

27849
EB

SERVICE DATE - JANUARY 14, 1999

SURFACE TRANSPORTATION BOARD¹

DECISION

No. 41177

M.A.C. MANAGEMENT, INC.--PETITION FOR DECLARATORY ORDER--CERTAIN
RATES AND PRACTICES OF TRANSCONTINENTAL FREIGHT SYSTEMS, INC.

Decided: January 11, 1999

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). Accordingly, we will not reach the other issues raised in this proceeding.

BACKGROUND

This matter arises out of a court action filed in the United States District Court for the Northern District of Illinois, Eastern Division, in Transcontinental Freight Systems, Inc., v. M.A.C. Management, Inc., Case No. 93C 0473. The court proceeding was instituted by Transcontinental Freight Systems, Inc. (TFS or respondent), a former motor common and contract carrier, to collect undercharges from M.A.C. Management, Inc. (MAC or petitioner), a licensed property broker. TFS seeks undercharges in the amount of \$9,787.00, plus attorneys' fees,² allegedly due, in addition to amounts previously paid, for services rendered in transporting eight shipments of furniture between March 9, 1991, and August 16, 1991. Arrangements for the shipments were made by MAC in its capacity as a property broker. The shipments were transported from points in North Carolina, New York, and Wisconsin, to points in Michigan, Illinois, Indiana, and Pennsylvania. By order entered

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) 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 The court dismissed respondent's attempt to collect attorneys' fees of \$2,447.16 in its summary judgment order dated December 3, 1993.

December 3, 1993, the court dismissed the proceeding with leave to reinstate within 30 days of a decision by the ICC.

Pursuant to the court order, MAC, on December 20, 1993, filed a petition for declaratory order requesting the ICC to resolve issues of rate reasonableness, broker liability, and contract carriage. By decision served January 6, 1994, a procedural schedule was established for development of the record. By decision served March 2, 1994, the ICC established a second procedural schedule permitting the parties to invoke the alternative procedure under section 2(e) of the NRA and to submit evidence and argument with respect to that provision. On March 7, 1994, MAC filed its opening statement.³ TFS filed its reply on April 6, 1994; petitioner filed its rebuttal on June 20, 1994; and TFS filed a reply to the rebuttal statement on August 15, 1994.⁴

Petitioner asserts that TFS transported the subject shipments under its contract carrier operating authority pursuant to arrangements made by MAC on behalf of its shipper clients in its capacity as a property broker, and that the rates respondent seeks to assess are unreasonable. It further contends that, if the service provided is deemed to be common carriage, because petitioner's function with respect to the subject movements was that of a broker and not a shipper, the asserted claims for undercharges should have been assessed against petitioner's shipper clients rather than against petitioner.

³ The petition for declaratory order filed by MAC, which included the court ruling and various documents submitted in the underlying court proceeding, was adopted by petitioner as its opening statement.

⁴ The rebuttal statement submitted by petitioner was accompanied by a motion to late-file and raised a new defense based on the section 10701(f)(9) small business "no liability" exemption of the NRA [now codified at 49 U.S.C. 13709(h)]. MAC stated that it had no objection to allowing TFS to file a response to the newly raised issue within 21 days. The response by TFS to petitioner's rebuttal was also accompanied by a motion to late-file. Under the circumstances here presented and in the interest of allowing the development of a full and complete record for this proceeding, we will accept the submission of respondent's sur-rebuttal statement and grant the motions to late-file.

As was indicated at page 4 of the procedural decision served March 2, 1994, neither the Board nor the ICC before it is the proper forum for determining an entity's status as a small business concern under the Small Business Act. Rather, the issue should be resolved by the court in which the subject undercharge action is pending or, pursuant to the doctrine of primary jurisdiction, the Small Business Administration. See Ceres Industries Corp. v. Bruce E. De'Medici, Trustee For Lifschultz Fast Freight Corp., No. 40870 (ICC served Mar. 23, 1994); Mo-Ark Truck Services, Inc.--Petition for Declaratory Order--Certain Rates and Practices of Atlantis Express, Inc., No. 40980 (ICC served Feb. 9, 1994). Accordingly, we will not rule on the small business exemption issue.

Petitioner supports its contentions with an affidavit from Mark Abraham, President of MAC.⁵ Mr. Abraham states that, during the period at issue, MAC operated as an independent motor carrier broker⁶ acting as an intermediary between the shipper and the motor carrier in arranging for transportation and negotiating the terms for the movement of traffic. According to Mr. Abraham, MAC and TFS negotiated the price to be charged for the movement of each of the subject shipments; TFS billed MAC for the services rendered at the agreed-upon rate; and MAC billed its shipper client for a total charge, consisting of the rate billed to it by TFS plus an amount to compensate for its brokerage services. Attached to Mr. Abraham's affidavit as Appendices A-H are a series of documents that relate to each of the subject shipments. The documents include the original freight bill issued by TFS to MAC,⁷ proof of payment by MAC to TFS of the amount assessed in the original freight bill, the freight invoice issued by MAC to its shipper client, and the dispatch sheet containing notations reflecting the agreed upon terms for the movement. In addition, Appendix A contains a faxed document that confirms the flat rate agreed to by MAC and TFS for a shipment delivered on March 11, 1991. Mr. Abraham asserts that MAC would never have used TFS to transport the subject shipments at the excessive rates that TFS is here seeking to assess.

In response, TFS maintains that the filed tariff rates that provide the basis for its undercharge claims, ICC Tariff TSCF 403-C and 403-D and Tariff 100, are reasonable and lawful. It argues that MAC failed to offer sufficient evidence to support its claim that the subject shipments were transported pursuant to TFS's contract carrier authority, and asserts that MAC, being the party identified in each of the billing documents as the party to be billed and the party that arranged for the movement of the shipments, is liable as broker-shipper or shipper-consignor for payment of the subject undercharges. TFS acknowledges that it dealt with MAC in arriving at the terms under which the subject shipments moved.

DISCUSSION AND CONCLUSIONS

We dispose of this proceeding under section 2(e) of the NRA. Accordingly, we do not reach the other issues raised.

⁵ Petition for Declaratory Order, Appendix D, Attachment IV.

⁶ Petitioner was authorized to operate as a motor carrier broker pursuant to ICC License No. MC 197009.

⁷ While the record in this proceeding indicates that TFS is claiming undercharges totaling \$9,787.00, it does not contain documentation that separately identifies the individual undercharge claims allegedly due for each of the subject shipments. An examination of the original freight bills indicates that the total charges originally assessed for the subject shipments amounted to \$4,998.00. From the totals available on this record, it appears that TFS is seeking to collect undercharges that will almost double its originally assessed charges.

At the outset, we recognize that the issues raised by the parties focus on matters of rate reasonableness, contract carriage, and broker liability and that neither party elected to address the section 2(e) “unreasonable practice” provisions of the NRA. Nevertheless, our use of the provisions of section 2(e) to resolve this matter is fully appropriate. The Board, as a general rule, is not limited to deciding only those issues explicitly referred by the court or raised by the parties. Rather, we may instead decide cases on other grounds within our jurisdiction, and, in cases where section 2(e) provides a dispositive resolution, we rely on it rather than more subjective provisions of the law such as those involving contract carriage and rate reasonableness. Cf. Amoco Fabrics and Fibers Co. v. Max C. Pope, Trustee of the Estate of A.T.F. Trucking, No. 40526 (ICC served Feb. 26, 1992). Thus, we have jurisdiction to issue a ruling under section 2(e) of the NRA here. The Ormond Shops, Inc., Thomas J. Lipton, Inc. and Lionel Leisure, Inc. v. Oneida Motor Freight, Inc. Debtor-in-Possession, and Delta Traffic Service, Inc., No. MC-C-30156 (ICC served Apr. 20, 1994); Have a Portion, Inc. v. Total Transportation, Inc., and Thomas F. Miller, Trustee Of The Bankruptcy Estate of Total Transportation, Inc., No. 40640 (ICC served Feb. 7, 1995).

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.”⁸

It is undisputed that TFS no longer transports property. Accordingly, we may proceed to determine whether TFS’ attempt to collect undercharges (the difference between the applicable filed 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 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 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 the original freight bills issued by TFS that identify the assessed charges paid by MAC, dispatch sheets for each of the subject shipments containing notations reflecting the charges assessed in the original freight bills, and a faxed rate confirmation for the subject shipment delivered March 11, 1991, that, in general, conforms with the originally

⁸ The ICC Termination Act removed the limitation that made section 2(e) of the NRA applicable only to transportation service provided prior to September 30, 1990. 49 U.S.C. 13711(g). Thus, the remedies in section 2(e) may be invoked for the eight shipments at issue in this proceeding, all of which were transported after September 30, 1990.

assessed charge.⁹ 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 is substantial that the parties conducted business in accordance with agreed-to negotiated rates that were originally billed by TFS and paid by MAC. Indeed, TFS acknowledges that it dealt with MAC in arriving at the terms under which the subject shipments were transported. The consistent application in the original freight bills of rates that are in full conformity with the rates noted in the dispatch sheets, together with the TFS acknowledgment that the parties dealt with each other in determining the terms of shipment, confirm the unrefuted testimony of Mr. Abraham and reflect the existence of negotiated rates. The evidence further indicates that MAC relied upon the agreed-to rates in tendering its traffic to TFS and would not have used the services of respondent had it attempted to charge the rates it here seeks to assess.

In exercising our jurisdiction under section 2(e), 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 negotiated rates were offered by TFS to MAC; that MAC, reasonably relying on the offered rates, tendered the subject traffic to TFS; that the rates negotiated were billed and collected by TFS; and that TFS 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 TFS to attempt to collect undercharges from MAC 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.

⁹ The faxed confirmation indicated a flat charge of \$662 would be assessed for the shipment. The original freight bill, however, assessed a charge of \$692, the amount paid by MAC. Notations made on the dispatch sheet for the shipment indicate that a \$30 charge was added to the earlier confirmed charge of \$662.

It is ordered:

1. The respective motions of MAC and TFS motions to late-file rebuttal and sur-rebuttal pleading are granted.
2. This proceeding is discontinued.
3. This decision is effective on its date of service.
4. A copy of this decision will be mailed to:

The Honorable George M. Marovich
United States District Court for the
Northern District of Illinois
219 South Dearborn Street
Chicago, IL 60604

Re: Case No. 93C 0473

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

Vernon A. Williams
Secretary