

28822
EB

SERVICE DATE - JANUARY 28, 1998

SURFACE TRANSPORTATION BOARD

DECISION

STB No. 41936¹

PENNSYLVANIA POWER & LIGHT COMPANY
--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF FRIEDMAN'S EXPRESS, INC.

STB No. 41937

HULS AMERICA, INC.
--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF FRIEDMAN'S EXPRESS, INC.

STB No. 41938

BMW OF NORTH AMERICA
--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF FRIEDMAN'S EXPRESS, INC.

STB No. 41939

J&J FLOCK PRODUCTS
--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF FRIEDMAN'S EXPRESS, INC.

Decided: January 22, 1998

We find that collection of the undercharges sought in these proceedings 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 these proceedings.

¹ These proceedings are not consolidated. A single decision is being issued for administrative convenience.

BACKGROUND

These matters arise out of court actions in the United States Bankruptcy Court for the Eastern District of Pennsylvania.² The court proceedings were instituted by Friedman's Express, Inc. (Friedman's or respondent),³ a former motor common and contract carrier, to collect undercharges from Pennsylvania Power & Light Company; Huls America, Inc.; BMW of North America; and J&J Flock Products (shippers or petitioners). Friedman's seeks undercharges of varying amounts allegedly due, in addition to amounts previously paid by the shippers, for the interstate transportation⁴ of a number of shipments of miscellaneous commodities from and to various points in the United States. These shipments moved at various times between 1990 and 1993. By order dated July 10, 1996, the bankruptcy court stayed the proceedings and referred the transportation issues raised in these cases to the Board.⁵

Pursuant to the court order, petitioners filed petitions for declaratory order requesting that the Board resolve the issues raised by the court. The Board issued procedural schedules, and petitioners filed their opening statements. Friedman's submitted a reply to each, and petitioners filed rebuttals.

Petitioners assert that respondent's attempts to collect the claimed undercharges constitute unreasonable practices under section 13711(a), that the rates respondent seeks to collect are unreasonable, and that respondent is not entitled to collect late charges for petitioners' alleged failure to pay freight bills in a timely fashion. Petitioners maintain that the freight charges originally billed by Friedman's and paid by each shipper were rates mutually agreed upon by the parties, and that each shipper relied on the agreed-upon rates in tendering its traffic to Friedman's to the exclusion of services provided by other carriers.

² Friedman's Express, Inc. v. Pennsylvania Power & Light Company, Adv. No. 95/2212; Friedman's Express, Inc. v. Huls America, Inc., Adv. No. 95/2174; Friedman's Express, Inc. v. BMW of North America, Inc., Adv. No. 95-2318; Friedman's Express, Inc. v. J&J Flock Products, Inc., Adv. No. 95-2148.

³ On April 6, 1993, Friedman's filed for bankruptcy under Chapter 11 of the United States Bankruptcy Code, in the United States Bankruptcy Court for the Eastern District of Pennsylvania, Case No. 93-21066T.

⁴ The records suggest that some shipments may have moved in intrastate commerce. As to those shipments, respondent's claims were extinguished by the Federal Aviation Administration Authorization Act of 1994, Pub. L. No. 103-105, 105 Stat. 1605, 49 U.S.C. 14501(c). *See St. Johnsbury Trucking Co., Inc. v. Mead Johnson*, 199 B.R. 84, 87 (S.D.N.Y. 1996).

⁵ The court issued a single order covering all four adversary proceedings.

Attached to each shipper's opening statement are copies of letters issued by respondent asserting the undercharge claims against it, as well as a list respondent attached to each of its complaints against the shippers, setting forth respondent's claims by freight bill number, together with the original billing dates and balance due amounts claimed for each shipment.

Each shipper also attaches an affidavit from Donald J. Sooy of Freight Traffic Services, Inc., a transportation consultant retained by each petitioner. In each case, Mr. Sooy testifies that the rates originally charged were rates mutually agreed upon by the parties, and that each shipper relied on the agreed-upon rates in tendering its traffic to Friedman's to the exclusion of services provided by other carriers. Attached to each of Mr. Sooy's affidavits are samples of the "balance due" bills issued by respondent to each shipper, which reflect originally issued freight bill data as well as revised balance due amounts. The originally issued freight bills, according to Mr. Sooy, reflect the discounts that each of the petitioners had negotiated with Friedman's. These bills indicate that the percentage discounts that Friedman's originally applied to the shipments were disallowed and that the shipments were then re-rated using higher minimum charges.

Respondent submitted no evidence, relying instead on argument of counsel. First, Friedman's contends that the shippers proffered no written evidence of the original rate charged, the agreement to charge that rate, or petitioners' reasonable reliance on the rate. Second, respondent contends that section 13711(a) does not apply retroactively to claims which were pending when that section was enacted as section 2(e) of the Negotiated Rates Act of 1993 (NRA), Pub. L. No. 103-180, 107 Stat. 2044 (1993). Finally, Friedman's notes that it has abandoned its late pay claims, but it claims that undercharges are nonetheless due on those shipments because there was no effective tariff on file at the time of the shipments.

DISCUSSION AND CONCLUSIONS

We will dispose of these proceeding under section 13711. Accordingly, we do not reach the other issues raised.⁶

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

⁶ Typically, a 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 such as 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 October 23, 1997). We will not address the other more complex issues raised here because our section 13711 findings fully resolve the question of petitioner's liability for the rates sought.

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 Friedman’s no longer transports property.⁷ Accordingly, we may proceed to determine whether respondent’s attempts to collect undercharges (the difference between the applicable filed rate and the negotiated rate) constitute an unreasonable practice.

Initially, we must address the threshold issue of whether, in each case, 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, each petitioner has submitted a list of the shipments subject to respondent’s collection efforts, as well as sample revised freight bills. That evidence indicates that the rates originally charged by Friedman’s were consistently and substantially below those that respondent is now seeking to assess and were in conformity with the 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) (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).⁸

Not only do these lists along with the written freight bills satisfy the “written evidence” requirement of the statute, but, together with Mr. Sooy’s unrefuted testimony, they provide evidence establishing that the original rates assessed by Friedman’s and paid by the shippers were rates agreed to in negotiations between the parties. The original freight bills issued by respondent for the subject shipments, as well as the additional evidence, support petitioners’ contentions and reflect the existence of negotiated rates. The evidence indicates that the shippers relied on Friedman’s

⁷ Prior to filing for bankruptcy, Friedman’s held motor common and contract carrier operating authority, issued by the Interstate Commerce Commission.

⁸ Friedman’s, at p. 2 of each of its reply statements, contends that each petitioner has failed to provide “written evidence of the original rate charged or that Petitioner reasonably relied on this rate.” It argues that the absence of such written evidence defeats petitioners’ assertions. But section 13711(f) requires merely that there be written evidence of an agreement to charge the agreed-upon rate, and as noted, the lists of claims and the sample freight bills constitute written evidence of those agreements.

agreement to charge the negotiated rates, and that the shippers would not have used Friedman's had it quoted the 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)].

The evidence submitted by each petitioner establishes that a negotiated rate was offered to each shipper by Friedman's; that each shipper reasonably relied on the offered rate in tendering its traffic to Friedman's; that the negotiated rate was billed and collected by Friedman's; and that Friedman's now seeks to collect additional payments 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 Friedman's to attempt to collect undercharges from the petitioners for transporting the shipments at issue in these proceedings.⁹

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

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

The Honorable Thomas M. Twardowski

⁹ With respect to the retroactivity of section 13711, we point out that the courts have consistently held that that section, by its own terms, may be applied retroactively against the undercharge claims of defunct, bankrupt carriers that were pending on the NRA's enactment. *See, e.g., Gold v. A.J. Hollander Co. (In re Maislin Indus.)*, 176 B.R. 436, 443-44 (Bankr. E.D. Mich. 1995); *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); *Allen v. National Enquirer*, 187 B.R. 29, 33 (Bankr. N.D. Ga. 1995); *cf. Jones Truck Lines, Inc. v. Phoenix Products Co.*, 860 F.Supp. 1360 (W.D. Wisc. 1994).

STB Nos. 41936, et al.

United States Bankruptcy Court for
the Eastern District of Pennsylvania
The Madison Building
400 Washington Street
Reading, PA 19601

Re: Adv. Nos. 95/2212; 95/2174; 95/2318; 95/2148

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

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