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SERVICE DATE - AUGUST 19, 1998

SURFACE TRANSPORTATION BOARD¹

DECISION

No. 40901

PARKER HANNIFIN CORPORATION--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF BUR-COLD EXPRESS, INC.

Decided: August 13, 1998

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 Southern District of Texas, Brownsville District, in Bur-Cold Express, Inc. v. Parker Hannifin Corporation, Civil Action No. 91-112. The court proceeding was instituted by Bur-Cold Express, Inc. (Bur-Cold or respondent), a former motor common carrier, to collect undercharges from Parker Hannifin Corporation (Parker Hannifin or petitioner). Bur-Cold seeks undercharges of \$180,640.05 allegedly due, in addition to amounts previously paid, for services rendered in transporting approximately 645 shipments of auto parts and related equipment between January 11, 1988, and December 11, 1989.² The shipments were transported between Brownsville, TX, and St. Augustine,

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 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.

² The court determined that claims based on shipments delivered or tendered for delivery prior to June 25, 1988, were barred by the statute of limitations and ordered that all such claims be dismissed. The court also dismissed eight of respondent's originally listed claims that were determined to be double billings for previously billed shipments. Two of the claims identified as double-billed claims were transported prior to June 25, 1988, and were included among the

(continued...)

FL; Brownsville and Columbia, MO; and St. Augustine and Columbia. By order dated December 11, 1992, the court stayed the proceeding and directed that the issue of rate reasonableness be referred to the ICC for resolution.

Pursuant to the court order, Parker Hannifin, on January 5, 1993, filed a petition for declaratory order requesting the ICC to resolve issues of tariff applicability and construction, unreasonable practice, and rate reasonableness. By decision served January 15, 1993, a procedural schedule was established. On March 15, 1995, petitioner filed its opening statement. Respondent filed its reply and a motion to strike specified portions of petitioner's opening statement on April 28, 1993. Petitioner submitted its rebuttal and reply to the motion to strike on May 28, 1993.

Parker Hannifin asserts that the common carrier rates asserted for a substantial portion of the shipments at issue (shipments between St. Augustine and Columbia) were never properly filed with the ICC and that the rates Bur-Cold here seeks to assess are unreasonable. Petitioner maintains that the parties intended the originally billed rates to be the applicable rates to be assessed; that Bur-Cold billed and accepted Parker Hannifin's payment of the originally assessed rates without objection; that the originally assessed rates were comparable to rates available from other motor carriers; and that petitioner would not have used Bur-Cold's services had it demanded the rates it here seeks to assess.

Petitioner supports its contentions with a verified statement from Phil Cressman, Purchasing Manager for Parker Hannifin's Ideal Division from November 28, 1988, to November 30, 1989.

² (...continued)

approximately 162 claims determined to have been barred by the statute of limitations. The court dismissal rulings reduced respondent's claim for undercharges to be considered in this proceeding to \$133,794.85 for services rendered in transporting approximately 477 shipments between June 25, 1988, and December 11, 1989.

Mr. Cressman's responsibilities included negotiating for motor carrier transportation services and overseeing the performance of those services.³ Mr. Cressman states that he dealt with Bur-Cold and was familiar with the circumstances under which Bur-Cold provided service to petitioner. According to Mr. Cressman, Bur-Cold put into effect a rate of \$1.00 per mile for shipments to and from St. Augustine; later reduced that rate to \$0.95 per mile effective August 20, 1989; applied the same rates to shipments between Brownsville and Columbia; and so advised petitioner. Mr. Cressman asserts that Bur-Cold billed petitioner in accordance with the represented rates and accepted petitioner's payment of the billed rates as payment in full. Attached to Mr. Cressman's verified statement are copies of two letters addressed to him from Mr. Les Burch, President of Bur-Cold. The first letter dated July 31, 1989, confirms Bur-Cold's intent expressed in a telephone conversation to reduce its freight rate on truckload movements between St. Augustine and Columbia from \$1.00 per mile to \$.95 per mile (Exhibit D). The second letter dated November 8, 1989, reconfirms this reduced rate (Exhibit E). Also attached to Mr. Cressman's verified statement are attachments to respondent's court complaint that list each of the shipments originally at issue by invoice number, date of shipment, mileage traversed, originally billed rate or amount, asserted tariff rate or amount, and claimed amount due (Exhibits A and B). A review of the claims listings indicates that the vast majority of the subject shipments were originally billed at a rate of \$1.00 per mile; that subsequent to August 20, 1989, at least 10 shipments were originally billed at \$.95 per mile; and that respondent is seeking to assess a tariff rate of \$1.25 per mile. Mr. Cressman asserts that the originally assessed rates were comparable to the rates offered by other carriers and that petitioner would never have agreed to use respondent's services at an assessed rate of \$1.25 per mile.

In reply, respondent contends that its filed tariffs were applicable to all of the subject shipments, and that petitioner has failed to establish that the filed rate it here seeks to assess is unreasonable. It supports its contentions with a verified statement from Bur-Cold Vice President Larry George Burch. Mr. Burch asserts that Item 4000 of Bur-Cold's Tariff ICC BCEP 200 is the published tariff item applicable to the subject shipments. The tariff provides for a per-loaded rate of

³ Respondent seeks to strike certain portions of Mr. Cressman's verified statement pertaining to the rates charged by other carriers. Based on the nature of his responsibilities within petitioner's organization, Mr. Cressman would be expected to have personal knowledge of the information contained in the challenged statements. Respondent's objections relate more to the weight to be given to the challenged statements than to their admissibility. Respondent's motion to strike is denied.

\$1.25 per mile.⁴ Mr. Burch acknowledges that the freight bills originally issued by respondent were based on negotiated rates agreed to by the parties,⁵ but states that following the decision of the Supreme Court in Maislin Indus. v. Primary Steel, 497 U.S. 116 (1990) (Maislin),⁶ Bur-Cold issued corrected invoices for each of the subject shipments based on its filed tariff rate of \$1.25 per mile.

By decision served September 9, 1993, the ICC reopened the proceeding and, in recognition of its newly adopted standards for rate reasonableness announced in Georgia-Pacific Corp.-- Pet. for Declar. Order, 9 I.C.C.2d. 103 (1992), reconsidered, 9 I.C.C.2d 796 (1993), extended an opportunity to the parties to supplement the record with respect to the rate reasonableness issue. On November 23, 1993, petitioner submitted its supplemental statement, to which was attached a verified statement of Michael Orsog, petitioner's Manager of Corporate Transportation. On December 22, 1993, respondent submitted its supplemental reply and motion to strike portions of Mr. Orsog's statement.⁷

On December 3, 1993, the NRA became law. The NRA substantially restored the ability of the ICC (and now the Board) to find that assessment of undercharges is an unreasonable practice, and it provided several new grounds on which shippers may defend against payment of undercharges. By decision served December 22, 1993, the ICC reopened the record and established

⁴ A review of respondent's Tariff ICC BCEP 200 shows that Item 180-C of that tariff, which was in effect at the time the involved shipments moved, provided that the rates contained in the tariff only applied to authorized operating rights set forth in Certificate No. MC-155487, respondent's original motor carrier certificate. That certificate did not include authority to transport shipments between points in Florida and points in Missouri. Even though respondent subsequently obtained nationwide general commodity authority from the ICC, it did not publish a revised tariff to reflect its additional authority. Under these circumstances, the tariff rate that respondent here seeks to apply is inapplicable to any of the subject shipments that moved from St. Augustine, FL, to Columbia, MO.

⁵ Mr. Burch states at p. 6 of his verified statement:

Bur-Cold calculated the freight charges due from Parker Hannifin on the original invoices by reference to negotiated rates due to our understanding that, as a common carrier of freight operating pursuant to ICC authority in interstate commerce, it could engage in such negotiations and collect charges based on negotiated rates rather than its filed tariff rate.

⁶ The ICC's prior unreasonable practice policy was invalidated by the Supreme Court in Maislin.

⁷ Respondent seeks to strike certain portions of Mr. Orsog's verified statement that contain references to Mr. Cressman's statement or pertain to rates offered by other carriers. As indicated with respect to Mr. Cressman, the nature of Mr. Orsog's responsibilities within petitioner's organization are such as would require access to and personal knowledge of the information contained in the challenged statements. Respondent's motion to strike the challenged portions of Mr. Orsog's statement is denied.

a procedural schedule permitting the parties to invoke the alternative procedure under section 2(e) of the NRA and to submit new evidence and argument in light of the new law. On April 21, 1994, petitioner filed a supplemental statement asserting that, based on the existing record, it is entitled to relief pursuant to section 2(e) of the NRA. On May 24, 1994, respondent filed a letter stating that it would rely on its previously filed pleadings and that it would not submit an additional supplemental reply statement.

DISCUSSION AND CONCLUSIONS

We dispose of this proceeding under section 2(e) of the NRA. Accordingly, with the exception of the tariff applicability issue addressed in note 4, we do not reach the other issues raised.

At the outset, we recognize that the court referred this matter to the ICC to consider the issue of rate reasonableness. Nevertheless, our use of section 2(e)'s "unreasonable practice" provision to resolve this proceeding is fully 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 grounds within our jurisdiction, and, in cases where section 2(e) provides a dispositive resolution, we rely on it rather than the more subjective rate reasonableness provisions. 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 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

⁸ 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.

It is undisputed that Bur-Cold no longer transports property.⁹ Accordingly, we may proceed to determine whether Bur-Cold's 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 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 includes attachments to respondent's court complaint that indicate that virtually all of the shipments at issue were originally billed at a rate of \$1.00 per mile. Also present on the record is a letter dated July 31, 1989, signed by the President of Bur-Cold that, in the course of confirming an intended rate reduction to \$.95 per mile effective August 20, 1989, indicates that Bur-Cold's billing rate for Parker Hannifin's traffic moving between St. Augustine and Columbia prior to the projected effective date was \$1.00 per mile. 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) (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 rates and that the rates were agreed upon by the parties).

In this case the evidence is substantial that the parties conducted business in accordance with agreed-to negotiated rates. Indeed, respondent acknowledges that its originally assessed charges

⁹ On February 12, 1988, respondent filed for bankruptcy protection under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of Texas. ICC records confirm that Bur-Cold's motor carrier operating rights were revoked on July 22, 1991.

were calculated based upon negotiated rates. The consistent application of originally assessed freight rate charges of \$1.00 per mile and, in certain instances after August 20, 1989, \$0.95 per mile, confirm the unrefuted testimony of Mr. Cressman and reflect the existence of negotiated rates.

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 a negotiated rate was offered to Parker Hannifin by Bur-Cold; that Parker Hannifin, reasonably relying on the offered rate, tendered the subject traffic to Bur-Cold; that the negotiated rate was billed and collected by Bur-Cold; and that Bur-Cold 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 Bur-Cold to attempt to collect undercharges from Parker Hannifin 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. Respondent's motions to strike portions of the verified statements of Mr. Phil Chessman and Mr. Michael Orsog are denied.
2. This proceeding is discontinued.
3. This decision is effective on its service date.

No. 40901

4. A copy of this decision will be mailed to:

The Honorable Filemon B. Vela
United States District Court for the
Southern District of Texas, Brownsville Division
P.O. Box 1072
Brownsville, TX 78522

Re: Civil Action No. B-91-112

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary