

SERVICE DATE - JULY 18, 1997

SURFACE TRANSPORTATION BOARD<sup>1</sup>

DECISION

No. MC-C-30137

B & B BEVERAGE CO.

v.

EAZOR SPECIAL SERVICES, INC.

Decided: July 10, 1997

We find that collection of the undercharges sought in this proceeding would be an unreasonable practice under 49 U.S.C. 10701(a) and section 2(e) of the Negotiated Rates Act of 1993, Pub. L. No. 103-180, 107 Stat. 2044 (NRA) (now codified at 49 U.S.C. 13711). Because of our finding under section 2(e) of the NRA, we will not reach the rate reasonableness issue raised in the proceeding.

BACKGROUND

This matter arises out of a court action in the Superior Court of New Jersey, Law Division, Special Civil Part, for Monmouth County, in *Eazor Special Services, Inc. v. B & B Beverage*, No. 88D-04425. The court proceeding was instituted by Eazor Special Services, Inc. (Eazor or defendant), a former motor common carrier, to collect undercharges from B & B Beverage Co. (B&B or complainant). Eazor seeks to collect undercharges in the amount of \$5,000<sup>2</sup> allegedly due, in addition to amounts previously paid, for services rendered in transporting eight truckload shipments of malt beverages from Milwaukee, WI, to complainant's facilities at Long Branch, NJ, between June 22 and July 30, 1985. By order dated November 30, 1988, the court stayed the proceeding to enable B&B to initiate an administrative proceeding before the ICC for the purpose of determining the inherent reasonableness of Eazor's filed rates.

Pursuant to the court order, Eazor, by complaint filed December 19, 1988, requested the ICC to resolve issues of rate reasonableness and unreasonable practice. By decision served February 8, 1989, the ICC established a procedural schedule. Complainant's opening submission consisting of three verified statements was filed April 17, 1989. Defendant filed its reply statement on May 15, 1989. Complainant's rebuttal was filed on June 9, 1989.

Complainant is a licensed distributor of malt beverages servicing retail outlets and bars in the area of Monmouth County, NJ. In June 1985, Pabst Brewing Company closed its Newark, NJ, brewery and advised complainant to seek future shipments of Pabst products from its brewery located in Milwaukee, WI. Robert L. Bainton, president of B&B, asserts in a verified statement that he undertook an effort to locate a suitable motor carrier to provide the subject service from

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<sup>1</sup> The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the ICC Termination Act or the Act), which was enacted on December 29, 1995, and 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. 13709-13711. 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.

<sup>2</sup> B&B notes in the complaint that, prior to instituting court action, Eazor's undercharge claims totaled \$5,471.18. Complainant suggests that defendant reduced the amount of its total claim to \$5,000 to come within the jurisdiction of the court.

Milwaukee and was in communication with a number of carriers, including Eazor. Mr. Bainton states that he was contacted by Mr. James Carey, Eazor's vice president, who quoted a per-load rate of \$1,248.80, which, based on an 892-mile movement, equates to \$1.40 per mile. According to Mr. Bainton, complainant relied upon the quoted rate in determining to tender its traffic to Eazor. Mr. Bainton notes that the quoted rate was confirmed in each of the originally issued freight bills and that each bill was promptly paid by complainant. Attached as Exhibit 7 to Mr. Bainton's rebuttal statement is a reproduced copy of Mr. Bainton's written notations made on June 17, 1985. The notations contain rates offered by three carriers and indicate that Eazor, through Mr. Carey, had offered a rate of \$1,248.80. Mr. Bainton states that complainant would never have agreed to use defendant's service had it been aware that defendant would attempt to collect the rates it is currently seeking to assess.

Stanley J. Gutkowski, a traffic consultant retained by complainant, submitted a verified statement directed primarily at the issue of rate reasonableness. Attached as Exhibits B-1 through B-8 are copies of the corrected freight bills issued by defendant that reflect originally issued freight bill data as well as corrected balance due amounts claimed. Each of the corrected freight bills indicates an originally assessed charge of \$1,248.80 for an 892-mile movement based on a rate of \$1.40 per mile.

Defendant maintains that the rates originally assessed for seven of the subject shipments transported between June 22, 1985, and July 1, 1985, were erroneously based on Tariff ICC ESSV 2000, Item 3285.08, a tariff that did not become effective until July 11, 1985. Defendant rerated the charges for these shipments at an asserted applicable published tariff rate of \$4.48 per cwt. based on Tariff ICC ESSV 5000, Item 111470, Class 35. With respect to the eighth shipment, transported on July 30, 1985, defendant bases its \$53.52 undercharge claim on a previously unrecognized excessive weight charge. Defendant further insists that the rates it seeks to collect have not been shown to be unjust or unreasonable.

The ICC processed the complaint under its "negotiated rates" policy adopted in *NITL--Pet. to Inst. Rule on Negotiated Motor Car. Rates*, 3 I.C.C.2d 99 (1986) and 5 I.C.C.2d 623 (1989) (*Negotiated Rates*). By decision served August 21, 1989, the ICC found that the originally billed rate was a negotiated rate and that collection of undercharges for those shipments involving a dispute over the applicable rate would be an unreasonable practice.<sup>3</sup> The ICC did not address the rate reasonableness issue. By decision served February 5, 1990, the ICC denied a petition filed by complainant to reopen the proceeding for reconsideration of the rate reasonableness issue and reaffirmed its prior findings.

Subsequently, the United States Supreme Court, in *Maislin Indus. v. Primary Steel*, 497 U.S. 116 (1990) (*Maislin*), invalidated *Negotiated Rates*. The Supreme Court stated, however, that the filed rate is nevertheless not enforceable if the ICC finds it to be unreasonably high. In light of *Maislin*, complainant, on August 13, 1990, filed a further petition to reopen and reconsider on the existing record. In its reply, Eazor supported reopening. By decision served August 25, 1993, the ICC reopened the proceeding and, in recognition of its newly adopted standards for rate reasonableness announced in *Georgia -Pacific Corp. -- Pet. for Declar. Order*, 9 I.C.C.2d 103

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<sup>3</sup> Specifically, the ICC found, in its August 21, 1989 decision, at 3:

We are satisfied that a negotiated rate was agreed to in this case by B & B and Eazor. The evidence of offer and acceptance is clearly established by the testimony of Mr. Bainton. It is clear that B & B would not have agreed to pay substantially more than the quoted rate, and that Eazor never charged or demanded payment of more than that rate. The carrier's representative in the negotiations was a vice president upon whom B & B could reasonably rely, and he gave the shipper's personnel ample grounds for reliance on his representations. Accordingly, we conclude that it would be an unreasonable practice to require complainant to pay undercharges for the shipments handled by Eazor prior to the July 11, [1985], effective date of the filed mileage rate tariff. We make no finding with respect to the one shipment billed under the filed tariff. [Footnote omitted.]

(1992), *reconsidered* 9 I.C.C.2d 796 (1993), extended an opportunity to the parties to supplement the record with respect to the rate reasonableness issue. No additional pleadings were filed by the parties in response to this decision.<sup>4</sup>

On December 3, 1993, the NRA became law. The NRA substantially restored the ability of the ICC (and now the Board) to find that assessment of undercharges is an unreasonable practice, and it provided several new grounds on which shippers may defend against payment of undercharges. By decision served December 20, 1993, the ICC reopened the record and established a procedural schedule permitting the parties to invoke the alternative procedure under section 2(e) of the NRA and to submit new evidence and argument in light of the new law. On May 24, 1994, B&B submitted a supplemental statement asserting that, based on its previously submitted evidence, it is entitled to relief from defendant's efforts to collect undercharges pursuant to the provisions of section 2(e) of the NRA.<sup>5</sup> Eazor did not respond.<sup>6</sup>

## DISCUSSION AND CONCLUSIONS

We dispose of this proceeding under section 2(e) of the NRA. Accordingly, we do not reach the issue of rate reasonableness.

Section 2(e) of the NRA provides, in pertinent part, that "it shall be an unreasonable practice for a motor carrier of property . . . providing transportation subject to the jurisdiction of the [Board] . . . to attempt to charge or to charge for a transportation service . . . the difference between the applicable rate that [was] lawfully in effect pursuant to a [filed] tariff . . . and the negotiated rate for such transportation service . . . if the carrier . . . is no longer transporting property . . . or is transporting property . . . for the purposes of avoiding application of this subsection."<sup>7</sup>

It is undisputed that Eazor is no longer transporting property. Accordingly, we may proceed to determine whether Eazor's attempt to collect undercharges (the difference between the applicable filed tariff rate and the rate originally collected) is an unreasonable practice.

Initially, we must address the threshold issue of whether sufficient written evidence of a negotiated rate agreement exists to make a section 2(e) determination. Section 2(e)(6)(B) defines the term "negotiated rate" as one agreed upon by the shipper and carrier "through negotiations pursuant to which no tariff was lawfully and timely filed . . . and for which there is written evidence of such agreement." Thus, section 2(e) cannot be satisfied unless there is written evidence of a negotiated rate..

Here, the record contains written notations made on June 17, 1985, by complainant's president indicating that Eazor had offered to transport B&B's traffic at a rate of \$1,248.80 per

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<sup>4</sup> On September 22, 1993, B&B filed a letter advising the ICC of its intention not to submit additional rate reasonableness evidence and asking that agency to decide that issue on the existing record.

<sup>5</sup> Complainant's submission was accompanied by a motion to accept its pleading as late-filed. The motion to accept the late-filed pleading is granted.

<sup>6</sup> In a letter filed August 22, 1994, B&B advises, and provides documentation to support this advice, that it has been unable to locate defendant's legal representative (Mr. Gene J. Carroll) and that neither Eazor nor its collection agency, Corban Professional Services, Inc., is functioning as an existing entity. We also note that, at least since November 15, 1993, Board staff has been unable to reach Mr. Carroll at his most recent phone listing.

<sup>7</sup> Section 2(e), as originally drafted, applied only to transportation service provided prior to September 30, 1990. Here, we note, the shipments at issue moved before September 30, 1990. In any event, 49 U.S.C. 13711(g), which was enacted in the ICC Termination Act as an exception to the general rule noted in footnote 1 to this decision, deletes the September 30, 1990 cut-off date as to proceedings pending as of January 1, 1996.

shipment. In addition, complainant has submitted balance due freight bills for each of the subject shipments which show that the original freight bills issued by defendant consistently applied the \$1,248.80 rate identified in the June 17, 1985 notation. We find this evidence sufficient to satisfy the written evidence requirement. *E.A. Miller, Inc.--Rates and Practices of Best*, 10 I.C.C.2d 235 (1994) (*E.A. Miller*). See *William J. Hunt, Trustee for Ritter Transportation, Inc. v. Gantrade Corp.*, C.A. No. H-89-2379 (S.D. Tex. March 31, 1997) (finding that written evidence need not include the original freight bills or any other particular type of evidence, as long as the written evidence submitted establishes that specific amounts were paid that were less than the filed rates and that the rates were agreed upon by the parties).

In this case, the evidence is substantial that the rates originally billed by Eazor and paid by B&B were rates agreed to in negotiations between the parties. The original freight bills issued by the carrier and the rate set forth June 17, 1985 notation confirm Mr. Bainton's testimony and reflect the existence of negotiated rates. Further, these facts support the findings made by the ICC in its decision served August 21, 1989, that the originally billed charges were agreed upon by the parties through negotiations pursuant to which no tariff was lawfully filed.

In exercising our jurisdiction under section 2(e)(2), we are directed to consider five factors: (1) whether the shipper was offered a transportation rate by the carrier other than the rate legally on file [section 2(e)(2)(A)]; (2) whether the shipper tendered freight to the carrier in reasonable reliance on the offered rate [section 2(e)(2)(B)]; (3) whether the carrier did not properly or timely file a tariff providing for such rate or failed to enter into an agreement for contract carriage [section 2(e)(2)(C)]; (4) whether the transportation rate was billed and collected by the carrier [section 2(e)(2)(D)]; and (5) whether the carrier or the party representing such carrier now demands additional payment of a higher rate filed in a tariff [section 2(e)(2)(E)].

Here, the evidence establishes that a negotiated rate was offered B&B by Eazor; that B&B tendered freight to Eazor in reliance on the negotiated rate; that the negotiated rate was billed and collected by Eazor; and that Eazor now seeks to collect additional payment based on a higher rate filed in a tariff. Therefore, under 49 U.S.C. 10701(a) and section 2(e) of the NRA, we find that it is an unreasonable practice for Eazor to attempt to collect undercharges from B&B for transporting the shipments at issue in this proceeding.

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

*It is ordered:*

1. This proceeding is discontinued.
2. This decision is effective on its service date.
3. A copy of this decision will be mailed to:<sup>8</sup>

Superior Court of New Jersey, Law Division  
Special Civil Part, Monmouth County  
Monmouth County Court House  
71 Monument Park  
P.O. Box 1252  
Freehold, NJ 07728

Re: Civil Action Docket No. 88D-04425.

By the Board, Chairman Morgan and Vice Chairman Owen.

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<sup>8</sup> This address changed after the issuance of the ICC's most recent decision in this proceeding.

Vernon A. Williams  
Secretary