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SERVICE DATE - JANUARY 19, 2001

SURFACE TRANSPORTATION BOARD

DECISION

STB No. 42018

SHUFORD MILLS, INC.--PETITION FOR DECLARATORY ORDER--CERTAIN RATES  
AND PRACTICES OF WILLIG FREIGHT LINES, INC.

Decided: January 18, 2001

We find that collection of the undercharges sought in this proceeding would be an unreasonable practice under 49 U.S.C. 13711. Because of our finding under section 13711, we will not reach the other issues raised in this proceeding.

BACKGROUND

This matter arises out of a court action in the United States Bankruptcy Court for the Northern District of California in Willig Freight Lines, Inc., v. Shuford Mills, Inc., Adv. No. 97-3-383-DM. The court proceeding was instituted on May 21, 1997, by Willig Freight Lines, Inc. (Willig or respondent),<sup>1</sup> a former motor common and contract carrier, to collect undercharges from Shuford Mills, Inc. (Shuford or petitioner). Willig seeks undercharges in the amount of \$21,668.92 (plus costs and interest), allegedly due, in addition to amounts previously paid, for services rendered in transporting 89 shipments of textiles and tape products from Shuford's facility at Phoenix, AZ, to points in Washington and Oregon. The shipments were transported between August 25, 1993, and May 23, 1994. By order dated March 31, 1997, the court stayed the proceeding to enable petitioner to seek a determination by the Board of issues of rate reasonableness, unreasonable practice, and tariff applicability.<sup>2</sup>

Pursuant to the court order, Shuford, by petition filed September 25, 1997, requested the Board to resolve the issues raised by the court. By decision served October 2, 1997, the Board established a procedural schedule for the submission of evidence. On December 1, 1997,

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<sup>1</sup> On October 19, 1995, Willig filed for bankruptcy under Chapter 11 of the United States Bankruptcy Code, in the United States Bankruptcy Court for the Northern District of California, Case No. 95-33940 DM.

<sup>2</sup> The court order was issued in the underlying bankruptcy proceeding as a case management order for the handling of undercharge claim adversary proceedings instituted by Willig.

petitioner filed its opening statement.<sup>3</sup> Respondent filed its reply on December 23, 1997, and Shuford submitted its rebuttal on January 14, 1998.

Shuford asserts that Willig's attempt to collect the claimed undercharges constitutes an unreasonable practice under section 13711(a), and that the rates Willig now seeks to collect are unreasonable. Shuford maintains that the discounted freight charges originally billed by Willig and paid by Shuford were discount rates mutually agreed upon by the parties, and that Shuford relied on the agreed-upon rates in tendering its traffic to Willig to the exclusion of services provided by other carriers.

Shuford supports its assertions with affidavits from Cecil W. Davis, petitioner's Director of Traffic and Distribution, and William Dennis Lively, a Willig terminal manager and sales representative for Arizona. Mr. Davis states that his responsibilities include negotiating rates and terms with carriers for the transportation of Shuford's products. He asserts that in 1993 he negotiated an agreement with Willig for the transportation of Shuford's products from Phoenix to destinations in Nevada, Oregon, and Washington<sup>4</sup> at rates that were discounted 60% from the National Motor Freight Classification class 55 rates.<sup>5</sup> According to Mr. Davis, it was his intention to have the 60% discount apply to all destinations in Oregon and Washington. He states that application of the agreed-to 60% discount was reflected in Willig discount tariff 603, Item 3104(R), effective August 7, 1993 (Davis Exhibit F). Mr. Davis asserts that Shuford relied upon the mutually agreed-upon discounted rates in tendering its freight to Willig; that Willig billed Shuford at the discounted, agreed-upon rates; and that the billed discounted rates were promptly paid by Shuford. Attached as Exhibit H to Mr. Davis' statement are copies of four representative balance due freight bills issued by Willig that contain originally issued freight bill data as well as "corrected" balance due amounts. An examination of these representative freight bills indicates originally assessed charges to which discounts of 60% were applied and newly

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<sup>3</sup> On December 18, 1997, petitioner filed a motion to supplement its opening statement to include newly found evidence. The evidence was contained in certain documents that respondent had been directed to provide pursuant to Vertex Corp. – Pet. Declar. Order – Rates and Practices, 9 I.C.C.2d 688 (1993), modified at 10 I.C.C.2d 367 (1994). The documents were received by Shuford on December 14, 1997, subsequent to the filing of its opening statement. Petitioner asserts that Willig will not be prejudiced by its supplemental filing because respondent had not yet filed its reply. Petitioner's motion for supplemental filing was not challenged by Willig. The motion to supplement will be granted.

<sup>4</sup> Attached as Exhibit A to the Davis statement is a letter from Sal Ioele, Southern Regional Sales Manager for Willig, dated February 9, 1993, indicating that Mr. Ioele is joined by Mr. Lively in thanking Mr. Davis for meeting with them.

<sup>5</sup> Mr. Davis maintains that the agreed-upon 60% discount was incorporated into prediscounted commodity rates contained in Tariff ICC WLIG 310, Item 7913, effective February 4, 1993, attached as Exhibit E to his statement.

assessed charges that eliminate the originally applied discounts. Mr. Davis states that competitive motor carrier services at rates comparable to those originally billed by Willig were available to and used by Shuford, and that had respondent attempted to charge the rates it now seeks to assess, the shipments at issue would not have been tendered to Willig.

Mr. Lively states that his duties included negotiating and initiating rates with shippers and that Shuford was one of his accounts. He asserts that he personally negotiated Willig rate agreements with Shuford that provide for a 60% discount off class rates for movements from petitioner's Phoenix facility and that Willig's published tariffs provide for the application of a 60% discount for Shuford shipments to destinations in California, Nevada, Oregon, and Washington. He states that beginning in late August 1993 Shuford tendered freight to Willig and that Willig billed Shuford and collected for the transportation service provided in accordance with the terms of the negotiated discount agreement.<sup>6</sup>

Respondent's evidence consists of legal argument of counsel and a declaration by Rodney Johnson (Exhibit A), President of Trans-Allied Audit Co. Inc.<sup>7</sup> Counsel contends that the facts submitted by petitioner are insufficient to sustain an unreasonable practice finding and that petitioner has failed to demonstrate that the rates Willig here seeks to collect are unreasonable. Mr. Johnson explains the process used in auditing the freight bills at issue and attests to the rate accuracy of the amounts claimed in the balance due bills. Attached to Mr. Johnson's declaration are copies of 89 balance due bills issued by respondent for the shipments subject to this proceeding.<sup>8</sup>

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<sup>6</sup> Mr. Lively also states that these same discount rates were provided for in a transportation contract that he, on behalf of Willig, negotiated with Shuford. A copy of the transportation agreement, which bears an effective date of January 1, 1995, is attached as Exhibit G to the Davis statement.

<sup>7</sup> Trans-Allied was the organization retained by the estate of Willig to audit freight undercharges for the 3-year period that preceded defendant's bankruptcy filing.

<sup>8</sup> These balance due freight bills include and conform with the representative balance due freight bills submitted in Exhibit H to the Davis statement.

## DISCUSSION AND CONCLUSIONS

We will dispose of this proceeding under section 13711. Accordingly, we do not reach the other issues raised.<sup>9</sup>

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 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 Willig no longer transports property. Accordingly, we may proceed to determine whether the respondent’s attempt to collect undercharges (the difference between the applicable filed 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 89 balance due freight bills issued by Willig that include originally assessed charges to which discounts of 60% were applied and copies of tariff provisions published by respondent that provide for the application of 60% discounts. These balance due freight bills indicate that the rates originally charged were consistently and substantially below those that respondent is seeking to assess. 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. Mar. 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 rates and that the rates were agreed upon by the parties).

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<sup>9</sup> Typically, a district court hearing undercharge cases will direct the shipper to bring to the Board all defenses that have been raised in court; as a result, in addition to section 13711 issues, petitioners before the Board typically raise issues of contract carriage, rate applicability, and rate reasonableness. When it is able to resolve a case fully on section 13711 grounds, however, the Board does not address those other more complex issues. See, e.g., Rhineland Paper Company v. The Bankruptcy Estate of Murphy Motor Freight Lines, Inc., No. 40837 (STB served Oct. 23, 1997). We will not address the other issues raised here because our section 13711 findings fully resolve the question of petitioner’s liability for the rates sought.

In this case, the evidence indicates that the parties conducted business in accordance with agreed-to negotiated discount rates that were originally billed by Willig and paid by Shuford. The consistent application in the original freight bills of assessed charges of class rates to which discounts of 60% were applied, the correspondence from Willig's Mr. Ioele, and the published tariffs that provided for application of 60% discounts, support the unrefuted assertions of Mr. Davis and Mr. Lively and reflect the existence of negotiated rates. The evidence further indicates that Shuford relied on the agreed-to discount rates in tendering its traffic to Willig and would not have used Willig to transport the shipments at issue had respondent attempted to charge the undiscounted rates it now seeks to collect.

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 a negotiated discount rate was offered to Shuford by Willig; that Shuford reasonably relied on the offered discount rate in tendering its traffic to Willig; that Willig did not properly or timely file a tariff providing for such discount rate; that the negotiated rate was billed and collected by Willig; and that Willig now seeks to collect additional payment based on a higher undiscounted rate filed in a tariff. Therefore, under 49 U.S.C. 13711, we find that it is an unreasonable practice for Willig to attempt to collect undercharges from Shuford 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. Shuford's motion to supplement its opening statement is granted.
2. This proceeding is discontinued.
3. This decision is effective on its service date.
4. A copy of this decision will be mailed to:

The Honorable Dennis Montali  
United States Bankruptcy Court for  
the Northern District of California  
P.O. Box 7341  
San Francisco, CA 94120

Re: Case No. 95-33940-DM  
Adv. No. 97-3-383-DM

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

Vernon A. Williams  
Secretary