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SERVICE DATE - JANUARY 12, 1998

SURFACE TRANSPORTATION BOARD

DECISION

STB No. 41701¹

ALBERTO-CULVER COMPANY--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF
ST. JOHNSBURY TRUCKING COMPANY, INC.

STB No. 41705

AGWAY, INC.--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF
ST. JOHNSBURY TRUCKING COMPANY, INC.

STB No. 41706

AMPHENOL CORPORATION--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF
ST. JOHNSBURY TRUCKING COMPANY, INC.

STB No. 41731

THE BON-TON STORES, INC.--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF
ST. JOHNSBURY TRUCKING COMPANY, INC.

STB No. 41768

CHISWICK TRADING, INC.--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF
ST. JOHNSBURY TRUCKING COMPANY, INC.

STB No. 41791

DRESSER-RAND POWER, INC.--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF
ST. JOHNSBURY TRUCKING COMPANY, INC.

STB No. 41793

¹ These proceedings are not consolidated. A single decision is being issued for administrative convenience.

STB No. 41701 , et al.

GENERAL FOODS CORP.--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF
ST. JOHNSBURY TRUCKING COMPANY, INC.

STB No. 41794

GENERAL MILLS, INC.--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF
ST. JOHNSBURY TRUCKING COMPANY, INC.

STB No. 41796

DUNLOP TIRE CORPORATION--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF
ST. JOHNSBURY TRUCKING COMPANY, INC.

STB No. 41800

INGERSOLL-RAND COMPANY--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF
ST. JOHNSBURY TRUCKING COMPANY, INC.

STB No. 41801

HIMARK ENTERPRISES, INC.--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF
ST. JOHNSBURY TRUCKING COMPANY, INC.

STB No. 41804

SIEBE TRANSPORTATION COUNCIL AND ROBERTSHAW CONTROLS
COMPANY--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF
ST. JOHNSBURY TRUCKING COMPANY, INC.

STB No. 41805

HULS AMERICA, INC.--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF
ST. JOHNSBURY TRUCKING COMPANY, INC.

STB No. 41808

STB No. 41701 , et al.

KEYSTONE LIGHTING CORP. D/B/A COLUMBIA LIGHTING
--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF
ST. JOHNSBURY TRUCKING COMPANY, INC.

STB No. 41809

GREENMAN BROS., INC.--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF
ST. JOHNSBURY TRUCKING COMPANY, INC.

STB No. 41822

PLASTIC DISTRIBUTION CORP. N/K/A M. A. HANNA--PETITION FOR
DECLARATORY ORDER--CERTAIN RATES AND PRACTICES OF
ST. JOHNSBURY TRUCKING COMPANY, INC.

STB No. 41830

MITA COPYSTAR AMERICA, INC.--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF
ST. JOHNSBURY TRUCKING COMPANY, INC.

STB No. 41831

MOBIL CHEMICAL COMPANY, INC.--PETITION FOR DECLARATORY
ORDER--CERTAIN RATES AND PRACTICES OF
ST. JOHNSBURY TRUCKING COMPANY, INC.

STB No. 41834

MORRISON-KNUDSEN COMPANY, INC.--PETITION FOR DECLARATORY
ORDER--CERTAIN RATES AND PRACTICES OF
ST. JOHNSBURY TRUCKING COMPANY, INC.

STB No. 41701 , et al.

STB No. 41835

MONSANTO COMPANY--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF
ST. JOHNSBURY TRUCKING COMPANY, INC.

STB No. 41837

MOTION CONTROL INDUSTRIES, INC.--PETITION FOR DECLARATORY
ORDER--CERTAIN RATES AND PRACTICES OF
ST. JOHNSBURY TRUCKING COMPANY, INC.

STB No. 41838

KRAFT FOODS, INC.--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF
ST. JOHNSBURY TRUCKING COMPANY, INC.

STB No. 41840

THE NIPPERT COMPANY D/B/A COOPER METAL PRODUCTS--PETITION
FOR DECLARATORY ORDER--CERTAIN RATES AND PRACTICES OF
ST. JOHNSBURY TRUCKING COMPANY, INC.

STB No. 41841

MITSUBISHI ELECTRONICS AMERICA, INC.--PETITION FOR
DECLARATORY ORDER--CERTAIN RATES AND PRACTICES OF
ST. JOHNSBURY TRUCKING COMPANY, INC.

STB No. 41846

PACCAR, INC.--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF
ST. JOHNSBURY TRUCKING COMPANY, INC.

STB No. 41857

PHILLIPS ELECTRONIC N/A--PETITION FOR
DECLARATORY ORDER--CERTAIN RATES AND PRACTICES OF
ST. JOHNSBURY TRUCKING COMPANY, INC.

STB No. 41874

STB No. 41701 , et al.

RALSTON PURINA COMPANY D/B/A/ BEECH-NUT NUTRITION
--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF
ST. JOHNSBURY TRUCKING COMPANY, INC.

STB No. 41879

SALLY BEAUTY COMPANY, INC.--PETITION FOR DECLARATORY
ORDER--CERTAIN RATES AND PRACTICES OF
ST. JOHNSBURY TRUCKING COMPANY, INC.

STB No. 41898

THE STANLEY WORKS--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF
ST. JOHNSBURY TRUCKING COMPANY, INC.

STB No. 41902

WEGMANS FOOD MARKETS, INC., CHASE- PITKIN DIVISION--PETITION
FOR DECLARATORY ORDER--CERTAIN RATES AND PRACTICES OF
ST. JOHNSBURY TRUCKING COMPANY, INC.

Decided: December 15, 1997

We find that collection of the undercharges sought in these proceedings 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 these proceedings.

BACKGROUND

These matters arises out of court actions in the United States District Court for the Southern District of New York identified in the Appendix.² The court proceedings were instituted by St. Johnsbury Trucking Co., Inc. (St. Johnsbury or respondent),³ a former motor common and contract

² The Appendix lists these proceedings, identifying the Board docket numbers, the names of the shippers\petitioners, and the respective district court and bankruptcy court docket numbers for each.

³ On June 15, 1993, St. Johnsbury filed for bankruptcy under Chapter 11 of the United
(continued...)

carrier, to collect undercharges from the shippers identified in the Appendix (shippers or petitioners). St. Johnsbury seeks undercharges of varying amounts (plus interest) allegedly due, in addition to amounts previously paid by the shippers, for the interstate transportation of shipments from and to various points in the United States. By order dated March 29, 1996, the district court directed petitioners to initiate administrative proceedings before the Board for the purpose of resolving issues of tariff applicability, unreasonable practice, contract carriage, and rate reasonableness.⁴

Pursuant to the court order, petitioners filed petitions for declaratory order requesting that the Board resolve the issues raised by the court. In each case, the Board issued a procedural schedule, and petitioners filed their opening statements. In each case, St. Johnsbury failed to submit a timely reply.⁵

Petitioners assert that respondent's attempts to collect the claimed undercharges constitute an unreasonable practice under section 13711(a). Certain shippers also contend that the movements were not in common carriage, but by contract carriage, and that the rates respondent now seeks to collect are unreasonable. Petitioners maintain that the freight charges originally billed by St. Johnsbury and paid by the shippers were rates mutually agreed upon by the parties, and that each of them relied upon the agreed-upon rates in tendering its traffic to St. Johnsbury to the exclusion of services provided by other carriers.

Each shipper supports its argument with an affidavit from Michael Bange of Champion Transportation Services, Inc., a transportation consultant retained by petitioners. Attached to each of Mr. Bange's affidavits is a copy of the original court complaint filed by respondent against each respective shipper, listing each of respondent's undercharge claims by freight bill number, together

³(...continued)

States Bankruptcy Code, in the United States Bankruptcy Court for the Southern District of New York, Case No. 93 B 43136 (FGC).

⁴ The court order was issued in a consolidated proceeding captioned *St. Johnsbury Trucking Co., Inc. v. Morrison Knudsen Co., Inc.*, bearing the docket number 95 Civ. 1344 (SS).

⁵ St. Johnsbury's replies were due at various times in 1997. By letters filed in October 1997, respondent requested extensions of time to file its replies in some of these cases. Because each of these extension requests was egregiously late, in many cases having been filed months after the statements were due, each of the requests was denied by decision served November 5, 1997. St. Johnsbury's failure to participate in these proceedings should bind it in the court proceedings to the record developed at 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 failed to make)" before the [Board] when pursuing its undercharge proceeding in the courts). We should point out that, even in those cases in which St. Johnsbury has filed evidence and argument, it has been unable to rebut petitioners' showings that collection of its sought rates would constitute an unreasonable practice.

with the original billing date and balance due amount claimed. In addition, each of Mr. Bange's affidavits includes some or all of the "balance due" bills issued by respondent to each respective shipper which reflect originally issued freight bill data as well as revised balance due amounts. In each case, Mr. Bange states that his review of balance due bills issued by respondent⁶ for the shipments indicates that higher charges were arrived at by various means including disallowing discounts off rates originally applied, re-rating shipments at higher class or commodity rates, and applying contract rates.

DISCUSSION AND CONCLUSIONS

We will dispose of this proceeding under section 13711. Accordingly, we do not reach the other issues raised.⁷

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 St. Johnsbury no longer transports property.⁸ Accordingly, we may proceed to determine whether the respondent's attempt to collect undercharges (the difference between the applicable filed rate and the negotiated rate) in each case 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)

⁶ Some of St. Johnsbury's claims included an additional amount for intrastate movements. These claims were subsequently dismissed. *See St. Johnsbury Trucking Co., Inc. v. Mead Johnson*, 199 B.R. 84 (S.D.N.Y. 1996).

⁷ Typically, a district 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., Rhinelander Paper Company v. The Bankruptcy Estate of Murphy Motor Freight Lines, Inc.*, No. 40837 (STB served October 23, 1997). We will not address the other issues raised here because our section 13711 findings fully resolve the question of petitioner's liability for the rates sought.

⁸ Prior to filing for bankruptcy, St. Johnsbury held motor common and contract carrier operating authority, issued by the Interstate Commerce Commission under various sub-numbers of No. MC-108473.

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, in each case, Mr. Bange has submitted a list of the shipments subject to respondent’s collection efforts, as well as many, if not all, of the revised freight bills. Those representative revised freight bills indicate that the rates originally charged were consistently and substantially below those that respondent is seeking to assess and were in conformity with the rates assertedly agreed to by the parties. 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) (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).

Not only do these written freight bills satisfy the “written evidence” requirement of the statute, but, together with Mr. Bange’s testimony, they provide evidence establishing that the original rates assessed by St. Johnsbury and paid by the shippers were rates agreed to in negotiations between the parties. The original freight bills issued by respondent for the subject shipments support petitioners’ contentions and reflect the existence of negotiated rates. The testimony indicates that petitioners relied on the St. Johnsbury agreement to charge the negotiated rates, and that petitioners would not have used St. Johnsbury had it quoted the rates it now seeks to collect.

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)].

In all these cases, the unrefuted evidence submitted by petitioners establishes that a negotiated rate was offered to the petitioners by St. Johnsbury; that the petitioners reasonably relied on the offered rate in tendering their traffic to St. Johnsbury; that the negotiated rate was billed and collected by St. Johnsbury; and that St. Johnsbury now seeks to collect additional payment based on a higher rate filed in a tariff.

Therefore, under 49 U.S.C. 13711, we find that it is an unreasonable practice for St. Johnsbury to attempt to collect undercharges from the petitioners for transporting the shipments at issue in these proceedings.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. These proceedings are discontinued.
2. This decision is effective on the service date.
3. A copy of this decision will be mailed to:

The Honorable Sonia Sotomayor
United States District Court for
the Southern District of New York
500 Pearl Street, Room 1340
New York, NY 10038

Re: Cases listed in the Appendix.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

APPENDIX A

STB Docket No.	Petitioner	Adv. Proc. No.	Civ. No.
41701	Alberto-Culver Company	95/9332A	95-CIV-5218 (SS)
41705	Agway, Inc.	95/9330A	95-CIV-5213 (SS)
41706	Amphenol Corporation	95/9562A	95-CIV-5518 (SS)
41731	The Bon-Ton Stores, Inc.	95/9471A	95-CIV-5507 (SS)
41768	Chiswick Trading, Inc.	95/9229A	95-CIV-5680 (SS)
41791	Dresser-Rand Power, Inc.	95/9555A	95-CIV-5681 (SS)
41793	General Foods Corp.	95/9386A	95-CIV-5217 (SS)
41794	General Mills, Inc.	95/9567A	95-CIV-5516 (SS)
41796	Dunlop Tire Corporation	95/9199A	95-CIV-7065 (SS)
41800	Ingersoll-Rand Company	95/9558A	95-CIV-5684 (SS)
41801	Himark Enterprises, Inc.	95/9382A	95-CIV-4875 (SS)
41804	Siebe Transportation Council and Robertshaw Controls Company	95/9470A	95-CIV-5522 (SS)
41805	Huls America, Inc.	95/9564A	95-CIV-6080 (SS)
41808	Keystone Lighting Corp. d/b/a Columbia Lighting	95/1624A	95-CIV-0964 (SS)
41809	Greenman Bros., Inc.	95/9396A	95-CIV-5510 (SS)
41822	Plastic Distributing Corp. n/k/a M. A. Hanna	95/9273A	95-CIV-4883 (SS)
41830	Mita Copystar America, Inc.	95/8999A	95-CIV-4394 (SS)
41831	Mobil Chemical Company, Inc.	95/9663A	95-CIV-4870 (SS)
41834	Morrison-Knudsen Company, Inc.	95/8004A	95-CIV-1344 (SS)
41835	Monsanto Company	95/8003A	95-CIV-1349 (SS)
41837	Motion Control Industries, Inc.	95/9025A	95-CIV-4877 (SS)

STB Docket No.	Petitioner	Adv. Proc. No.	Civ. No.
41838	Kraft Foods, Inc.	95/9155A	95-CIV-4882 (SS)
41840	The Nippert Company d/b/a Cooper Metal Products	95/9042A	95-CIV-4391 (SS)
41841	Mitsubishi Electronics America, Inc.	95/8017A	95-CIV-1346 (SS)
41846	Paccar, Inc.	95/9350A	95-CIV-5683 (SS)
41857	Phillips Electronic N/A	95/9352A	95-CIV-1192 (SS)
41874	Ralston Purina Company d/b/a Beech-Nut Nutrition	95/9526A	95-CIV-7738 (SS)
41879	Sally Beauty Company, Inc.	95/9475A	95-CIV-5503 (SS)
41898	The Stanley Works	95/8126A	95-CIV-1519 (SS)
41902	Wegmans Food Markets, Inc., Chase-Pitkin Division	95/9587A	95-CIV-5004 (SS)