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SERVICE DATE - LATE RELEASE NOVEMBER 18, 1996

SURFACE TRANSPORTATION BOARD¹

DECISION

No. 41491

ANDREW CORPORATION--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF TRANSCON LINES

Decided: November 13, 1996

This proceeding arises out of the efforts of Transcon Lines (respondent) to collect undercharges on certain shipments from Andrew Corporation (Andrew or petitioner). The matter is before the Board on referral from the United States Bankruptcy Court, Central District of California, in Leonard L. Gumpert, Chapter 7 Trustee of the Bankruptcy Estate of Transcon Lines v. Andrew Corporation, Case No. SB 93-22207 DN, Chapter 7, Adversary No. SB 93-02211 DN (referral order dated September 28, 1994).

Andrew filed a petition for declaratory order with the ICC on November 23, 1994, for a determination of rate reasonableness and unreasonable practice issues. By decision served December 13, 1994, a procedural schedule was established permitting the parties to submit evidence and argument with respect to both rate reasonableness and non-rate reasonableness issues, including the section 10701(f) and the alternative section 2(e) procedures of the Negotiated Rates Act of 1993, Pub. L. 103-180, 107 Stat. 2044 (NRA). The decision specifically directed respondent to furnish petitioner with the information described in its attached Appendix A called for in Vertex Corp. Pet. Declar. Order Rates and Practices, 9 I.C.C.2d 688 (1993) (Vertex II), modified at 10 I.C.C.2d 367 (1994) (Vertex III), hereafter referred to as Vertex.

On January 14, 1995, petitioner, alleging that respondent failed to provide petitioner with the relevant documentation and information described in Appendix A, filed a motion for a "Vertex order" finding that respondent is not entitled to collect any of the claimed undercharges.

In its response filed January 30, 1995, respondent maintains that the Vertex documentation was previously furnished to petitioner. Specifically, respondent asserts, these documents were attached to the declaration submitted by Vernon A. Gasper to the Bankruptcy court in support of respondent's motion for summary judgement. Respondent acknowledges that it did not advise petitioner by formal letter that the Appendix A Vertex documentation had previously been provided but expresses its willingness to provide petitioner with other documents to the extent they are available.

In a pleading filed February 21, 1995, described by petitioner as a reply in support of its motion for Vertex Order, petitioner argues that the documentation provided by respondent does not include copies of the original freight bills and otherwise fails to satisfy the Vertex requirements. Attached to petitioner's pleading is a copy of the Gasper declaration as well as representative freight bills provided by respondent which contain the original charge assessed by Transcon, the amount of the undercharge claim plus interest, and the asserted basis for the undercharge claim.²

"Including "original,, in the Appendix A guidelines directing the carrier party to provide "a copy of the original bill of lading and a copy of the original freight bill" was an unfortunate adoption from the Documentation of Claims procedures where the shipper is expected to provide copies of these documents to the carrier. Routinely, the shipper rather than the carrier would have possession of the original bill of lading and the original freight bill. Consequently, a carrier party to an undercharge proceeding cannot be expected to produce copies of the "originals" of these documents. We will omit the "original" reference in future procedural schedule decisions invoking the Vertex II guidelines. Parties to proceedings under existing procedural schedule decisions should consider the guidelines modified by deleting the "original" reference."

From the information and materials contained in the Gasper declaration and the representative freight bills which respondent has provided to petitioner, it is apparent that respondent has substantially complied with the Vertex requirements. A new procedural schedule set forth below is established.

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¹ On December 29, 1995, the President signed the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICC Termination Act or the Act). Effective January 1, 1996, the Act abolished the Interstate Commerce Commission (ICC) and transferred various ICC functions, including the resolution of issues in motor carrier undercharge proceedings, to a newly created Surface Transportation Board (Board), 49 U.S.C. 1370913711.

² In a pleading filed March 13, 1995, respondent asserts that the attachments submitted in petitioner's February 21, 1995 submission confirm its compliance with the spirit and intent of the Vertex requirements. On March 22, 1995, petitioner moved to strike respondent's sur-reply claiming that respondent's pleading constituted an improper reply to a reply in violation of the [Board's] rules of practice at 49 CFR 1104.13(c). It should be noted that petitioner's February 21, 1995 filing suffers from the same defect. Neither supplement submission has prejudiced the interests of either party. The motion to strike is denied.

It is ordered:

1. Petitioner's motion is denied.
2. Petitioner's opening statement must be filed by December 18, 1996.
3. Respondent's reply must be filed by January 17, 1997.
4. Petitioner's rebuttal must be filed by February 6, 1997.
5. This decision is effective on its service date.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams
Secretary