

SERVICE DATE - JULY 29, 1997

SURFACE TRANSPORTATION BOARD<sup>1</sup>

DECISION

No. 41283

ALL MODES TRANSPORTATION CONSULTANTS, INC.--PETITION FOR  
DECLARATORY ORDER--CERTAIN RATES AND PRACTICES OF  
OVERLAND EXPRESS, INC.

Decided: July 22, 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 the proceeding.

BACKGROUND

This matter arises out of a court action in the United States District Court for the Southern District of Indiana, Indianapolis Division, in *Overland Express v. All Modes Transportation Consultants, Inc.*, Case No: IP90 448C. The court proceeding was instituted by Overland Express, Inc. (Overland or respondent), a former motor common carrier, to collect undercharges from All Modes Transportation Consultants, Inc. (All Modes or petitioner), a licensed property broker. Overland seeks undercharges totaling \$69,717.28 (plus interest) allegedly due, in addition to amounts previously paid, for the transportation of 35 truckload shipments of various commodities between August 25, 1987, and February 12, 1988. By order dated June 3, 1994, the court stayed the action before it and referred the matter to the ICC for a determination on the issue of unreasonable practice.<sup>2</sup>

Pursuant to the court order, petitioner, on June 29, 1994, filed a petition for declaratory order requesting the ICC to resolve the court-referred issue. By decision served August 9, 1994, the ICC established a procedural schedule for the consideration of all issues including rate reasonableness. By decision, served September 20, 1994, the ICC, in response to a motion filed by petitioner, bifurcated the proceeding and directed the parties to submit statements on all issues other than rate reasonableness in accordance with the established procedural schedule. On October 11, 1994, 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.<sup>3</sup>

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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. 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> The court removed the proceeding from its active docket until further notice by the parties.

<sup>3</sup> By decision served April 17, 1995, the ICC directed respondent to file its reply or show cause why this proceeding should not be decided on the existing record. Overland did not respond.

Petitioner asserts that respondent's attempt to collect freight undercharges constitutes an unreasonable practice under section 2(e) of the NRA.<sup>4</sup> Petitioner supports its argument with affidavits from George Sambus, President of All Modes, and Anthony M. Garrone, petitioner's Traffic Manager. Mr. Garrone states that on or about August of 1987, he was visited by Dan Snell, Divisional Marketing Manager of Overland, and Edward R. Lake, Overland's Regional Marketing Director, who, in the process of actively soliciting petitioner's business, quoted rates of 85 to 90 cents per mile for backhaul movements, particularly movements to the West Coast. Both Mr. Sambus and Mr. Garrone assert that All Mode relied upon the offered rate in tendering its traffic to Overland; and that the offered rate was billed by Overland and paid by All Mode. Mr. Garrone characterizes the rates being sought by respondent (rates as high as \$1.83 per mile) as totally unrealistic, and maintains that he would not have used a carrier that charged such a high rate, noting that competitive carriers were offering rates far lower than those being sought here.

Attached to petitioner's statement as Exhibit C are copies of four representative original freight bills issued by respondent indicating originally assessed charges of between \$0.85 and \$0.90 per mile.<sup>5</sup>

### DISCUSSION AND CONCLUSIONS

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 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 Overland no longer transports property.<sup>7</sup> Accordingly, we may proceed to determine whether Overland's 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 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.

Here, the record contains representative original freight bills issued by Overland indicating the application of an \$0.85 or \$0.90 per mile rate to the subject traffic. 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*

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<sup>4</sup> Petitioner also asserts that the rates Overland had on file with the ICC are subject to challenge based on Overland's failure to participate in the mileage guide underlying its tariff.

<sup>5</sup> Each of the freight bills reflects the actual billed miles. Although three of the four bills state that the subject shipment was rated as per load, the total amount billed conformed to the \$0.85 or \$0.90 per mile rate.

<sup>6</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>7</sup> Overland, which operated as a motor carrier pursuant to ICC Docket No. MC-133689, filed for bankruptcy in the United States Bankruptcy Court for the Southern District of Indiana and is no longer operating.

*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 indicates that the parties conducted business in accordance with agreed-to negotiated rates. The original freight bills confirm the unrefuted testimony of Mr. Garrone 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 All Modes by Overland; that All Modes, relying on the offered rate, tendered the subject traffic to Overland; that the negotiated rate was billed and collected by Overland; and that Overland 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 Overland to attempt to collect undercharges from All Modes 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.

*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 S. Hugh Dillin  
United States District Court  
for the Southern District of Indiana,  
Indianapolis Division  
U.S. Courthouse, 46 East Ohio Street  
Room 255  
Indianapolis, IN 46204

Re: Case No. IP90 448C

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams  
Secretary