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SERVICE DATE - AUGUST 10, 2000

SURFACE TRANSPORTATION BOARD

DECISION

STB No. 42007

FLEXCON COMPANY, INC.
v.
WILLIG FREIGHT LINES, INC.

Decided: August 3, 2000

We find that collection of the undercharges sought in this proceeding would be an unreasonable practice under 49 U.S.C. 13711. Because of our finding under section 13711, we will not reach the other issues raised in this proceeding.

BACKGROUND

This matter arises out of a court action in the United States Bankruptcy Court for the Northern District of California in Willig Freight Lines, Inc. v. Flexcon Company, Inc., Adv. No. 97 3 138 DM. The court proceeding was instituted by Willig Freight Lines, Inc. (Willig or defendant),¹ a former motor common and contract carrier, to collect undercharges from Flexcon Company, Inc. (Flexcon or complainant). Willig seeks undercharges of \$74,447.11 (plus interest), allegedly due, in addition to amounts previously paid, for services rendered in transporting 960 shipments between October 18, 1992, and August 25, 1994. The shipments were transported from Flexcon's distribution center in Chino, CA, to points in Arizona, Nevada, Oregon, and Washington. By order dated March 31, 1997, the court stayed the proceeding to enable complainant to seek a determination by the Board of issues of rate reasonableness, unreasonable practice, and tariff applicability.²

Pursuant to the court order, Flexcon, by complaint filed June 27, 1997, requested the Board to resolve issues within its primary jurisdiction. By decision served August 5, 1997, the Board established a procedural schedule for the submission of evidence. On October 6, 1997, complainant filed its opening statement. Willig filed its reply on November 6, 1997, and complainant submitted its rebuttal on November 25, 1997.

¹ On October 19, 1995, Willig filed for bankruptcy under Chapter 11 of the United States Bankruptcy Code, in the United States Bankruptcy Court for the Northern District of California, Case No. 95-33940 DM.

² The court order was issued in the underlying bankruptcy proceeding as a case management order for the handling of undercharge claim adversary proceedings instituted by Willig.

Complainant asserts that defendant's attempt to collect the claimed undercharges constitutes an unreasonable practice under section 13711(a) and that the rates defendant now seeks to collect are unreasonable. Flexcon maintains that the freight charges originally billed by Willig were discount rates mutually agreed upon by the parties, that it relied upon the agreed-upon rates in tendering its traffic to Willig, that the originally billed rates were paid by complainant without objection from Willig, and that complainant would not have used Willig's transportation services had defendant attempted to charge the undiscounted class rates it now seeks to collect. Attached as Appendix A to Flexcon's rebuttal statement is a list of the undercharges claimed by defendant that contains the freight bill number, bill of lading date, originally billed charge, asserted corrected charge, and balance due amount claimed for each of the shipments at issue. Also attached to complainant's rebuttal statement are copies of five sample rerated freight bills representative of the balance due bills issued by Willig to Flexcon that reflect originally issued freight bill data as well as revised balance due amounts (Appendix C).³ An examination of the sample balance due bills indicates originally billed rates to which were applied discounts of 53% or 54% as well as minimum assessed charges of \$59.00 and \$61.00 and newly assessed charges that eliminate the originally applied discounts or impose minimum charges of \$102.00 or \$131.89.

Flexcon supports its argument with a verified statement from David R. Trujillo, Manager of complainant's Chino Distribution Center. Mr. Trujillo states that he negotiated the originally applied discount rates with Willig,⁴ that Flexcon relied upon the agreed-to discount rates in tendering its shipments to Willig, and that Willig billed and collected the agreed-to discount rates. He indicates that a tariff item applicable to Flexcon shipments providing for the agreed-to discount rates published by Willig (tariff ICC WLIG 603) contained an incorrect commodity description. Mr. Trujillo asserts that the negotiated discount rates were competitive rates similar to those available from other motor carriers offering a comparable service at the time the shipments at issue were moved and that Flexcon would not have used Willig's services had defendant attempted to charge undiscounted class rates.

Defendant maintains that the facts submitted by complainant are not sufficient to sustain an unreasonable practice finding in that written evidence of the original rate charged has not been

³ Flexcon indicated in its opening statement that it was unable to provide copies of the relevant rerated freight bills or a claims list because defendant had not provided any of the "Vertex" documents called for in the Board's August 5th procedural order. Complainant subsequently located copies of these documents, which had been provided by Willig prior to the filing of its court complaint, and attached them to its rebuttal statement.

⁴ Mr. Trujillo also states that in 1993 he was a signatory to a California intrastate special contract between Flexcon and Willig that provided for similar discounts. Trujillo statement Attachment D.

provided and it has not been shown that complainant reasonably relied on that rate. Willig further contends that complainant has failed to establish that the rates it here seeks to assess are unreasonable.

Willig supports its position with an affidavit from Rodney Johnson, President of Trans-Allied Audit Co. Inc. Mr. Johnson states that each of the shipments at issue was originally afforded discounts of 53% and 54% off the appropriate class rates. He indicates that the applied discounts appear to have come from tariff ICC WLIG 603, Item 1417 or Item 1533.⁵ Mr. Johnson asserts that the discount items used were not applicable to the commodities transported in the shipments at issue and were erroneously applied. He states that no applicable discount items apply to the shipments at issue and that the rerated balance due bills accurately set forth the unpaid charges due to Willig.

DISCUSSION AND CONCLUSIONS

We will dispose of this proceeding under section 13711. Accordingly, we do not reach the other issues raised.

Section 13711(a) 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 (1) the applicable rate that was lawfully in effect pursuant to a [filed] tariff . . . and (2) 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 section.”

It is undisputed that Willig no longer transports property. Accordingly, we may proceed to determine whether defendant’s 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 13711(a) determination. Section 13711(f) 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 13711(a) cannot be satisfied unless there is written evidence of a negotiated rate agreement.

Here, the record contains a list of the shipments subject to defendant’s collection efforts that includes originally billed charges and asserted corrected charges, a representative sample of

⁵ Item 1533, which was canceled on August 14, 1993, provided for a 53% discount. Item 1417 provided for a 53% discount that was increased to 54% on March 1, 1993, and minimum charges of \$59.00 and \$61.00 for direct line movements.

the related balance due freight bills that include originally assessed charges, and copies of tariff provisions published by defendant providing for rates that conform with the discount rates originally assessed. 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. Mar. 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 rates and that the rates were agreed upon by the parties).

In this case, the evidence indicates that the parties conducted business in accordance with agreed-to negotiated discount rates that were originally billed by Willig and paid by Flexcon. The consistent application in the original freight bills of assessed charges to which were applied discounts of 53% and 54%, charges that conform with tariff rates applicable solely to Flexcon published by Willig, confirm the unrefuted testimony of Mr. Trujillo and reflect the existence of negotiated rates. The evidence further indicates that Flexcon relied on the agreed-to rates in tendering its traffic to Willig and would not have used the transportation services of Willig had defendant attempted to charge the undiscounted rates it here seeks to assess.

In exercising our jurisdiction under section 13711(b), 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 13711(b)(2)(A)]; (2) whether the shipper tendered freight to the carrier in reasonable reliance upon the offered rate [section 13711(b)(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 13711(b)(2)(C)]; (4) whether the transportation rate was billed and collected by the carrier [section 13711(b)(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 13711(b)(2)(E)].

Here, the evidence establishes that negotiated discount rates were offered to Flexcon by Willig; that Flexcon reasonably relied on the offered discount rates in tendering its traffic to Willig; that Willig did not properly or timely file a tariff providing for such discount rates and has not entered into an agreement for contract carriage; that the negotiated rates were billed and collected by Willig; and that Willig now seeks to collect additional payment based on higher rates filed in a tariff. Therefore, under 49 U.S.C. 13711, we find that it is an unreasonable practice for Willig to attempt to collect undercharges from Flexcon 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 Montali
United States Bankruptcy Court for
the Northern District of California
P.O. Box 7341
San Francisco, CA 94120

Re: Case No. 95-33940 DM
Adv. No. 97 3 138 DM

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

Vernon A. Williams
Secretary