANY, a corporation,
*Defendant and Appellant.*

Case No. 12,852

## BRIEF OF APPELLANT

### STATEMENT OF THE NATURE OF THE CASE

This is an action, in contract, by a freight broker against its principal, a shipper, for sums expended to transport goods to European ports initiated when the shipper refused to pay because the amount claimed far exceeded the sum the shipper had authorized the broker to expend.

### DISPOSITION IN THE LOWER COURT

The trial court, sitting without a jury, awarded judgment to the freight broker (Respondent, Ameri-

can Express Company) and against the shipper (Appellant, Utah Feathers, a division of Miller Ski Company) in the principal sum of $4,111.56, the full amount claimed by the broker.

## NATURE OF RELIEF SOUGHT

Utah Feathers seeks a reversal of that portion of the trial court judgment which exceeds $1,534.35, the sum American Express was authorized to expend.

## STATEMENT OF FACTS

Appellant is a Utah corporation owned by Earl Miller and engaged in various types of manufacturing, including processing and exporting of turkey feathers (under the commercial names of Utah Feathers and Miller Masterfletchers) to various European ports for use as fletching on arrows (Transcript pages 5 and 52 and Defendant's Exhibit No. 20). American Express, among its other business activities, held itself out to be, and acted as a freight agent and custom house broker licensed by the U. S. Maritime Commission to represent shippers in moving their marchandise in international freight (Transcript pages 24 and 25 and Plaintiff's Exhibit No. 11). The transaction was entered into through a series of letters between the parties by which American Express agreed for compensation to act as agent to represent Utah Feathers' interest in arranging transportation, customs clearance, insurance and documentation for shipment of turkey feathers in

bulk from San Francisco, California to European ports (Defendant's Exhibit No. 20 and Plaintiff's Exhibits Nos. 11, 13 and 14.)

Utah Feathers had for many years shipped feathers in bulk across the United States by inland carriers to Port of New York, and by steamship from there to European ports (Transcript pages 52 and 53), but had done so with the assistance of freight agents and customs brokers other than American Express. The carrier charges customarily paid by Utah Feathers for shipments to European Ports immediately prior to the transactions here involved had been $133.60 per metric ton (2260 lbs.) (Transcript page 56). It occurred to Earl Miller, president of Utah Feathers, that it might be easier to ship from Port of San Francisco (Transcript page 52) and so he wrote a letter of inquiry to the San Francisco office of American Express asking the price for shipping feathers and the availability of space on carriers (Defendant's Exhibit No. 20). Thereafter an agreement was arranged by correspondence between Earl Miller, acting for Utah Feathers, and John James Ewing, Export Manager of American Express (Defendant's Exhibit No. 20 and Plaintiff's Exhibits Nos. 11, 13 and 14).

The negotiations were launched by a letter from Earl Miller to American Express on August 20, 1968, which stated as follows:

"Gentlemen:

Please quote us a price of shipping feath-

ers compressed to 7 lbs. per cubic foot to Liverpool, England from the Port of San Francisco.

Also, please advise us the schedule of available space on carriers during the next 45 days.

Thank you.

Sincerely yours,

MILLER MASTERFLETCHERS
/s/ Earl A. Miller
President"

(Defendant's Exhibit No. 20)

On August 26, 1968, Mr. Ewing answered for American Express by letter as follows:

"Dear Sir,

Re your letter of the 20th August 1968. There is know (sic) specific Rate Item for Feathers quoted in the Pacific Coast European Conference Tariff. Cargo would go as Cargo NOS. The Rate for Cargo NOS to Liverpool is:

NON CONFERENCE RATE

90.58 per 40 Cubic Feet or Two Thousand Pounds. OCEAN FREIGHT plus 3% of

Total Freight 4.20 per 40 Cubic Feet or Two Thousand Pounds San Francisco HANDLING Fees.

1.00 per 40 Cubic Feets (sic) or Two Thousand Pounds San Francisco WHARFAGE Fees.

CONFERENCE RATE

77.00 per 40 Cubic Feet or Two Thousand Pounds. OCEAN FREIGHT plus 3% of Total Freight.

San Francisco Terminal Charges (Handling and Wharfage same as for Non Conference).

As you can see, it will pay you, if you decide to ship on a regular basis, to sign a Conference Agreement. All this means is that you agree to only use Conference Vessels and The Conference agree to always have a Vessel available. If after a time you ship sufficient Freight you can apply to have a Specific Rate for Feathers which would be less that (sic) the NOS Rate.

American Express Charges would be $20.00 for Documentation plus $2.50 for Banking if you would so wish us to handle your shipments. We can also arrange Insurance at a

rate of .44¢ per $100.00 coverage plus $2.50 Insurance Brokerage Fee.

There is approx one Vessel a week leaving the San Francisco Bay Area for Liverpool so Space requirement is not difficult.

"If you have any more questions please write to the undersigned and we will be please (sic) to assist you.

Yours truly,

/s/ John J. Ewing.
Export Division."

(Plaintiff's Exhibit No. 11)

On August 30, 1968 Earl Miller responded setting forth his understanding of the proposed term as follows:

"Dear Mr. Ewing:

Thank you for your letter of August 26.

We wish to sign an agreement to ship all our feathers via Conference vessels in the $77.00 per 2,000 pounds rate plus the other charges of 3% of the total freight, $4.20 per 2,000 pounds handling fees, and $1.00 for 2,000 pounds for wharfage fees.

Please advise to which dock we should deliver these feathers. They will be coming from

various turkey plants throughout the United States and should be ready for you to ship within two weeks.

Sincerely yours,

MILLER MASTERFLETCHERS

/s/ Earl A. Miller
President"

(Plaintiff's Exhibit No. 13)

Mr. Ewing then wrote on September 3, 1968 as follows:

"Dear Mr. Miller,

Re your letter of the 30th August 1968, We (sic) will be very happy to assist you in the exportation of your feathers. attached (sic) please find two copies of Shippers Rate Agreement, from the Pacific Cost (sic) European Conference. Please sign and return. We tried to phone you but according to the Orem Operator there was no such Phone Number please confirm that 801-FR- 3-6008 is correct. Before you can go ahead and deliver your cargo we must know how much cargo you will be shipping, so as we can book space with a shipping company.

If you wish us to handle the Banking please inform us. A few copies of our Export

Shipping Instruction form are attched. If you have any questions; please call us at the above Phone Number.

Yours truly,

/s/ John J. Ewing.
Export Division."

(Plaintiff's Exhibit No. 14).

This letter was accompanied by a contract form called a Shippers Rate Agreement (Plaintiff's Exhibit No. 12) of an organization of steamship carriers called the Pacific Coast European Conference which Mr. Ewing stated in his letter and at the trial would ship at lower rates for shippers that would agree to ship all their merchandise by conference vessels rather than non-conference vessels (Transcript page 28). The Shippers Rate Agreement mailed to Utah Feathers did not specify any rates but related only to the relationship to be established between shipper and carrier. In referring to rates it merely referred to existing conference tariffs and stated that a schedule of rates would be available at the conference and carriers offices and that a shipper could obtain the schedule by subscription at a reasonably compensatory price (Plaintiff's Exhibit No. 12, paragraph 10). Mr. Ewing used those schedules in quoting the rates but the onliy communication to defendant specifying the rates was Mr. Ewing's letter of August 26, 1968 (Plaintiff's Ex-

hibit No. 11). At the trial Mr. Ewing explained that he quoted the conference rate for feathers as cargo NOS (not otherwise specified) because the conference did not list fathers as a specific item in its rate schedule (Transcript page 28 and his letter, Plaintiff's Exhibit No. 11).

Although Mr. Miller's letter of August 30, 1968 stated that Utah Feathers wanted to sign an agreement to "ship all our feathers via conference vessels in the $77.00 per 2000 pounds rate plus the other charges of 3% of the total freight, $4.20 per 2000 pounds handling fees, and $1.00 for 2000 pounds for wharfage fees," the Shippers Rate Agreement was never executed (Transcript pages 30, 64, 69 and 84).

On September 4, 1968 Miller mailed the following letter to American Express:

> "Dear Mr. Ewing:
>
> To further classify our letter of August 30th do not, under any circumstances, ship the feathers to European ports if the rate exceeds $77.00 per 2000 lbs, plus the 3% of total freight, $4.20 per 2000 lbs handling fees, and $1.00 for 2000 lbs wharfage fees.
>
> The rate from the port of New York is $132.00 approximately for 2260 lbs (metric ton). Cost from Utah and California to New York is approximately $10.50 per hundred weight or $210.00 per ton.

Sincerely yours,

MILLER MASTERFLETCHERS

/s/ Earl A. Miller
President"

Mr. Ewing testified that this letter was never received.

American Express received and shipped the feathers for Utah Feathers (Transcript pages 10 to 18) and three or four months thereafter, when Utah Feathers had not received bills, Mr. Miller wrote requesting them. When the invoices were finally forwarded to Utah Feathers, they learned for the first time that American Express had paid the shipping lines freight bills approximately ten times larger than the amount of the quoted rate Utah Feathers had authorized American Express to expend and far in excess of what it would have cost if the shipments had gone through Port of New York (Transcript pages 57, 59, 64, 65 and 74).

John Ewing testified at the trial that the rates he quoted in his letter of August 26, 1968 "implied" that the ship line, at its option, could charge either by weight or by volume, and the carrier had applied the rate to volume to their advantage (Transcript page 44 and 26).

Earl Miller testified that the quoted and agreed rate was $77.00 per two thousand pounds plus the charges for the services of American Express and that his letter of August 30, 1968 specifically made his un-

derstanding of that rate clear to plaintiff before the shipments were made (Transcript pages 54, 55, 56 and 58).

With the rates and charges computed in accordance with Mr. Miller's letter of August 30, 1968, American Express was not authorized to expend more than $1,534.35 (Transcript page 74). They claimed to have expended $4,111.56.

## STATEMENT OF POINTS

### POINT I

IT WAS ERROR FOR THE TRIAL COURT TO AWARD JUDGMENT FOR SUMS EXPENDED BY THE AGENT BEYOND THE AMOUNT AUTHORIZED BY THE PRINCIPAL.

### POINT II

THE TRIAL COURT ERRED WHEN IT FAILED TO RULE THAT BECAUSE THE UTAH FEATHERS' ANSWER TO THE AMERICAN EXPRESS OFFER VARIED THE PROPOSED TERMS BY LIMITING THE RATES TO MEASURE BY WEIGHT ONLY, IT CONSTITUTED A REJECTION OF THAT OFFER AND THEREFORE A COUNTEROFFER.

WHEN AMERICAN EXPRESS PERFORMED THE ACT OF SHIPPING THE GOODS THAT COUNTEROFFER SET THE LIMIT OF THE AGENT'S AUTHORITY.

## POINT III

THE TRIAL COURT COMMITTED ERROR IN BASING ITS DECISION UPON A DETERMINATION THAT UTAH FEATHERS WAS CHARGEABLE WITH KNOWLEDGE THAT THE RATES QUOTED BY AMERICAN EXPRESS WERE MADE WITHIN THE CUSTOM AND USAGE OF THE BUSINESS.

## ARGUMENT

### POINT I

IT WAS ERROR FOR THE TRIAL COURT TO AWARD JUDGMENT FOR SUMS EXPENDED BY THE AGENT BEYOND THE AMOUNT AUTHORIZED BY THE PRINCIPAL.

American Express Company acted as agent for Utah Feathers in the transactions that are the subject of this action. They were to be paid for services in arranging transportation of shipments of feathers from

Port of San Francisco to European ports. By their letterhead and by the testimony of their export manager, American Express had held themselves out to be licensed and available to act as a freight agent and custom house broker to represent the interests of shippers in dealing with the complexities of export documentation and coordination and in moving merchandise from inland carriers through customs and on board ocean carriers for transportation overseas. They classed themselves as a "licensed international freight forwarder" (Transcript page 24) and agreed for a compensation to act for Utah Feathers in making necessary arrangements for ocean transportation of feathers.

In assuming the responsibilities of an agent American Express established a fiduciary relationship knowing that Utah Feathers would repose trust and confidence in them to exercise loyalty and care toward their affairs and to faithfully protect their interests. It is a well recognized principal of agency law that:

> "An agent is a fiduciary with respect to matters within the scope of his agency."

Restatement, Agency (2nd Ed.) Section 13, and

> ". . . . The fiduciary relationship existing between an agent and his principal has been compared to that which arises upon the creation of a trust, and the rule requiring an agent to act with the utmost good faith and loyalty toward his principal or employer applies regard-

> less of whether the agency is one coupled with an interest, or the compensation given the agent is small or nominal, or that it is a gratuitous agency . . ."

3 Am. Jur. 2d, Agency, Section 199, pages 580 and 581, and *Little vs. Herzinger,* 34 Utah 337, 97 P. 639.

It has also long been established as a general rule of agency law that the agent owes to his principal the use of such skill as may be required to accomplish the object of his employment, and if he omits to exercise reasonable care, diligence and judgment he may be responsible to the principal for damages (3 Am. Jur 2d Agency, Section 202, page 583). Indeed, it has been held that the law scrutinizes very closely all dealings between a principal and agent in the subject matter of the agency to see that the agent has given the principal the benefit of all his knowledge and skill (*Merchant vs. Foreman,* 182 Kan. 550, 322 P. 2d 740; *Shatz Realty Company vs. King,* 225 Ky. 846, 10 S.W. 2d 456, 6 A.L.R. 1374).

Where, as in this case, the agent holds himself out as having particular skills and talents in a certain field, he assumes an obligation to exercise the care and skill that characterizes that field and is therefore different in kind from the diligence or capacity of the ordinary citizen (*Cooms vs. Beede,* 89 Me. 187, 36 A. 104; *Isham vs. Post,* 141 N.E. 100, 35 N.E. 1084; 3 Am. Jur. 2nd, Agency, Section 205, page 585).

Although the courts have generally held that where an agent is employed or directed by his principal to do an act and he acts within the scope of his authority, the law implies a promise to reimburse for necessary expenses advanced or incurred by the agent in order to consumate that which he is directed to do (*Hoggan vs. Cahoon,* 26 Utah 444, 73 P. 512; 3 Am. Jur. 2nd, Agency, Section 243, page 612). Nevertheless, the rule is well established that where the agent exceeds his authority he will not be permitted to recover from the principal for money advanced or liabilities incurred beyond the limits of his authority (3 Am. Jur. 2nd, Agency, Section 244, page 613). The Restatement of Agency in describing this rule says:

> "When No Duty of Indeminity
>
> Unless otherwise agreed, the principal is not subject to a duty to indemnify an agent:
>
> (a) for pecuniary loss or other harm, not of benefit to the principal, arising from the performance of unauthorized acts or resulting solely from the agent's negligence or other fault. . ."

(Restatement, Agency, 2nd Ed., Section 440).

And at page 335 under the comment on that section its states that:

> ". . . the principal has no duty to indemnify the agent for unauthorized payments or for losses resulting from unauthorized acts. . ."

This rule has been stated and applied in a federal court as follows:

> ". . . [the] disbursements must be made, however, within the scope of the agent's authority, and if money is paid out or a loss incurred with respect to a matter as to which the agent acted in excess of his authority or in violation of his instructions, he is not entitled to reimbursement unless the principal ratifies his acts."

*In re American Range & Foundry Co.*, 14 F. 2d 466 at page 468.

American Express held itself out as having special skills as a freight or custom house broker and although a broker is, broadly speaking, an agent, the agency of a broker is distinguishable from general agencies in that he is an independent contractor and his authority is of a special character specifically limited by the instructions given to him by his principal (12 Am. Jur. 2nd, Brokers, Section 2 and Section 3, pages 773 and 774). Furthermore, a broker cannot recover money which he voluntarily advances in behalf of his employer without being expressly or impliedly requested to do so unless his principal subsequently ratifies such unwarranted action on his part (*Delafield vs. Smith,* 101 Wis. 664, 78 N.W. 170; 12 Am. Jur. 2nd, Brokers, Section 239, page 981). Here there was no ratification. American Express did not claim there was. In fact, Mr. Miller

protested the expenditures as soon as he learned of them.

In the instant case the only source for authority of American Express to expend sums on behalf of Utah Feathers was Mr. Miller's letter of August 26, 1968 which expressly set forth the terms they would agree to for the shipment of their feathers, namely:

> ". . . $77.00 per 2,000 pounds rate plus the other charges of 3% of the total freight, $4.20 per 2,000 pounds handling fees, and $1.00 for 2,000 pounds for wharfage fees."

If, as claimed by American Express' Export Manager, his prior letter of August 20, 1968 impliedly meant that the carrier had the option of charging the $77.00 rate either by weight or by volume, whichever became most advantageous to the carrier and that Mr. Miller of Utah Feathers should have read that meaning into it, then Mr. Miller's answering letter setting forth terms that contradicted Mr. Ewing's understanding of his quote surely should have constituted a "red flag" waving in Mr. Ewing's face saying, "Watch out! Miller doesn't understand the quote you gave. He only intends to pay $77.00 per 2,000 pounds without modification for volume."

For Ewing to go forward and ship the feathers without any further communication or clarification with Mr. Miller about the rates could only be a breach of the good faith and loyalty required in the fiduciary rela-

tionship of the agent and a violation of the obligation of skill and diligence that should characterize a freight forwarder and custom house broker who is paid to represent the interests of the shipper.

In order to determine the question of the scope of authority of American Express to expend funds to ship the Utah Feathers cargos the trial court had before it only the following items relating thereto:

1. Mr. Ewing's testimony.

2. Mrs. Mote's testimony.

3. Mr. Miller's testimony.

4. Mr. Ewing's letter of August 26, 1968 (Plaintiff's Exhibit No. 11).

5. Mr. Miller's answering letter of August 30, 1968 (Plaintiff's Exhibit No. 13).

6. The Shippers Rate Agreement (Plaintiff's Exhibit No. 12).

7. Mr. Miller's letter of September 4, 1968 (Defendant's Exhibit No. 21).

Examining the items in that order reveals that:

1. Mr. Ewing's testimony was that the entire agreement as to rates was contained in the correspondence (Transcript page 39). Although he referred to a telephone conversation with Mrs. Mote, a Utah Feathers employee on September 9, 1968 regarding coordinating of shipments and rates (Transcript page 38) there

was no testimony that the conversation in any way expanded or modified the limited authority granted by Mr. Miller's letter of August 30, 1968.

2. Mrs. Mote stated that the conversation related to destination of the feathers, that she did not recollect having any conversaion regarding rates, that all communications regarding the rates were by letter and that she had no authority to arrange rates because Mr. Miller handled all that personally (Transcript pages 48, 49 and 50).

3. Mr. Miller testified that the arrangements were all donc through the correspondence (Transcript page 56).

4. Mr. Ewing's letter of August 26, 1968 is ambiguous as to the rate quoted in that it stated "77.00 per 40 cubic feet or two thousand pounds." He testified the letter "implied" an option on the part of the carrier to charge by weight or by volume at its option.

5. Mr. Miller's letter of August 30, 1968 on the other hand, makes it clear that he only intended to pay a rate of $77.00 per 2000 pounds plus the American Express fees.

6. The Shippers Rate Agreement did not in any way describe the rate to be paid and in no way modified the rate stated in Mr. Miller's letter of August 30, 1968.

7. Although the trial court ruled that American Express did not receive Mr. Miller's letter of September 4, 1968, that letter nevertheless clearly showed Mr.

Miller's understanding that the rate would be charged by weight only at the time of the transaction.

The law is clear that:

> ". . . an agent may not recover for losses incurred because of failure to follow the principal's instructions, or for payments made for the principal but without the latter's authority."

*Hollandale Marketing Association vs. Goemat,* 72 N.W. 2d 376. See also *Drake-Jones Co. vs. Drogseth,* 246 N.W. 664.

When American Express expended funds to ship the feathers far in excess of $77.00 per 2000 pounds measured by weight, they exceeded the authority given them by Utah eFathers. Whether done deliberately or by inadvrtance or negligence in failure to check the extent of their authority, American Express exceeded their authorized expenditures without seeking new instructions from Utah Feathers and without Utah Feathers' knowledge that they had done so. Mr. Miller protested the excessive charges as soon as he learned of them. The trial court chose to ignore both the facts and the law in that regard and in doing so committed reversable error.

## POINT II

## THE TRIAL COURT ERRED WHEN IT FAILED TO RULE THAT BE-

## CAUSE THE UTAH FEATHERS' ANSWER TO THE AMERICAN EXPRESS OFFER VARIED THE PROPOSED TERMS BY LIMITING THE RATES TO MEASURE BY WEIGHT ONLY, IT CONSTITUTED A REJECTION OF THAT OFFER AND THEREFORE A COUNTEROFFER. WHEN AMERICAN EXPRESS PERFORMED THE ACT OF SHIPPING THE GOODS THAT COUNTEROFFER SET THE LIMIT OF THE AGENT'S AUTHORITY.

The agency relationship between American Express and Utah Feathers was created by contract. The trial court was called upon to determine the terms of that contract from the correspondence of the parties in order to determine how much American Express was authorized to spend for transporting the feathers (Transcript page 7). All of the witnesses testified that there was no agreement except that arrived at by the correspondence between them (Transcript pages 39, 48, 50 and 54). The trial court construction of that documentary evidence is not entitled to any presumption of correctness since this court has those same documents before it.

The initial letter Mr. Miller wrote to American Express Company on August 20, 1968 was a request for a quote of prices for handling the shipment of

feathers and can only be construed to be an invitation to enter into negotiations (Defendant's Exhibit No. 20). Therefore it was Mr. Ewing's answering letter of August 26, 1968 (Plaintiff's Exhibit No. 11) that constituted the first offer. In this letter American Express offered to handle the shipments, spelled out their fees and charges and in very ambiguous language quoted non-conference and conference cargo rates.

It is fundamental that in order to create a contract from that offer the letter by Utah Feathers would have to have agreed to all of the terms set forth in the offer without any substantial or material variance, and without qualification or departure.

Williston on Contracts, 3rd Ed., Section 73, describes the rule and its application as follows:

> *"Acceptance Must Comply With Terms of Offer*
>
> In order to make a bargain it is necessary that the acceptor shall give in return for the offeror's promise exactly the consideration which the offeror requests. If an act is requested, that very act and no other must be given. If a promise is requested, that promise must be made absolutely and unqualifiedly. This does not mean necessarily that the precise words of the requested promise must be repeated, but by a positive and unqualified assent to the proposal the acceptor must in effect agree to

> make precisely the promise requested; and if any provision is added to which the offeror did not assent, the consequence is not merely that this provision is not binding and that no contract is formed, but that the offer is rejected.
>
> The new condition is as fatal when its inconsistency with the offer appears by implication only as when it is explicitly stated. . ."

Mr. Miller's response to the offer proposed by Mr. Ewing did not consist of an unqualified acceptance of its terms. If Mr. Miller had said merely, "We wish to ship our feathers via conference vessels with terms as set forth in your letter." his acceptance would have been unqualified. He did not do that. Instead his letter spelled out his understanding of the rates in detail and in language that made it clear that he did not intend to pay by volume. Viewing the rates quoted in terms of Mr. Ewing's understanding, the Miller response would have to be a counteroffer thereby rejecting Mr. Ewing's offer and if American Express chose to proceed without further negotiations as to rates, they were bound to conform to the terms specified in Mr. Miller's letter (17 Am. Jur. 2nd, Contracts, Section 866).

The very language of the offer made by Mr. Ewing is ambiguous as to rates. What does he mean by "77.00 per 40 cubic feet or two thousand pounds.

OCEAN FREIGHT plus 3% of Total Freight."? Does the reference to weight *or* cubic volume mean that the *shipper* could elect to pay either by weight or by volume, as testified to by Mr. Miller (Transcript page 56), or does it mean, as claimed by Mr. Ewing, that it is carrier's option (Transcript pages 40 and 43)?

It is noteworthy that at the trial the judge could see no ambiguity in the rate quoted by Mr. Ewing and apparently drew upon some prior experiences of his own with surface shipping. Counsel for Utah Feathers had offered evidence of the intent of the parties for clarification and Judge Sorensen stated: "Let's have that out right now. Where is the ambiguity, Mr. Jeffs? I don't see any ambiguity in Exhibit 11. I don't see any ambiguity." (Transcript page 60.)

Then when counsel for Utah Feathers pointed out that American Express had already introduced testimony to explain their interpretation of the meaning of the rate quote per "forty cubic feet or two thousand pounds," in that letter Judge Sorensen said:

> "You are claiming this as an ambiguity? To me it is not. I have had a little experience with surface shipping. It was when you were a little lad in rompers. It may have been an ambiguity to this man. Go ahead. You may develop that. Go ahead."

(Transcript page 61).

In any event, after all testimony was in, the trial court had before it two possibilities in regard to the language of Mr. Ewing's letter of August 26, 1962 quoting the rate. It could have meant that Utah Feathers could choose whether to pay by volume or by weight. If that is the proper construction, then Mr. Miller's response constituted an election to ship by weight and American Express had no authority to pay other than by weight. On the other hand, the court could determine that the quoted language by inference meant that the carrier had the option to charge by weight or by volume, which ever was to *its* advantage. In that event, Mr. Miller's answering letter setting forth in detail that the rates he wished to pay "per 2000 pounds" being by volume only constituted a rejection of the proposed terms and a counteroffer.

Mr. Miller didn't take any chances on what Mr. Ewing meant when he wrote his response. Instead his answer spelled out exactly what Utah Feathers was willing to pay so Mr. Ewing would have no question of the limits of his authority. His letter made no reference to cubic feet, and stated:

> "We wish to sign an agreement to ship all our feathers via Conference vessels in the $77.00 per 2,000 pound rate. . ."

When Mr. Ewing read this response he could have had no question in his mind that Mr. Miller did not intend to pay by cubic volume and that American Express

was not authorized to pay cargo rates in excess of $77.00 per 2,000 pounds plus the handling, wharfage and American Express charges.

> ". . . Under the rule that an agent is bound to exercise such diligence as persons of common prudence are accustomed to use about their own affairs, the law creates no promise on the part of the principal to pay expenses which the agent, although acting in good faith, might have avoided by the exercise of ordinary diligence. For example, where the circumstances are such that because of an obvious mistake on the part of the principal a prudent person would not have made an advance of money to a third person, an agent who makes the advance is negligent, and cannot recover therefor. . ."

(3 Corpus Juris Secundum, Agency, Section 198C).

If Mr. Ewing, as he stated, understood his letter giving the quoted rates to imply that the carrier had the option to charge by either weight or volume, whichever was to its advantage, then he had a duty when he received Mr. Miller's response omitting any reference to a rate per volume to advise Mr. Miller of the meaning he intended in his previous quote. None of his communications did so. American Express was supposed to be the expert with skill in the field of arranging transportion and working out rates, and it was in the very least, gross negligence for them to proceed to expend funds

to ship the goods in amounts far in excess of the rate authorized by Mr. Miller's letter.

Even if Mr. Ewing's action in paying freight charges beyond those authorized by Mr. Miller were merely a mistake by American Express, they cannot avoid responsibility on that ground since a unilateral mistake will not avoid the contract (17 Am. Jur. 2nd, Contracts, Section 146), and of course does not relieve the agent of its responsibilities to its principal.

It would be unconscionable to allow American Express to carelessly and recklessly ignore the language in Mr. Miller's response to their offer and then hold Utah Feathers responsible. The trial court committed error in doing so.

## POINT III

## THE TRIAL COURT COMMITTED ERROR IN BASING ITS DECISION UPON A DETERMINATION THAT UTAH FEATHERS WAS CHARGEABLE WITH KNOWLEDGE THAT THE RATES QUOTED BY AMERICAN EXPRESS WERE MADE WITHIN THE CUSTOM AND USAGE OF THE BUSINESS.

In the findings, the trial court ruled:

"That the plaintiff's (American Express) quotes to the defendant (Utah Feathers) were

made within the custom and usage of the business, and the defendant principal is chargeable with such knowledge."

This appears to have been a basis of the trial court's decision. In the Memorandum Decision the court cited as authority the Restatement, Agency, 2nd Ed., Section 10, which reads as follows:

"Knowledge Which Principal or Agent Should Have Inter Se

*Unless the parties have otherwise agreed,* a principal or agent, with respect to the other, should know what a person of ordinary experience and intelligence would know, and in addition, what he would know if, having the knowledge and intelligence which he has or which he purports to have, he were to use due care in the performance of his duties to the other." (Emphasis added).

Under this rule of law, Mr. Miller, acting for Utah Feathers, was not required to know more than a person of ordinary experience and intelligence would know. Ordinary experience would not have told him that Mr. Ewing's quote of rates would allow the carrier the option of how to charge the rate. Moreover, the rule as stated in the Restatement, expressly excludes its application where parties have otherwise agreed. When the Miller letter responded with terms contrary to Mr.

Ewing's understanding of the terms he set forth in his earlier letter, the law infers an assent or agreement to the terms of the Miller letter when American Express proceeds to do the act requested without seeking any modification of Miller's instructions as to rate.

It should be pointed out that while Section 10 of the Restatement concerns itself with the standard of knowledge and experience as between the principal and agent, holding them each only to that of a person of ordinary experience and intelligence, it is Section 36 of the Restatement that relates to custom and usage.

> "Usage in Interpretation of Authority
>
> Unless otherwise agreed, an agent is authorized to comply with relevant usage of business *if the principal has notice* that usages of such a nature may exist." (Emphasis added)

Restatement, Agency, 2nd Ed., Section 36.

Mr. Ewing stated that usage of the business construed a rate quote such as he used to mean the carrier had the option to charge the rate either by weight or by volume. But there was absolutely no evidence tending to show Utah Feathers or Mr. Miller had any notice of such a usage. In fact, Mr. Miller testified that in his experience unless the quoted rate specified otherwise, the shipper could choose to have the rate applied either to weight or to volume at its election (Transcript pages 56, 61, 52 and 63). In either case, "usage is not effec-

tive to contradict the specific terms of an authorization. . . ." (Restatement, Agency, 2nd Ed., Section 36, Comment b).

As stated in 3 Am. Jur. 2nd, Agency, 3, under the heading, "Obedience to Instructions and Directions," Section 206:

> "Where the instructions are clear, precise and imperative, they should be followed strictly and exactly, and a violation of definite instructions cannot be excused by a custom or usage in the business."

Even if the trial court were right that Utah Feathers is chargeable with knowledge that Mr. Ewing's quote impliedly meant that the rate could be applied by the carrier either to weight or volume, that is not to say that Utah Feathers could not, by its own instructions, limit the authority of their agent in the amount authorized to be spent for freight by designating that they wanted to pay only $77.00 per 2000 pounds.

Freight rates are a complex matter with variations in the rates as they are applied to different commodities, variations in rates based upon routes taken, variations resulting from modes of transportation and variations resulting from many other factors. Mr. Miller testified that Utah Feathers had previously shipped feathers to European ports from Port of New York for a total of $132.60 per mertic ton (2260 lbs.). Furthermore, he was looking for a better way to ship his

feathers. The quote from Mr. Ewing for non-conference vessels totaled $123.00 per 2000 pounds (computed $90.58 plus $2.72, being 3% of total freight; $4.20 handling fees; $1.00 wharfage fee; $2.50 banking; and $20.00 documentation), and was close to what Utah Feathers had paid in the past, since the former rate was per metric ton, and Mr. Ewing's quote was per 2000 pounds. When Mr. Ewing's letter suggested that if Utah Feathers were willing to agree to use only conference vessels, the conference rate would be a savings, Mr. Miller, by computation, obviously arrived at the conclusion that the total for conference rates and charges of $107.01 per 2000 pounds would be a savings over the rate he had been paying of $132.60 per metric ton.

The real question for determination by the trial court was not so much the meaning of Mr. Ewing's rate quote in the light of custom and usage, but rather, the authority granted by the answering letter of Mr. Miller. The language of that answering letter is unequivocal as to the rate and needs no help from custom or usage to clarify its meaning. Mr. Miller's letter was unequivocal as to the extent of authority of American Express as to rates. Amrican Express could, within their authority, only pay $77.00 per 2000 pounds, plus the other charges he itemized for the shipment, which totaled $107.01 per 2000 pounds. The extent of the authority of American Express was therefore limited to the sum of $1,534.35 as testified by Mr. Miller and

shown by weight on the invoices. It was error to grant judgment for any sum in excess of that amount.

## CONCLUSION

On the record as it stands there can be no question that American Express acted as agent for Utah Feathers in the transactions and owed the utmost degree of good faith and care in the affairs of their principal. American Express held itself out as having special skills in arrainging rates and the other complexities of processing shipments of goods in international freight. There is no question that Utah Feathers intended to pay the freight rate on the basis of weight only, and that this fact was communicated in writing to American Express. As between the parties, it was American Express that failed to maintain the standard of care owed to its principal. The Utah Feathers communications gave no authority to American Express to pay freight rates computed on the basis of volume. We submit that the agent ought not now be permitted to recoup from their principal the loss created by their own failure to stay within the authority they were given.

RESPECTFULY SUBMITTED this 14th day of July, 1972.

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