29163 SERVICE DATE - MAY 5, 2000
SEC

SURFACE TRANSPORTATION BOARD

DECISION

STB No. 42004

NORTH PACIFIC LUMBER COMPANY--PETITION FOR DECLARATORY ORDER--CERTAIN RATES AND PRACTICES OF AMERICANA EXPRESSWAYS, INC.

Decided: May 2, 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 District Court for the District of Utah, Central Division in Americana Expressways, Inc., Kenneth A. Rushton, Trustee, v. North Pacific Lumber Company, Civil No. 93-C-1024S, Adv. Pro. No. 93PC-2312. The court proceeding was instituted by Kenneth A. Rushton, as Trustee for American Expressways, Inc. (Americana or respondent), a former motor common and contract carrier, to collect undercharges from North Pacific Lumber Company (NPLC or petitioner). Americana seeks undercharges of $34,224,55 (plus interest) allegedly due, in addition to amounts previously paid, for services rendered in transporting 109 shipments of such commodities as lumber, decking, molding, fertilizer, salt and soda ash between December 30, 1988, and September 21, 1992. The shipments were transported from points in Oregon, Washington, Montana, Idaho, Utah, California, Missouri, New Mexico, Wisconsin, and Minnesota, to points in 21 states. By order dated February 19, 1997, the court stayed the proceeding and referred the matter to the Surface Transportation Board (Board) for consideration of the issues raised.

Pursuant to the court order, NPLC, on June 9, 1997, filed a petition for declaratory order requesting the Board to resolve all disputed issues raised in this proceeding within its primary jurisdiction. By decision served June 16, 1997, the Board issued a procedural schedule. On December 15, 1997, petitioner filed its opening statement. Respondent failed to submit a reply and indeed has failed to make an appearance or otherwise participate in any aspect of this proceeding.[1]

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[1] Under 49 CFR 1112.3, a party that fails to comply with the schedule for submission of verified statements is deemed to be in default and to waive any further participation in the proceeding. The failure of Americana to participate in this agency proceeding should bind it in the court proceeding to the record developed before the agency. See Carriers Traffic Serv. v. Toastmaster, 707 F. Supp. 1498, 1505-06 (N.D. Ill. 1988) (carrier on court referral must "live with the record it has made (or

(continued...)

Petitioner asserts that respondent's attempt to collect additional freight charges constitutes an unreasonable practice under section 13711(a), that certain of the shipments at issue were transported in contract carriage pursuant to a duly executed contractual agreement, that the tariffs on which respondent bases its undercharge claims are not applicable to those shipments at issue transported subsequent to Americana's filing for bankruptcy, and that the rates respondent now seeks to assess are unreasonable. Petitioner maintains that the freight charges originally billed by Americana and paid by NPLC were in accord with rates mutually agreed to by the parties, and that NPLC relied on the agreed-upon rates in tendering its traffic to Americana to the exclusion of services provided by other carriers.

NPLC supports its assertions with an affidavit from Michael Bange, president of Champion Transportation Services, Inc., a transportation consultant retained by petitioner who conducted an audit and analysis of the balance due bills and claims of respondent. Mr. Bange states that respondent's original billings for the subject shipments were based on the application of flat rates, mileage rates, or dollars per hundred weight. He asserts that respondent issued corrected freight bills that disallowed the originally billed charges and re-rated the shipments based on tariffs that were either adopted or published by Americana that, in most instances, were substantially higher than the charges originally assessed and paid. Attached to Mr. Bange's affidavit are 31 examples of the "balance due" bills issued by respondent that reflect originally issued freight bill data as well as "corrected" balance due amounts (Exhibit B). An examination of the sample balance due bills indicates that the re-rated charges were applied on the basis of dollars per hundred weight. Also attached to Mr. Bange's affidavit is a copy of a document signed by the parties dated October 31, 1990, entitled "Contract Carrier Agreement" that refers in item 10 to a rate schedule (not submitted with the document) that is subject to modification by mutual agreement of the parties (Exhibit E).

DISCUSSION AND CONCLUSIONS

We will dispose of this proceeding under section 13711. Accordingly, we do not reach the other issues raised.[2]

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[1](...continued)
failed to make)" before the Board when pursuing its undercharge proceeding in the courts).

[2] Typically, a court hearing undercharge cases will direct the shipper to bring to the Board all defenses that have been raised in court; as a result, in addition to section 13711 issues, petitioners before the Board typically raise issues of contract carriage, rate applicability and rate reasonableness. When it is able to resolve a case fully on section 13711 grounds, however, the Board does not address those other more complex issues. See, e.g., Rhineland Paper Company v. The Bankruptcy Estate of Murphy Motor Freight Lines, Inc., No. 40836 (STB served Oct. 23, 1997). We will not address the other more complex issues raised here because our section 13711 findings fully resolve the question of petitioner's liability for the rates sought.

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 Americana no longer transports property.[3] Accordingly, we may proceed to determine whether respondent'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 listing of shipments subject to respondent's collection efforts (Bange Exhibit A); a representative sample of the balance due bills issued by respondent indicating originally assessed charges substantially below those respondent here seeks to assess that conform to rates assertedly agreed to by the parties; and a signed document dated October 31, 1990, indicating agreement between the parties with respect to 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). See William J. Hunt, Trustee for Ritter Transportation, Inc. v. Gantrade Corp., C.A. No. H-89-2379 (S.D. Tex. March 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 rate 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 rates that were originally billed by Americana and paid by NPLC. The consistent application in the original freight bills of charges based on a variety of flat rates, mileage rates, and rates in dollars per hundred weight that resulted in billings substantially below the charges respondent now seeks to assess supports petitioner's assertions and reflects the existence of negotiated rates. The record further indicates that NPLC relied on the agreed-to rates in tendering its traffic to Americana, and that NPLC would not have used Americana's services had respondent attempted to charge the rates it here seeks to assess.

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[3] See Bange Exhibit C at 4 and 10.

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 unrefuted evidence submitted by petitioner establishes that negotiated rates were offered to NPLC by Americana; that NPLC reasonably relied on the offered rates in tendering its traffic to Americana; that Americana did not properly or timely file a tariff providing for such rates and has not entered into an agreement for contract carriage applicable to all of the shipments at issue; that the negotiated rates were billed and collected by Americana; and that Americana 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 Americana to attempt to collect undercharges from NPLC 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 date of service.

3. A copy of this decision will be mailed to:

The Honorable David Sam
United States District Court for
the District of Utah, Central Division
U.S. Courthouse
350 South Main Street, Room 148
Salt Lake City, UT 84101

Re: Civil No. 93-C-1024S
Adv. Pro. No. 93PC-2312

STB No. 42004

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

Vernon A. Williams
Secretary