

SERVICE DATE - OCTOBER 14, 1997

SURFACE TRANSPORTATION BOARD¹

DECISION

No. 40833

MANSFIELD PLUMBING PRODUCTS, INC.²

v.

THE BANKRUPTCY ESTATE OF MURPHY MOTOR FREIGHT LINES, INC.

Decided: October 6, 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 matter arises out of a court action in the United States Bankruptcy Court, District of Minnesota, Third Division, in *Murphy Motor Freight Lines, Inc., v. Mansfield Plumbing Products, Inc.*, BKY 3-87-577 and ADV. 3-89-49. The court proceeding was instituted by Murphy Motor Freight Lines, Inc. (Murphy or defendant), a former motor common and contract carrier, to collect undercharges from Mansfield Plumbing Products, Inc. (Mansfield or complainant). Murphy seeks to collect undercharges in the amount of \$115,718.06 allegedly due, in addition to the amounts previously paid, for services rendered in transporting 114 shipments of plumbing products between March 1, 1984, and October 2, 1986. The shipments were transported from Mansfield's facilities at Perrysville, OH, to points in Wisconsin, Minnesota, Georgia, and North Carolina. By order dated April 2, 1991, the court stayed the proceeding and referred all tariff rate issues, particularly the issue of rate reasonableness, to the ICC for determination.

Pursuant to the court order, Mansfield, by complaint filed July 10, 1992, requested the ICC to resolve issues of tariff applicability and rate reasonableness. By decision served August 27, 1992, the ICC established a procedural schedule. On November 19, 1992, complainant submitted its opening statements. Defendant failed to submit a reply and indeed has failed to make an appearance or otherwise participate in any aspect of this proceeding.³

Complainant contends that the undiscounted class rates that defendant here seeks to assess are unreasonable. It also maintains that the subject undercharge claims fail to recognize or apply shipper discounts provided for by Murphy in its published tariffs. Mansfield supports its assertions with affidavits from Jerry Tackett, Mansfield Traffic Manager from 1983 to January 1986; Dean B.

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.

² By decision served October 7, 1994, this proceeding was re-titled as shown above to reflect the complainant's complete name.

³ By decision served February 18, 1993, the ICC directed Murphy either to file a reply or to show cause why this proceeding should not be decided on the existing record. Murphy did not respond.

Ulery, Mansfield Traffic and Warehouse Manager during the period 1984 through 1987; and Paul Kistner, Murphy's Terminal Manager at Mansfield, OH, from 1983 through March 1986. Mr. Tackett states that he would not have tendered freight to Murphy at the assessed class rates because other carriers offering discounted rates were available to Mansfield. Mr. Kistner states that because of the discount rates offered by other carriers, Murphy's class rates were too high to ever attract Mansfield's traffic. He further states that without providing discount rates, Murphy would never have been given the opportunity to transport Mansfield's traffic. Both Mr. Tackett and Mr. Kistner were under the impression that the reduced rates offered by Murphy to Mansfield were filed with the ICC.

Mr. Ulery states that Murphy handled approximately 15% of Mansfield's traffic during the subject period. He maintains that Murphy offered discounted rates to Mansfield, advised Mansfield that the discounted rates were filed, and billed Mansfield at the discounted rate. Mr. Ulery maintains that, absent the availability of discounted rates, Mansfield would never have used the services of Murphy. Attached to Mr. Ulery's affidavit is a representative sample of 14 balance due bills issued by the defendant that reflect original freight bill data as well as the revised balance due amounts (Exhibit C). The representative balance due bills show that Murphy now seeks to impose class rates that are double or triple the rates originally assessed for the subject shipments.

On March 19, 1993, complainant submitted an additional pleading entitled "Memorandum by Mansfield Plumbing" in which it reviewed its previous submissions as they relate to the standards of rate reasonableness announced in *Georgia-Pacific Corp.--Pet. for Declar. Order*, 9 I.C.C.2d 103 (1992).

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 the payment of undercharges.⁴ By decision served December 30, 1993, the ICC reopened the record and established a procedural schedule permitting the parties to invoke the alternative procedure under section 2(e) of the NRA and to submit new evidence and argument in light of the new law. By letter filed March 30, 1994, complainant acknowledged the enactment of the NRA and indicated that the present record was sufficient to resolve this proceeding.

DISCUSSION AND CONCLUSIONS

We dispose of this proceeding under section 2(e) of the NRA. Accordingly, we do not reach the other issues raised.⁵

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

⁴ The ICC's prior unreasonable practice policy was invalidated by the Supreme Court in *Maislin Indus. v. Primary Steel*, 497 U.S. 116 (1990).

⁵ We recognize that the court referred this case to the ICC for consideration of rate reasonableness and other tariff rate issues. 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 and tariff rate 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).

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."⁶

It is undisputed that Murphy is no longer an operating carrier.⁷ Accordingly, we may proceed to determine whether defendant's attempt to collect undercharges (the difference between the applicable filed tariff rate and the rate originally collected) 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, complainant has submitted copies of original freight bills indicating that the rates originally assessed by defendant were consistently and substantially below those that defendant is here attempting to collect. We find this evidence sufficient to satisfy the written evidence requirement of section 2(e). *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. 89-2379 (S.D. Tex. March 31, 1997) (finding that written evidence submitted 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 rates originally billed by the carrier and paid by Mansfield were discount rates negotiated by the parties. The freight bills confirm the unrefuted testimony of Mr. Tackett, Mr. Kistner, and Mr. Ulery that the rates originally assessed by the defendant were rates negotiated by the parties and reflect the existence of a negotiated rate.

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 upon 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 a negotiated rate was offered to Mansfield by Murphy; that Mansfield, reasonably relying on the offered rate, tendered the subject traffic to Murphy; that the negotiated rate was billed and collected by Murphy; and that Murphy 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 Murphy to attempt to collect undercharges from Mansfield for transporting the shipments at issue in this proceeding.

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

⁶ 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.

⁷ Murphy held both common and contract carrier operating authority issued by the ICC under various subnumbers of No. MC 108937. All of Murphy's operating authorities were revoked on December 7, 1987.

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 Dennis D. O'Brien
United States Bankruptcy Court for the
District of Minnesota, Third Division
627 Federal Building
St. Paul, MN 55101

Re: Case No. BKY-87-577
ADV. 3-89-49

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary