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SERVICE DATE - JANUARY 2, 1998

SURFACE TRANSPORTATION BOARD

DECISION

STB No. 41723

AZON CORPORATION--PETITION FOR DECLARATORY ORDER--CERTAIN  
RATES AND PRACTICES OF ST. JOHNSBURY TRUCKING COMPANY, INC.

Decided: December 15, 1997

We find that collection of the undercharges sought in this proceeding would be an unreasonable practice under 49 U.S.C. 13711. Because of our finding under section 13711, 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 Southern District of New York in St. Johnsbury Trucking Co., Inc. v. Azon Corporation, 95 CIV 4878 (SS), Adv. No. 95-9152A. The court proceeding was instituted by St. Johnsbury Trucking Company, Inc. (St. Johnsbury or respondent),<sup>1</sup> a former motor common and contract carrier, to collect undercharges from Azon Corporation (Azon or petitioner). St. Johnsbury seeks undercharges of \$4,286.49 (plus interest) allegedly due, in addition to the amounts previously paid, for transporting 12 shipments of sensitized diazotype reproduction paper, mill rolls, or power packs from Azon's facilities in Johnson City, NY, to Brighton, MA (11 shipments), and Bloomfield, CT (1 shipment), between May 16, 1991, and June 3, 1993.<sup>2</sup> By order dated March 29, 1996, the district court directed Azon to initiate administrative proceedings before the Board for the purpose of resolving issues of tariff applicability, unreasonable practice, contract carriage, and rate reasonableness.<sup>3</sup>

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<sup>1</sup> On June 15, 1993, St. Johnsbury filed for bankruptcy under Chapter 11 of the United States Bankruptcy Code, in the United States Bankruptcy Court for the Southern District of New York, Case No. 93 B 43136 (FGC).

<sup>2</sup> In the court action, St. Johnsbury sought undercharges of \$38,402.31 based on claims set forth in 125 balance due freight bills issued for shipments transported from Johnson City to points in nine states and the District of Columbia. In the course of developing the record in this proceeding, respondent canceled its claims with respect to 113 of the balance due bills and reduced its claim for undercharges to \$4,286.49, the total claims asserted in the remaining 12 balance due bills.

<sup>3</sup> The court order was issued in a consolidated proceeding captioned St. Johnsbury Trucking Co. Inc. v. Morrison Knudsen, Co., Inc., bearing the docket number 95 Civ. 1344 (SS).

Pursuant to the court order, Azon, on May 16, 1996, filed a petition for declaratory order requesting that the Board resolve the issues referred to by the court. By decision served May 23, 1996, the Board issued a procedural schedule. On November 25, 1996, Azon filed its opening statement. St. Johnsbury filed its reply statement on December 10, 1996. Azon filed its rebuttal on January 13, 1997.

Azon asserts that St. Johnsbury's attempt to collect the claimed undercharges constitutes an unreasonable practice under section 13711(a). It further contends that the originally billed charges were properly assessed in accord with respondent's filed tariffs and that the rates St. Johnsbury now seeks to collect are unreasonable. Azon maintains that the freight charges originally billed by St. Johnsbury and paid by Azon were rates mutually agreed upon by the parties, and that Azon relied upon the agreed-to rates in tendering its traffic to St. Johnsbury to the exclusion of services provided by other carriers.

Azon supports its argument with an affidavit from Michael Bange of Champion Transportation Services, a transportation consultant retained by petitioner. Attached to Mr. Bange's affidavit is a copy of the original court complaint filed by St. Johnsbury that lists each of the subject undercharge claims by freight bill number together with the original billing date and balance due amount claimed (Exhibit A). In addition, Mr. Bange's affidavit includes copies of the balance due bills issued by respondent that reflect originally issued freight bill data as well as revised balance due amounts for the shipments that remain subject to this proceeding (Exhibits C and C-1). Mr. Bange states that his review of these balance due bills indicates the original application of flat charges of \$516.00 for each of seven shipments transported to Brighton between May 16, 1991, and June 30 1992; \$541.80 for each of four shipments transported to Brighton between January 25, 1993, and June 3, 1993; and \$500.00 for one shipment transported to Bloomfield on August 7, 1992. Mr. Bange's affidavit also includes copies of respondent's tariff ICC SJTC 208D, Item 4370, and revisions which apply to Azon shipments from Johnson City to Woburn and Boston, MA (Exhibit H).<sup>4</sup> The tariff provided for rates of \$516.00 per vehicle for shipments transported between January 30, 1991, and December 31, 1992. Effective

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<sup>4</sup> Mr. Bange notes that Brighton is located within the corporate limits of Boston.

January 1, 1993, the tariff rates were increased to \$541.80. According to Mr. Bange, the claimed undercharges are based on respondent's contention that the originally assessed flat rate charges were improper. As a consequence, respondent rerated the originally assessed charges and issued revised freight bills using allegedly applicable class rates that resulted in substantially increased freight charges.

St. Johnsbury asserts that the charges originally assessed were not authorized by an applicable filed tariff, that the rates it is here seeking to assess have not been shown to be unreasonable, and that the revised rates set forth in the balance due bills are applicable. To support its contentions, respondent submits a verified statement from Stephen L. Swezey, Senior Transportation Consultant for Carrier Service, Inc., the auditor authorized by the bankruptcy court to provide rate audit and collection services on behalf of respondent. Mr. Swezey maintains that the rates originally assessed for the 12 subject Brighton and Bloomfield shipments were not applicable filed rates. More particularly, he contends that tariff ICC SJTC 208D did not provide for a Commercial Zone application and thus cannot be applied to the Brighton shipments.

#### DISCUSSION AND CONCLUSIONS

We will dispose of this proceeding under section 13711. Accordingly, we do not reach the other issues raised.

Section 13711(a) 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 (1) the applicable rate that was lawfully in effect pursuant to a [filed] tariff . . . and (2) 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 section."

It is undisputed that St. Johnsbury no longer transports property.<sup>5</sup> Accordingly, we may proceed to determine whether the respondent'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 13711(a) determination. Section 13711(f)

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<sup>5</sup> Prior to filing for bankruptcy, St. Johnsbury held motor common and contract carrier operating authority, issued by the Interstate Commerce Commission under various sub-numbers of No. MC-108473.

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 13711(a) cannot be satisfied unless there is written evidence of a negotiated rate agreement.

Here, the record contains a list of the shipments subject to this proceeding as well as copies of the revised freight bills. The revised bills indicate that the rates originally charged were consistently and substantially below those that St. Johnsbury is here seeking to assess and were in conformity with the rates assertedly agreed to by the parties. In addition, petitioner has submitted copies of tariff provisions specifically applicable to Azon shipments from Johnson City that provide for flat rates that are in full or comparable conformity with the flat rates originally assessed by respondent. 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).<sup>6</sup> See William J. Hunt, Trustee for Ritter Transportation, Inc. v. Gantrade Corp.,

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<sup>6</sup> St. Johnsbury, at p. 4 of its reply statement, argues that freight bills do not constitute written evidence. Respondent contends that, under section 13711(b)(2)(D), the Board must consider whether the negotiated rate “was billed and collected by the carrier” in making its merits determination as to whether a carrier’s conduct was an “unreasonable practice.” This section, according to St. Johnsbury, contemplates that freight bills reflecting the negotiated rate were issued by the carrier, and that the Board must examine these freight bills to determine if section 13711(b) has been satisfied. St. Johnsbury asserts that allowing freight bills to satisfy the written evidence requirement would make the written evidence provision superfluous because the Board, under section 13711(b)(2)(D), must independently consider the collected freight bill.

The ICC and the Board have consistently rejected this argument. Section 13711(b)(2)(D) requires the Board to consider “whether the [unfiled] rate was billed and collected by the carrier.” There is no requirement under this provision that the Board use a carrier’s freight bills for that determination. A carrier may separately attest, or submit or concede in pleading, that the negotiated, unfiled rate was billed and collected, and there is nothing to preclude the Board from using such statements (or other evidence) in finding that section 13711(b)(2)(D) was satisfied.

Even if the Board uses freight bills to satisfy this element, however, it is not inappropriate for it to use those same bills to satisfy the “written evidence” requirement of section 13711(f). The carrier’s argument might be more persuasive if the written evidence requirement were a “sixth” element of the merits determination under section 13711(b)(2), but it is not. Rather, as the ICC previously indicated, it is simply a threshold requirement needed to invoke section 13711. See E.A. Miller, supra, at 239-40. Once that requirement is satisfied by freight bills (or other contemporaneous written evidence), there is nothing to suggest that the same evidence could not be used as part of the Board’s separate five-part analysis under section 13711(b)(2) to determine whether the carrier’s undercharge collection effort is an unreasonable practice.

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 parties conducted business in accordance with agreed-to negotiated rates. The original freight bills issued by St. Johnsbury for the subject shipments support Azon's contentions and reflect the existence of negotiated rates.

In exercising our jurisdiction under section 13711(b), 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 13711(b)(2)(A)]; (2) whether the shipper tendered freight to the carrier in reasonable reliance upon the offered rate [section 13711(b)(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 13711(b)(2)(C)]; (4) whether the transportation rate was billed and collected by the carrier [section 13711(b)(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 13711(b)(2)(E)].

Here, the evidence establishes that a negotiated rate was offered to Azon by St. Johnsbury; that Azon reasonably relied on the offered rate in tendering its traffic to St. Johnsbury; that the negotiated rate was billed and collected by St. Johnsbury; and that St. Johnsbury now seeks to collect additional payment based on a higher rate filed in a tariff. Therefore, under 49 U.S.C. 13711, we find that it is an unreasonable practice for St. Johnsbury to attempt to collect undercharges from Azon 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 the service date.
3. A copy of this decision will be mailed to:

STB No. 41723

The Honorable Sonia Sotomayor  
United States District Court for  
the Southern District of New York  
500 Pearl Street, Room 1340  
New York, NY 10038

Re: 95 CIV 4878 (SS)  
Adv. No. 95-9152A

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams  
Secretary