

SURFACE TRANSPORTATION BOARD¹

DECISION

No. 41515

ALBERTO CULVER COMPANY, AUDIOVOX CORP., FOUR SEASONS, AND
SIMMONS UPHOLSTERY, INC. FKA TOWNHOUSE PENTHOUSE
INDUSTRIES, INC.--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF TRANSCON LINES

Decided: December 19, 1996

This proceeding arises out of the efforts of the trustee in bankruptcy of Transcon Lines (Transcon or respondent), a former motor carrier, to collect undercharges based on common carrier tariffs for certain transportation services performed during 1987-1990 by Transcon for Alberto Culver Company (Alberto), Audiovox Corp. (Audiovox), Four Seasons, and Simmons Upholstery, Inc. fka Townhouse Penthouse Industries, Inc. (Simmons Upholstery), collectively petitioners. We find that the collection of the 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 is before the Board on referral from the United States Bankruptcy Court, Central District of California, in Leonard L. Gumport, Chapter 7 Trustee of the Bankruptcy Estate of Transcon Lines v. Alberto Culver Company, Audiovox Corp., Four Seasons, and Simmons Upholstery, Inc. fka Townhouse Penthouse Industries, Inc., Case No. SB 93-22207 DN, Chapter 7, Adv. No. SB 93-02663 DN, Adv. No. SB 93-02233 DN, Adv. No. SB 93-02286 DN, and Adv. No. SB 93-02352 DN (referral orders dated September 28, 1994). The court stayed the proceedings to enable referral of issues of rate reasonableness and unreasonable practice to the ICC for determination.

Pursuant to the court orders, petitioners, on December 27, 1994, jointly filed a petition for declaratory order requesting

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 that was 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.

the ICC to resolve the issues referred by the court. By decision served January 11, 1995, the ICC established a procedural schedule for the submission of evidence on non-rate reasonableness issues. On March 14, 1995, petitioners filed their opening statements. Respondent filed its reply on July 7, 1995. Petitioners submitted their rebuttal on July 27, 1995.²

Petitioners assert that Transcon's efforts to collect undercharges for shipments transported during the period 1987-1990 constitute an unreasonable practice under section 2(e) of the NRA. Petitioners maintain that the written evidence submitted by Audiovox, Four Seasons, and Simmons Upholstery shows that Transcon offered each petitioner a transportation rate that each relied upon in tendering shipments to Transcon; that the offered rates were billed and collected; and that the payments made by each petitioner were accepted by Transcon as payment in full.

Respondent's statement consists of legal argument of counsel. Respondent maintains that petitioners have not proffered written proof that the rates negotiated had been agreed upon, i.e., written evidence of the original rate charged or that petitioners reasonably relied on this rate. Respondent also contends that section 2(e) of the NRA does not apply retroactively to pending claims such as those which are the subject of this proceeding.³

DISCUSSION AND CONCLUSIONS

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

We recognize that the court referred both unreasonable practice and rate reasonableness issues to the ICC, and that petitioners presented evidence on both issues. Section 2(e), however, was enacted essentially to resurrect the ICC's Negotiated Rates policy.⁴ That policy was not intended to produce extended evidentiary inquiries or extended rate analyses to determine whether, in each instance, the negotiated rate, or the rate sought to be collected, was the applicable and/or

² By decision served August 30, 1995, petitioner Alberto, at its own request, was dismissed as a party to this proceeding.

³ With respect to the retroactive applicability of section 2(e), we point out that the courts have consistently held that section 2(e), 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).

⁴ See NITL--Pet. to Inst. Rule on Negotiated Motor Car. Rates, 3 I.C.C.2d 99 (1986) and 5 I.C.C.2d 623 (1989) (Negotiated Rates). The ICC's prior unreasonable practice policy was invalidated by the Supreme Court in Maislin Indus. v. Primary Steel, 497 U.S. 116 (1990).

reasonable rate. Rather, the focus of the Negotiated Rates policy was simply on whether the shipper and the carrier negotiated a rate on which the shipper relied, and whether the carrier now seeks to collect a rate that is higher than the agreed-to rate. Section 2(e), in our view, was not designed to complicate matters, but to resolve the undercharge crisis by holding a carrier to its bargain when it would be fair to do so. Requiring highly involved rate analyses for every shipment before applying section 2(e) would not, in our view, advance the objectives of the NRA.

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."⁵

It is undisputed that Transcon no longer transports property.⁶ Accordingly, we may proceed to determine whether the respondent's attempt to collect undercharges 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.

In E.A. Miller, Inc.--Rates and Practices of Best, 10 I.C.C.2d 235 (1994), the ICC held that the original freight bills embodying the negotiated rate meet the "written evidence" standard of section 2(e). In Johnson Welding & Manufacturing Co. et al. v. Bankr. Estate of Murphy Motor Freight Lines, Inc., No. 40716 (ICC served May 9, 1995), the ICC explained that evidence of the existence of freight bills embodying the negotiated rate, sample freight bills, or some other contemporaneous writing evidencing the existence of a negotiated rate satisfies the section 2(e) standard.

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 Transcon held both motor common and contract carrier operating authority, issued by the ICC under various sub-numbers of No. MC-110325. All of Transcon's operating authorities were revoked on September 21, 1990.

Dick McCormick, Accounts Payable Manager for Audiovox, asserts that he is generally familiar with the business operations of Audiovox, including the transportation of its products by Transcon during 1987 to 1990. He states that Transcon delivered inbound shipments from various Audiovox suppliers. These shipments were billed to Audiovox at discount rates agreed to by Transcon and the respective suppliers. The discounted charges were noted on each of the Transcon freight bills tendered to Audiovox and were promptly paid by Audiovox. The Audiovox payments were accepted by Transcon without objection.

William J. Caroselli, Traffic Manager for Four Seasons, states that he supervises motor carrier transportation arrangements on behalf of Four Seasons and is familiar with the arrangements made with Transcon during the 1987-1990 period. He asserts that Transcon offered Four Seasons discount rates delineated in correspondence between the parties and the freight bills issued by Transcon. Copies of correspondence setting forth the discount rates offered to Four Seasons are attached to Mr. Caroselli's statement. Mr. Caroselli further states that Transcon's freight bills were promptly paid by Four Seasons and that Transcon accepted these payments as full payment for the services rendered.

Karen Arnold, National Claims Manager for Simmons Upholstery, states that she is familiar with the arrangements made with Transcon during the 1987-1990 period. She states that Transcon offered Simmons Upholstery discount rates delineated in the freight bills issued by Transcon. She further states that Simmons Upholstery promptly paid Transcon's freight bills and that Transcon accepted these payments as full payment for the services rendered.

Mr. McCormick, Mr. Caroselli, and Ms. Arnold also assert that their respective companies, in tendering their traffic to Transcon rather than to its competitors, relied upon Transcon's representations that the rates originally billed and paid by them were the lawful applicable rates.

Attached as Exhibit C to petitioners' opening statement are representative revised freight bills issued by Transcon, consisting of 11 sample bills submitted on behalf of Audiovox (Exhibit C2), 18 sample bills submitted on behalf of Four Seasons (Exhibit C3), and 12 sample bills submitted on behalf of Simmons Upholstery (Exhibit C4). Each of the sample freight bills show the original freight rates billed by Transcon and paid by the respective petitioner. We conclude that the representative freight bills and the correspondence submitted on behalf of Four Seasons confirm the testimony of Mr. McCormick, Mr. Caroselli, and Ms. Arnold with regard to the existence of negotiated discount rates and satisfy the written evidence requirement of section 2(e).

In exercising our jurisdiction under section 2(e), 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 by Transcon to each of the petitioners; that each petitioner tendered freight to Transcon in reliance on the negotiated rate; that the rates negotiated were billed and collected by Transcon; and that Transcon now seeks to collect additional payment based on higher rates 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 Transcon to attempt to collect undercharges from Audiovox, Four Seasons, and Simmons Upholstery for transporting the shipments at issue in this proceeding.⁷

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.
3. This decision is effective on December 26, 1996.
4. A copy of this decision will be mailed to:

The Honorable David N. Naugle
United States Bankruptcy Court,
Central District of California
200 Federal Building
699 North Arrowhead Avenue
San Bernardino, CA 92401

Re: Case No. SB 93-22207 DN, Chapter 7
Adv. No. SB 93-02233 DN
Adv. No. SB 93-02286 DN

⁷ Although the record here does not contain all of the freight bills for which respondent seeks undercharges, it does contain sample freight bills which appear to be representative of all of Transcon's undercharge claims. These freight bills constitute written evidence of a negotiated rate as to the specific shipments identified in the freight bills. The record also contains the uncontroverted testimony by petitioners of their reliance on the originally negotiated rate. Transcon's general assertion that petitioners have not provided written evidence of the rate originally charged or of shippers' reliance on that rate clearly fails as to those shipments identified in the freight bills.

As to any other shipments with respect to which specific freight bills were not submitted, where the documentation is similar to that presented in the sample freight bills, it would be an unreasonable practice for Transcon "to attempt to recover the difference between the applicable tariff rate . . . and the negotiated rate." Accordingly, we advise the court of our legal opinion that, to the extent other undercharge demands follow the pattern outlined here, they too would constitute an unreasonable practice.

No. 41515

Adv. No. SB 93-02352 DN

By the Board, Chairman Morgan, Vice Chairman Simmons, and
Commissioner Owen.

Vernon A. Williams
Secretary