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SERVICE DATE - JULY 13, 2000

SURFACE TRANSPORTATION BOARD

DECISION

STB No. 41763

CONAGRA, INC.--PETITION FOR DECLARATORY ORDER--CERTAIN RATES AND  
PRACTICES OF BE-MAC TRANSPORT COMPANY, INC.

Decided: July 7, 2000

We find that the collection of 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 Eastern District of Missouri, Eastern Division, in Be-Mac Transport Company, Inc. and the Plan Committee for Be-Mac Transport Company, Inc. v. ConAgra, Inc., Adv. No. 95-4300-293. The court proceeding was instituted by Be-Mac Transport Company, Inc., and the Plan Committee for Be-Mac Transport Company, Inc. (Be-Mac or respondent),<sup>1</sup> a former motor common and contract carrier, to collect undercharges from ConAgra, Inc. (ConAgra or petitioner). Be-Mac seeks undercharges of \$17,812.80 (plus interest) allegedly due, in addition to amounts previously paid, for services rendered in transporting 47 shipments of food products, bags, and cleaning supplies for the account of three ConAgra affiliates. The shipments were transported between April 17, 1990, and September 11, 1992. By order dated May 20, 1996, the court directed petitioner to initiate administrative proceedings before the Board for determination of the applicable issues raised and administratively closed the proceeding.<sup>2</sup>

Pursuant to the court order, ConAgra, on May 28, 1996, filed a petition for declaratory order requesting the Board to resolve the issue of unreasonable practice and the other issues identified by the court. By decision served June 10, 1996, the Board issued a procedural

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<sup>1</sup> On January 22, 1993, Be-Mac filed for bankruptcy under Chapter 11 of the United States Bankruptcy Code, in the United States Bankruptcy Court for the Eastern District of Missouri, Eastern Division, Case No. 93-40022-293.

<sup>2</sup> The court retained exclusive jurisdiction over the proceeding and authorized reopening upon the request of either party.

schedule. On August 7, 1996, petitioner filed its opening statement. Be-Mac filed its statement of facts and argument on August 20, 1996, and ConAgra filed its rebuttal on September 5, 1996.

Petitioner asserts that respondent's attempt to collect the claimed undercharges constitutes an unreasonable practice under section 13711(a). ConAgra maintains that the shipments at issue were transported at rates quoted to its affiliates by Be-Mac; that its affiliated companies relied upon the offered rates in tendering their shipments to Be-Mac; that Be-Mac regularly invoiced petitioner's affiliates at the agreed-to rates; and that Be-Mac accepted payment of the invoiced rates as payment in full for the transportation services rendered. Petitioner states that, in many instances, the rates that respondent now seeks to collect are more than twice the level of the originally agreed-to rates.

ConAgra supports its argument with verified statements from Louis H. Farnung, Manager, Transportation of ConAgra Frozen Foods Company (CFFC);<sup>3</sup> Randy R. Leaders, Traffic Manager of ConAgra Flour Milling Company (CFMC);<sup>4</sup> and Don Fennelly, Director of Transportation of Armour Swift-Eckrich, an operating division of ConAgra that includes Decker Foods (Decker). Messrs. Farnung, Leaders, and Fennelly indicate that the subject shipments were less-than-truckload movements consisting of 26 shipments of food products transported for CFFC from a distribution facility in Kansas City, KS; 14 shipments of empty one hundred pound bags used to package flour transported for CFMC;<sup>5</sup> and 7 shipments of cleaning materials transported from Kansas City, MO, to Decker's facility in San Antonio, TX. They state that Be-Mac solicited their traffic; offered rates, represented to be lawfully applicable rates, that conformed with prevailing market rates available from competing motor carriers; consistently billed at the originally offered rates; and accepted payment for the assessed charges as originally billed. Be-Mac's services, they assert, would never have been used had respondent attempted to assess the rates it now seeks to collect.

Attached to the verified statements of Mr. Farnung, Mr. Leaders, and Mr. Fennelly are copies of freight bill correction notices issued on behalf of respondent that reflect originally issued freight bill data as well as "corrected" balance due amounts.<sup>6</sup> An examination of the

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<sup>3</sup> CFFC is a division of ConAgra.

<sup>4</sup> CFMC is a subsidiary of ConAgra.

<sup>5</sup> The CFMC shipments were transported from Buffalo, NY, to Chester, IL; from Cleveland, OH, to Alton, IL; from Olathe, KS, to Hastings, MN; from Milwaukee, WI, to Kansas City, MO; from Houston, TX, to Omaha, NE; and from Hastings, MN, to points in Ohio.

<sup>6</sup> Mr. Farnung attached to his verified statement copies of the freight bill correction notices for each of the CFFC shipments at issue (Exhibits B-1 through B-26). Mr. Leaders attached to  
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freight bill correction notices indicates originally assessed charges to which discounts ranging from 20% to 60% were applied and substantially higher newly assessed charges that eliminate the originally applied discounts.

Respondent maintains that the rates and charges initially assessed were not authorized by an applicable tariff in effect at the time of shipment, and that the rates it now seeks to collect have not been shown to be unreasonable. Be-Mac further asserts that petitioner has provided no evidence that the originally assessed charges were negotiated.

Be-Mac supports its argument with a verified statement from Stephen L. Swezey, Senior Transportation Consultant for Carrier Service, Inc. (CSI).<sup>7</sup> Mr. Swezey explains the basis for issuing the subject balance due bills and states that the discounts applied to the originally assessed rates and flat charges billed to and paid by petitioner were not supported by applicable tariffs filed by Be-Mac. Attached to Mr. Swezey's statement are seven representative balance due bills (Appendix A),<sup>8</sup> and copies of tariff pages that support the asserted balance due charges (Appendix B). Mr. Swezey asserts that the freight charges set forth in the balance due bills are based on applicable tariff rates and are the correct charges to be assessed.

#### DISCUSSION AND CONCLUSIONS

We will dispose of this proceeding under section 13711. Accordingly, we 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

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<sup>6</sup>(...continued)

his verified statement a copy of a freight bill correction notice for one of the CFMC shipments at issue (Exhibit B). Mr. Fennelly attached to his verified statement copies of the freight bill correction notices for each of the Decker shipments at issue (Exhibits B-1 through B-7).

<sup>7</sup> CSI is the auditor authorized by the court to provide rate audit and collection services for respondent.

<sup>8</sup> Of the seven representative balance due bills, four were included among the attachments submitted by Mr. Famung and Mr. Fennelly. The three remaining corrected freight bills indicate originally assessed flat charges that were rerated based on assertedly applicable undiscounted class rates. Mr. Swezey states that the originally assessed flat charges were not published in an applicable filed tariff.

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 Be-Mac no longer transports property. Accordingly, we may proceed to determine whether respondent’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 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 a list of the shipments at issue in this proceeding and copies of freight bill correction notices issued on behalf of respondent for each of the subject CFFC and Decker shipments and representative CFMC shipments. The freight bill correction notices indicate originally assessed charges based on class rates to which discounts of 20% to 60% were applied as well as flat rates that are significantly less than the undiscounted class rate charges respondent is here 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) (E.A. Miller).<sup>9</sup> See William J. Hunt, Trustee for Ritter Transportation, Inc. v. Gantrade Corp.,

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<sup>9</sup> Be-Mac, at p. 4 of its statement, filed August 20, 1996, argues that freight bills cannot be used as the basis for satisfying the written evidence requirement. Respondent argues that allowing freight bills to be used for this purpose would render the written evidence provision of section 13711(f) superfluous because the Board, under section 13711(b)(2)(D), must independently consider whether the carrier submitted and collected freight bills reflecting the unfiled agreed-upon rate.

The Interstate Commerce Commission (ICC) and the Board have consistently rejected this argument. Section 13711(b)(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 that the Board use a carrier’s freight bills for that determination. A carrier may separately attest, or submit or concede in a 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 13711(b)(2)(D) was satisfied.

Even if the Board uses freight bills to satisfy this element, however, it is not inappropriate for it to use those same bills to satisfy the “written evidence” requirement of section 13711(f). Respondent’s argument might be more persuasive if the written evidence requirement were a “sixth” element of the merits determination under section 13711(b)(2), but it is not. Rather, as the ICC previously indicated, it is simply a threshold requirement needed to invoke section

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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 rates that were originally billed by Be-Mac and paid by ConAgra. The consistent application in the original freight bills of class rates to which discounts of 20% to 60% were applied and flat rates that resulted in billings substantially below the charges respondent now seeks to assess supports the assertions of petitioner and Messrs. Farnung, Leaders, and Fennelly and reflects the existence of negotiated rates. The evidence further indicates that ConAgra's affiliates relied upon the agreed-to rates in tendering their shipments to Be-Mac and would not have used Be-Mac's services had respondent attempted to charge the rates it here seeks to assess.

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 supports the conclusion that negotiated discount rates were offered to ConAgra's affiliates by Be-Mac; that ConAgra's affiliates reasonably relied on the offered discount rates in tendering their shipments to Be-Mac; that Be-Mac did not properly or timely file a tariff providing for such discount rates and has not entered into an agreement for contract carriage; that the negotiated rates were billed and collected by Be-Mac; and that Be-Mac 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 Be-Mac to attempt to collect undercharges from ConAgra 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.

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<sup>9</sup>(...continued)

13711. 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 13711(b)(2) to determine whether the carrier's undercharge collection effort is an unreasonable practice.

It is ordered:

1. This proceeding is discontinued.
2. This decision is effective on the service date.
3. A copy of this decision will be mailed to:

The Honorable David P. McDonald  
United States Bankruptcy Court for the  
Eastern District of Missouri, Eastern Division  
211 North Broadway, 7th Floor  
One Metropolitan Square  
St. Louis, MO 63102-2734

Re: Adv. No. 95-4300-293

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

Vernon A. Williams  
Secretary