

20400
EB

SERVICE DATE - JANUARY 16, 1998

SURFACE TRANSPORTATION BOARD¹

DECISION

No. 41611

GOODYEAR TIRE & RUBBER COMPANY--PETITION FOR DECLARATORY
ORDER--CERTAIN RATES AND PRACTICES OF TSC EXPRESS CO.

Decided: January 12, 1998

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). Because of our finding under section (2)(e) of the NRA, we will not reach the other issues raised in this proceeding.

BACKGROUND

The matter arises out of a court action in the United States Bankruptcy Court for the Northern District of Georgia, Atlanta Division, in *L. Lou Allen, Trustee on Behalf of The Bankruptcy Estate of TSC Express Co. v. Goodyear Tire & Rubber Company*, Case No. 91-69474, Adv. No. 93-6294. The court proceeding was instituted by L. Lou Allen, Trustee on Behalf of The Bankruptcy Estate of TSC Express Co. (TSC or respondent), a former common and contract carrier, to collect undercharges from Goodyear Tire & Rubber Company (Goodyear or petitioner). TSC seeks undercharges of \$11,753.92 (plus interest) allegedly due, in addition to amounts previously paid, for services rendered in transporting 192 less-than-truckload (LTL) shipments of belts or belting, rubber hoses, catalogs or related items between June 8, 1988, and July 19, 1990. The shipments were distributed from TSC's terminal in Atlanta, Ga, to various points in Florida, Georgia, Tennessee, Alabama, Kentucky, Virginia, Texas, North Carolina, South Carolina and

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 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.

Louisiana. By order dated August 16, 1995, the court stayed the proceeding and directed petitioner to submit issues of rate reasonableness and unreasonable practice to the ICC for resolution.²

Pursuant to the court order, Goodyear, on August 31, 1995, filed a petition for declaratory order requesting the ICC to resolve the issues referred to by the court. By decision served September 13, 1995, a procedural schedule was established for the submission of evidence on non-rate reasonableness issues. Petitioner filed its opening statement on November 15, 1995. Respondent filed a reply statement on December 5, 1995, and petitioner filed its statement in rebuttal on December 11, 1995.

Goodyear asserts that respondent's attempt to collect additional freight undercharges constitutes an unreasonable practice under section 2(e) of the NRA and that the rates respondent seeks to assess are unreasonable. Petitioner maintains that the charges originally assessed by TSC and paid by Goodyear were negotiated and agreed upon by the partes and that petitioner relied upon the original agreed-to and assessed rates in tendering its traffic to respondent to the exclusion of services provided by other carriers. Attached to petitioner's opening statement is a copy of the original court complaint filed by respondent that lists each of the subject undercharge claims by freight bill number together with the original billing date and balance due amount claimed (Exhibit 2). Petitioner's opening statement also includes a representative sample of five of the "balance due" bills issued by respondent that reflect originally issued freight bill data as well as revised balance due amounts (Exhibit 3).

Goodyear supports its argument with an affidavit from Michael Bange of Champion Transportation Services, Inc., a transportation consultant retained by petitioner. Mr. Bange conducted an audit and analysis of the balance due bills and claims of respondent.³ He states that the original freight bills issued by TSC all applied percentage discounts off class rates, subject to a minimum charge floor of \$35.00 or \$40.00. He asserts that respondent has disallowed the originally applied discounts and reduced minimum charges in computing its "corrected" freight charges and now seeks freight charges that, for most of the subject shipments, are nearly double the originally billed amounts. According to Mr. Bange, the principal tariff issue in this proceeding is the applicability of TSC's discount tariff, ICC TSCP 301-A, a tariff that provided for discounts on class rated shipments transported between points involved in this proceeding in both direct and joint-line service. He states that the subject tariff, which originally became effective on May 1, 1987,

² The court administratively closed the proceeding and directed the parties to advise the court of the ICC's determinations. It also found that the provisions of the NRA are constitutional and applicable to the subject matter of this proceeding.

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remained in effect during the period the shipments at issue were transported.⁴ Mr. Bange notes that, effective April 13, 1989, Item 1555 of tariff TSCP 301-A specifically provided for a 40% discount off class rates, subject to a minimum charge of \$35.00 or \$40.00, for Goodyear Atlanta origin traffic transported to TSC direct service points and points in Florida served by SUTV.

TSC asserts that balance due bills for the subject shipments were issued to recover undercharges resulting from the use in the originally issued freight bills of inapplicable discounts or minimum charges. It further contends that section 2(e) of the NRA may not be applied retroactively and is unconstitutional.⁵ TSC also contends that petitioner has not submitted any evidence that the discounted rates set forth in the original freight bills were negotiated.

⁴ Mr. Bange makes specific reference to 46 of the 192 subject shipments that respondent contends involve "joint line" shipments. He asserts that, as TSC held common carrier authority to operate between all points in 48 states, the interlining of Goodyear's traffic was not necessary. Mr. Bange maintains that, even if interlining actually occurred, the interlining was done for the convenience of the TSC. He argues that "convenience interlining" cannot be a basis for charging a shipper a higher rate and concludes that all of the original freight bills in this group were properly rated by TSC, in full accord with its lawfully filed tariff.

⁵ As noted, the judge in the underlying proceeding here has already determined that TSC's arguments on these matters are without merit. 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 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).

In response to respondent's "takings" challenge, the Eighth Circuit in *Jones Truck Lines, Inc. v. Whittier Wood Products, Inc.*, 57 F.3d 642 (8th Cir. 1995) and the Eleventh Circuit in *Whitaker v. Power Brake Supply, Inc.*, 68 F.3d 1304 (11th Cir. 1995) 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).

As part of its reply, respondent submits the verified statement of Stephen L. Swezey, Senior Transportation Consultant for Carrier Service, Inc., (CSI).⁶ Mr. Swezey explains the basis for respondent's issuance of the balance due bills⁷ and insists that the rates and charges assessed in the balance due bills are applicable. Mr. Swezey states that there were no tariff discount provisions applicable to Goodyear traffic until April 13, 1989, when the 6th revised page No. 73 to tariff ICC TSCP 301-A, item 1555, became effective. He points out that 141 of the shipments at issue moved before the effective date of that tariff. Mr. Swezey also asserts that 49 other shipments were interlined with a connecting carrier, and that the subject tariff did not apply to interline movements. He maintains that the original freight bills for those shipments clearly indicate that they were interlined. In addition, Mr. Swezey claims that one balance due bill was corrected to reflect the applicable minimum charge of \$40 for a shipment to Florida, while the remaining balance due bill, involving a shipment from Birmingham, AL, to Goodyear's facility at Memphis, TN, to which an original discount of 45% was applied, was rerated to apply a 30% discount per Item 1530 of ICC TSCP 301-A. Attached to Mr. Swezey's statement are ten representative balance due bills issued by TSC to petitioner in which discounts of 30% (one freight bill) and 40% (nine freight bills) were originally applied (Appendix A). Mr. Swezey's statement also contains copies of the published tariffs referred to in this proceeding, including item 1555 of tariff ICC TSCP 301A, 6th revised page No. 73, effective April 13, 1989, and 5th revised page No. 73, effective September 29, 1988 (Appendix B).⁸

DISCUSSION AND CONCLUSIONS

We dispose of this proceeding under section 2(e) of the NRA. Accordingly, we do not need to 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."⁹

⁶ CSI is the organization authorized by the bankruptcy court to provide rate, audit, and collection services on behalf of TSC.

⁷ Attached to Mr. Swezey's statement as Appendix C is an affidavit from Charles B. Shinn, another CSI auditor, that discusses in detail the process used in rerating the original freight bills.

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⁹ Section 2(e), as originally drafted, applied only to transportation service provided prior to
(continued...)

It is undisputed that TSC no longer transports property. Accordingly, we may proceed to determine whether TSC's attempt to collect undercharges (the difference between the applicable filed 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 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 a representative sample of five "balance due" freight bills submitted by petitioner and ten "balance due" freight bills submitted on behalf of respondent indicating the application to Goodyear shipments of discounts ranging from 30 to 45% off originally assessed class rates. In addition, respondent has submitted copies of tariff ICC TSCP 301-A which provide for the application of discounts off class rates. 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) (E. A. Miller). See *William J. Hunt Trustee for Ritter Transportation, Inc. v. Gantrade Corp.*, C. A. 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 rate 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 discount rates. The consistent application in the original freight bills of discounts off applied class rates which for the most part conform to the 40% discount rate called for in item 1555 of tariff TSCP 301-A support the contentions of petitioner and reflect the existence of negotiated rates.

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

⁹(...continued)

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.

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 to Goodyear by TSC; that Goodyear, reasonably relying on the offered rate, tendered the subject traffic to TSC; that the negotiated rate was billed and collected by TSC; and that TSC 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 TSC to attempt to collect undercharges from Goodyear for transporting the shipments at issue in this proceeding.

This decision 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 James E. Massey
United States Bankruptcy Court
for the Northern District of
Georgia, Atlanta Division
Richard B. Russell Federal Building
and U.S. Courthouse
75 Spring St., S.W.
Room 1215
Atlanta, GA 30303

Re: Case No. 91-69474, Adv. No. 93-6294

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

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SURFACE TRANSPORTATION BOARD¹

DECISION

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BACKGROUND

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Louisiana. By order dated August 16, 1995, the court stayed the proceeding and directed petitioner to submit issues of rate reasonableness and unreasonable practice to the ICC for resolution.²

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Goodyear asserts that respondent's attempt to collect additional freight undercharges constitutes an unreasonable practice under section 2(e) of the NRA and that the rates respondent seeks to assess are unreasonable. Petitioner maintains that the charges originally assessed by TSC and paid by Goodyear were negotiated and agreed upon by the partes and that petitioner relied upon the original agreed-to and assessed rates in tendering its traffic to respondent to the exclusion of services provided by other carriers. Attached to petitioner's opening statement is a copy of the original court complaint filed by respondent that lists each of the subject undercharge claims by freight bill number together with the original billing date and balance due amount claimed (Exhibit 2). Petitioner's opening statement also includes a representative sample of five of the "balance due" bills issued by respondent that reflect originally issued freight bill data as well as revised balance due amounts (Exhibit 3).

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

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In this case, the evidence is substantial that the parties conducted business in accordance with agreed-to negotiated discount rates. The consistent application in the original freight bills of discounts off applied class rates which for the most part conform to the 40% discount rate called for in item 1555 of tariff TSCP 301-A support the contentions of petitioner and reflect the existence of negotiated rates.

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

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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.

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 to Goodyear by TSC; that Goodyear, reasonably relying on the offered rate, tendered the subject traffic to TSC; that the negotiated rate was billed and collected by TSC; and that TSC 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 TSC to attempt to collect undercharges from Goodyear for transporting the shipments at issue in this proceeding.

This decision 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.
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The Honorable James E. Massey
United States Bankruptcy Court
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Richard B. Russell Federal Building
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75 Spring St., S.W.
Room 1215
Atlanta, GA 30303

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By the Board, Chairman Morgan and Vice Chairman Owen.

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BACKGROUND

The matter arises out of a court action in the United States Bankruptcy Court for the Northern District of Georgia, Atlanta Division, in *L. Lou Allen, Trustee on Behalf of The Bankruptcy Estate of TSC Express Co. v. Goodyear Tire & Rubber Company*, Case No. 91-69474, Adv. No. 93-6294. The court proceeding was instituted by L. Lou Allen, Trustee on Behalf of The Bankruptcy Estate of TSC Express Co. (TSC or respondent), a former common and contract carrier, to collect undercharges from Goodyear Tire & Rubber Company (Goodyear or petitioner). TSC seeks undercharges of \$11,753.92 (plus interest) allegedly due, in addition to amounts previously paid, for services rendered in transporting 192 less-than-truckload (LTL) shipments of belts or belting, rubber hoses, catalogs or related items between June 8, 1988, and July 19, 1990. The shipments were distributed from TSC's terminal in Atlanta, Ga, to various points in Florida, Georgia, Tennessee, Alabama, Kentucky, Virginia, Texas, North Carolina, South Carolina and

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 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.

Louisiana. By order dated August 16, 1995, the court stayed the proceeding and directed petitioner to submit issues of rate reasonableness and unreasonable practice to the ICC for resolution.²

Pursuant to the court order, Goodyear, on August 31, 1995, filed a petition for declaratory order requesting the ICC to resolve the issues referred to by the court. By decision served September 13, 1995, a procedural schedule was established for the submission of evidence on non-rate reasonableness issues. Petitioner filed its opening statement on November 15, 1995. Respondent filed a reply statement on December 5, 1995, and petitioner filed its statement in rebuttal on December 11, 1995.

Goodyear asserts that respondent's attempt to collect additional freight undercharges constitutes an unreasonable practice under section 2(e) of the NRA and that the rates respondent seeks to assess are unreasonable. Petitioner maintains that the charges originally assessed by TSC and paid by Goodyear were negotiated and agreed upon by the partes and that petitioner relied upon the original agreed-to and assessed rates in tendering its traffic to respondent to the exclusion of services provided by other carriers. Attached to petitioner's opening statement is a copy of the original court complaint filed by respondent that lists each of the subject undercharge claims by freight bill number together with the original billing date and balance due amount claimed (Exhibit 2). Petitioner's opening statement also includes a representative sample of five of the "balance due" bills issued by respondent that reflect originally issued freight bill data as well as revised balance due amounts (Exhibit 3).

Goodyear supports its argument with an affidavit from Michael Bange of Champion Transportation Services, Inc., a transportation consultant retained by petitioner. Mr. Bange conducted an audit and analysis of the balance due bills and claims of respondent.³ He states that the original freight bills issued by TSC all applied percentage discounts off class rates, subject to a minimum charge floor of \$35.00 or \$40.00. He asserts that respondent has disallowed the originally applied discounts and reduced minimum charges in computing its "corrected" freight charges and now seeks freight charges that, for most of the subject shipments, are nearly double the originally billed amounts. According to Mr. Bange, the principal tariff issue in this proceeding is the applicability of TSC's discount tariff, ICC TSCP 301-A, a tariff that provided for discounts on class rated shipments transported between points involved in this proceeding in both direct and joint-line service. He states that the subject tariff, which originally became effective on May 1, 1987,

² The court administratively closed the proceeding and directed the parties to advise the court of the ICC's determinations. It also found that the provisions of the NRA are constitutional and applicable to the subject matter of this proceeding.

³ Mr. Bange's affidavit was dated October 27, 1993. It had been submitted in the underlying bankruptcy court adversary proceeding.

remained in effect during the period the shipments at issue were transported.⁴ Mr. Bange notes that, effective April 13, 1989, Item 1555 of tariff TSCP 301-A specifically provided for a 40% discount off class rates, subject to a minimum charge of \$35.00 or \$40.00, for Goodyear Atlanta origin traffic transported to TSC direct service points and points in Florida served by SUTV.

TSC asserts that balance due bills for the subject shipments were issued to recover undercharges resulting from the use in the originally issued freight bills of inapplicable discounts or minimum charges. It further contends that section 2(e) of the NRA may not be applied retroactively and is unconstitutional.⁵ TSC also contends that petitioner has not submitted any evidence that the discounted rates set forth in the original freight bills were negotiated.

⁴ Mr. Bange makes specific reference to 46 of the 192 subject shipments that respondent contends involve "joint line" shipments. He asserts that, as TSC held common carrier authority to operate between all points in 48 states, the interlining of Goodyear's traffic was not necessary. Mr. Bange maintains that, even if interlining actually occurred, the interlining was done for the convenience of the TSC. He argues that "convenience interlining" cannot be a basis for charging a shipper a higher rate and concludes that all of the original freight bills in this group were properly rated by TSC, in full accord with its lawfully filed tariff.

⁵ As noted, the judge in the underlying proceeding here has already determined that TSC's arguments on these matters are without merit. 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 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).

In response to respondent's "takings" challenge, the Eighth Circuit in *Jones Truck Lines, Inc. v. Whittier Wood Products, Inc.*, 57 F.3d 642 (8th Cir. 1995) and the Eleventh Circuit in *Whitaker v. Power Brake Supply, Inc.*, 68 F.3d 1304 (11th Cir. 1995) 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).

As part of its reply, respondent submits the verified statement of Stephen L. Swezey, Senior Transportation Consultant for Carrier Service, Inc., (CSI).⁶ Mr. Swezey explains the basis for respondent's issuance of the balance due bills⁷ and insists that the rates and charges assessed in the balance due bills are applicable. Mr. Swezey states that there were no tariff discount provisions applicable to Goodyear traffic until April 13, 1989, when the 6th revised page No. 73 to tariff ICC TSCP 301-A, item 1555, became effective. He points out that 141 of the shipments at issue moved before the effective date of that tariff. Mr. Swezey also asserts that 49 other shipments were interlined with a connecting carrier, and that the subject tariff did not apply to interline movements. He maintains that the original freight bills for those shipments clearly indicate that they were interlined. In addition, Mr. Swezey claims that one balance due bill was corrected to reflect the applicable minimum charge of \$40 for a shipment to Florida, while the remaining balance due bill, involving a shipment from Birmingham, AL, to Goodyear's facility at Memphis, TN, to which an original discount of 45% was applied, was rerated to apply a 30% discount per Item 1530 of ICC TSCP 301-A. Attached to Mr. Swezey's statement are ten representative balance due bills issued by TSC to petitioner in which discounts of 30% (one freight bill) and 40% (nine freight bills) were originally applied (Appendix A). Mr. Swezey's statement also contains copies of the published tariffs referred to in this proceeding, including item 1555 of tariff ICC TSCP 301A, 6th revised page No. 73, effective April 13, 1989, and 5th revised page No. 73, effective September 29, 1988 (Appendix B).⁸

DISCUSSION AND CONCLUSIONS

We dispose of this proceeding under section 2(e) of the NRA. Accordingly, we do not need to 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."⁹

⁶ CSI is the organization authorized by the bankruptcy court to provide rate, audit, and collection services on behalf of TSC.

⁷ Attached to Mr. Swezey's statement as Appendix C is an affidavit from Charles B. Shinn, another CSI auditor, that discusses in detail the process used in rerating the original freight bills.

⁸ The 5th revised page No. 73 provided for the application of a 40% discount off class rates for a group of named shippers that did not include Goodyear.

⁹ Section 2(e), as originally drafted, applied only to transportation service provided prior to
(continued...)

It is undisputed that TSC no longer transports property. Accordingly, we may proceed to determine whether TSC's attempt to collect undercharges (the difference between the applicable filed 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 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 a representative sample of five "balance due" freight bills submitted by petitioner and ten "balance due" freight bills submitted on behalf of respondent indicating the application to Goodyear shipments of discounts ranging from 30 to 45% off originally assessed class rates. In addition, respondent has submitted copies of tariff ICC TSCP 301-A which provide for the application of discounts off class rates. 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) (E. A. Miller). See *William J. Hunt Trustee for Ritter Transportation, Inc. v. Gantrade Corp.*, C. A. 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 rate 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 discount rates. The consistent application in the original freight bills of discounts off applied class rates which for the most part conform to the 40% discount rate called for in item 1555 of tariff TSCP 301-A support the contentions of petitioner and reflect the existence of negotiated rates.

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

⁹(...continued)

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.

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 to Goodyear by TSC; that Goodyear, reasonably relying on the offered rate, tendered the subject traffic to TSC; that the negotiated rate was billed and collected by TSC; and that TSC 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 TSC to attempt to collect undercharges from Goodyear for transporting the shipments at issue in this proceeding.

This decision 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 James E. Massey
United States Bankruptcy Court
for the Northern District of
Georgia, Atlanta Division
Richard B. Russell Federal Building
and U.S. Courthouse
75 Spring St., S.W.
Room 1215
Atlanta, GA 30303

Re: Case No. 91-69474, Adv. No. 93-6294

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary