

SURFACE TRANSPORTATION BOARD<sup>1</sup>

DECISION

No. 41516

UINTA GOLF--PETITION FOR DECLARATORY ORDER--  
CERTAIN RATES AND PRACTICES OF TRANSCON LINES

Decided: December 19, 1996

This proceeding arises out of the efforts of the trustee in bankruptcy of Transcon Lines (Transcon or respondent), a former motor carrier, to collect undercharges based on common carrier tariffs for certain transportation services performed during 1987-1990 by Transcon for Uinta Golf (Uinta or petitioner). We find that the 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). Accordingly, we will not reach the other issues raised in this proceeding.

BACKGROUND

This matter is before the Board on referral from the United States Bankruptcy Court, Central District of California, in Leonard L. Gumport, Chapter 7 Trustee of the Bankruptcy Estate of Transcon Lines v. Uinta Golf, Case No. SB 93-22207 DN, Chapter 7, Adv. No. SB 93-02397 DN (referral order dated September 28, 1994). The court stayed the proceeding to enable referral of issues of rate reasonableness and unreasonable practice to the ICC's for determination.

Pursuant to the court order, petitioner, on December 27, 1994, filed a petition for declaratory order requesting the ICC to resolve the issues referred by the court. By decision served January 11, 1995, the ICC established a procedural schedule for the submission of evidence on non-rate reasonableness issues. On March 14, 1995, petitioner filed its opening statement. Respondent filed its reply on July 7, 1995. Petitioner submitted its rebuttal on July 27, 1995.

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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.

Petitioner asserts that Transcon's efforts to collect undercharges for shipments transported by Transcon during the period 1987-1990 constitute an unreasonable practice under section 2(e) of the NRA. Petitioner maintains that the written evidence it has submitted shows that Transcon offered a transportation rate on which Uinta relied in tendering shipments to Transcon; that the offered rates were billed and collected by Transcon; and that the payments made by petitioner were accepted by Transcon as payment in full.

Respondent's statement consists of legal argument of counsel. Respondent maintains that petitioner has not proffered written proof that the rates negotiated had been agreed upon i.e., written evidence of the original rate charged or written evidence that petitioner reasonably relied on this rate. Respondent also contends that section 2(e) of the NRA does not apply retroactively to pending claims such as those which are the subject of this proceeding.<sup>2</sup>

#### DISCUSSION AND CONCLUSIONS

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

We recognize that the court referred both unreasonable practice and rate reasonableness issues to the ICC, and that petitioner presented evidence on both issues. Section 2(e), however, was enacted essentially to resurrect the ICC's Negotiated Rates policy.<sup>3</sup> That policy was not intended to produce extended evidentiary inquiries or extended rate analyses to determine whether, in each instance, the negotiated rate, or the rate sought to be collected, was the applicable and/or reasonable rate. Rather, the focus of the Negotiated Rates policy was simply on whether the shipper and the carrier negotiated a rate on which the shipper relied, and whether the carrier now seeks to collect a rate that is higher than the agreed-to rate. Section 2(e), in our view, was not designed to complicate matters, but to resolve the undercharge crisis by holding a carrier to its bargain when it would be fair to do so. Requiring highly involved rate analyses for every shipment before applying section 2(e) would not, in our view, advance the objectives of the NRA.

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<sup>2</sup> With respect to the retroactive applicability of section 2(e), we point out that the courts have consistently held that section 2(e), by its own terms, may be applied retroactively against the undercharge claims of defunct, bankrupt carriers that were pending on the NRA's enactment. See, e.g., Gold v. A.J. Hollander Co. (In re Maislin Indus.), 176 B.R. 436, 443-44 (Bankr. E.D. Mich. 1995); 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); Allen v. National Enquirer, 187 B.R. 29, 33 (Bankr. N.D. Ga. 1995); cf. Jones Truck Lines, Inc. v. Phoenix Products Co., 860 F. Supp. 1360 (W.D. Wisc. 1994).

<sup>3</sup> See NITL--Pet. to Inst. Rule on Negotiated Motor Car. Rates, 3 I.C.C.2d 99 (1986) and 5 I.C.C.2d 623 (1989) (Negotiated Rates). The ICC's prior unreasonable practice policy was invalidated by the Supreme Court in Maislin Indus. v. Primary Steel, 497 U.S. 116 (1990).

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>4</sup>

It is undisputed that Transcon no longer transports property.<sup>5</sup> Accordingly, we may proceed to determine whether the respondent's attempt to collect undercharges 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.

In E.A. Miller, Inc.--Rates and Practices of Best, 10 I.C.C.2d 235 (1994), the ICC held that the original freight bills embodying the negotiated rate meet the "written evidence" standard of section 2(e). In Johnson Welding & Manufacturing Co. et al. v. Bankr. Estate of Murphy Motor Freight Lines, Inc., No. 40716 (ICC served May 9, 1995), the ICC explained that evidence of the existence of freight bills embodying the negotiated rate, sample freight bills, or some other contemporaneous writing evidencing the existence of a negotiated rate satisfies the section 2(e) standard.

In a declaration submitted as part of Uinta's evidentiary presentation, Mr. Gordon O'Neil, President of Uinta and a Uinta employee since 1971, states that he is responsible for Uinta's transportation arrangements with trucking companies and is familiar with the arrangements made with Transcon during the 1987-1990 period. He asserts that Uinta was offered discount rates by Transcon on which Uinta relied in tendering its traffic to Transcon. A copy of a communication from Transcon dated March 12, 1987, confirming the existence of a discount applicable to

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<sup>4</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>5</sup> Transcon held both motor common and contract carrier operating authority, issued by the ICC under various sub-numbers of No. MC-110325. All of Transcon's operating authorities were revoked on September 21, 1990.

Uinta traffic, is attached to Mr. O'Neil's statement.<sup>6</sup> Mr. O'Neil further states that the discounted billing amount was noted on each freight bill received from Transcon, that Transcon's freight bills were promptly paid by Uinta, and that Transcon accepted these payments as full payment for the services rendered.

Attached as Exhibit C1 to petitioner's opening statement are 10 representative sample revised freight bills issued by Transcon which include the original freight rates charged. Each of the sample freight bills show the original freight rates billed by Transcon and paid by the petitioner. We conclude that the representative revised freight bills and the March 12, 1987 communication from Transcon confirm the testimony of Mr. O'Neil with regard to the existence of negotiated discount rates and satisfy the written evidence requirement of section 2(e).

In exercising our jurisdiction under section 2(e), 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 by Transcon to Uinta; that Uinta tendered freight to Transcon in reliance on the negotiated rate; that the rate negotiated was billed and collected by Transcon; and that Transcon 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 Transcon to attempt to collect undercharges from Uinta for transporting the shipments at issue in this proceeding.<sup>7</sup>

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<sup>6</sup> The communication states; "This is to advise you that the tariff which applies to Uinta Golf is filed under tariff TCON 625, item 1000-10039 at a 40% discount, effective 2/4/87. This applies on all inbound collect bills. Please refer to this entire tariff number when paying bills."

<sup>7</sup> Although the record here does not contain all of the freight bills for which respondent seeks undercharges, it does contain sample freight bills which appear to be representative of all of Transcon's undercharge claims. These freight bills constitute written evidence of a negotiated rate as to the specific shipments identified in the freight bills. The record also contains the uncontroverted testimony of Mr. O'Neil as to petitioner's reliance on the originally negotiated rate. Transcon's general assertion that petitioner has not provided written evidence of the rate originally charged or of shipper's reliance on that rate clearly fails as to those shipments identified in the freight bills.

As to any other shipments with respect to which specific  
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This action 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.
3. This decision is effective on December 26, 1996.
4. A copy of this decision will be mailed to:

The Honorable David N. Naugle  
United States Bankruptcy Court,  
Central District of California  
200 Federal Building  
699 North Arrowhead Avenue  
San Bernardino, CA 92401

Re: Case No. SB 93-22207 DN, Chapter 7  
Adv. No. SB 93-02397 DN

By the Board, Chairman Morgan, Vice Chairman Simmons, and  
Commissioner Owen.

Vernon A. Williams  
Secretary

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(...continued)  
freight bills were not submitted, where the documentation is similar to that presented in the sample freight bills, it would be an unreasonable practice for Transcon "to attempt to recover the difference between the applicable tariff rate . . . and the negotiated rate." Accordingly, we advise the court of our legal opinion that, to the extent other undercharge demands follow the pattern outlined here, they too would constitute an unreasonable practice.