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SERVICE DATE - JULY 23, 1999

SURFACE TRANSPORTATION BOARD¹

DECISION

No. 41570

NOVAMAX TECHNOLOGIES (U.S.A.), INC.--PETITION FOR DECLARATORY
ORDER--CERTAIN RATES AND PRACTICES OF
JONES TRUCK LINES, INC.

Decided: July 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). Because of our finding 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 State Court of Fulton County, State of Georgia, in Jones Truck Lines, Inc., Debtor-In-Possession v. Novamax Technologies (U.S.A.), Inc., Civil Action File No. 93-VS-74659-D. The court proceeding was instituted by Jones Truck Lines, Inc. (Jones or respondent), a former motor common and contract carrier, to collect undercharges from Novamax Technologies (U.S.A.), Inc. (Novamax or petitioner). Jones seeks undercharges of \$19,182.34 allegedly due, in addition to amounts previously paid, for the transportation of 156 shipments of such commodities as solvents, corrosive liquids, and corrosive solids, between July

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.

1988 and October 1990.² The shipments were less-than-truckload movements transported from Atlanta, GA, and Arlington, TX, to various points. By order dated January 24, 1995, the court stayed the proceeding and referred the matter to the ICC for resolution.

Pursuant to the court order, Novamax, on April 25, 1995, filed a petition for declaratory order requesting the ICC to resolve issues of rate reasonableness, tariff applicability, and unreasonable practice. By decision served May 5, 1995, the ICC established a procedural schedule for the submission of evidence on non-rate reasonableness issues. On July 3, 1995, petitioner filed its opening statement. Respondent filed its statement of facts and argument on August 31, 1995, and petitioner submitted its rebuttal statement on September 25, 1995.

Petitioner asserts that 83 of the shipments in question were transported by Jones between November 1, 1989, and March 1, 1990, under its contract carrier authority pursuant to a written agreement entered into by the parties. Novamax further asserts that respondent's attempt to collect undercharges constitutes an unreasonable practice under section 2(e) of the NRA and that the rates which Jones seeks to assess are unreasonable.

Petitioner supports its assertions with an affidavit from William H. Lewis, Comptroller of Novamax. Mr. Lewis claims that 83 of the subject shipments³ were transported from Atlanta under an agreement that provided for a 55% discount off class rates, subject to a minimum charge of \$42. The agreement refers to Item 2055 of Jones Tariff 651 and is described in a communication from Novamax to Jones, dated October 31, 1989, attached as Appendix 1 to Mr. Lewis' affidavit. Mr. Lewis also attached to his statement a document, signed by representatives of Jones and Novamax, entitled "Customer Cancellation Request," indicating that Items 2030 and 10044 of Tariff JTLS 630, a tariff that relates to movements from Arlington, were in effect between December 7, 1988, and November 3, 1989. Mr. Lewis states that Jones quoted the discount rate to Novamax at the time the subject shipments moved, that Jones billed petitioner for its services at the discounted rate, and that Novamax paid the bills as rendered. Mr. Lewis asserts that rates comparable to the rates originally quoted by Jones were available from other motor carriers used by petitioner during the involved period and maintains that Novamax would not have used Jones to transport its traffic had respondent attempted to assess the full undiscounted rates it is here seeking to collect.

Jones contends that the initially allowed discounts were not supported by an applicable, effective tariff and that petitioner has failed to establish that the subject transportation was performed

² Jones originally sought undercharges of \$26,145.33 based on claims derived from 213 shipments. During the course of the underlying court proceeding, respondent canceled 57 of its claims and modified 10 others, reducing its total claim for undercharges to \$19,182.34.

³ The undercharge claims relating to certain of these 83 shipments appear to have been included among the 57 original claims canceled by respondent.

in contract carriage. Respondent further contends that section 2(e) of the NRA does not govern this proceeding and contests the applicability of that provision on statutory and constitutional grounds.⁴

Respondent supports its position with a verified statement from Stephen L. Swezey, Senior Transportation consultant for Carrier Service, Inc. (CSI), the organization authorized to provide rate audit and collection services on behalf of Jones.⁵ Attached as Appendix C to Mr. Swezey's statement are eight representative balance due freight bill corrections issued by CSI on behalf of respondent that contain original freight bill data as well as asserted balance due amounts. The "corrected" freight bills indicate the original application of 55% discounts to five shipments

⁴ Jones argues that section 2(e) of the NRA is inapplicable to bankrupt carriers, may not be applied retroactively, and is unconstitutional. 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 (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. 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).

⁵ Attached as Appendices A and B to Mr. Swezey's statement are two affidavits submitted by Mr. Charles E. Shinn, another CSI analyst, in the underlying court case. These affidavits, which Mr. Swezey adopts as his own for purposes of this proceeding, describe the rationale used by respondent in re-rating the original freight bills.

transported from Atlanta between March 5, 1990, and May 21, 1990, as well as one shipment from Arlington transported on September 12, 1990; and the original application of 35% discounts to two shipments transported from Arlington on December 11 and 14, 1989. The correction adjustments made in each of the representative balance due freight bills resulted in the disallowance of the originally applied discounts and in one instance the re-rating of the originally assessed charge. Mr. Swezey asserts that petitioner's customer participation request for a 30% discount for shipments from Arlington, which became effective December 7, 1988, was canceled effective November 3, 1989; and that petitioner's participation in Tariff JTLS 651, which made provision for a 55% discount for shipments transported from Atlanta, was in effect from November 1, 1989, through March 1, 1990.⁶ Mr. Swezey states that balance due bills were issued to recover discounts applied for shipments transported either before or after the effective dates of the discount provisions or if the discount provisions did not apply from the origin point of the shipment. Mr. Swezey maintains that the corrected bills reflect the appropriate charge for the services rendered.

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."⁷

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 that 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

⁶ Included in Appendix D attached to Mr. Swezey's statement are two unsigned Customer Participation Requests (CPR) (forms used by Jones to indicate a shipper's participation in a tariff) relating to Tariff JTLS 630 listing Novamax's name and account numbers. The CPR's bear effective dates of December 7, 1988, and November 3, 1989. Also included is a copy of the signed Customer Cancellation Request with an effective date of November 3, 1989, submitted by Mr. Lewis.

⁷ 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 for all of the shipments at issue in this proceeding, including the 15 shipments transported after September 30, 1990.

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 System, Inc. v. ICC (In re American Freight System), 179 B.R. 952, 957 (Bankr. D. Kan. 1995).

It is undisputed that Jones no longer transports property.⁸ 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 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 eight representative balance due freight bills that indicate originally assessed class rate charges to which discounts of 35% and 55% were applied; correspondence referring to agreed upon negotiations to establish a 55% discount off class rates; and two separately dated customer participation requests, as well as a customer cancellation request form relating to tariffs that provide for discounted rates.⁹ 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, 239-40 (1994) (E.A. Miller).¹⁰ See William J. Hunt, Trustee for Ritter Transportation, Inc. v. Gantrade

⁸ Board records confirm that Jones’ motor carrier operating authorities were revoked on February 18, 1992.

⁹ The customer participation requests (CPR) bear effective dates of December 7, 1988, and November 3, 1989, while the customer cancellation request indicates a cancellation date of November 3, 1989. It appears that the cancellation request was intended to cancel the December 7, 1988 CPR and that a new CPR was intended to take effect immediately upon that cancellation. We note the November 3, 1989 CPR lists origin point zip codes applicable to both Atlanta and Arlington.

¹⁰ Jones, at pp 13-14 of its statement filed August 31, 1995, argues that freight bills cannot be used to satisfy the written evidence requirement. 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 the Board must

(continued...)

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 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 Jones and paid for by Novamax. The consistent application of rate discounts in the original freight bills issued by respondent at levels that conform with discount levels provided for in respondent's published tariffs confirm the testimony of Mr. Lewis and reflect the existence of negotiated rates. The evidence further indicates that Novamax relied upon the agreed-to discount rates in tendering its traffic to Jones, and that petitioner would not have used respondent to provide transportation service had respondent 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

¹⁰(...continued)

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 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, Jones concedes at page 11 of its statement 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 discounted rates were offered to Novamax by Jones; that Novamax tendered freight in reliance on the agreed-to discounted rates; that the negotiated rates were 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 Novamax 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 Charles L. Carnes
State Court of Fulton County,
State of Georgia
Superior Court House
136 Pryor Street, S.W.
Atlanta, GA 30303

Re: Civil Action File No. 93-VS-74659-D

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

Vernon A. Williams
Secretary