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SERVICE DATE - FEBRUARY 2, 2000

SURFACE TRANSPORTATION BOARD¹

DECISION

No. 41565

HAYWARD INDUSTRIES, INC.--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF NORTH PENN TRANSFER, INC.

Decided: January 27, 2000

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). 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 District Court for the District of New Jersey in North Penn Transfer, Inc. v. Hayward Industries, Inc., Civ. No. 94-581 (AJL). The court proceeding was instituted by North Penn Transfer, Inc. (North Penn or respondent), a former motor common and contract carrier, to collect undercharges from Hayward Industries, Inc. (Hayward or petitioner). North Penn seeks undercharges of \$20,183.45 (plus interest) allegedly due, in addition to amounts previously paid, for services rendered in transporting 293 shipments of such commodities as steel, bronze or iron castings, stainless steel, nickel or monel sheets, plastic articles, power pumps, and filtering machines between June 7, 1990, and February 18, 1992.² The

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. While this decision generally applies the law in effect prior to the Act, new 49 U.S.C. 13711(g) provides that new section 13711 applies to cases pending as of January 1, 1996, and hence section 13711 will be applied to the factual situation presented in this proceeding. Unless otherwise indicated, citations are to the former sections of the statute.

² North Penn originally sought undercharges of \$21,201.42 based on 304 shipment claims. During the course of the corresponding court proceeding, respondent canceled claims relating to 11
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shipments were less-than-truckload (LTL) movements transported to petitioner's facilities in Elizabeth, NJ, from points in Pennsylvania, Rhode Island, Maryland, New York, and Connecticut (inbound collect shipments) or from petitioner's Elizabeth, NJ facilities to points in Pennsylvania, Connecticut, Massachusetts, Delaware, Maryland, New York, and Virginia (outbound prepaid shipments). By order dated April 5, 1995, the court dismissed the proceeding without prejudice and directed petitioner to seek an administrative determination from the ICC.

Pursuant to the court order, Hayward, on April 13, 1995, filed a petition for declaratory order requesting the ICC to resolve issues of unreasonable practice, tariff applicability, and rate reasonableness. By decision served April 24, 1995, the ICC established a procedural schedule for the submission of evidence on non-rate reasonableness issues. On July 13, 1995, petitioner filed its opening statement. Respondent filed its statement of facts and argument on September 18, 1995, and petitioner submitted its rebuttal on October 25, 1995.

Petitioner asserts that respondent's attempt to collect undercharges constitutes an unreasonable practice under section 2(e) of the NRA; that the shipments at issue were transported pursuant to discounted rates agreed to by the parties; that Hayward tendered its traffic to North Penn in reliance upon the agreed-to discounted rates; and that the agreed-to discounted rates were billed and collected in full by North Penn. Petitioner further asserts that the originally billed discount rates were applied in conformity with North Penn tariffs ICC NOPT 600-J or ICC NOPT 602 and were properly assessed.

Hayward supports its assertions with an affidavit from Michael Bange, president of Champion Transportation Services, Inc., a transportation consultant retained by petitioner who conducted an audit and analysis of the balance due bills and claims of respondent. Mr. Bange states that nearly all of the original freight bills for the subject shipments indicate on their face the application of a 60% discount off the applicable class rates³ and that respondent in its re-rated balance due bills has either completely disallowed the originally applied discounts or, with respect to inbound collect movements, re-rated the shipments with a 40% discount. Included among the attachments to Mr. Bange's affidavit are copies of sample "balance due" bills issued by respondent,

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shipments in the amount of \$1,027.97, reducing its total claim for undercharges to \$20,183.45.

³ Discounts of 50% or 52% were originally applied to five of the subject shipments destined to points in Virginia. For each of these shipments the shipper is identified as Hayward Pool Products, Inc. See Exhibit L to Mr. Bange's affidavit.

for inbound collect shipments (Exhibit A)⁴ and outbound prepaid shipments (Exhibit B)⁵ which reflect originally issued freight bill data as well as “corrected” balance due amounts; a letter from North Penn to Hayward Industrial Products dated June 1, 1990, and a letter from North Penn to Hayward Pool Products dated June 8, 1990, stating that a 60% discount will be applied to their shipments effective June 4, 1990 (Exhibit G);⁶ and a document entitled “customer profile” indicating that Hayward Food Products and its customer code account number are alternatives to Hayward Industrial Products and its customer code account number (Exhibit M). Also attached to Mr. Bange’s affidavit are copies of tariff ICC NOPT 600-J, effective October 30, 1989, which at Item 1390.10 provides for a discount of 60% off applicable class rates for movements involved in this proceeding (Exhibit I), and tariff ICC NOPT 602, effective November 30, 1990, which at item 10710 provides for discounts of 52% to 60% for movements originating at Elizabeth, NJ. Mr. Bange is of the opinion that one or both of the referenced tariffs were applicable to the shipments at issue.

North Penn contends that the originally applied discounts were not authorized by an effective applicable filed tariff in that (1) with respect to tariff ICC NOPT 600-J, petitioner had failed to provide written notification of its participation in the tariff as required by Item 165 of that tariff and (2) Item 10710 of tariff ICC NOPT 602 was only applicable to Shipper Code Number 44037, the code number designated for Hayward Pool Products. Respondent further contends that section 2(e) of the NRA does not govern this matter and contests the applicability of that provision on statutory and constitutional grounds.⁷

⁴ The “balance due” bills contained in Exhibit A reveal the application of discounts to the originally assessed charges ranging from 50% to 60% and newly assessed charges that reduce the applied discounts to 40%.

⁵ The “balance due” bills contained in Exhibit B reveal the application of discounts of 60% to the originally assessed charges and newly assessed charges that eliminate the originally applied discounts.

⁶ Exhibit G also contains a letter dated June 21, 1990, from North Penn to Hayward Pool Products indicating that the 60% discount will apply only to shipments in excess of 10,000 pounds and that a 52% discount will apply to shipments of less than 10,000 pounds.

⁷ North Penn 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 North Penn. 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 re 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. (continued...)

Respondent supports its argument with a verified statement from Stephen L. Swezey, Senior Transportation Consultant for Carrier Services, Inc. (CSI), the organization authorized by the bankruptcy court to provide rate audit and collection services for North Penn. Mr. Swezey maintains that, as petitioner had not complied with the written notification requirements of Item 165 to tariff ICC NOPT 600-J, the discount provisions of that tariff were not applicable to the subject shipments. He further states that the discount provisions of Item 10710 of tariff ICC NOPT 602 did not provide for discounts for joint line movements and applied only to the shipper code number designated for Hayward Pool Products. Mr. Swezey notes that only five of the subject shipments designated Hayward Pool Products as the shipper and that each of these shipments involved interline movements to points in Virginia. He asserts that the appropriate charges to be assessed for the subject movements are reflected in the re-rated balance due bills.

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

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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).

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.”⁸

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 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).

It is undisputed that North Penn no longer transports property. Accordingly, we may proceed to determine whether North Penn’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 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 re-rated balance due bills that indicate originally assessed charges to which discounts of 60%, and in a few instances 50% and 52%, were applied; letters from North Penn to petitioner and Hayward Pool Products advising that effective June 4, 1990, a 60% discount would be provided for petitioner’s shipments and discounts of 52% and 60% would be provided for Hayward Pool Products’ shipments; and published discount rates contained in Item 1390.10 of tariff ICC NOPT 600-J that provide for a discount of 60% off applicable class rates and Item 10710 of tariff ICC NOPT 602 that provide for discounts of 52% to 60% off applicable class rates. We find this evidence sufficient to satisfy the written evidence requirement. E. A. Miller,

⁸ The ICC Termination Act removed the limitation that made section 2(e) of the NRA applicable only to transportation services provided prior to September 30, 1990. Thus, the remedies in section 2(e) may be invoked for all the shipments at issue in this proceeding, including the 222 shipments that were transported after September 30, 1990.

Inc.--Rates and Practices of Best, 10 I.C.C.2d 235 (1994) (E.A. Miller).⁹ See William J. Hunt, Trustee for Ritter Transportation, Inc. v. Gantrade Corp., C.A. No. H-89-2379 (S.D. Tex. March 31, 1997) (mem.) (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 is substantial that the rates originally billed by North Penn and paid by Hayward were rates agreed to in negotiations between the parties. The consistent application in the original freight bills of assessed charges to which were applied discounts ranging from 50% to 60% that are in conformity with the discounts called for in the letters of June 1, 8, and 21, 1990, to petitioner and Hayward Pool Products, and the discounts provided for in Item 1390.10 of tariff ICC NOPT 600-J and Item 10710 of tariff ICC NOPT 602, reflect the existence of negotiated discount

⁹ North Penn, at p. 12-13 of its statement filed September 18, 1995, argues that freight bills do not constitute written evidence. Respondent contends that, under section 2(e)(2)(D) of the NRA, 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 North Penn, contemplates that freight bills reflecting the negotiated rate were issued by the carrier and the Board must examine the freight bills to determine if section 2(e) has been satisfied. North Penn asserts that allowing freight bills to satisfy the written evidence requirement would make the written evidence provision superfluous because the Board, under section 2(e)(2)(D), must independently consider the collected freight bill.

The ICC and the Board have consistently rejected this argument. Section 2(e)(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 or the NRA’s legislative history 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 2(e)(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 2(e)(6)(B). The carrier’s argument might be more persuasive if the written evidence requirement were a “sixth” element of the merits determination under section 2(e)(2), but it is not. Rather, as the ICC previously indicated, it is simply a threshold definitional requirement needed to invoke section 2(e). See E.A. Miller, supra, 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 2(e)(2) to determine whether the carrier’s undercharge collection is an unreasonable practice.

rates. The evidence further indicates that Hayward relied upon the agreed-to rates in tendering the subject shipments to North Penn.

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, North Penn concedes at page 10 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. The evidence establishes that discounted rates were offered to Hayward by North Penn; that Hayward tendered freight in reliance on the agreed-to discounted rates; that North Penn has raised a serious challenge to the applicability of filed tariffs providing for such discounted rates and has not entered into an agreement for contract carriage; that the negotiated rates were billed and collected by North Penn; and that North Penn now seeks to collect additional payment based on higher rates 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 North Penn to attempt to collect undercharges from Hayward 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 Dennis M. Cavanaugh
United States District Court for
the District of New Jersey
U.S. Post Office & Courthouse, Federal Building
P. O. Box 999
Newark, NJ 07101

Re: Civ. No. 94-581 (AJL)

No. 41565

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

Vernon A. Williams
Secretary