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SERVICE DATE - APRIL 24, 1998

SURFACE TRANSPORTATION BOARD<sup>1</sup>

DECISION

No. 40559

RAULAND-BORG CORPORATION--PETITION FOR DECLARATORY ORDER--  
CERTAIN RATES AND PRACTICES OF LIFSCHULTZ FAST FREIGHT, INC.

Decided: April 20, 1998

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 other issues raised in this proceeding.

BACKGROUND

This matter arises out of a court action in the United States District Court for the Northern District of Illinois in Lifschultz Fast Freight, Inc. v. Rauland-Borg Corporation, No. 91 C 3671. The court proceeding was instituted by Lifschultz Fast Freight, Inc. (Lifschultz or respondent), a former motor common carrier, to collect undercharges from Rauland-Borg Corporation (Rauland-Borg or petitioner). Lifschultz seeks undercharges totaling \$14,551.22 (plus interest) allegedly due, in addition to amounts previously paid, for services rendered in transporting 146 shipments of electronic communications equipment between May 9, 1989, and March 6, 1990. The shipments were transported from Rauland-Borg's facility in Skokie, IL, to points throughout the United States.

On April 30, 1991, Rauland-Borg filed a petition for declaratory order requesting the ICC to resolve issues of tariff applicability and rate reasonableness. By decision served May 20, 1991, the

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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.

ICC established a procedural schedule. Rauland-Borg filed its opening statement on July 19, 1991.<sup>2</sup> Lifschultz filed its response on September 6, 1991, and Rauland-Borg filed its rebuttal on October 11, 1991.

Petitioner maintains that the shipping charges originally assessed by respondent were billed in accordance with respondent's tariff rates on file with the ICC, that petitioner and its customers paid all of the shipping charges billed by respondent, and that respondent is not entitled to recover any of the undercharges claimed. Specifically, petitioner contends: (1) that the discount rates authorized in respondent's tariff ICC LIFS 601-G, Item 17106 applied to all of petitioner's outbound shipments, both prepaid and collect; and (2) that the provisions of Item 17106 applied equally to shipments from Chicago and Skokie.<sup>3</sup> Attached as Exhibit 2 to petitioner's rebuttal statement is a copy of the court complaint filed by respondent that lists each of the subject undercharge claims by freight bill number, original billing date, and asserted balance due amount.

Rauland-Borg supports its arguments with verified statements from Kenneth T. James, petitioner's Executive Vice-President and Chief Operating Officer; Rick Stalkfleet, petitioner's Vice-President/Comptroller; Charles Tresidder, petitioner's Shipping and Receiving Manager; James Bradley, Lifschultz salesman who serviced the Rauland Borg account; Joseph Sulli, respondent's Senior Vice-President of Sales National Accounts and Chicago Sales Manager; and representatives from four of its customers. Mr. James asserts that the shipping rates charged to Rauland-Borg customers during the involved time period were the discount rates reached with Lifschultz and on file with the ICC. Mr. Stalkfleet states that the bills received from Lifschultz conformed with the tariff rates sheets previously provided by that carrier and were paid by Rauland-Borg in a timely fashion. Each of the customer representatives asserts that shipping rates assessed by Lifschultz for collect shipments were rates agreed to by Rauland-Borg and Lifschultz which were applicable to Rauland-Borg and its customers.

Mr. Tresidder coordinated and supervised petitioner's shipping activities and was responsible for motor carrier shipping rate arrangements. Mr. Tresidder states that between 1986 and 1991, he engaged in discussions with Mr. Sulli and Mr. Brady regarding shipping rates and discounts applicable to Rauland-Borg's traffic. He asserts that each time a new discount rate was agreed to, Lifschultz provided him with a copy of the tariff rate sheet (copies of which are attached to Mr. Tresidder's statement) and the rate was published in tariffs on file with the ICC. He further states that when Rauland-Borg and its customers were billed for shipments by Lifschultz, the freight charges were calculated according to the rate discounts in the filed tariffs. Mr. Bradley and Mr. Sulli confirm Mr. Tresidder's assertions. Mr. Bradley states that, in 1986, a discount rate of 30% was applied to all shipments made from Rauland-Borg facilities. He further states that, after

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<sup>2</sup> Rauland-Borg titled its statement Motion for Summary Judgment.

<sup>3</sup> In February 1989, petitioner moved its plant facility from Chicago to Skokie, a point within the Chicago Commercial Zone located about seven miles from its Chicago location.

conversations with Mr. Tresidder, he requested and received approval from his supervisors to increase the discount rate to 37% in October 1988 and 45% in March of 1990.

In reply, Lifschultz acknowledges that tariff ICC LIFS 601-G, Item 17106 provides for discounts available to Rauland-Borg. Respondent asserts, however, that the authorized discounts were not applicable to movements from Skokie until March 7, 1990, the effective date on which Skokie was added to the subject tariff. Respondent further contends that the authorized discounts were not available to Rauland-Borg customers obligated to pay collect shipment charges for shipments moving from Rauland-Borg facilities.<sup>4</sup>

Lifschultz supports its contentions with a verified statement from Leo F. Logan. Mr. Logan is an employee of Norcross, Inc., d/b/a Freight Audit and Collection (FAAC), the organization that conducted an audit of respondent's freight bills and prepared revised freight bills for the subject shipments. Mr. Logan indicates that an agreement for providing discount rates existed between Lifschultz and Rauland-Borg. Attached as Exhibit B to Mr. Logan's statement are copies of the revised freight bills issued by FAAC on behalf of Lifschultz that reflect original freight bill data as well as the asserted balance due amounts.<sup>5</sup> An examination of these revised freight bills indicates that each of the subject undercharge claims is based on the elimination of the originally applied 37% discount.<sup>6</sup>

By decision served August 30, 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 (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. Rauland-Borg filed a supplemental opening statement on October 28, 1993. Lifschultz filed a supplemental response on December 20, 1993, and a supplemental rebuttal was filed by Rauland-Borg on January 18, 1994.

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<sup>4</sup> None of the shipments subject to this proceeding are affected by this contention as Rauland-Borg is the identified payee for each of the involved shipments.

<sup>5</sup> Mr. Logan also submitted 12 balance due bills for shipments transported from Chicago between September 29, 1988, and October 21, 1988, for which original discounts of 37% were applied. He contends that the applicable Item 17106 discount at the time these shipments were transported was 30% and that the 37% discount level did not become effective until October 24, 1988. Rauland-Borg notes that these shipments were not included in the underlying court action. While these shipments are not at issue in this proceeding, our resolution of the issues with respect to those shipments that are here at issue is equally applicable to these 1988 shipments.

<sup>6</sup> Originally applied discounts of 45% were eliminated in eight revised freight bills issued for shipments transported between February 22, 1990, and March 3, 1990. In one revised freight bill dated August 25, 1989, a 35% discount was eliminated.

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 the payment of undercharges.<sup>7</sup> By decision served December 30, 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 in light of the new law.

On March 4, 1994, Rauland-Borg filed a supplemental statement requesting that its petition for declaratory order be granted based on the NRA small business exemption from undercharge claims set forth in former 49 U.S.C. 10701(f)(9), now codified at 49 U.S.C. 13709(h). By decision served April 28, 1995, the ICC denied Rauland-Borg's request, advising that the ICC was not the proper forum to address this matter. The decision noted that Rauland-Borg could invoke the small business exemption either in the court in which the subject undercharge action is pending, or by obtaining a finding to that effect from the Small Business Administration (SBA).<sup>8</sup> In a decision served January 29, 1997, Rauland-Borg was directed to show cause why this proceeding should not be dismissed, noting that Rauland-Borg had not responded<sup>9</sup> to informal inquiries relating to its intention to invoke the small business exemption before the court. On February 14, 1997, Rauland-Borg filed a letter response renewing its request for a favorable determination of this matter based on the NRA small business exemption. Absent a court ruling on this issue, we will resolve this proceeding on the basis of the present record.

#### DISCUSSION AND CONCLUSIONS

We will dispose of this proceeding under section 2(e) of the NRA. Accordingly, we do not reach the other issues raised.

At the outset, we recognize that the issues raised by the parties for our consideration focus primarily on tariff applicability issues. Nevertheless, our use of section 2(e)'s "unreasonable practice" provisions to resolve this matter is fully appropriate. The Board, as a general rule, is not limited to deciding only those issues explicitly referred by a court or raised by the parties. Rather, we may instead decide cases on other grounds within our jurisdiction and, in cases where section 2(e) provides a dispositive resolution, we rely on it rather than the more subjective rate reasonableness and tariff rate provisions. Cf. Amoco Fabrics and Fibers Co. v. Max C. Pope, Trustee of the Estate of A.T.F. Trucking, No. 40526 (ICC served Feb. 26, 1992). Thus, we have

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<sup>7</sup> The ICC's prior unreasonable practice policy was invalidated by the Supreme Court in Maislin Indus. v. Primary Steel, 497 U.S. 116 (1990).

<sup>8</sup> Upon obtaining a favorable ruling from the SBA, petitioner could then submit to the court a motion for dismissal of the underlying undercharge claims.

<sup>9</sup> The decision noted that Board staff had made several informal but unsuccessful efforts to determine the status of the court proceeding.

jurisdiction to issue a ruling under section 2(e) of the NRA here. The Ormond Shops, Inc., Thomas J. Lipton, Inc. and Lionel Leisure, Inc. v. Oneida Motor Freight, Inc. Debtor-in-Possession, and Delta Traffic Service, Inc., No. MC-C-30156 (ICC served Apr. 20, 1994); and Have a Portion, Inc. v. Total Transportation, Inc., and Thomas F. Miller, Trustee of the Bankruptcy Estate of Total Transportation, Inc., No. 40640 (ICC served Feb. 7, 1995).

Section 2(e)(1) 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 purpose of avoiding application of this subsection.”<sup>10</sup>

It is undisputed that Lifschultz no longer transports property.<sup>11</sup> Accordingly, we may proceed to determine whether Lifschultz’s attempt to collect undercharges (the difference between the applicable filed rate and the negotiated rate) 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 agreement.

Here, the record contains a copy of respondent’s court complaint that lists each of the asserted balance due claims, copies of tariff rate sheets provided by Lifschultz to Rauland-Borg indicating respondent’s intent to provide discounted rates to petitioner, and copies of the revised freight bills indicating the application for the most part of a 37% discount off the originally assessed charges for each of the subject shipments. 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). 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 bill or any other particular type of evidence, as long as the written evidence submitted establishes that

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<sup>10</sup> Section 2(e), as originally drafted, applied only to transportation service provided prior to September 30, 1990. We note that the shipments at issue here 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.

<sup>11</sup> Prior to filing for bankruptcy, Lifschultz held motor carrier operating authority issued by the ICC.

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 parties conducted business in accordance with agreed-to negotiated discount rates. Indeed, respondent acknowledges that an agreement for providing discount rates did exist between the parties. The consistent application in the originally issued freight bills of discounts (primarily discounts of 37%) that are in conformity with the discount levels identified in the tariff rate sheets confirm the unrefuted testimony of petitioner's witnesses and reflect the existence of negotiated rates.

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 upon 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 Lifschultz offered a negotiated rate to Rauland-Borg; that Rauland-Borg reasonably relied on the offered rate in tendering its traffic to Lifschultz; that the negotiated rate was billed and collected by Lifschultz; and that Lifschultz 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 Lifschultz to attempt to collect undercharges from Rauland-Borg 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.

No. 40559

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

United States District Court for the  
Northern District of Illinois, Eastern Division  
Everett McKinley Dirksen Building  
219 South Dearborn Street  
Chicago, IL 60604

Re: No. 91 C 3671

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams  
Secretary