

SERVICE DATE - OCTOBER 27, 1997

SURFACE TRANSPORTATION BOARD¹

No. 40834

SCM CORPORATION

v.

THE BANKRUPTCY ESTATE OF MURPHY MOTOR FREIGHT LINE, INC.

Decided: October 20, 1997

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). 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 Bankruptcy Court, District of Minnesota, Third Division, in *Murphy Motor Freight Lines, Inc. v. SCM Corp.*, BKY 3-87-577, ADV. No. 3-89-114. The court proceeding was instituted by Murphy Motor Freight Lines, Inc. (Murphy or defendant), a former motor common and contract carrier, to collect undercharges from SCM Corporation (SCM or complainant). Murphy seeks to collect undercharges in the amount of \$133,431.33 allegedly due, in addition to the amounts previously paid, for services rendered in transporting 266 shipments of typewriters and related items between March 6, 1984, and December 12, 1986. The shipments were transported primarily from complainant's facilities in East Syracuse or Cortland, NY, to Dayton, OH.² By order dated October 31, 1989, the court stayed the proceeding and referred the matter to the ICC for resolution of issues respecting the reasonableness of Murphy's billing practices and efforts to collect undercharges.

Pursuant to the court order, SCM, by complaint filed on July 10, 1992, requested the ICC to resolve issues of tariff applicability and rate reasonableness. By decision served August 27, 1992, the ICC established a procedural schedule. On November 19, 1992, the complainant submitted its opening statement. Defendant failed to submit a reply and indeed has failed to make an appearance or otherwise participate in any aspect of this proceeding.³

Complainant asserts that the class rates that defendant here seeks to assess are unreasonable; that the charges originally assessed for 26 shipments transported from East Syracuse to Dayton between October 12, 1984, and March 26, 1985, were properly assessed in accordance with tariff ECA 215-X, Item 308025; and that the balance of the undercharge claims asserted by Murphy fail to consider published discount tariffs applicable to the subject shipments. Attached to

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 former sections of the statute, unless otherwise indicated.

² According to complainant, the remaining shipments moved from Dayton, Syracuse, and Cortland, primarily to points in Wisconsin and Minnesota.

³ By decision served February 5, 1993, the ICC directed Murphy either to file a reply or to show cause why this proceeding should not be decided on the existing record. Murphy did not respond.

complainant's initial statement is a list of the subject undercharge claims that includes the original bill date, the freight bill number, and the asserted balance due amount. Complainant divides the undercharge claims into four categories consisting of: 26 shipments transported from East Syracuse to Dayton after October 11, 1984 (Group 1); 59 shipments transported from East Syracuse to Dayton between March 6, 1984, and October 11, 1984 (Group 2); 12 shipments transported from East Syracuse and Dayton to points in Minnesota, Wisconsin, Indiana, and Tennessee from November 2, 1984, to May 10, 1985 (Group 3); and the remainder of the shipments transported from Cortland, Syracuse, and Dayton, to destinations primarily in Wisconsin and Minnesota (Group 4).

Also included as part of complainant's initial submission are balance due bills that reflect originally issued freight bill data as well as the "corrected" balance due amounts issued by the defendant for those shipments identified in Groups 1, 2, and 3. The balance due bills indicate an originally assessed rate of \$642 for each of the shipments listed in Groups 1 and 2. With respect to the balance due bills for shipments listed in Group 3, defendant's originally assessed rates were substantially below those here being sought. No freight bills were provided by complainant for the 169 shipments included in Group 4.⁴

Complainant supports its contentions with affidavits from: (1) Nelson Babcock, manager of SCM's Northeast Distribution Center during 1984 through August 1986; (2) Charles Stine, SCM manager of Physical Distribution during 1984 through 1986; (3) Andrew R. Clark, complainant's counsel, who provided an analysis of Murphy's tariffs;⁵ and (4) Richard Capone, Murphy's sales representative in New York. Mr. Babcock asserts that he negotiated rates for the subject shipments and approved the use of Murphy's services based on those rates. Specifically, he states that he and Mr. Capone agreed to a rate of \$642 per load for movements from East Syracuse to Dayton and that the \$642 rate was applied by Murphy to all of the subject shipments transported to Dayton. Mr. Babcock further asserts that all of the subject shipments were tendered to Murphy in reliance upon rates agreed to in negotiation with Murphy personnel and that the agreed-to rates were billed by Murphy and paid by SCM without objection from Murphy. He maintains that the rates Murphy here seeks to assess are too high and points out that SCM would not have used Murphy based on the newly assessed rates, as other competitive motor carrier services were available at lower rates.

Mr. Capone confirms that he and Mr. Babcock met on numerous occasions from 1984 through 1986 to discuss and negotiate rates for SCM's business. More particularly, he acknowledges negotiating a rate of \$642 for shipments from SCM's plant to Dayton. He states that the freight rates billed to and paid by SCM for the subject shipments were consistent with competitor rates and were properly assessed.

Mr. Stine testifies that he negotiated rates for the involved shipments with Murphy's authorized representative, Mr. Charles R. Mace. He says that the \$642 rate for shipments to Dayton is an example of the rates he negotiated with Murphy. Mr. Stine states that for numerous other shipments involved in this claim, he was advised that applicable discounts were appropriately filed and that a series of commodity rates covering all origins, commodities and destinations for SCM's shipments were included in Tariff ICC MFRY 405A. Moreover, Mr. Stine maintains that SCM tendered shipments to Murphy based on the assurances of Murphy's representatives that the agreed-upon rates were lawful. He states that SCM paid invoices based on the agreed-upon rates, and that these payments were accepted by Murphy without objection.

⁴ Group 4 shipments represent undercharge claims valued by defendant at approximately \$14,000.

⁵ Mr. Clark argues that Murphy's auditors failed to apply various discount tariff rates to the involved shipments. He asserts that Murphy's Tariff ICC MFRY 630-B, Item 1125, offered discounts from 15% to 25% to all shippers. Although that item requires a notation on the bill of lading to invoke such discounts, Mr. Clark maintains that the discount is applicable to the involved shipments because that notation requirement was found to be an unreasonable practice in *Tennant Company--Petition for Declaratory Order--Certain Rates and Practices of Murphy Motor Freight Lines, Inc.*, No. 40378 (ICC served Dec 17, 1990).

By decision of September 2, 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 (1993), extended an opportunity to the parties to supplement the record with respect to the rate reasonableness issue. By letter filed September 16, 1993, the complainant responded that it had previously submitted rate reasonableness evidence in conformance with the *Georgia Pacific* decisions and did not intend to make a further submission.

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.⁶ 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. By letter filed March 29, 1994, complainant acknowledged the enactment of the NRA and indicated that the present record was sufficient to resolve this proceeding.

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 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 Murphy is no longer an operating carrier.⁸ Accordingly, we may proceed to determine whether defendant'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 on 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, complainant has submitted balance due bills indicating that the charges originally assessed by defendant were consistently below those that defendant is here seeking to assess and were in conformity with rates agreed to by the parties. 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.

⁶ The ICC's prior unreasonable practice policy was invalidated by the Supreme Court in *Maislin Indus. v. Primary Steel*, 497 U.S. 116 (1990).

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 Murphy held both common and contract carrier operating authority issued by the ICC under various subnumbers of No. MC-108937. All of Murphy's operating authorities were revoked on December 7, 1987.

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 rate and that the rates were agreed upon by the parties).

In this case, the evidence indicates that the rates originally billed by the carrier and paid by SCM were rates negotiated by the parties. The freight bills confirm the unrefuted testimony of Mr. Babcock, Mr. Stine, and Mr. Capone and reflect the existence of a negotiated rate.

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 a negotiated rate was offered to SCM by Murphy; that SCM, reasonably relying on the offered rate, tendered the subject traffic to Murphy; that the negotiated rate was billed and collected by Murphy; and that Murphy 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 Murphy to attempt to collect undercharges from SCM for transporting the shipments at issue in this proceeding.⁹

This decision 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:

The Honorable Dennis D. O'Brien
United States Bankruptcy Court for the
District of Minnesota, Third Division
627 Federal Building
St. Paul, MN 55101

RE: Case No. BKY 3-87-577, ADV. No. 3-89-114

⁹ As indicated above, defendant also includes among its undercharge claims 166 shipments, described as miscellaneous, that moved from Dayton, OH, or Cortland or Syracuse, NY, primarily to points in Wisconsin and Minnesota. Although the record here does not contain representative freight bills for these particular movements, it does contain the sample freight bills discussed above, which appear to be representative of defendant's undercharge claims. These freight bills constitute written evidence of a negotiated rate as to the specific shipments identified in the freight bills. The record also contains the uncontroverted testimony of complainant's witnesses as to complainant's reliance on the originally negotiated rate.

As to any other shipments with respect to which specific freight bills were not submitted, where the documentation is similar to that presented in the sample freight bills, it would be an unreasonable practice for Murphy "to attempt to recover the difference between the applicable tariff rate . . . and the negotiated rate." Accordingly, we advise the court of our legal opinion that, to the extent other undercharge claims follow the pattern outlined here, collection of such claims would also constitute an unreasonable practice.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary