

SERVICE DATE - OCTOBER 14, 1997

SURFACE TRANSPORTATION BOARD¹

DECISION

No. 41548

TELEX COMPUTER PRODUCTS, INC.-PETITION FOR DECLARATORY
ORDER--CERTAIN RATES AND PRACTICES OF
JONES TRUCK LINES, INC.

Decided: October 6, 1997

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 the proceeding.

BACKGROUND

This matter arises out of a court action in the United States District Court for the Northern District of Texas, Dallas Division, in *Jones Truck Lines, inc. v. Telex Computer Products, Inc. n/k/a Memorex Telex Corporation*, Civil Action No. 3:93-CV-0917-G. The court proceeding was instituted by Jones Truck Lines, Inc. (Jones or respondent), a former motor common and contract carrier, to collect undercharges from Telex Computer Products, Inc. n/k/a Memorex Telex Corporation (Telex or petitioner). Jones seeks undercharges of \$84,174.77² plus interest of \$10,561.02 allegedly due, in addition to amounts previously paid, for the transportation of 1,570 shipments of data processing machines and equipment from July 18, 1988, to July 8, 1991. Nearly all of the shipments were less-than-truckload (LTL) movements transported from petitioner's facilities at Tulsa and Broken Arrow, OK, to points in Missouri, Kansas, Iowa, Tennessee, Kentucky, Colorado, Arkansas, Texas, Louisiana, Nebraska, Alabama, Illinois, Mississippi, and New Mexico. By order dated October 26, 1993, the court stayed the proceeding and directed Telex to submit issues of contract carriage and rate reasonableness to the ICC for determination.³

Pursuant to the court order, petitioner, on February 17, 1995, filed a petition for declaratory order requesting the ICC to resolve the court-referred issues. By decision served February 28, 1995, the ICC established a procedural schedule for the submission of evidence on non-rate reasonableness

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 During the course of the underlying court proceeding, respondent amended two bills and canceled seven others, thus revising the principal claim to \$83,835.62.

³ The court directed administrative termination of the proceeding, without prejudice to the right of the parties to reopen within 30 days of the agency's determination of the issues raised.

issues. Petitioner filed its opening statement on June 8, 1995, respondent filed a reply statement on July 7, 1995, and petitioner filed a rebuttal statement on July 24, 1995. Petitioner, in its opening statement, asserts that the shipments in question were transported by Jones under its contract carrier authority pursuant to transportation agreements. Telex further asserts that respondent's attempt to collect undercharges constitutes an unreasonable practice under section 2(e) of the NRA.

Telex supports its arguments with the affidavit of Michael Bange, president of Champion Transportation Services, Inc., a transportation consultant retained by petitioner. Mr. Bange's affidavit includes among its attachments a representative sample of "balance due" bills issued by respondent that reflect originally issued freight bill data as well as "corrected" balance due amounts (Exhibits A and B). It also includes executed documents bearing the signatures of representatives of Jones and Telex entitled, respectively, "Transportation Agreement" (TA) (Exhibit E, to be effective July 27, 1987) and "Contract Carrier Agreement" (CCA) (Exhibit F, dated September 27, 1989). The TA indicates that transportation services are to be performed by Jones under its contract carrier Permit No. MC-111231 (Sub-No. 382). It provides for the application of a 50% discount off class rates for outbound shipments from the Tulsa, OK facility to the carrier's direct service points, and a 45% discount off class rates for inbound shipments to Tulsa from the carrier's direct service points, subject to a minimum charge of \$40.00. The CCA provides for a 60% discount off class rates in effect January 2, 1989, for outbound shipments, prepaid and collect, from all of petitioner's facilities to the carrier's direct service points as well as for inbound collect shipments to petitioner's facilities from Jones' direct service points. Additionally, it provides for a 30% discount off class rates for outbound prepaid and collect joint line shipments and a 60% discount on third party payor shipments. All shipments covered by the CCA are subject to a \$38.00 minimum charge.⁴

Jones argues that the shipments at issue moved in common carriage, not contract. It points to the language of the TA⁵ itself--that its "sole purpose is to provide reductions and allowances" from Jones' tariffs and that "provisions of common carriage apply to all shipments"--to establish that common carrier rates apply. To determine the appropriate common carrier rate, Jones' auditors⁶ analyzed its lawfully filed tariffs. They concluded that the discounts originally granted to Telex were not supported by an applicable tariff.⁷ Jones further argues that the auditors determined that the tariff offering the discount required written notification of participation therein, which Telex had failed to provide. Respondent maintains, therefore, that the revised bills reflect the appropriate charge for the services rendered.

⁴ Mr. Bange also attaches, as exhibits G and H, supplements to the CCA, dated in 1990 and 1991, and signed by both parties, which extend and slightly modify the terms of the original CCA.

⁵ Jones, in both its arguments and verified statements, refers only to the TA submitted by petitioner; the CCA and its supplements are completely ignored, although they differ significantly from the TA.

⁶ The audit was performed by Carrier Services, Inc. (CSI), a rate audit company authorized to provide rate audit and collection services on behalf of Jones as debtor in possession. Mr. Stephen L. Swezey, Senior Transportation Consultant for CSI, submitted a verified statement in this proceeding, in which he adopted the verified statement of Charles E. Shinn, another CSI analyst, that had been submitted in the underlying court case.

⁷ The auditors concede that there was a discount tariff applicable to Telex's shipments effective from September 13, 1988, to November 14, 1989. Balance due bills were not issued for shipments moved during this time period; rather, they were issued only for movements before and after this period.

Respondent also claims that section 2(e) of the NRA does not governs this matter. Jones contests the applicability of that provision on both statutory and constitutional grounds.⁸

DISCUSSION AND CONCLUSIONS

We dispose of this proceeding under section 2(e) of the NRA.⁹ 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 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."¹⁰

⁸ Jones 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 Jones. *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. 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).

⁹ We recognize that the court referred this case on the issues of rate reasonableness and common/contract carriage for our consideration. Nevertheless, our use of section 2(e)'s "unreasonable practice" provisions to resolve these matters 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 the more subjective rate reasonableness provisions. *See 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).

¹⁰ 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. Thus, the remedies in section 2(e) may be invoked as to all the shipments in this proceeding, including those shipments that were transported after September 30, 1990.

It is undisputed that Jones no longer transports property.¹¹ Accordingly, we may proceed to determine whether Jones' 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 a 1987 transportation agreement and a 1989 contract agreement signed by the parties confirming the existence of a negotiated discount rate as well as written supplements to the 1989 document also signed by both parties. In addition, petitioner has submitted representative sample documents indicating that the original freight bills issued by respondent consistently applied rates that reflected the stated discounts and minimum charges called for in the 1987 and 1989 agreements. 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*).¹² See *William J. Hunt, Trustee for Ritter Transportation, Inv. 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 rates originally billed by the carrier and paid for by the shipper were rates agreed to in negotiations between the parties. The original freight bills issued by the carrier confirm that the rates set forth in the 1987 and 1989 agreements reflect the existence of a negotiated rate.

¹¹ Board records confirm that Jones' motor carrier operating rights were revoked on February 18, 1992.

¹² Jones, at pp. 16 and 17 of its opening statement 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 Jones, contemplates that freight bills reflecting the negotiated rate were issued by the carrier, and the Board must examine these freight bills to determine if section 2(e) has been satisfied. Jones 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 was 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*, at 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.

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 on 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, Jones concedes at page 14 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. We agree. The evidence establishes that discounted rates were offered to Telex by Jones; that Telex tendered freight in reliance on the agreed-to rate; that the negotiated rate was billed and collected by Jones; and that Jones 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 Jones to attempt to collect undercharges from Telex 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 service date.

3 A copy of this decision will be mailed to:

The Honorable A. Joe Fish
United States District Court for the
Northern District of Texas, Dallas Division
Earl Cabell Federal Building and
U.S. Courthouse
1100 Commerce Street, Room 15D6L
Dallas, TX 75242

Re: Civil Action No. 3:93-CV-0917-G

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary