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SERVICE DATE - MARCH 10, 1997

SURFACE TRANSPORTATION BOARD¹

DECISION

Docket No. 40955

G.P.R. COMPANY

v.

JOHN W. HARGRAVE, TRUSTEE IN BANKRUPTCY FOR
SABER TRANSPORT, INC.

Decided: February 27, 1997

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

This proceeding arises out of the efforts of John W. Hargrave, Trustee in Bankruptcy for Saber Transport, Inc. (Saber or defendant), to collect undercharges in the amount of \$5,930.77 (including interest) for services rendered by Saber to G.P.R. Company (G.P.R. or complainant) in transporting seven shipments between August 1989 and November 1989. The shipments originated at G.P.R.'s facility in Spring City, PA and moved to Barker, NY; Birmingham, AL; Greenville, SC; Montgomery, AL; and Raleigh, NC. Saber filed suit to collect the alleged undercharges in the United States District Court for the Eastern District of Pennsylvania in Civil Action No. 92-CV-3632, John W. Hargrave, Trustee in Bankruptcy for Saber Transport, Inc. v. G.P.R. Company. By order dated March 11, 1993, the court stayed the proceeding and directed complainant to promptly submit for determination by the ICC matters within the primary jurisdiction and particular expertise of the agency.

Pursuant to the court order, complainant, on March 22, 1993, filed a complaint requesting that the ICC determine whether the tariff rates sought to be applied by Saber were applicable, reasonable, and lawful. The complaint includes a copy of Saber's court filing and an attached exhibit listing the seven shipments for which undercharges are sought. The list shows the "pro number" (freight bill number), date of shipment, undercharge

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.

amount, interest claimed, and amount due. By decision served May 5, 1993, the ICC established a procedural schedule for the submission of evidence on non-rate reasonableness issues.

G.P.R. filed its opening statement on July 7, 1993, asserting that the subject shipments moved under contracts with Saber and that the service performed was contract carriage. Complainant also submitted a verified statement from Albert Roberts, G.P.R.'s Vice-President, which lists the seven shipments for which undercharges are claimed and identifies the destination, undercharge amount, interest claimed, and amount due for each of the shipments. Mr. Roberts also submitted copies of two letters dated July 17, 1989, and September 22, 1989, from Saber's Regional Sales Manager to G.P.R. setting forth truckload rates from Spring City, PA, to Birmingham, AL; Charlotte, NC; Montgomery, AL; Greenville, SC; and Raleigh, NC. Mr. Roberts asserts that six of the shipments moved under rates designated in these letters and that the seventh shipment to Barker, NY, moved under a similar orally agreed-to arrangement. G.P.R. did not submit freight bills or shipping documents for these shipments.

Saber, in its response filed August 19, 1993, argues that the service provided was not contract carriage. It contends that the two letters referred to by G.P.R. do not establish the existence of a contract carrier arrangement between the parties, but can be characterized, at best, as solicitation letters. Saber did not submit any evidence supporting its undercharge claims. G.P.R. filed its rebuttal argument on October 5, 1993.

On December 3, 1993, the NRA became law. The NRA substantially restored the ability of the ICC (and now the Board) to find that assessment of undercharges is an unreasonable practice, and it provided several new grounds on which shippers may defend against payment of undercharges.² By decision served December 22, 1993, the ICC established a procedural schedule permitting the parties to invoke the alternative procedure under the section 2(e) of the NRA and to submit new evidence in light of the new law.

On March 11, 1994, G.P.R. submitted a supplemental statement indicating that the NRA was applicable and that the evidence it previously submitted would establish a defense under the NRA. On April 12, 1994, Saber responded with legal argument that the letters G.P.R. submitted were inadequate to establish a defense under the NRA.

By decision served August 6, 1996, the record in this proceeding was reopened to allow for the submission of supplemental evidence sufficient to enable the Board to evaluate the merits of the claimed undercharges. The parties were asked to submit freight bills or alternative written materials which would reflect the original shipment charges assessed by Saber and paid by G.P.R., as well as balance due bills showing the tariff charges and the basis for those charges Saber is seeking to collect.

² The ICC's prior unreasonable practice policy was invalidated by the Supreme Court in Maislin Indus. v. Primary Steel, 497 U.S. 116 (1990).

G.P.R. filed a supplementary statement on August 28, 1996, which included copies of the freight bill and balance due bill for each shipment and a copy of Saber's tariff, ICC SBTS 201A, Item 3600, cited as the basis of the undercharge claims.

On September 11, 1996, Saber filed its supplementary response asserting that G.P.R. has failed to meet the statutory requirements needed to support a section 2(e) finding. Specifically, defendant argues that complainant has not provided written evidence of the original rate agreed upon and charged or established that it reasonably relied on such a rate.

DISCUSSION

We dispose of this proceeding under section 2(e) of the NRA. Accordingly, we do not reach 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."³

It is undisputed that Saber is no longer an operating carrier. Accordingly, we may proceed to determine whether Saber's 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 to 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.

In E.A. Miller, Inc.--Rates and Practices of Best, 10 I.C.C.2d 235 (1994), the ICC held that the original freight bills embodying the negotiated rate meet the "written evidence" standard of section 2(e). In Johnson Welding & Manufacturing Co. et al. v. Bankr. Estate of Murphy Motor Freight Lines, Inc., No. 40716 (ICC served May 9, 1995), the ICC explained that evidence of the existence of freight bills embodying the negotiated rate, or some other contemporaneous writing evidencing the existence of a negotiated rate satisfies the section 2(e) standard.

³ 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 exemption 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.

Here, G.P.R. has satisfied the written evidence requirement. The two letters from Saber identify specific rates discussed by the parties for the movement of traffic from G.P.R.'s Spring City facility to Birmingham, AL; Charlotte, NC; Montgomery, AL; Greenville, SC; and Raleigh, NC. The six freight bills submitted by G.P.R. for the shipments transported to those points show that the rates originally assessed by Saber are in close conformity with or identical to the flat rates described in the letters. Neither of the two letters listed a flat rate for shipments to the Barker, NY destination point for the seventh shipment. However, the freight bill for the Barker, NY shipment submitted by G.P.R. confirms the testimony of Mr. Roberts that the parties orally agreed to a \$450 flat rate, the rate originally assessed by Saber for the shipment to Barker, NY. We find the letters and freight bills sufficient to satisfy the written evidence requirement of section 2(e).

In exercising our jurisdiction under 2(e)(2), we are directed to consider five factors: (1) whether the shipper was offered a transportation rate by the carrier other than a 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, the evidence establishes that G.P.R. was offered a negotiated rate by Saber. G.P.R. tendered freight in reasonable reliance on the offered rate. Saber billed and collected the negotiated rate. Now, Saber is seeking 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 Saber to attempt to collect undercharges from G.P.R. 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 March 10, 1997.
3. A copy of this decision will be mailed to:

United States District Court,
Eastern District of Pennsylvania
5614 U.S. Courthouse
Philadelphia, PA 19106

Re: Civil Action No. 92-CV-3632

By the Board, Chairman Morgan and Vice Chairman Owen.

No. 40955

Vernon A. Williams
Secretary