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SERVICE DATE - APRIL 1, 1999

SURFACE TRANSPORTATION BOARD

DECISION

No. 41244

DIVERSIFIED ELECTRIC SUPPLY, INC.--PETITION FOR  
DECLARATORY ORDER--CERTAIN RATES AND PRACTICES  
OF JONES TRUCK LINE, INC.

Decided: March 26, 1999

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 findings 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 District Court for the Eastern District of Arkansas, Western Division, in Jones Truck Lines, Inc. v. Diversified Electric Supply, Inc., No. LR-C-93-409. The court proceeding was instituted by Jones Truck Lines, Inc. (Jones or respondent), a former motor common and contract carrier, to collect undercharges from Diversified Electric Supply, Inc. (Diversified or petitioner). Jones seeks undercharges of \$7,326.37 allegedly due, in addition to amounts previously paid, for services rendered in transporting 128 shipments of electrical supplies between July 20, 1988, and February 7, 1989. By order dated March 28, 1994, the court stayed the proceeding and authorized Diversified to seek from the ICC a determination of those matters properly within the primary jurisdiction of that agency, including, but not limited to,

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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 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> Jones originally sought undercharges of \$7,459.55 based on claims derived from 130 shipments. Respondent subsequently canceled its claims for two of the shipments and modified three other claims, reducing its total claim for undercharges to \$7,326.37 derived from 128 shipments.

issues of contract carriage, tariff applicability, and rate reasonableness.

Pursuant to the court order, Diversified, on April 14, 1994, filed a petition for declaratory order requesting the ICC to resolve issues of contract carriage, rate reasonableness, and unreasonable practice. By decision served May 4, 1994, the ICC established a procedural schedule for development of the record. On June 20, 1994, petitioner filed its opening statement. Respondent filed its statement of facts and argument on July 25, 1994, and petitioner submitted its statement in rebuttal on August 12, 1994.

Diversified asserts that the subject shipments were transported pursuant to a contractual agreement with Jones at rates based on a discount from tariff rates published by Jones. Petitioner maintains that the contractual arrangement was subsequently replaced by Tariff ICC JTLS 630, and later by Tariff JTLS 650 Item 3636-F, published tariffs that increased the discount percentage to be applied. Diversified further contends that the Jones attempt to collect undercharges in this proceeding constitutes an unreasonable practice under section 2(e) of the NRA.

Diversified supports its assertions with affidavits from George Buchanan, petitioner's Warehouse Supervisor; Fred Yarbrough, the Jones Account Executive responsible for soliciting petitioner's freight and negotiating pricing programs at the time the subject shipments were transported; and Charles Brown, petitioner's General Manager. All three witnesses maintain that the involved shipments were transported pursuant to a contractual agreement entered into by the parties that provided for a percentage discount off currently filed published rates. Mr. Buchanan acknowledged, however, that he was unable to locate a copy of the contractual agreement. Mr. Yarbrough states that the subject transportation service was provided by Jones in its capacity as a contract carrier. Mr. Brown asserts that petitioner had used respondent's service based on an agreement that Jones would provide Diversified with a 40% discount off currently published rates; that Jones provided Diversified with a 40% discount in its original billings; that Diversified paid the original billings as presented without challenge from Jones; and that other carriers were offering similar discounts for providing a competitive service at the time the subject shipments were moved.

Jones contends that petitioner has failed to submit sufficient evidence to support its contention that the subject shipments moved in contract carriage pursuant to a contractual agreement. Respondent further contends that section 2(e) of the NRA is inapplicable to bankrupt

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<sup>3</sup> The court administratively terminated the proceeding subject to further order of the court.

<sup>4</sup> Diversified also contends that Jones did not furnish the documents required under Vertex Corp.-Pet. Declar. Order-Rate and Practices, (Vertex) 9 I.C.C. 2d 688 (1993). Petitioner maintains that the only documents that it has received are extracts of alleged bills presented by Carrier Service, Inc. (CSI), the tariff audit firm appointed by the bankruptcy court to review Jones' freight bills and records. A review of the record indicates that copies of balance due freight bills containing the essential information required by Vertex were provided to petitioner prior to the commencement of court litigation and that respondent has substantially complied with the Vertex requirements.

carriers, may not be applied retroactively, and is unconstitutional.

Jones supports its position with the verified statement of Stephen L. Swezey, CSI's Senior Transportation Consultant. Mr. Swezey maintains that a search of respondent's records failed to produce a copy of the alleged contract between Jones and Diversified or any reference to such a contract. He asserts that the discounts originally applied were not applicable to petitioner's traffic and that Jones incorrectly billed Diversified for the shipments at issue. Accordingly, following CSI's audit of the freight bills issued by Jones, balance due bills containing original freight bill data, the asserted corrected charge, and the claimed balance due were issued to Diversified. The balance due bills eliminated the discount originally applied to 102 of Diversified's shipments and rerated the

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<sup>5</sup> 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 Lifschultz 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; 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. 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>6</sup> Mr. Swezey also asserts that the originally assessed charges do not support petitioner's claim of the existence of a contract that provided for a 40% discount. According to Mr. Swezey, of the original billings for the 128 shipments at issue, 32 provided a 35% discount, 69 provided a 40% discount, 1 provided a 45% discount, 16 imposed a \$34.00 minimum charge, and 10 imposed a \$42.00 minimum charge.

remaining 26 shipments at issue based on the minimum charge rates contained in Jones' class tariff, ICC JTLS 510. Attached as Appendix C to Mr. Swezey's statement is a copy of a balance due bill issued to Diversified that eliminates a 35% discount originally applied to one of the subject shipments.

## 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)(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."

It is undisputed that Jones no longer transports property. Accordingly, we may proceed to determine whether Jones' attempt to collect undercharges (the difference between the applicable filed 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 copy of a balance due bill for one of the subject shipments issued to Diversified that contains the original discounted charge assessed by respondent and paid by petitioner, the revised assessed charge ascertained by eliminating an originally applied 35% discount, and the claimed balance due. Jones has acknowledged the existence of balance due freight bills for the remaining shipments involved in this proceeding and does not dispute that the submitted bill is representative of the other shipments. 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

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<sup>7</sup> These shipments were originally assessed at a minimum charge level.

<sup>8</sup> Board records confirm that Jones' motor carrier operating authorities were revoked on February 18, 1992.

<sup>9</sup> Jones, at page 14 of its statement filed July 25, 1994, argues that freight bills cannot be used to satisfy the written evidence requirement. Respondent contends that, under section 2(e)(2)(D) of the

89-2379 (S.D. Tex. March 31, 1997) (finding that the 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 that were originally billed by Jones and paid by Diversified. The representative balance due bill confirms the testimony of Mr. Buchanan, Mr. Yarbrough, and Mr. Brown that an agreement to provide Diversified with discounted rates substantially below those respondent is now seeking to assess had been reached by the parties and reflects the existence of negotiated rates. The evidence further indicates that Diversified relied upon the agreed-to rates in tendering the subject shipments to Jones, and that petitioner would not have used the services of respondent had it attempted to charge the rates it here seeks to assess.

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

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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 the Board must examine the freight bills reflecting the negotiated rate that were issued by the carrier 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.

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 negotiated rates were offered by Jones to Diversified; that Diversified, reasonably relying on the offered rates, tendered the subject traffic to Jones; that the negotiated rates were billed and collected by Jones; and that Jones now seeks to collect additional payment based on higher rates 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 Diversified 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 its service date.
3. A copy of this decision will be mailed to:

The Honorable Henry Woods  
United States District Court for the  
Eastern District of Arkansas, Western Division  
U.S. Courthouse  
Suite 360  
600 West Capital Avenue  
Little Rock, Arkansas 72201-3325

Re: No. LR-C-93-409

By the Board, Chairman Morgan, Vice Chairman Clyburn and Commissioner Burkes.

Vernon A. Williams  
Secretary