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SERVICE DATE - NOVEMBER 18, 1998

SURFACE TRANSPORTATION BOARD¹

DECISION

No. 40995

SANDMEYER STEEL COMPANY--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF BROWN TRANSPORT TRUCKLOAD INC.,
BROWN TRANSPORT CORP. AND THURSTON MOTOR LINES, INC.

Decided: November 12, 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 Eastern District of Pennsylvania in Robert Brizendine, Trustee on Behalf of the Bankrupt Estate of Brown Transport Truckload, Inc., Brown Transport Corp., and Thurston Motor Lines, Inc. v. Sandmeyer Steel Company, Civil Action No. 92-CV0772. The court proceeding was instituted by Robert Brizendine, Trustee on behalf of the Bankrupt Estate of Brown Transport Corp. (Brown or respondent), a former motor common and contract carrier, to collect undercharges from Sandmeyer Steel Company (Sandmeyer or petitioner). Brown seeks undercharges of \$3,970.80 allegedly due, in addition to amounts previously paid, for services rendered in transporting 97 less-than-truckload (LTL) shipments of unfinished steel shapes or rough steel plate between February 22, 1989, and October 17, 1989. The shipments were transported from Sandmeyer's facility in Philadelphia, PA, to points in Ohio. By order entered August 14, 1992, the court placed the proceeding in civil suspense and referred issues of tariff applicability and rate reasonableness to the ICC for resolution.

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.

Pursuant to the court order, on May 7, 1993, Sandmeyer filed a petition for declaratory order requesting the ICC to resolve issues of tariff applicability, unreasonable practice, and rate reasonableness. By decision served July 30, 1993, the ICC established a procedural schedule for the submission of evidence on non-rate reasonableness issues. On September 8, 1993, petitioner filed its opening statement. Respondent filed its reply on September 29, 1993, and petitioner submitted its rebuttal on October 15, 1993.

Sandmeyer asserts that the discounted charges originally assessed and collected by Brown were properly rated in accordance with respondent's lawfully filed tariffs and that respondent's purported cancellation of its existing tariff was ineffective and invalid in that it did not comply with ICC tariff publishing regulations.

Sandmeyer supports its contentions with affidavits from Raymond H. Weldie, petitioner's Manager of Manufacturing and Administration, and Michael Bange, president of Champion Transportation Services, Inc., a transportation consultant retained by petitioner. Mr. Weldie states that his responsibilities included managing the transportation of petitioner's products from its Philadelphia facility. According to Mr. Weldie, respondent had provided transportation services to petitioner at rates competitive with those offered by other motor carriers for more than 10 years. Mr. Weldie asserts that, in February 1987, he was notified by Brown sales representative Dave Mascaintonio that, effective February 25, 1987, Brown would increase its discount applicable to Sandmeyer shipments to 40% as reflected in Item 118880 of Brown's tariff ICC BRNT 608-A. Attached to Mr. Weldie's affidavit is a copy of a letter dated February 27, 1987, to Mr. Weldie from Mr. Mascaintonio confirming the 40% discount. Mr. Weldie states that petitioner tendered its traffic to Brown based on the discount offered by the carrier; that the freight charges originally billed by Brown from February 1987 until October 1989 (when Brown ceased to operate) conformed to the 40% discount; that the originally billed charges were paid by petitioner and accepted by Brown without question; that petitioner was never notified that Brown cancelled the discount; and that petitioner would never have used Brown to transport its traffic at the rate level it now seeks to apply.

Mr. Bange asserts that Brown published a tariff (ICC BRNT 608-A, Item 118880, effective February 25, 1987) that provided for a 40% discount off class rates for petitioner's traffic. He states that he examined the balance due bills issued by respondent; that the balance due bills included original freight bill data; that nearly all of the subject shipments were originally rated using this discount provision; and that respondent, in asserting its claim for undercharges, eliminated the originally applied discounts for each of the subject shipments. Attached as Exhibit B to Mr. Bange's affidavit are seven representative balance due bills reflecting the original application of a 40% discount.² This discount provision, Mr. Bange argues, was illegally canceled by Brown in violation

² Mr. Bange also refers to evidence submitted by respondent in the underlying court proceeding consisting of copies of the 97 balance due bills issued by respondent for the subject shipments. A review of those bills, which are attached to respondent's reply statement, shows that a
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of ICC regulations and therefore remained applicable to the traffic at issue. Mr. Bange further asserts that the increased charges Brown seeks to assess are unreasonably high in comparison to other rates offered by competing carriers during the period the subject shipments were moved.

Brown maintains that the tariff cancellation issue raises a moot question in that the referenced tariff was restricted to an account code number assigned to a shipper other than Sandmeyer and, accordingly, was not applicable to petitioner's traffic. Further, respondent contends that Sandmeyer was not a tariff subscriber entitled to formal notification of a tariff cancellation, that Sandmeyer's knowledge of the applicable filed tariff is conclusively presumed, and that the tariff cancellation was proper and in compliance with ICC regulations.

Brown supports its arguments with the verified statement of Stephen L. Swezey, Senior Transportation Consultant of Carrier Service, Inc., the company authorized by the court to provide rate audit and collection services for respondent. Mr. Swezey maintains that the discount tariff ICC BRNT 608-A was canceled on January 30, 1989, and in fact was never applicable to Sandmeyer shipments. He explains that the balance due bills submitted to petitioner eliminated inapplicable original freight bill discounts and in nine instances also adjusted the originally applied rate.

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.³ By decision served December 20, 1993, the ICC reopened the record and established 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 March 18, 1994, petitioner submitted a supplemental opening statement requesting a finding that Brown's efforts to collect undercharges in this proceeding constitutes an unreasonable practice under section 2(e) of the NRA. Respondent filed its supplemental statement in reply on April 19, 1994. Petitioner submitted its rebuttal on May 11, 1994.

Brown argues that section 2(e) of the NRA is inapplicable to bankrupt carriers, may not be applied retroactively to pending claims such as those which are the subject of this proceeding, and is unconstitutional.⁴ In the alternative, respondent maintains that freight bills cannot be used to meet

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40% discount was originally applied to 49 of the bills and that the remaining 48 bills consisted of minimum weight shipments to which discounts ranging from 26% to 32% were applied.

³ The ICC's prior unreasonable practice policy was invalidated by the Supreme Court in Maislin Indus. v. Primary Steel, 497 U.S. 116 (1990).

⁴ We point out that six federal circuit courts of appeals and virtually every other federal court that has considered respondent's applicability arguments have determined that the remedies
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the written evidence requirement of section 2(e)(6) and that petitioner has not produced written evidence of an agreement warranting relief under section 2(e).

DISCUSSION AND CONCLUSIONS

We dispose of this proceeding under section 2(e) of the NRA. Accordingly, we do not reach the other issues raised.

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

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provided in section 2 of the NRA apply to the undercharge claims of bankrupt carriers such as Brown. See Whitaker v. Power Brake Supply, Inc., 68 F.3d 1304 (11th Cir. 1995) (Power Brake); Jones Truck Lines, Inc. v. Whittier Wood Products, Inc., 57 F.3d 642 (8th Cir. 1995) (Whittier Wood); In the Matter of Lifschultz Fast Freight Corporation, 63 F.3d 621 (7th Cir. 1995); In re Transcon Lines, 58 F.3d 1432 (9th Cir. 1995) cert. denied, 116 S. Ct. 1016; In re Bulldog Trucking, Inc., 66 F.3d 1390 (4th Cir. 1995); Hargrave v. United Wire Hanger Corp., 73 F.3d 36 (3d Cir. 1996); see also, e.g., Jones Truck Lines, Inc. v. AFCO Steel, Inc., 849 F. Supp. 1296 (E.D. Ark. 1994).

Further, as the courts have also held consistently, section 2(e), by its own terms and as more recently amended by the ICC Termination Act, may be applied retroactively against the undercharge claims of defunct, bankrupt carriers that were pending on the NRA’s enactment. See, e.g., 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); Gold v. A.J. Hollander Co. (In re Maislin Indus.), 176 B.R. 436 (Bankr. E.D. Mich. 1995); cf. Jones Truck Lines, Inc. v. Phoenix Products Co., 860 F. Supp. 1360 (W.D. Wisc. 1994).

Lastly, in response to respondent’s “takings” challenge, the Eighth Circuit in Whittier Wood and the Eleventh Circuit in Power Brake have concluded that the NRA does not work an unconstitutional taking under the Fifth Amendment. 57 F.3d at 649-52; 68 F.3d at 1306 n.3. We point out that the courts have consistently rejected that argument, as well as respondent’s “separation of powers” argument and its other constitutional challenges to the NRA. See, e.g., Gold v. A.J. Hollander, supra; American Freight System, Inc. v. ICC (In re American Freight System, Inc.), 179 B.R. 952 (Bankr. D. Kan. 1995); Rushton v. Saratoga Forest Products, Inc. (In re Americana Expressways), 177 B.R. 960 (D. Utah 1995), rev’g 172 B.R. 99 (Bankr. D. Utah 1994); Zimmerman v. Filler King Co. (In re KMC Transport), 179 B.R. 226 (Bankr. D. Idaho 1995); and Lewis v. Squareshooter Candy Co. (In re Edson Express), 176 B.R. 54 (D. Kan. 1994).

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.”⁵

It is undisputed that Brown no longer transports property.⁶ Accordingly, we may proceed to determine whether Brown’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 contains copies of revised freight bills issued by respondent for each of the subject shipments indicating the application of discounts ranging from 26% to 40% to originally billed rates that resulted in assessed and paid charges that were consistently and substantially below those respondent is now seeking to assess. Also present on the record is a letter dated February 27, 1987, from a Brown representative to Mr. Weldie confirming Brown’s intention to provide a 40% discount when handling petitioner’s LTL traffic. 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). See William J. Hunt, Trustee for Ritter Transportation, Inc. v. Gantrade Corp., C.A. No. 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 rate and that the rates were agreed upon by the parties).⁷

⁵ 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.

⁶ Brown Transport Corp. filed a petition for bankruptcy under Chapter 7 of the Bankruptcy Code in the United States Bankruptcy Court for the Northern District of Georgia, Atlanta Division on October 31, 1989 (Case No. A89-12517-WHD), and is no longer engaged in motor carrier operations.

⁷ The ICC and the Board have consistently rejected Brown’s argument that freight bills cannot be used to satisfy the requirement of written evidence. Respondent contends that under section 2(e)(2)(D) of the NRA, the Board must consider whether the negotiated rate “was billed and collected by the carrier” in making its merits determination as to whether a carrier’s conduct was an
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In this case the evidence is substantial that the parties conducted business in accordance with agreed-to negotiated rates. The consistent application of discounts to the charges assessed in the original freight bills confirms the unrefuted testimony of Mr. Weldie and reflects the existence of negotiated rates. The evidence further indicates that Sandmeyer relied upon the agreed-to rates in tendering its traffic to Brown and would not have used respondent's service had it quoted the rates it now seeks to collect.

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 Sandmeyer by Brown; that Sandmeyer, reasonably relying on the offered rate, tendered the subject traffic to Brown; that the negotiated rate was billed and collected by Brown; and that Brown 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

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“unreasonable practice.” This section, according to Brown, contemplates that the Board must examine the freight bills reflecting the negotiated rate that were issued by the carrier to determine if section 2(e) has been satisfied. Brown asserts that allowing freight bills to satisfy the written evidence requirement would make the written evidence provision superfluous because the Board, under section 2(e)(2)(D), must independently consider the collected freight bill.

Section 2(e)(2)(D), however, requires the Board to consider “whether the [unfiled] rate was billed and collected by the carrier.” There is no requirement under this provision or the NRA's legislative history that the Board use a carrier's freight bills for that determination. A carrier may separately attest, or submit or concede in 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 2(e)(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 2(e)(6)(B). The carrier's argument might be more persuasive if the written evidence requirement was a “sixth” element of the merits determination under section 2(e)(2), but it is not. Rather, as the ICC previously indicated, it is simply a threshold definitional requirement needed to invoke section 2(e). 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 2(e)(2) to determine whether the carrier's undercharge collection is an unreasonable practice.

2(e) of the NRA, we find that it is an unreasonable practice for Brown to attempt to collect undercharges from Sandmeyer 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. This proceeding is discontinued.
2. This decision is effective on its service date.
3. A copy of this decision will be mailed to:

The Honorable Herbert J. Hutton, Jr.
United States District Court for the
Eastern District of Pennsylvania
Independence Mall West
601 Market St.
Philadelphia, PA 19106

Re: Civil Action No. 92-CV0772

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary