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SERVICE DATE - MAY 5, 2000

SURFACE TRANSPORTATION BOARD

DECISION

STB No. 42013

PHILIPS ELECTRONICS NORTH AMERICA CORPORATION
DBA PHILIPS LIGHTING COMPANY—PETITION FOR DECLARATORY ORDER—
CERTAIN RATES AND PRACTICES OF DEBELLIS, INC.
AND 401 D.T., INC. DBA SPECTRUM

Decided: May 3, 2000

BACKGROUND

This proceeding arises out of claims by DeBellis, Inc. (DeBellis), and 401 D.T., Inc. dba Spectrum (Spectrum) (jointly, carriers or respondents), to collect additional charges for certain transportation services performed on behalf of Philips Electronics North America Corporation dba Philips Lighting Company (Philips) in a matter pending before the United States District Court for the Central District of California in DeBellis, Inc. and 401 D.T. Inc., dba Spectrum v. Philips Electronics North America Corporation dba Philips Lighting Company, Case No. 96-2467-DDP (RNBx). De Bellis is a defunct organization no longer transporting property.

Respondents instituted the court proceeding to collect additional charges arising out of the assertedly intentional failure of petitioner to include the weight of pallets on its bills of lading issued for shipments tendered for movement between October 1, 1992, and September 30, 1994. According to the court-filed complaint, transportation service was provided by DeBellis from October 1, 1992, to March 31, 1994, and by Spectrum from April 1, 1994, to September 30, 1994. Respondents maintain that the failure to include pallet weights resulted in the original assessment of charges lower than amounts actually due. Additional freight charges of approximately \$275,000, plus punitive damages, are claimed. Carriers further allege that the asserted failure of petitioner to include pallet weights on its bills of lading constitutes fraud. By order dated May 29, 1997, the court stayed the proceeding and directed the parties to submit all transportation issues, including issues of contract carriage, tariff interpretation and application, tariff participation, and unreasonable rates and practices, to the Surface Transportation Board (Board) for resolution.

Pursuant to the court order, Philips, on July 30, 1997, filed a petition for declaratory order requesting the Board to resolve issues of contract carriage; tariff interpretation and applicability, particularly with respect to the inclusion of pallet weights for rating purposes; tariff participation; unreasonable practice; rate reasonableness; and compliance with the "180-day rule" billing dispute notification requirement of 49 U.S.C. 13710(a)(3). By decision served August 11, 1997, the Board established a procedural schedule for the submission of evidence. On November 21, 1997,

petitioner filed its opening statement. Respondents filed their opening statement in reply on January 26, 1998. Philips submitted its rebuttal statement in reply on February 10, 1998.¹

Petitioner asserts that a contract carrier relationship existed between the parties and that the shipments at issue were transported by respondents in accordance with agreed-upon terms and rates.² In the alternative, should the services performed by respondents be determined to be common carriage, petitioner argues that the tariffs upon which respondents rely are ineffective to support the additional freight charges claimed; that respondents' efforts to collect additional charges constitute an unreasonable practice under section 2(e) of the Negotiated Rates Act of 1993 (NRA),³ now codified at 49 U.S.C. 13711; and that the record is devoid of any evidence of intentional misrepresentation by petitioner of the true weight of the subject shipments. Petitioner states that respondents have failed to provide a comprehensive list of the shipments at issue or to rebill for the "corrected" amounts.

Philips supports its position with signed declarations from Chris Petrocelli, petitioner's current transportation manager, and Michael Bange, president of Champion Transportation Services, Inc., a transportation consultant retained by petitioner to investigate and evaluate certain transportation issues involved in this proceeding. Mr. Petrocelli states that he is the custodian of petitioner's transportation records and that his familiarity with the subject transportation services provided by respondents is based on his review of transportation matters handled by his predecessor. Based on his review of company files, it is Mr. Petrocelli's understanding that Phillips had an agreement with respondents, that the parties understood that pallet weights need not be declared as part of the shipment weight on the bills of lading, that petitioner relied upon its agreement with respondents in tendering its traffic to the carriers, and that the originally assessed freight charges billed by respondents and paid by petitioner were the proper amounts due. Mr. Petrocelli asserts that neither respondent has provided petitioner with a statement of account or issued revised freight bills that specify the pallet weight misstatement and the asserted amount due for that weight misstatement. He notes that minimum charges were billed for many of petitioner's shipments and that the recognition of pallet weights may not result in an increase in the originally assessed charge.

Mr. Bange asserts that both DeBellis and Spectrum were authorized to operate as contract carriers (Bange Exhibits D and E) and refers to various documents that lend support to the

¹ Subsequently, on March 9, 1998, and August 24, 1998, two additional pleadings identified as declarations of petitioner's counsel in support of petitioner's reply (rebuttal) were submitted by petitioner's counsel.

² Petitioner in its rebuttal statement attached correspondence received from respondents in which the carriers offered to provide specialized service in transporting shipments from Philips' Bakersfield, CA distribution center. In a letter dated June 9, 1993, respondents proposed to use Philips' logo on trailers and have their drivers wear Philips' caps and shirts.

³ Pub. L. No. 103-180, 107 Stat. 2044.

contention that the shipments at issue were transported by respondents as contract carriers (Bange Exhibits G and H).⁴ He states that the tariffs on which respondents base their common carrier underpayment claims are Item 2150 of tariff ICC DBTI 200 (Bange Exhibit I-1) for DeBellis-handled shipments and tariff ICC SEUM 200-A (Bange Exhibit J) for Spectrum-handled shipments. Mr. Bange notes that Item 2150 of tariff ICC DBTI 200 did not become effective until September 27, 1993, and maintains that this tariff may not be used to support claims relating to shipments handled by DeBellis prior to September 27, 1993. With respect to Spectrum, Mr. Bange refers to the respondents' court complaint (Bange Exhibit A) and notes that tariff ICC SEUM 200-A did not become effective for interstate traffic until May 9, 1994.⁵ He maintains that this tariff may not be used to support claims relating to shipments handled by Spectrum prior to that date. Mr. Bange further notes that application of the rates contained in Item 2150 of tariff ICC DBTI 200 is dependent on mileage and that the governing tariff is the Household Goods Carrier's Bureau, ICC HGB 100 series (Bange Exhibit I-3). Based on his examination of the relevant HGB participating carrier tariffs, Mr. Bange asserts that DeBellis was not a participant in the HGB mileage guide tariffs in effect at the time the shipments at issue were transported (Bange Exhibits K and L) and that tariff ICC DBTI 200 is void and unenforceable.⁶

Mr. Bange states that, while respondents have failed to specify the increase in shipment weight that would result from including the weight of pallets, it has been his experience that pallets of the type used by shippers of lamps and lighting fixtures⁷ seldom weigh more than sixty-five pounds. He notes that many of petitioner's shipments were originally rated as minimum charge shipments and asserts that adding the weight of pallets to individual shipments would not necessarily increase freight charges above the originally billed level. From his examination and analysis of the

⁴ Exhibit G consists of a letter and attachments dated July 20, 1994, from Spectrum to Philips that refers to proposed amendments to a document entitled AGREEMENT FOR MOTOR CONTRACT CARRIAGE TRANSPORTATION. Included among the amended provisions is one limiting carrier liability for loss or damage to shipments. Exhibit H contains a letter dated January 4, 1995, from Spectrum declining to honor a shipment damage claim based on the liability limitation provision.

⁵ Exhibit B to the court complaint set forth in Bange Exhibit A contains the following note regarding tariff ICC SEUM 200-A: **Adopted by 401 DT, Inc., DBA Spectrum 5/9/94.**

⁶ Mr. Bange notes that the applicable Spectrum tariff is also dependent on mileage governed by the Household Goods Carrier's Bureau tariff ICC HGB 100 series (Bange Exhibit J-3). He asserts that Spectrum was not a participant in the HGB mileage guide tariffs in effect at the time the shipments at issue were transported. Respondents maintain that Spectrum was a participant in the mileage guide tariff during the pertinent time period and effectively refute Mr. Bange's assertion (Respondents opening statement at 3; Declaration of Robert Greitz at 5 and 10).

⁷ Petitioner is a manufacturer of lamps, lighting fixtures, and light bulbs.

documents available to him,⁸ Mr. Bange maintains that petitioner was offered freight rates that were not properly or timely filed; that petitioner tendered its shipments to respondents in reliance upon the offered rates; and that the originally assessed charges were paid by petitioner. Mr. Bange is of the opinion that, with regard to the DeBellis-handled shipments, these factors provide the basis for a finding of unreasonable practice.

Respondents argue that this proceeding does not involve an undercharge issue and that the only controversy to be resolved is whether they can charge for the full actual weight of the shipments transported. They acknowledge that DeBellis was not a participant in the HGB mileage guide tariffs in effect at the time the shipments at issue were transported, maintain that the service provided to petitioner was common carrier service, and assert that they are entitled to collect the agreed-upon rates applied to a shipment weight that includes pallet weight.

DISCUSSION AND CONCLUSIONS

While it is clear from the record developed in this proceeding that the two involved carriers are closely related⁹ and provided transportation service to petitioner similar in manner and circumstances, we recognize that DeBellis and Spectrum are separate corporate entities that were authorized to provide motor common and contract carrier service under separate operating authorities and tariffs. The current status of the two carriers, however, is quite different. DeBellis is no longer functioning as an operating carrier, and Spectrum is continuing to engage in motor carrier operations. The legal standards to be applied in the disposition of undercharge claims are affected by this difference in operating status and, particularly in this instance, require that we undertake two separate approaches in an attempt to resolve the issues raised.

DeBellis--To resolve the DeBellis claims to collect additional charges, we rely on section 13711 and, other than in peripheral references, do not reach the other issues raised.

Section 13711(a) 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 (1) the applicable rate that was lawfully in effect pursuant to a [filed] tariff . . . and (2) the negotiated rate for such

⁸ The documents included the court complaint filed by respondents (Bange Exhibit A identified as the First Amended Complaint), records of the Federal Highway Administration indicating that the motor common and contract carrier operating authorities held by DeBellis had been revoked on September 26, 1994 (Bange Exhibit S), and copies of the original freight bills and other supporting documents issued by respondents relating to five of the shipments at issue (Bange Exhibit C).

⁹ The carriers have the same mailing address (P.O. Box 3974, Laguna Hills, CA 92654) and management. All correspondence from DeBellis and Spectrum to Philips submitted on the record was signed by Mr. Carmen Cerciello, an individual referred to by Philips as respondents' principal.

transportation service if the carrier . . . is no longer transporting property . . . or is transporting property . . . for the purpose of avoiding application of this section.”

It is undisputed that DeBellis no longer transports property. Accordingly, we may proceed to determine whether the attempt by DeBellis 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 13711(a) determination. Section 13711(f) 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 13711(a) cannot be satisfied unless there is written evidence of a negotiated rate agreement.

Here, the record contains copies of original freight bills and other supporting documents issued by DeBellis indicating assessed charges based on stated weights that do not include pallet weights that conform with rates assertedly agreed to by the parties. 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 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 DeBellis and Philips conducted business in accordance with agreed-to negotiated rates that were originally billed by DeBellis and paid by Philips. The application in the original freight bills of assessed charges based on weights that do not include pallet weights confirm the assertions of Mr. Petrocelli and Mr. Bange and reflect the existence of negotiated rates. The evidence further indicates that Philips relied upon the agreed-to rates in tendering its traffic to DeBellis.

In exercising our jurisdiction under section 13711(b), 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 13711(b)(2)(A)]; (2) whether the shipper tendered freight to the carrier in reasonable reliance upon the offered rate [section 13711(b)(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 13711(b)(2)(C)]; (4) whether the transportation rate was billed and collected by the carrier [section 13711(b)(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 13711(b)(2)(E)].

Here, the evidence establishes that negotiated rates were offered by DeBellis to Philips; that Philips reasonably relied on the offered rates in tendering its traffic to DeBellis; that DeBellis did not properly or timely file a tariff providing for such rates and has seriously questioned the existence of an agreement for contract carriage; that the negotiated rates were billed and collected by DeBellis;

and that DeBellis now seeks to collect additional payment based on a higher rate filed in a tariff. Therefore, under 49 U.S.C. 13711, we find that it is an unreasonable practice for DeBellis to attempt to collect undercharges from Philips for transporting the shipments at issue in this proceeding.¹⁰

Spectrum--Because the provisions of section 13711 do not apply to operating carriers, resolution of the Spectrum undercharge claims requires consideration of other issues raised by Philips. A determination that the service provided to petitioner by Spectrum was that of a contract carrier would render ineffective Spectrum's claim for undercharges.¹¹

To conclude that certain transportation moved in contract carriage, we must find that: (1) the carrier held appropriate contract carrier authority to provide the service; (2) the shipper and the carrier had an agreement for the transportation to be provided as contract carriage, and the shipments moved under that agreement; and (3) the transportation was consistent with the statutory definition of contract carriage, i.e., (a) it moved under a continuing agreement, or (b) the carrier met the distinct needs of the shipper. See Freightliner Corp. & Mercedes-Benz Truck Co., -Rates, 9 I.C.C.2d 1031, 1040 (1993) , aff'd sub nom. In re Transcon Lines, 89 F.3d 559, 567 (9th Cir. 1996) (Transcon).

In resolving disputes concerning whether particular services were common or contract carriage, the "totality of the circumstances" is examined, General Mills, Inc.—Petition for Declaratory Order, 8 I.C.C.2d 313, 322-23 (1992), aff'd, Bankruptcy Estate of United Shipping Co. v. General Mills, 34 F.3d 1383 (8th Cir. 1994), taking into account the parties' negotiations, their intention, the agreements, and their performance under the agreements. Transcon, 89 F.3d at 566.

While the present record does contain some evidence that lends support to the contention that the shipments at issue were transported by Spectrum in contract carrier service, the evidence submitted is insufficient, upon consideration of the "totality of circumstances," to enable us to determine whether a shipper-contract carrier relationship existed between the parties. The record does include a letter (with attachments) dated July 20, 1994, from Spectrum to Philips that refers to

¹⁰ While our decision regarding the DeBellis aspect of this proceeding is based on our findings under section 13711, we recognize that there is also merit to petitioner's assertions that the tariff relied upon by DeBellis to support its undercharge claims (Item 2150 of tariff ICC DBTI 200) (1) may not be used to support claims relating to shipments handled by DeBellis prior to September 27, 1993, and (2) is void and unenforceable in that the subject tariff is dependent on mileage and DeBellis was not a participant in the applicable mileage guide tariff in effect at the time the shipments at issue were transported. See Security Services, Inc. v. K Mart Corp, 511 U.S. 431 (1994); Jasper Wyman & Son et al.—Pet. For Declaratory Order, 8 I.C.C.2d 246 (1992); and Roberts & Dybdahl Inc.—Pet. for Declar. Order, 9 I.C.C.2d 193 (1992).

¹¹ Undercharge claims arise out of the filed rate doctrine and must be based on applicable common carrier tariffs.

a proposed amendment to a document entitled AGREEMENT FOR MOTOR CONTRACT CARRIAGE TRANSPORTATION, but the “Agreement” has not been submitted into the record and there is no indication as to whether it was ever executed. The record does not contain testimony, correspondence, or documents clearly showing that the parties intended the transportation service provided to be contract carriage.

As indicated in Exhibit B to the court complaint filed by respondents (Bange Exhibit A), the Spectrum claims are predicated upon Item 3030 of tariff ICC SEUM 200-A. The rates in this item are expressed in cents per hundredweight based on mileage and five separate minimum weight categories (Bange Exhibit J).¹² The tariff provides for a minimum charge of \$25 per shipment. Item 995 of the tariff contains the following provision:

Charges shall be assessed on the gross weight of the shipment. No allowance shall be made for the weight of pallets.

Neither the rate levels, product weights, nor mileage aspects of the originally assessed charges are questioned in this proceeding. The only element requiring consideration is the effect, if any, that the addition of pallet weights would have in determining the proper charges to be assessed.

The record, however, as presently developed does not contain a comprehensive listing of the Spectrum-handled shipments at issue and is insufficient to allow for adequate consideration of the common carrier tariff based claims of Spectrum.¹³ It contains only two original freight bills and related documents issued by Spectrum¹⁴ and does not include balance due bills that calculate and detail the amount and supporting basis, including the asserted weight shortfall and rate to be applied, for the undercharges claimed. Nor does it contain an explanation or response to the assertions made on behalf of Philips that the originally billed freight charges for its minimum rate shipments would

¹² The categories are described in terms of minimum weight in pounds and consist of any quantity; 5,000; 10,000; 20,000; and 40,000.

¹³ The record is also inadequate to enable us to determine whether the originally assessed rates conform with Item 3030 of tariff ICC SEUM 200-A. We note that the tariff provides for a minimum charge of \$25.00 but that Spectrum assessed a minimum charge of \$26.50 in the only such freight bill issued by that carrier submitted on this record. See Bange Exhibit C.

¹⁴ Both freight bills indicate a 4/30/94 date of shipment. One bill reflects the assessment of a minimum charge of \$26.50 for a 66-pound shipment (the minimum charge for shipments within California referred to in the proposed amendments to the “Agreement” included in Bange Exhibit G). The other assesses a \$62.85 charge for a 539-pound shipment based on an \$11.66 per hundredweight rate.

not necessarily be affected by increasing the originally stated shipment weights by pallet weights.¹⁵ These matters require clarification.

Spectrum acknowledges that it was approximately November 1, 1994, when it first became aware of the asserted under-reporting of pallet weights (Bange Exhibit A) and has not questioned petitioner's assertions that respondent has never issued revised freight bills specifying the additional charges sought or otherwise attempted to formally rebill for its asserted claims.

The "180-day rule" motor carrier billing dispute notification provisions of 49 U.S.C. 13710(a)(3)¹⁶ applies to all original freight bills issued on or after August 26, 1994. As pertinent, the provision states

A carrier must issue any bill for charges in addition to those originally billed within 180 days of the receipt of the original bill in order to have the right to collect such charges.

Although a finding as to the 180-day rule ultimately must be made by a court in the context of a lawsuit, we have stated that we would provide our opinion on the issue in a case that is appropriately before us. See NSL, Inc., v. Owen Eugene Whitlock, et al., STB Docket No. 41997, et al. (STB served Apr. 5, 2000), at 3. In this case, it is apparent to us that Spectrum has failed to comply with the provisions of the "180-day rule" and is thus precluded from attempting to collect additional charges for shipments transported subsequent to August 26, 1994.¹⁷

For that reason, and in light of Mr. Bange's assertion that tariff ICC SEUM 200-A may not be used to support claims relating to shipments handled by Spectrum prior to May 9, 1994 — which was not challenged by Spectrum and is adopted herein — the only period during which Spectrum might be able to collect additional charges would be from May 9, 1994, to August 26, 1994. As to that period, in order to provide petitioner and Spectrum with an opportunity to rectify the deficiencies in the present record, we will reopen the record in this proceeding to allow the parties to submit supplemental evidence and clarify their positions. If an adequate record is not developed, this proceeding will be dismissed without prejudice, and the court will be advised that additional charges sought by Spectrum have not been justified.

¹⁵ It is also conceivable that the originally applied minimum weight category could be altered by a pallet weight addition and result in a reduced freight charge.

¹⁶ This provision was enacted in the Transportation Industry Regulatory Reform Act of 1994 (TIRRA), Pub. L. No. 103-311, section 206(c)(4), 108 stat. 1683, 1685 (1994).

¹⁷ As Spectrum did not become aware of the asserted weight shortfall until November 1, 1994, it had until May 1, 1995, to comply with the rebilling requirements of the rule.

Finally, the Board has previously noted that questions of fraud are issues of law which can be resolved by the courts without a determination by the Board. Philips Lighting Co.—Petition for Declaratory Order—Certain Rates and Practices of J.K. Hutch, Inc. STB Docket No. 42024 (STB served Aug. 6, 1998).

It is ordered:

1. This proceeding is discontinued with respect to the claims of DeBellis.
2. With respect to claims of Spectrum, within 30 days of the service date of this decision, the parties are directed to submit supplemental evidence addressing the issues discussed in this decision regarding the shipments transported by Spectrum between May 9, 1994, and August 26, 1994. To the extent that either party wishes to respond to a filing by the other party, it may do so within 50 days of the service date of this decision.
3. This decision is effective on the date served.
4. A copy of this decision will be mailed to:

The Honorable Dean D. Pregerson
United States District Court for the Central District of California
U.S. Courthouse
312 North Spring Street
Room 504
Los Angeles, CA 90012

Re: Case No. 96-2467-DDP(RNBx)

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

Vernon A. Williams
Secretary