IN THE SUPREME COURT OF THE STATE OF NEVADA

AT&T, A CORPORATION,
Appellant,
vs.
LAS VEGAS RESERVATION SYSTEMS, INC., AND LAS VEGAS RESERVATION SYSTEMS, D/B/A FLORIDA RESERVATION SYSTEMS,
Respondents.

No. 32552

FILED

JUL 16 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Richards
CHIEF DEPUTY CLERK

ORDER DENYING PETITION FOR REHEARING AND AMENDING PRIOR ORDER

This is a petition for rehearing of a panel decision that affirmed in part and reversed in part a final judgment in an action concerning telecommunications, and remanded for a reallocation of damages.

LVRS disputes the statement in our order that its counterclaims related to incomplete calls and the termination of service by AT&T without notice, are "preempted by federal law because they are derivative of telephone services which are inherently addressed in AT&T's applicable schedule. Therefore, they are barred by the filed rate doctrine." LVRS contends: "The fact that a claim is preempted does not mean it is barred. The only type of claim that is barred [under the filed rate doctrine] is a claim of promised preferential treatment," and LVRS's claims were not seeking preferential treatment. LVRS asserts that the claims are governed by federal law, in this case AT&T's tariff, which

requires a customer seeking consequential damages to prove willful misconduct. LVRS argues that it proved AT&T's willful misconduct.

We agree with LVRS's assertion that just because a claim is preempted under federal law, it is not necessarily barred by the filed rate doctrine. We conclude, however, that LVRS's state-law tort claims concerning incomplete calls and service termination are preempted under federal law. Further, assuming these counterclaims could be construed as federal claims alleging that AT&T violated the tariff, LVRS did not establish any violation of the tariff provisions. LVRS was not entitled to relief on these claims. Accordingly, rehearing is not warranted, and our prior decision that affirmed the judgment concerning the billing claim, reversed the judgment concerning the incomplete calls and service termination claims, and remanded for a proper allocation of damages, should stand.

Nevertheless, we take this opportunity to clarify and amend our prior order concerning our decision as to these claims. In particular, we amend our prior order as follows: First, the first full paragraph on page six, stating "This view appears to be bolstered by . . . (Footnote added.)" is deleted. Second, the discussion beginning on page nine with "As to the other counterclaims . . ." and ending with the last sentence on page ten, which continues over onto page eleven, stating "Further, AT&T properly raised the issue of subject matter jurisdiction on appeal . . . Swan v. Swan, 106 Nev. 464, 496, 796 P.2d 221, 224 (1990)," shall be replaced with the following discussion.

As to LVRS's other counterclaims related to incomplete calls and the termination of service without notice, we conclude that these claims are preempted under federal law. Several courts have held that state-law contract and tort claims seeking to enforce a common carrier's obligations under the tariff are preempted under federal law because they are grounded upon rights found in the tariff. See, e.g., Ivy Broadcasting Co. v. American Tel. & Tel. Co., 391 F.2d 486 (2d Cir. 1968); Oh v. AT & T Corp., 76 F. Supp. 2d 551, 556 (D.N.J. 1999) (holding that customers' state-law contract and tort claims that are grounded upon rights found in the tariff arise under federal law); In re Long Distance Telecommunication Litigation, 639 F. Supp. 305 (E.D. Mich. 1986) (dismissing state-law contract and tort claims as preempted by the FCA); see also Harbor Broadcasting, Inc. v. Boundary Waters Broadcasters, Inc., 636 N.W.2d 560, 566 (Minn. Ct. App. 2001) (holding that the FCA impliedly preempts a state-law claim for tortious interference with business expectancy).

In Ivy Broadcasting Co. v. American Telephone & Telegraph Co., the Second Circuit held that "questions concerning the duties, charges and liabilities of telegraph or telephone companies with respect to interstate communications service are to be governed solely by federal law and . . . the states are precluded from acting in this area." 391 F.2d at 491. Thus, state-law claims to enforce the tariff cannot be maintained. See Cahnmann v. Sprint Corp., 133 F.3d 484 (7th Cir. 1998) (holding that a suit to enforce or invalidate a tariff arises only under federal law, precluding state-law claims). In contrast, some state-law claims are not

preempted when they are completely unrelated to the tariff. Claims that involve neither the quality of the common carrier's service nor the reasonableness of its rates are not preempted under federal law. See Kellerman v. MCI Telecommunications Corp., 493 N.E.2d 1045, 1051 (Ill. 1986).

Here, unlike the billing counterclaim, the incomplete calls and service termination counterclaims involve the quality of AT&T's service, which is inherently governed by the tariff. LVRS's pleading referenced an "agreement," and alleged that AT&T breached its duty to provide proper service. These claims were clearly governed by the tariff and arose only under federal law.

To the extent that LVRS sought to enforce AT&T's obligations under the tariff, it could have brought a federal claim under the tariff. See 47 U.S.C. §§ 201-207 (1994); see also Cahnmann, 133 F.3d at 490.[1] LVRS contends that it did assert its claims for incomplete calls and service termination under federal law by seeking damages under AT&T's tariff, which allows an award of consequential damages if AT&T committed

---

[1]Even if LVRS's counterclaims alleged that AT&T violated the FCA or the tariff, it is questionable whether such an action could be maintained in state court. See 47 U.S.C. § 207 (1994) (providing that a person claiming to be damaged by a common carrier may either make a complaint to the FCC or bring a suit for damages in federal district court); compare US Sprint Communications Co. v. Computer Generation, Inc., 401 S.E.2d 573 (Ga. Ct. App. 1991) (holding that § 207 allowed concurrent state court jurisdiction over a customer's claims under the FCA), with AT & T Corp. v. Coeur D'Alene Tribe, 283 F.3d 1156 (9th Cir. 2002) (stating that § 207 establishes exclusive jurisdiction in the FCC and federal district courts and leaves no room for adjudication in tribal or state court).

willful misconduct. Specifically, the portion of the tariff limiting AT&T's liability for damages provides:

> The Company's liability, if any, for its willful misconduct is not limited by this tariff. With respect to any other claim or suit, by a Customer or by any other, for damages associated with the installation, provision, termination, maintenance, repair or restoration of WATS, and subject to the provisions of B. through G. following, the Company's liability, if any, shall not exceed the amount equal to the monthly recurring charge provided for under this tariff for Custom 800 Services or, in the case of AT&T 800 Service and AT&T WATS, the monthly charge for access lines therewith.

LVRS argues that in order to recover consequential damages under the tariff, it needed to prove only that AT&T engaged in willful misconduct.

LVRS's argument is unpersuasive. In order to seek relief through the tariff's willful misconduct provision, LVRS first had to prove that AT&T violated or breached its duties under the tariff. The willful misconduct provision does not create a separate cause of action. It merely removes the limitation on damages LVRS may recover under the tariff to the extent that AT&T engaged in willful misconduct when violating the tariff's provisions. Thus, if LVRS's counterclaims for incomplete calls and service termination were brought under the tariff, as LVRS maintains, then LVRS had the burden of demonstrating that AT&T violated the tariff's provisions concerning the provisioning and termination of service. Only then could LVRS obtain consequential damages if it proved that the

DOCKET ALARM

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts

Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research

With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips

Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS
Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS
Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS
Sync your system to PACER to automate legal marketing.