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SERVICE DATE - AUGUST 19, 1999

SURFACE TRANSPORTATION BOARD¹

DECISION

No. 41146

MUENCH KREUZER CANDLE COMPANY
--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF
LYONS TRANSPORTATION LINES, INC.

Decided: August 16, 1999

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). 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 Western District of Pennsylvania, in Vedder J. White, (Trustee), v. Muench Kreuzer Candle, Adv. No. 92-1401. The court proceeding was instituted by Vedder White, Trustee² of the bankruptcy estate of Lyons Transportation Lines, Inc. (Lyons or respondent), a former motor common and contract carrier, to collect undercharges from Muench Kreuzer Candle Company (M-K or petitioner). Lyons seeks undercharges in the amount of \$166,344.92, in addition to amounts previously paid, for services rendered in transporting approximately 1,083 shipments of candles during 1987, 1988, and 1989.³ The shipments were transported from M-K's facilities at Syracuse,

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.

² Subsequent to commencement of the case, Trustee White passed away. The successor Trustee is Gary V. Skiba.

³ Lyons' court complaint originally sought undercharges of \$166,557.44. During the course of the proceeding before the Board, respondent advised that bill Number 15314452X, which claimed a balance due of a \$212.52, had been issued in error and would be canceled. The effect of

NY, to points in Pennsylvania and New England. The court complaint consisted of two counts. Under Count I, \$5,571.11 in undercharges are claimed for 63 shipments⁴ transported between April 14, 1988, and May 25, 1988, and between December 1 and December 14, 1989, to which allegedly inapplicable reduced class ratings or tariff discounts were applied.⁵ Under Count II, respondent seeks reimbursement for the payment to M-K of loading allowances in the amount of \$160,773.81 that allegedly did not conform with the provisions of its loading allowance tariff, Item 681510-35-B of Tariff LYNT 601-B and LYNT-601-C.⁶ By order dated October 26, 1993, the court stayed the proceeding and directed petitioner to institute a proceeding before the ICC for resolution of all issues raised with respect to the claimed undercharges.

Pursuant to the court order, M-K, on November 8, 1993, filed a petition for declaratory order requesting the ICC to resolve issues concerning the applicability, construction, and reasonableness of the carrier rates and practices underlying the asserted court claims. By decision served November 26, 1993, the ICC established a procedural schedule for the development of the record.⁷ On April 13, 1994, petitioner filed its opening statement. Respondent filed its statement of facts and argument on June 10, 1994, and petitioner submitted its rebuttal on July 8, 1994.

Petitioner asserts that the retroactive denial of previously paid loading allowances would be an unreasonable practice, and that the attempt by Lyons to collect the additional charges claimed constitutes an unreasonable practice under section 2(e) of the NRA. M-K further asserts that the

this cancellation reduces respondent's overall claim for undercharges to \$166,344.92.

⁴ The initial amount sought in the court complaint was \$5,783.63 based on 64 shipment claims.

⁵ The shipments transported between April 14, 1988, and May 25, 1988, were originally rated at a Freight of All Kinds (FAK) Class 60 rating, a class rating which did not become effective until May 28, 1988, per Item 751510-285, Tariff LYNT 601-B, Supplement 91. These shipments were re-rated at a Class 70 rating per Item 39810, Sub 9, ICC NMF 100. A 50% discount was applied in the originally issued bills for those shipments transported between December 1 and 14, 1989. The tariff source for the discount did not become effective until December 15, 1989, per Item 751510-285, Tariff LYNT 601-D, Supplement 7. The balance due bills issued for these shipments eliminated the originally applied discounts.

⁶ Lyons maintained loading allowance tariff provisions for certain of its accounts. Essentially, these provisions authorized payment of allowances (usually stated as a percentage of the tariff charges) where the shipper loaded (or the consignee unloaded) the vehicle. Typically, the allowances were restricted by commodity and imposed the condition that the shipper file a claim for the allowance with Lyons within 60 days of the shipment.

⁷ By decision served December 30, 1993, the ICC established a new procedural schedule permitting the parties to invoke the alternative procedure under section 2(e) of the NRA and to submit evidence in light of the new law.

rates Lyons now seeks to assess are unreasonable.

M-K supports its assertions with a verified statement from John Gerharz, petitioner's Warehouse Manager, and an affidavit from Robert W. Ackroyd, a Lyons traffic rate auditor during the period the subject shipments were transported. Mr. Gerharz states that his responsibilities include arranging for and overseeing the transportation of petitioner's products. With respect to those shipments transported between April 14, 1988, and May 25, 1988, Mr. Gerharz asserts that Lyons represented to petitioner that an FAK Class 60 rate published in Item 751510.285 of ICC LYNT 601 was effective; that M-K tendered shipments in reliance upon that representation; and that Lyons billed M-K in accordance with the rates in that item and accepted M-K's payment of the billed rates as payment in full for its services. Similarly, with respect to those shipments transported between December 1 and 14, 1989, Mr. Gerharz maintains that Lyons represented to petitioner that a 50% discount published in Item 751510.285 of ICC LYNT 601-D was applicable to the subject shipments; that M-K tendered traffic to Lyons based on that representation; and that Lyons billed M-K in accordance with the discount and accepted M-K's payment of the billed rate.

Mr. Gerharz states that the loading allowance tariff relating to the remaining claims⁸ provides for payment of loading allowances on a monthly basis upon presentation of a claim filed with the carrier. As stated in the tariff, the purpose of the claim was to assure "... sufficient information to enable carrier to verify the shipments [for] which the claim is made." Mr. Gerharz asserts that M-K was never requested to submit a claim to Lyons because the carrier had all of the information necessary to verify their shipments. Attached to Mr. Gerharz' statement is a copy of a Lyons inter-office memorandum, representative of the 25 loading allowance payments made by respondent for which Lyons here seeks reimbursement, authorizing an allowance payment (Exhibit B). Also attached are copies of a typical monthly loading allowance check (Exhibit C) and a supporting summary of shipment data information generated by Lyons from its own records (Exhibit D).⁹ Mr. Gerharz maintains that the net rates paid by M-K to Lyons after deducting the loading allowance were equivalent to the rates available to petitioner from other carriers providing comparable service. He notes that disallowance of the loading allowance would, in most instances, double the level of the originally assessed charges, and he indicates that M-K would not have used Lyons to move its traffic had respondent ever suggested that petitioner would not receive the loading allowances.

⁸ Item 681510-35-B of ICC LYNT 601-B (attached as Appendix A to Mr. Gerharz' statement).

⁹ Exhibit D is a copy of a computer printout dated 6/06/89 and entitled LYONS TRANSPORTATION LINES, INC., OUTBOUND LOADING ALLOWANCE FOR THE MONTH OF 5/89. It identifies M-K as the shipper and notes tariff item 681510-35. Listed are 85 M-K shipments by pro number, bill date, originally assessed charge, and loading allowance. The statement provides the destination, type, and weight of each shipment. Page 3 of the statement provides the totals for Lyons revenue (\$14,750.28), access charges (\$328.46), net revenue (\$14,421.82), and pay amount (\$6,570.89). The pay amount represents the loading allowance paid by Lyons to M-K and corresponds to the amount of the check identified in Exhibit C.

Mr. Ackroyd describes the process by which loading allowance discounts were applied and paid by Lyons to customer accounts. He asserts that it was not necessary for shippers to take any action to trigger the application and payment of loading allowances, as Lyons controlled the process and was in possession of all the information needed.

In reply, respondent asserts that there was no applicable, effective tariff authorizing the reduced class rating or discount applied in its original billings to petitioner; that the loading allowances did not conform to the requirements of the loading allowance tariff and were erroneously paid; that the rates it here seeks to assess have not been shown to be unreasonable; and that the NRA is not applicable to the subject claims.¹⁰

Respondent supports its position with a verified statement from R. E. Stulting, a rate auditor and analyst employed by Delta Traffic Service, Inc. (Delta), a professional audit company retained by Lyons to provide audit and collection services.¹¹ Mr. Stulting, attaching copies of the relevant

¹⁰ Lyons argues that section 2(e) of the NRA is inapplicable to bankrupt carriers, may not be applied retroactively, and is unconstitutional. 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 Lyons. See Whitaker v. Power Brake Supply, Inc., 68 F.3d 1304 (11th Cir. 1995) (Power Brake); Jones Truck Lines, Inc. v. Whittier Wood Products, Inc., 57 F.3d 642 (8th Cir. 1995) (Whittier Wood); 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).

Lastly, in response to respondent's "takings" challenge, the Eighth Circuit in Whittier Wood and the Eleventh Circuit in Power Brake have concluded that the NRA does not work an unconstitutional taking under the Fifth Amendment. 57 F.3d at 649-52; 68 F.3d at 1306 n.3. We point out that the courts have consistently rejected that argument, as well as respondent's "separation of powers" argument and its other constitutional challenges to the NRA. See, e.g., Gold v. A.J. Hollander, *supra*; American Freight System, Inc. v. ICC (In re American Freight System, Inc.), 179 B.R. 952 (Bankr. D. Kan. 1995); Rushton v. Saratoga Forest Products, Inc. (In re Americana Expressways), 177 B.R. 960 (D. Utah 1995), rev'g 172 B.R. 99 (Bankr. D. Utah 1994); Zimmerman v. Filler King Co. (In re KMC Transport), 179 B.R. 226 (Bankr. D. Idaho 1995); Lewis v. Squareshooter Candy Co. (In re Edson Express), 176 B.R. 54 (D. Kan. 1994).

¹¹ Delta's contract with Lyons was approved by the Bankruptcy Court on May 10, 1991.

tariffs to his statement (Appendix A and Appendix B), asserts that the FAK Class 60 rating was not made applicable to outbound shipments from Syracuse until May 28, 1988, and that the 50% discount was not made effective for petitioner's shipments until December 15, 1989. With respect to the loading allowances Mr. Stulting contends that the payments made by Lyons were unauthorized in that M-K failed to file claims as required by the tariff and failed to establish that petitioner actually loaded the shipments.¹² Mr. Stulting further contends that numerous allowances were improperly paid for commodities that, based on the tariff, were not eligible for the allowance.

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."¹³

We note that section 2(e)'s availability is not limited to situations where the originally billed rate was unfiled. In evaluating whether a carrier's collection efforts would be an "unreasonable practice" under section 2(e), the Board must consider, *inter alia*, whether the shipper was offered a rate by the carrier "other than that legally on file with the Board for the transportation service." Section 2(e)(2)(A) (emphasis added). If the carrier and shipper agreed to a price that was embodied in a filed rate that cannot be applied to the involved shipments, then the shipper was offered a rate not legally on file "for [that] transportation service." Thus, even if "some of [a carrier's undercharge claims] are based on it billing and collecting an erroneous [filed] rate, if the so-called erroneous rate was negotiated between the shipper and [carrier] and if the shipper reasonably relied on the rate, the rate would meet the definition of a 'negotiated rate' and trigger the application of the provisions of the NRA." American Freight System, Inc. v. ICC (In re American Freight System), 179 B.R. 952, 957 (Bankr. D. Kan. 1995).

¹² Mr. Stulting maintains that freight documents referenced in Appendix E to his statement indicate that the actual loading of the shipments was not performed by M-K. Appendix E consists of copies of bills of lading or shipping orders and driver tally sheets for a sampling of the shipments on which allowances were paid.

¹³ 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.

It is undisputed that Lyons no longer transports property.¹⁴ Accordingly, we may proceed to determine whether Lyons' 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 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 agreement.

Here the record contains copies of tariff items that provide for the application of an FAK Class 60 rate (Item 751510.285 of ICC LYNT 601), the application of a 50% discount (Item 751510.285 of ICC LYNT 601-D), and the payment of loading allowances (Item 681510-35-B of Tariff LYNT 601-B); a Lyons inter-office memorandum authorizing a loading allowance payment; a copy of a monthly loading allowance check; and a computer printout supporting summary of shipment data listing originally assessed charges and authorized loading allowances for 85 M-K shipments transported in May 1989. 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 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 indicates that the parties conducted business in accordance with agreed-to negotiated discount rates and allowances. The discount charges were originally billed by Lyons and paid by M-K. Thereafter, Lyons made a collective payment of the allowances on a monthly basis. As is manifest from the record, the charges originally assessed for the shipments subject to this proceeding and the loading allowances paid by Lyons fully conform with the discount rates (Class 60 and 50% discounts) and loading allowances authorized in the respective tariff provisions identified above. The consistent application of the discounts and allowances identified in the tariff items, in addition to the representative Lyons inter-office memorandum, loading allowance check, and supporting summary of shipment data information, confirm the unrefuted testimony of Mr. Gerharz and Mr. Ackroyd and reflect the existence of negotiated rates. The evidence further indicates that M-K relied upon the agreed-to rates in tendering the subject shipments to Lyons, and that petitioner would not have used Lyons to move its traffic had respondent failed to provide the loading allowances here being challenged or attempted to charge the rates it here seeks to assess.

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

¹⁴ Board records confirm that the common and contract carrier authorities of Lyons were revoked on November 3, 1991, and November 11, 1991, respectively.

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, Lyons concedes at page 15 of its statement that, if section 2(e) is read to apply to this case, it will preclude the Trustee from collecting on his claims. We agree. The evidence establishes that a negotiated rate and allowance was offered to M-K by Lyons; that M-K reasonably relied on the offered rate and allowance in tendering its traffic to Lyons; that the negotiated rate was billed and collected by Lyons and that the agreed-to allowance was thereafter paid to M-K by Lyons; and that Lyons 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 Lyons to attempt to collect undercharges from M-K 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:

The Honorable Warren W. Bentz
United States Bankruptcy Court
for the Western District of Pennsylvania
P. O. Box 1755
Erie, PA 16507

Re: Adv. No. 92-1401

By the Board, Chairman Morgan, Vice Chairman Clyburn, and Commissioner Burkes.

Vernon A. Williams
Secretary