

SURFACE TRANSPORTATION BOARD<sup>1</sup>

DECISION

No. 41525

STATIONERS DISTRIBUTING COMPANY  
--PETITION FOR DECLARATORY ORDER--  
CERTAIN RATES AND PRACTICES OF NORTH PENN TRANSFER, INC.

Decided: June 23, 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 Illinois in *North Penn Transfer, Inc. v. Stationers Distributing Company*, No. 94 C 796. The court proceeding was instituted by North Penn Transfer, Inc. (North Penn or respondent), a former motor common and contract carrier, to collect undercharges from Stationers Distributing Company (Stationers or petitioner). North Penn seeks undercharges of \$13,491.94 (plus interest) for the transportation of 578 shipments of miscellaneous office supplies and equipment between February 10, 1989, and January 2, 1990.<sup>2</sup> The shipments moved between Stationers' facility at Jessup, MD, and points in New Jersey, Pennsylvania, New York, Delaware, Virginia, and the District of Columbia. By order dated October 18, 1994, the court stayed the proceeding for the purpose of enabling petitioner to submit issues of rate reasonableness and unreasonable practice to the ICC for resolution.<sup>3</sup>

Pursuant to the court order, petitioner, on January 5, 1995, filed a petition for declaratory order requesting the ICC to resolve all disputed issues within its primary jurisdiction relating to North Penn's undercharge claims. By decision served January 17, 1995, the ICC established a procedural schedule for the submission of evidence on non-rate reasonableness issues. On June 14,

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<sup>1</sup> The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (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.

<sup>2</sup> In the court action, North Penn claimed undercharges of \$13,518.36 based on 582 Balance due or corrected freight bills. A re-audit of the freight bills during the court proceeding resulted in the cancellation of four balance due bills and a reduction in the amount of claimed undercharges to \$13,491.94.

<sup>3</sup> The court declined at this stage of the proceeding to dismiss undercharge claims pertaining to 28 of the subject shipments that were transported between Jessup and other points in Maryland involving claims totaling \$591.83. As intrastate movements, these shipments are not subject to Board jurisdiction.

1995, Stationers 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.<sup>4</sup>

Petitioner asserts that respondent's attempt to collect undercharges constitutes an unreasonable practice under section 2(e) of the NRA. Petitioner supports its argument with an affidavit from Michael Bange of Champion Transportation Services, Inc., a transportation consultant retained by petitioner. Mr. Bange's affidavit includes among its attachments a representative sample of the "balance due" bills issued by respondent that reflect originally issued freight bill data as well as the "corrected" balance due amounts (Appendices A and B). Mr. Bange states that nearly all of the original freight bills for the subject shipments indicate the application of a 40 or 45 percent discount off class 60 rates, subject to a minimum charge floor of \$40.00, for outbound shipments from Jessup, and various percentage discounts off applicable class rates, subject to a minimum charge floor of \$40.00 for inbound shipments to that point. Also attached as Exhibit F to Mr. Bange's affidavit is a letter dated June 21, 1989, from Darwin R. Mininger, Tariff Manager for North Penn, to petitioner that states:

Please be advised that effective June 26, 1989 your discount will be 45%.  
All other provisions of your discount will remain the same . . . .

We trust this will allow you to continue shipping by North Penn Transfer and we look forward to a long and prosperous relationship.

From his examination of the complaint filed by respondent in the court proceeding, the responses provided by North Penn to petitioner's discovery requests, and the "balance due" bills, Mr. Bange maintains that petitioner was offered a freight rate that was not properly or timely filed in a tariff; that petitioner tendered freight in reliance upon the offered rate; and that petitioner was originally billed and paid the offered rate. Mr. Bange is of the opinion that these circumstances provide the basis for a finding of unreasonable practice.

#### DISCUSSION AND CONCLUSIONS

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

Section 2(e) 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 purposes of avoiding application of this subsection."<sup>5</sup>

It is undisputed that North Penn no longer transports property.<sup>6</sup> Accordingly, we may proceed to determine whether North Penn's attempt to collect undercharges (the difference between the applicable filed tariff rate and the rate originally collected) is an unreasonable practice.

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<sup>4</sup> By decision served August 23, 1995, the ICC directed North Penn either to file a reply or to show cause why this proceeding should not be decided on the existing record. North Penn did not respond.

<sup>5</sup> 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 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.

<sup>6</sup> Respondent in its answers to petitioner's request for admission and accompanying interrogatories dated March 2, 1994, submitted in the court proceeding, acknowledges that it has ceased motor carrier operations (Bange Affidavit Exhibit E at 20).

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 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 2(e) cannot be satisfied unless there is written evidence of a negotiated rate.

Here, the record contains a June 1989 letter advising of an increase in the amount of discount to be applied by North Penn when transporting Stationers' traffic, confirming by inference the existence of a North Penn agreement to provide petitioner with discounted rates. In addition, petitioner has submitted representative balance due bills indicating the consistent application of a discount and/or minimum charge in the freight bills originally issued by respondent that reflect the existence of a negotiated rate. 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. 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 unrefuted that the parties conducted business in accordance with agreed-to negotiated discount rates. North Penn's intention to provide discounted rates to Stationers is also revealed in documents submitted in the court proceeding, where North Penn admitted that all of the freight charges originally assessed for the shipments at issue applied discounts to otherwise applicable tariff rates.<sup>7</sup> In other words, the originally billed rates were not the result of unplanned billing mistakes but reflect a deliberate intention by North Penn to encourage Stationers to use its service by means of offering discounts to its filed tariff 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 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 unrefuted evidence submitted by petitioner establishes that a negotiated rate was offered Stationers by North Penn; that Stationers tendered freight to North Penn in reliance on the negotiated rate; that the negotiated rate was billed and collected by North Penn; and that North Penn 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 North Penn to attempt to collect the sought undercharges from Stationers 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:

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<sup>7</sup> See North Penn's answers 6 and 9 to Stationers' request for admission (Bange affidavit Exhibit E at 4 and 5).

No. 41525

The Honorable John A. Nordberg  
United States District Court for the Northern District  
of Illinois, Eastern Division  
Courthouse  
Dearborn Street  
Chicago, IL 60604

U.S.  
219 South

Re: No. 94 C 796

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams  
Secretary