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SERVICE DATE - DECEMBER 23, 1999

SURFACE TRANSPORTATION BOARD¹

DECISION

No. 41301

W.R. GRACE & CO.-CONN.

v.

GROSS COMMON CARRIER, INC.

Decided: December 20, 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). Accordingly, 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 Western District of Wisconsin, in Gross Common Carrier, Inc. v. W.R. Grace & Co.-Conn., No. 94-C-2121-S. The court proceeding was instituted by Gross Common Carrier, Inc. (Gross or defendant), a former motor common and contract carrier, to collect undercharges from W.R. Grace & Co.-Conn. (Grace or complainant). Gross seeks undercharges of \$180,476.95 (plus interest) allegedly due, in addition to amounts previously paid, for services rendered in transporting 600 shipments of plastic film from Buffalo Grove, IL, and Cedar Rapids, IA, to points in Michigan, Minnesota, North

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. 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.

Dakota, and South Dakota between December 6, 1988, and August 5, 1991.² By order entered July 14, 1994, the court dismissed the proceeding without prejudice and referred the matter to the ICC for resolution.

Pursuant to the court order, Grace, by complaint filed August 12, 1994, requested the ICC to resolve issues of contract carriage, tariff applicability, and rate reasonableness. On September 9, 1994, Gross filed its answer to the complaint. By decisions served September 20, 1994, and December 28, 1994, the ICC established a procedural schedule for the submission of evidence on non-rate reasonableness issues. On January 25, 1995, complainant filed its opening statement. Defendant filed its reply statement on April 3, 1995, and Grace submitted its rebuttal on May 8, 1995.

Complainant asserts that Gross engaged in convenience interlining; that 433 of the subject shipments were transported subsequent to July 21, 1989, under the terms of a negotiated contract carriage agreement with defendant that became effective on that date; that Gross' effort to collect undercharges for transporting 166 shipments transported prior to July 21, 1989, for which originally assessed charges based on an applicable discount rate tariff were billed by Gross and paid by complainant, constitute an unreasonable practice; and that the remaining undercharge claim involves an intermodal movement via Gross and the Union Pacific Railroad Company (UP) for which Gross has failed to provide an applicable tariff basis to support the rate level it here seeks to assess. Grace states that the undercharges claimed by Gross are based on the reclassification or substitution of undiscounted class rates for originally assessed rates billed by defendant and paid by complainant to which discounts of ranging from 48% to 58% were applied. Complainant maintains that it would never have agreed to pay full undiscounted class rates for the movement of its traffic and would have demanded single-line service from Gross or obtained the services of another carrier.

Complainant supports its assertions with a verified statement from George P. Bell, Transportation Manager for Grace. Mr. Bell asserts that complainant routed all shipments via Gross single-line service on its bills of lading and never indicated a connecting carrier for the shipments at issue. He states that those shipments transported after July 21, 1989, were transported under a written contractual agreement that provided for discounts of 58% for single-line movements to points in Minnesota and Michigan (413 shipments) and 48% for joint line movements to points in North Dakota and South Dakota (20 shipments). A copy of the contractual agreement is attached as Exhibit C to Mr. Bell's statement. With respect to the 166 non-intermodal shipments transported prior to July 21, 1989, Mr. Bell asserts that these shipments were transported and billed in accordance with published rates contained in Items 4785 and 4786 of ICC Tariff GRCC 200-E that provided for discounts of 55% for direct single line service to points in Minnesota and 48% for

² Gross originally sought undercharges of \$182,196.76. In the course of the proceeding before the Board, defendant withdrew claims with respect to two intermodal shipments amounting to \$1,719.81, reducing its total claim for undercharges to \$180,476.95.

convenience interline movements to points in Minnesota, North Dakota, and South Dakota.³ Attached to Mr. Bell's statement are copies of the freight bill corrections issued on behalf of Gross that reflect originally billed freight bill data as well as "corrected" balance due amounts for shipments transported subsequent to July 29, 1989 (Exhibit D), prior to July 29, 1989 (Exhibit E), and the remaining UP intermodal shipment at issue (Exhibit J).⁴ An examination of the attached freight bills indicates the original application of discounts ranging from 48% to 58% for each of the subject shipments and a newly assessed charge substantially higher than the originally billed amount based on class rates set forth in Middlewest Motor Freight Tariff ICC MWB-550 that eliminated the originally applied discount. Mr. Bell maintains that Gross held operating authority issued by ICC that fully authorized the carrier to meet the transportation needs of Grace and that Gross should have provided single-line service from origin to destination as directed.

In its reply, Gross asserts that all of the shipments at issue involve interline service. Defendant contends that ICC Tariff GRCC 200-E is not applicable to those shipments transported before July 21, 1989, because the interlining carriers were not participants in the tariff. While Gross does not dispute that the parties entered into a valid agreement effective July 21, 1989, that was sufficient to establish contract carriage under former 49 U.S.C. 10923 and 10102(6), it maintains that because those shipments that moved subsequent to July 21, 1989, were transported in interline service, the status of the service provided by defendant must be viewed as common carriage subject to an appropriate common carrier tariff rather than contract carriage.

Gross supports its position with affidavits from Roger Placzek, defendant's Vice President-Sales and Marketing, and Oscar P. Peck, founder of Truck Rates Co., Inc.⁵ Mr. Placzek asserts that decisions to interline shipments originated by Gross were based on whether interlining was necessary to effect delivery of the shipment with reasonable dispatch. He states that regular users of defendant's service were familiar with the fact that some of their shipments would involve the use of interline carriers, and he points out that in most instances the use of an interlining carrier was reflected in the routing section and other portions of the freight bills issued by Gross.

Mr. Peck was engaged by Mark/AGL, Inc., the court-appointed auditor in defendant's bankruptcy proceeding, to audit defendant's freight records. Mr. Peck states that he specifically reviewed the freight bills for the subject shipments to determine whether the shipments moved in joint-line service. He asserts that all of the subject shipments involve interline movements; that such movements constitute common carrier service; that as motor contract carriers may not interline shipments, the rates contained in the transportation contract with Grace were inapplicable; and that the Tariff 200-E rates were not applicable to the subject shipments transported prior to July 21,

³ Exhibit F to Mr. Bell's statement.

⁴ A shipment transported July 16, 1990, identified as Freight bill No. 016-0093350.

⁵ Truck Rates is a Texas corporation specializing in the audit of motor carrier freight bills and the collection of undercharge claims.

1989, because none of the motor carriers participating in that tariff were involved in the subject joint-line movements.⁶ Accordingly, freight correction notices were issued in which the original charges assessed by Gross were re-rated based on applicable joint line tariffs.

DISCUSSION AND CONCLUSIONS

We dispose of this proceeding primarily under section 2(e) of the NRA. Accordingly, our decision does not turn on the resolution of the other issues raised.⁷

At the outset, we recognize that the issues raised for our consideration focus primarily on contract carriage, tariff applicability, and rate reasonableness issues. Nevertheless, our use of section 2(e)'s "unreasonable practice" provisions to resolve this matter is entirely appropriate. The Board, as a general rule, is not limited to deciding only those issues explicitly referred by a court or raised by the parties. Rather, we may instead decide cases on other dispositive grounds within our jurisdiction, and, in cases where section 2(e) provides a dispositive resolution--one that was adopted by Congress as a surrogate for the more complex tariff applicability and rate reasonableness provisions--we rely on it. Cf. Amoco Fabrics and Fibers Co. v. Max C. Pope, Trustee of the Estate of A.T.F. Trucking, No. 40526 (ICC served Feb. 26, 1992). Thus, we have jurisdiction to issue a ruling under section 2(e) of the NRA here. The Ormond Shops, Inc., Thomas J. Lipton, Inc. and Lionel Leisure, Inc. v. Oneida Motor Freight, Inc. Debtor-in-Possession, and Delta Traffic Service, Inc., No. MC-C-30156 (ICC served Apr. 20, 1994); and Have a Portion, Inc. v. Total

⁶ Mr. Peck identifies the participating carriers in Tariff 200-E other than Gross as Belleville Truck Line, Fort Transportation and Service Company, West Bend Transit and Service Company, and Seymour Transfer Line, Inc., and indicates that the latter four carriers were not involved in the subject movements. Mr. Peck did not identify the actual interlining carriers.

⁷ We should note that we fully agree with the complainant's argument that: (1) the carrier's decision to interline with connecting carriers that were not participants in the tariff was made unilaterally and for its own convenience; and (2) it would be an unreasonable practice for the carrier to assess a higher rate as a result of this decision. While we are deciding this case under section 2(e), we note that under ICC precedent a carrier generally would not be allowed to avoid a discount tariff by interlining outside that tariff without the consent of the shipper and for its own convenience. The discount tariff would be deemed to apply to the involved shipment. Motor carriers are generally required to charge the lowest rate that they could lawfully charge for a given service. See, e.g., Murray Co. of Texas v. Morrow, Inc., 54 M.C.C. 442 (1952); Hewitt-Robbins, Inc. v. Eastern Freight-Ways, Inc., 302 I.C.C. 173 (1957); Westinghouse Electric Corp. v. Pennsylvania R. Co., 318 I.C.C. 460 (1962); and Anacomp, Inc; Et Al.--Petition for a Declaratory Order--Certain Rates and Practices of Churchill Truck Lines, Inc. (Trans-Allied Audit Company, Inc.), No. 41573 (ICC served Aug. 7, 1995). There is an exception where the carrier was legally or physically unable to operate under the lowest-rate tariff. There may also be an exception when the shipper assented to a higher rate for its own purposes. Neither of these exceptions would appear to apply here.

Transportation, Inc., and Thomas F. Miller, Trustee of the Bankruptcy Estate of Total Transportation, Inc., No. 40640 (ICC served Feb. 7, 1995).

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.”⁸

We note that Section 2(e)’s availability is not limited to situations where the originally billed rate was unfiled. In evaluating whether a carrier’s collection efforts would be an “unreasonable practice” under section 2(e), the Board must consider, *inter alia*, whether the shipper was offered a rate by the carrier “other than the rate legally on file with the Board for the transportation service.” Section 2(e)(2)(A) (emphasis added). If the carrier and shipper agreed to a price that was embodied in a filed rate that cannot be applied to the involved shipments, then the shipper was offered a rate not legally on file “for [that] transportation service.” Thus, even if “some of [a carrier’s undercharge claims] are based on it billing and collecting an erroneous [filed] rate, if the so-called erroneous rate was negotiated between the shipper and [carrier] and if the shipper reasonably relied on the rate, the rate would meet the definition of a ‘negotiated rate’ and trigger the application of the provisions of the NRA.” American Freight Systems, Inc. v. ICC 179 B.R. 952, 957 (Bankr. D. Kan. 1995). Here, if we accept Gross’ argument that the tariff at issue was not applicable to the involved shipments because the shipments were interlined with carriers that were not participants in the tariff, then Gross offered a rate to Grace that was not legally on file for those shipments, even though it may have been a negotiated rate.

Federal Highway Administration records now confirm that Gross no longer transports property.⁹ Accordingly, we may proceed to determine whether Gross’ 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

⁸ The ICC Termination Act removed the limitation that made section 2(e) of the NRA applicable only to transportation services provided prior to September 30, 1990. Thus, the remedies in section 2(e) may be invoked for all the shipments at issue in this proceeding, including those that were transported after September 30, 1990.

⁹ While the record in this proceeding includes assertions to the effect that Gross was continuing to function as an operating motor carrier, Federal Highway Administration records reveal that Gross’ motor carrier operating authorities were revoked on September 19, 1996.

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, the record contains copies of the freight bill corrections issued on behalf of defendant that indicate an originally assessed charge to which a discount ranging from 48% to 58% is applied that is substantially below the amount defendant is now attempting to assess. The record also includes a July 21, 1989 contractual agreement between the parties that provides for discounts of 58% for single-line movements and 48% for joint line movements, and published rates contained in Items 4785 and 4786 of ICC Tariff GRCC 200-E that provide for discounts off class rates of 55% for direct single line service and 48% for convenience interline movements. 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). See William J. Hunt, Trustee for Ritter Transportation, Inc. v. Gantrade Corp., C.A. No. H-89-2379 (S.D. Tex. March 31, 1997) mem. (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 rate 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 discount rates that were originally billed by Gross and paid by Grace. The consistent application in the original freight bills of assessed charges to which were applied discounts ranging from 48% to 58% that are in conformity with the discounts called for in the July 21, 1989 contractual agreement and the discounts provided for in Items 4785 and 4786 of ICC Tariff GRCC 200-E reflect the existence of negotiated discount rates. The evidence further indicates that Grace relied upon the agreed-to rates in tendering the subject shipments to Gross, that complainant would not have used defendant to transport its traffic had defendant attempted to charge the rates it here seeks to assess, and supports the conclusion that discounted rates were negotiated by parties.

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 negotiated discount rates were offered by Gross to Grace; that Grace, reasonably relying on the offered rates, tendered the subject traffic to Gross; that the negotiated discount rates were billed and collected by Gross; and that Gross now seeks to collect additional payment based on higher undiscounted 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 Gross to

attempt to collect undercharges from Grace 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.

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 John C. Shabaz
United States District Court for the
Western District of Wisconsin
P.O. Box 591
Madison, WI 53701

Re: No. 94-C-2121-S

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

Vernon A. Williams
Secretary