

SERVICE DATE - AUGUST 5, 1997

SURFACE TRANSPORTATION BOARD<sup>1</sup>

DECISION

No. 41588

AMEREX CORPORATION  
--PETITION FOR DECLARATORY ORDER--  
CERTAIN RATES AND PRACTICES OF JONES TRUCK LINES, INC.

Decided: July 29, 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 Bankruptcy Court for the Western District of Arkansas, Fayetteville Division, in *Jones Truck Lines, Inc. v. Amerex Corporation*, AP No. 93-8741. The court proceeding was instituted by Jones Truck Lines, Inc. (Jones or respondent), a former motor common and contract carrier, to collect undercharges from Amerex Corporation (Amerex or petitioner). Jones seeks undercharges in the amount of \$62,123.98 (plus interest), allegedly due, in addition to amounts previously paid, for services provided in transporting 340 shipments of fire extinguishers and related products between Trussville, AL, and various interstate points from March 23, 1989, through May 30, 1991.<sup>2</sup> By order dated May 24, 1995, the court stayed further proceedings to enable the parties to submit issues of contract carriage, unreasonable practice, and rate reasonableness to the ICC for resolution.

Pursuant to the court order, Amerex, on June 28, 1995, filed a petition for declaratory order requesting the ICC to resolve the issues referred to by the court. By decision served July 10, 1995, the ICC established a procedural schedule for the submission of evidence on non-rate reasonableness issues. Petitioner filed its opening statement on September 2, 1995. Respondent filed its reply on September 27, 1995. Petitioner submitted its rebuttal on October 25, 1995.

Amerex, in its opening statement, asserts that the shipments in question were transported by Jones under its contract carrier authority pursuant to a formal written agreement. Petitioner further asserts that respondent's attempt to collect undercharges constitutes an unreasonable practice under section 2(e) of the NRA and that the rates respondent is seeking to assess are unreasonable.

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<sup>1</sup> 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. While this decision generally applies the law in effect prior to the Act, new 49 U.S.C. 13711(g) provides that new section 13711 applies to cases pending as of January 1, 1996, and hence section 13711 will be applied to the factual situation presented in this proceeding. Unless otherwise indicated, citations are to the former sections of the statute.

<sup>2</sup> The undercharge total consists of \$44,699.62 for claimed underpayment of 290 freight bills and \$17,424.36 for claimed refunds due to Jones for 50 erroneous loading allowance payments to petitioner.

Petitioner supports its argument with a verified statement submitted by its Treasurer, Brian L. Justinger. Attached to Mr. Justinger's statement are copies of an executed agreement dated March 13, 1989, entitled "Jones Truck Lines, Inc. Motor Transportation Contract Carrier Agreement" (Agreement), and three rate schedule supplements effective March 27, 1989, June 9, 1989, and April 13, 1990, signed by representatives of Jones and Amerex.<sup>3</sup> The Agreement and the supplements include schedules of rates and charges that call for the application of discounts to class rates ranging from 53 to 61 percent, subject to minimum charges ranging from \$42.00 to \$43.10, and provide for an automatic loading allowance refund to be paid by the carrier for shipments moving to or from Trussville. Mr. Justinger asserts that petitioner relied on the terms of the Agreement in tendering its traffic to Jones. He further states that Jones billed petitioner at the rates set forth in the Agreement and supplements and accepted petitioner's payment of the assessed rates without question.

Also attached to Mr. Justinger's statement are verified statements of Ms. Cathy Hathaway, the Jones sales representative who negotiated the Agreement with Amerex, and Mr. Martin W. Brenner, Jr., Traffic Manager of Amerex. Ms. Hathaway states that Jones intended the subject shipments to be transported pursuant to the terms of the Agreement. Mr. Brenner asserts that both Jones and Amerex intended that the shipments at issue be transported under the terms of the Agreement. Mr. Brenner states that Amerex relied upon the written rates set forth in the Agreement in tendering its traffic to Jones and that Jones originally billed and Amerex paid the agreed-to rates.

Jones does not dispute the fact that it signed the contract carrier agreement and assessed charges for transportation services provided that were based on the schedule of contract rates contained in the agreement. Instead, respondent contends that the contract carrier agreement does not meet either the statutory or regulatory requirements for valid contract carriage. Respondent asserts that the agreement is "no more than an offer to provide reductions and allowances from Jones' tariffs." Jones further argues that section 2(e) of the NRA is not applicable in this proceeding on statutory and constitutional grounds.<sup>4</sup>

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<sup>3</sup> These items were also attached as Exhibit B to the petition for declaratory order filed by Amerex.

<sup>4</sup> Jones argues that section 2(e) of the NRA is inapplicable to bankrupt carriers, may not be applied retroactively, and is unconstitutional. The bankruptcy court has already determined that the remedies provided in the NRA apply to the undercharge claims of bankrupt carriers such as Jones (*see* Order of May 24, 1995). Additionally, we point out that six federal circuit courts of appeals and virtually every other federal court that has considered respondent's applicability arguments have determined that the remedies provided in section 2 of the NRA apply to the undercharge claims of bankrupt carriers such as Jones. *See Whitaker v. Power Brake Supply, Inc.*, 68 F.3d 1304 (11th Cir. 1995) (*Power Brake*); *Jones Truck Lines, Inc. v. Whittier Wood Products, Inc.*, 57 F.3d 642 (8th Cir. 1995) (*Whittier Wood*); *In the Matter of Lifshultz Fast Freight Corporation*, 63 F.3d 621 (7th Cir. 1995); *In re Transcon Lines*, 58 F.3d 1432 (9th Cir. 1995) *cert. denied*, 116 S. Ct. 1016 (1996); *In re Bulldog Trucking, Inc.*, 66 F.3d 1390 (4th Cir. 1995); *Hargrave v. United Wire Hanger Corp.*, 73 F.3d 36 (3d Cir. 1996); *see also, e.g., Jones Truck Lines, Inc. v. AFCO Steel, Inc.*, 849 F. Supp. 1296 (E.D. Ark. 1994).

Further, as the courts have also held consistently, section 2(e), by its own terms and as more recently amended by the ICC Termination Act, may be applied retroactively against the undercharge claims of defunct, bankrupt carriers that were pending on the NRA's enactment. *See, e.g., Jones Truck Lines, Inc. v. Scott Fetzer Co.*, 860 F. Supp. 1370, 1375-76 (E.D. Ark. 1994); *North Penn Transfer, Inc. v. Stationers Distributing Co.*, 174 B.R. 263 (N.D. Ill. 1994); *Gold v. A.J. Hollander Co.* (In re Maislin Indus.), 176 B.R. 436 (Bankr. E.D. Mich. 1995); *cf. Jones Truck Lines, Inc. v. Phoenix Products Co.*, 860 F. Supp. 1360 (W.D. Wisc. 1994).

Lastly, in response to respondent's "takings" challenge, the Eighth Circuit in *Whittier Wood* and the Eleventh Circuit in *Power Brake* have concluded that the NRA does not work an unconstitutional taking under the Fifth Amendment. 57 F.3d at 649-52; 68 F.3d at 1306 n.3. We point out that the courts have consistently rejected that argument, as well as respondent's "separation of powers" argument and its other constitutional challenges to the NRA. *See, e.g., Gold v. A.J.*

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Jones acknowledges that for the most part its freight bill underpayment claims are based on the disallowance of initially recognized discounts or discounted rates that are not supported by an applicable effective tariff. To support its contentions, respondent submits a verified statement from Stephen L. Swezey, Senior Transportation Consultant for Carrier Service, Inc. (CSI).<sup>5</sup> Attached as appendix B to Mr. Swezey's statement is a representative sample of the "balance due" bills issued on behalf of respondent that reflect originally issued freight bill data as well as the "corrected" balance due amounts. The representative sample reveals the application of discounts ranging from 53 to 61 percent as well as a minimum charge assessment of \$43.10 in the original freight bills issued for the shipments included in the exhibit.

#### DISCUSSION AND CONCLUSIONS

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

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 purpose of avoiding application of this subsection."<sup>6</sup>

It is undisputed that Jones no longer transports property.<sup>7</sup> Accordingly, we may proceed to determine whether Jones' 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 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 agreement.

Here, the record contains a 1989 Agreement and supplements signed by the parties confirming the existence of a negotiated rate. In addition, respondent has submitted representative balance due bills indicating that its originally issued freight bills consistently applied rates which reflected the stated discount and minimum charge called for in the 1989 Agreement and supplements. 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*).<sup>8</sup> See *William J.*

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<sup>4</sup>(...continued)

*Hollander, supra; American Freight System, Inc. v. ICC* (In re American Freight System, Inc.), 179 B.R. 952 (Bankr. D. Kan. 1995); *Rushton v. Saratoga Forest Products, Inc.* (In re Americana Expressways), 177 B.R. 960 (D. Utah 1995), rev'g 172 B.R. 99 (Bankr. D. Utah 1994); *Zimmerman v. Filler King Co.* (In re KMC Transport), 179 B.R. 226 (Bankr. D. Idaho 1995); *Lewis v. Squareshooter Candy Co.* (In re Edson Express), 176 B.R. 54 (D. Kan. 1994).

<sup>5</sup> CSI is the firm authorized by the court to provide rate audit and collection services for Jones.

<sup>6</sup> The ICC Termination Act removed the limitation that made section 2(e) of the NRA applicable only to transportation service provided prior to September 30, 1990. Thus, the remedies in section 2(e) may be invoked as to all of the shipments in this proceeding, including the 183 shipments that were transported after September 30, 1990.

<sup>7</sup> Board records confirm that Jones' motor carrier operating rights were revoked on February 18, 1992.

<sup>8</sup> Jones, at pp. 13-14 of its reply statement, argues that freight bills do not constitute written  
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*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 substantial that the rates originally billed by Jones and paid by Amerex were rates agreed to in negotiations between the parties. The original freight bills issued by respondent and the rates set forth in the 1989 Agreement and supplements confirm the testimony of Mr. Justinger, Ms. Hathaway, and Mr. Brenner and reflect the existence of negotiated 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, respondent concedes (respondent's statement at 11) that if section 2(e) is read to apply to this case, it will preclude the Trustee from collecting on his claims. We agree. The evidence establishes that a negotiated rate was offered by Jones to Amerex; that Amerex tendered freight to Jones in reliance on the negotiated rate; that the negotiated rate was billed and collected by Jones; and that Jones 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 Jones to attempt to collect undercharges from Amerex 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.

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<sup>8</sup>(...continued)

evidence. Respondent contends that, under section 2(e)(2)(D) of the NRA, the Board must consider whether the negotiated rate "was billed and collected by the carrier" in making its merits determination as to whether a carrier's conduct was an "unreasonable practice." This section, according to Jones, contemplates that freight bills reflecting the negotiated rate were issued by the carrier, and the Board must examine these freight bills to determine if section 2(e) has been satisfied. Jones asserts that allowing freight bills to satisfy the written evidence requirement would make the written evidence provision superfluous because the Board, under section 2(e)(2)(D), must independently consider the collected freight bill.

The ICC and the Board have consistently rejected this argument. Section 2(e)(2)(D) requires the Board to consider "whether the [unfiled] rate was billed and collected by the carrier." There is no requirement under this provision or the NRA's legislative history that the Board use a carrier's freight bills for that determination. A carrier may separately attest, or submit or concede in pleading, that the negotiated, unfiled rate was billed and collected, and there is nothing to preclude the Board from using such statements (or other evidence) in finding that section 2(e)(2)(D) was satisfied.

Even if the Board uses freight bills to satisfy this element, however, it is not inappropriate for it to use those same bills to satisfy the "written evidence" requirement of section 2(e)(6)(B). The carrier's argument might be more persuasive if the written evidence requirement was a "sixth" element of the merits determination under section 2(e)(2), but it is not. Rather, as the ICC previously indicated, it is simply a threshold definitional requirement needed to invoke section 2(e). See *E.A. Miller, supra*, at 239-40. Once that requirement is satisfied by freight bills (or other contemporaneous written evidence), there is nothing to suggest that the same evidence could not be used as part of the Board's separate five-part analysis under section 2(e)(2) to determine whether the carrier's undercharge collection is an unreasonable practice.

*It is ordered:*

1. This proceeding is discontinued.
2. This decision is effective on its service date.
3. A copy of this decision will be mailed to:

The Honorable James G. Mixon  
United States Bankruptcy Court for the  
Western District of Arkansas, Fayetteville Division  
P.O. Box 2381  
Little Rock, AR 72203

Re: AP No. 93-8741

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams  
Secretary