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SERVICE DATE - JULY 6, 1998

SURFACE TRANSPORTATION BOARD¹

DECISION

No. 40678

PRODUCTIVE TRANSPORTATION SERVICES CORP.--PETITION FOR
DECLARATORY ORDER--CERTAIN RATES AND PRACTICES OF
BEST REFRIGERATED EXPRESS, INC.

Decided: June 26, 1998

We find that the collection of 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). Accordingly, we will not reach the other issues raised in this proceeding.

BACKGROUND

This matter arises out of a court action in the United States Bankruptcy Court for the District of Nebraska in Thomas F. Hoarty, Jr., Trustee v. Productive Transportation Services, Corp., Case No. BK89-00169, A91-8022. The court proceeding was instituted by Best Refrigerated Express, Inc. (Best or respondent), a former motor common and contract carrier, to collect undercharges from Productive Transportation Services Corp. (Productive or petitioner), a licensed property broker. Best seeks undercharges of \$17,126.09 allegedly due, in addition to amounts previously paid, for services rendered in transporting 62 shipments of various commodities between October 13, 1987, and January 5, 1990. Transportation arrangements for the shipments at issue were made by Productive in its capacity as a property broker. The shipments were transported from origins in the East to destinations in the Midwest and South. By order dated August 8, 1991, the court stayed the proceeding and referred issues of rate reasonableness and unreasonable practice to the ICC for disposition.

¹ 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.

Pursuant to the court order, Productive, on October 24, 1991, filed a petition for declaratory order requesting the ICC to resolve issues of rate reasonableness and contract carriage. By decision served November 29, 1991, the ICC established a procedural schedule. On February 13, 1992, Productive filed its opening statement. Best filed its reply on March 27, 1992, and petitioner filed its rebuttal on May 1, 1992.

Productive asserts that the rates respondent seeks to assess are unreasonable; that as a broker, rather than a shipper (consignor) or receiver (consignee) of the transported property, it is not subject to liability for the claimed undercharges; and that the service at issue was provided by Best under its contract carrier authority pursuant to agreements negotiated by the parties.

Productive supports its contentions with an affidavit from Timothy O'Connell, petitioner's President. Mr. O'Connell states that petitioner began using Best's services as a contract carrier on or about October 1, 1987, after being contacted by Candy Long, Dispatcher for Best, who offered competitive rates of \$0.80 to \$0.90 per mile and excellent service. Mr. O'Connell further states that petitioner tendered its traffic to Best based on quoted rates provided by respondent's representatives in accordance with agreements reached by the parties, and that the agreed-to rates were billed by Best and paid by Productive. Attached to Mr. O'Connell's affidavit are two documents entitled "Transportation Service Contract" dated August 25, 1988, and March 31, 1989, respectively, signed by representatives of petitioner and respondent. Each of the documents indicates that rates are to be mutually agreed to in writing but that in appropriate situations verbally agreed-to rates will apply.² Mr. O'Connell asserts that Productive would never have used Best to transport its traffic at the rates respondent now seeks to assess.

In response, Best asserts that Productive has failed to establish that the rates it now seeks to assess are unreasonable or that the subject shipments moved pursuant to the statutory requirements for contract carriage. It further maintains that Productive is identified as the "Bill To" party in each of the subject freight bills and is primarily liable for the additional assessed charges regardless of its broker status. Best supports its position with a verified statement from Thomas K. Ledman, of Don H. Norman Associates, Inc., a firm specializing in rate and tariff research. Mr. Ledman confirms that the rates originally assessed for Productive's shipments were not filed with the ICC.

By decision served July 14, 1993, the ICC, on its own motion, reopened the record in this proceeding, directed respondent to furnish to petitioner all material called for in Appendix A to that

² In a subsequent affidavit filed December 29, 1993, Mr. O'Connell states that, in all of petitioner's dealings with Best, "rates were mutually agreed to over the telephone and reduced to writing by form of invoice."

decision,³ and set a procedural schedule for submission of additional evidence and argument on non-rate reasonableness issues.⁴ Petitioner submitted an opening statement on August 23, 1993, to which Best responded on September 13, 1993. Petitioner filed a statement in rebuttal on September 27, 1993. Attached to petitioner's opening statement are affidavits from Gary Zoldos, its General Manager, and Jo Ann Reese, Dispatcher for Best with whom Mr. Zoldos worked, as well as an Exhibit submitted with respondent's court complaint that lists each of the subject undercharge claims by freight bill number, date of shipment, originally assessed charge, asserted "corrected" billing, and balance due amount claimed. Mr. Zoldos includes as an attachment to his affidavit petitioner's daily dispatch sheets that indicate the rate to be charged for each of the shipments here at issue. Ms. Reese states that Mr. Zoldos, or another of petitioner's representatives, would contact her to arrange for the pick-up and delivery of a shipment, at which time a rate would be negotiated pursuant to the agreement entered into between the parties.

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.⁵ By decision served December 28, 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 December 29, 1993, petitioner filed a statement requesting a finding that the attempt by Best to collect undercharges in this proceeding constitutes an unreasonable practice under section 2(e) of the NRA.

³ Appendix A identified the information needed to support an undercharge claim, as described in Vertex Corp. Pet. Declar. Order Rates and Practices, 9 I.C.C.2d 688, 697-98 (1993).

⁴ Respondent filed a petition for reconsideration of the July 14 decision and a motion to dismiss the proceeding. Respondent's petition and motion were denied by decision served September 3, 1993.

⁵ The ICC's prior unreasonable practice policy was invalidated by the Supreme Court in Maislin Indus. v. Primary Steel, 497 U.S. 116 (1990).

Respondent filed its reply in opposition to the request on March 1, 1994.⁶ Petitioner submitted its rebuttal on March 14, 1994.

By decision served October 11, 1994, the ICC advised that the submission of certain basic information would be helpful in enabling it to evaluate the issues in this proceeding. Specifically, the parties were requested to provide copies, if available, of the balance due and original freight bills for each of the shipments at issue. On November 4, 1994, petitioner filed a supplemental opening statement to which it appended copies of balance due bills that incorporated original issued freight bill data for each of the 62 shipments at issue in this proceeding. Best submitted a supplemental reply on December 1, 1994, asserting that petitioner has failed to provide written evidence of the original rate charged or establish that it reasonably relied on that rate. A statement in rebuttal was submitted by petitioner on December 28, 1994.

DISCUSSION AND CONCLUSIONS

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

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

⁶ Best argues, generally, that the provisions of the NRA are inapplicable to bankrupt carriers and may not be applied retroactively. We point out that six federal circuit courts of appeals and virtually every other federal court that has considered respondent's applicability arguments have determined that the remedies provided in section 2 of the NRA apply to the undercharge claims of bankrupt carriers such as Best. See Whitaker v. Power Brake Supply, Inc., 68 F.3d 1304 (11th Cir. 1995); Jones Truck Lines, Inc. v. Whittier Wood Products, Inc., 57 F.3d 642 (8th Cir. 1995); In the Matter of Lifschultz Fast Freight Corporation, 63 F.3d 621 (7th Cir. 1995); In re Transcon Lines, 58 F.3d 1432 (9th Cir. 1995), cert. denied, 116 S. Ct. 1016 (1996); In re Bulldog Trucking, Inc., 66 F.3d 1390 (4th Cir. 1995); Hargrave v. United Wire Hanger Corp., 73 F.3d 36 (3d Cir. 1996); see also, e.g., Jones Truck Lines, Inc. v. AFCO Steel, Inc., 849 F. Supp. 1296 (E.D. Ark. 1994).

Further, as the courts have also held consistently, section 2(e), by its own terms and as more recently amended by the ICC Termination Act, may be applied retroactively against the undercharge claims of defunct, bankrupt carriers that were pending on the NRA's enactment. See, e.g., Jones Truck Lines, Inc. v. Scott Fetzer Co., 860 F. Supp. 1370, 1375-76 (E.D. Ark. 1994); North Penn Transfer, Inc. v. Stationers Distributing Co., 174 B.R. 263 (N.D. Ill. 1994); Gold v. A.J. Hollander Co. (In re Maislin Indus.), 176 B.R. 436 (Bankr. E.D. Mich 1995); cf. Jones Truck Lines, Inc. v. Phoenix Products Co., 860 F. Supp. 1360 (W.D. Wisc. 1994).

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."⁷

It is undisputed that Best no longer transports property.⁸ Accordingly, we may proceed to determine whether respondent's attempt to collect undercharges (the difference between the applicable filed tariff 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 copies of the August 25, 1988, and March 31, 1989 transportation service contracts; a copy of that portion of respondent's court complaint listing each of the subject undercharge claims and the charges originally assessed and paid; daily dispatch sheets prepared by petitioner indicating the rate to be charged for each of the subject shipments; and copies of the balance due bills issued by respondent indicating originally assessed charges that correspond to the charges reflected in petitioner's daily dispatch sheets. 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. 89-2379 (S.D. Tex. March 31, 1997) (finding that the 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 rate 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 rates. The consistent application in the original freight bills of the rates recorded in petitioner's daily dispatch sheets confirms the unrefuted testimony of Mr. O'Connell and

⁷ 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.

⁸ Board records show that Best held motor common carrier authority under No. MC-11592 and various sub-numbers, and contract carrier authority under No. MC-11592 (Sub-Nos. 38, 39 and 40). These operating authorities were transferred under exemption notices docketed as Nos. MC-F-19766 and MC-F-19767 in transactions consummated on September 20, 1991.

Ms. Reese and reflects the existence of negotiated rates. The evidence further indicates that Productive relied upon the agreed-to rates in tendering its traffic to Best and would not have used respondent's service had it quoted the rates it now seeks to collect.

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 Productive was offered a negotiated rate by Best; that Productive, reasonably relying on the offered rate, tendered the subject traffic to Best; that the negotiated rate was billed and collected by Best; and that Best 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 Best to attempt to collect undercharges from Productive for transporting the shipments at issue in this proceeding.

This decision will not significantly affect 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:

The Honorable Timothy J. Mahoney
United States Bankruptcy Court for the
District of Nebraska

No. 40678

P.O. Box 428, Down Town Station
Omaha, NE 68101-0428

Re: Case No. BK89-00169, A91-8022

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary