

SURFACE TRANSPORTATION BOARD¹

DECISION

No. 41483

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

Decided: September 16, 1997

We find that the 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 proceeding 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. Huff Corporation*, Case No. SB 93-22207 DN, Chapter 7, Adv. No. SB 93-2301 DN). This matter arises out of the efforts of the trustee in bankruptcy of Transcon Lines (Transcon or respondent), a former motor common and contract carrier, to collect undercharges from Huff Corporation (Huff or petitioner). Transcon seeks undercharges of \$333,461.15, plus interest, allegedly due, in addition to amounts previously paid, for services rendered in transporting 1,673 shipments of bicycles primarily from Huff's facilities at Celina, OH, to points throughout the United States.² The shipments were transported between April 21, 1987, and April 18, 1990. By order dated October 18, 1994, the court stayed the proceeding to enable petitioner to submit issues of tariff construction, tariff applicability, and rate reasonableness to the ICC for determination.

Pursuant to the court order, petitioner, on October 25, 1994, filed a petition for declaratory order requesting the ICC to resolve the issues referred to by the court. By decision served December 20, 1994, the ICC established a procedural schedule for the submission of evidence on non-rate reasonableness issues. On March 21, 1995, petitioner filed its opening statement. Respondent filed its reply on May 22, 1995. Petitioner submitted its rebuttal on July 5, 1995.

Petitioner states that virtually all of the undercharge claims are based on an inadvertent tariff publishing error made by Transcon. It argues that Tariff ICC TCON 625, Items 1000-1610 and 1000-29395, should be construed to give effect to the intent of the parties and allow for application

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 Petitioner indicates that respondent has submitted or asserted various claims for undercharges which differ in terms of total amount claimed and number of affected shipments. The amounts stated above (\$333,461.15 derived from 1,673 freight bill correction notices) were submitted to Huff by Transcon in response to the ICC's decision of December 20, 1994. Huff presumes that this most recent submission represents respondent's current claim totals.

of the originally assessed rates.³ Petitioner further argues that the rates respondent is seeking to assess are unreasonable and that Transcon's efforts to collect the undercharges claimed constitute an unreasonable practice under section 2(e) of the NRA. Petitioner maintains that it was repeatedly offered service at the originally billed rates; that it relied on the offered rates in tendering its traffic to Transcon; and that Transcon consistently billed to Huffey and accepted Huffey's payment of the offered rates.

Respondent's statement consists of legal argument of counsel. Respondent maintains that petitioner has not proffered written proof that the rates negotiated had been agreed upon, i.e., written evidence of the original rate charged or evidence that petitioner reasonably relied on this rate. Respondent also contends that section 2(e) of the NRA does not apply retroactively to pending claims such as those that are the subject of this proceeding.⁴

DISCUSSION AND CONCLUSIONS

We dispose of this proceeding under section 2(e) of the NRA. Accordingly, we do not reach the tariff applicability, tariff interpretation/construction or rate reasonableness 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."⁵

It is undisputed that Transcon no longer transports property.⁶ Accordingly, we may proceed to determine whether the respondent's attempt to collect undercharges (the difference between the applicable 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 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

³ Transcon argues that the tariff on which Huffey relies did not apply because Huffey's shipments did not fall within the density ranges set out in the tariff. Huffey asserts that, because the tariff was specifically designed for its shipments, the assignment of density ranges different from those associated with Huffey shipments was an inadvertent tariff publishing error.

⁴ With respect to the retroactive applicability of section 2(e), we point out that the courts have consistently held that section 2(e), by its own terms, may be applied retroactively against the undercharge claims of defunct, bankrupt carriers that were pending on the NRA's enactment. *See, e.g., Gold v. A.J. Hollander Co.* (In re Maislin Indus.), 176 B.R. 436, 443-44 (Bankr. E.D. Mich. 1995); *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); *Allen v. National Enquirer*, 187 B.R. 29, 33 (Bankr. N.D. Ga. 1995); *cf. Jones Truck Lines, Inc. v. Phoenix Products Co.*, 860 F. Supp. 1360 (W.D. Wisc. 1994).

⁵ 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.

⁶ Transcon held both motor common and contract carrier operating authority, issued by the ICC under various sub-numbers of No. MC-110325. All of Transcon's operating authorities were revoked on September 21, 1990.

of such agreement." Thus, section 2(e) cannot be satisfied unless there is written evidence of a negotiated rate agreement.

In *E.A. Miller, Inc.--Rates and Practices of Best*, 10 I.C.C.2d 235 (1994) (*E.A. Miller*), the ICC held that the original freight bills embodying the negotiated rate meet the "written evidence" standard of section 2(e). In *William J. Hunt, Trustee for Ritter Transportation, Inc. v. Gantrade Corp.*, C.A. No. H-89-2379 (S.D. Tex. March 31, 1997), the court found 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.

Stephen W. Young, Logistics Distribution Manager of Huffy, an assembler and shipper of bicycles located in Celina, states that he was responsible for arranging for the transportation of the shipments at issue in this proceeding. Mr. Young asserts that all of the subject shipments were transported in accordance with rates published for Huffy's account by Transcon in Items 1000-1610 and 1000-29395 of Transcon's Tariff ICC TCON 625. He maintains that the parties clearly understood that Items 1000-1610 and 1000-29395 were intended to apply to Huffy's shipments; that Huffy was consistently invoiced in accordance with the rate set forth in the tariffs; and that Transcon consistently accepted payment for the invoices by Huffy as payment in full for its services. Mr. Young further states that under no circumstances would Huffy ever have tendered any of its shipments to Transcon at the rates that respondent is now attempting to collect.

Attached to the verified statement submitted by Mr. Young, as Exhibits A thru H, are copies of Transcon's tariff ICC TCON 625 and revisions, containing rate provisions and providing for discounts that, according to Mr. Young, were relied upon by Huffy in tendering its traffic to Transcon. Also attached to Mr. Young's statement, as Exhibit I, is a multi-paged document entitled "Statement of Account - Transcon Lines" dated February 18, 1995, which lists each of the subject shipments, the original charge assessed to and paid by Huffy, the total shipment charge that should have been assessed based on the Transcon undercharge claim, and the asserted balance due amount.

In a further verified statement, Mr. D.A. Grose, a transportation consultant retained by Huffy, states that he conducted a review of all of the Transcon bill correction notices issued to Huffy. He asserts that every freight bill originally issued to Huffy by Transcon for a shipment of bicycles from Celina assessed the discount rates contained in Items 1000-1610 and 1000-25395. Attached, as Exhibits A thru E, are five representative freight bill correction notices containing original freight bill data issued by Transcon to Huffy for shipments transported between October 19, 1987, and January 29, 1990. An examination of the corrected freight bill notices indicates that the originally assessed charges had been paid and that respondent's modifications had resulted in the elimination of originally applied discounts and/or the rerating of the originally assessed charges.

In this proceeding, the evidence indicates that petitioner conducted business with Transcon in accordance with agreed-to negotiated rates. Regardless of whether the discount tariff was technically applicable in light of the density issue, we find that the representative freight bill correction notices, which embody the originally assessed charges, the contemporaneous tariff documents, and the Exhibit I shipment list confirm the unchallenged testimony of Mr. Young, satisfy the written evidence requirement of section 2(e), and reflect the existence of negotiated rates. *See American Freight System, Inc. v. ICC* (In re American Freight System), 179 B.R. 952, 957 (Bankr. D. Kan. 1995), where the court said that 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."

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 by Transcon to Huff; that Huff tendered freight to Transcon in reliance on the negotiated rate; that the rate negotiated was billed and collected by Transcon; and that Transcon 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 Transcon to attempt to collect undercharges from Huff 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 date of service.
3. A copy of this decision will be mailed to:

The Honorable David N. Naugle
United States Bankruptcy Court,
Central District of California
200 Federal Building
699 North Arrowhead Avenue
San Bernardino, CA 92401

Re: Case No. SB 93-22207 DN, Chapter 7
Adv. No. SB 93-2301 DN

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary