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SERVICE DATE - FEBRUARY 27, 1998

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. 41932

ACORN SUPPLY COMPANY, INC.; ANDERSON MOULDS, INC.; AQUA TREAT CHEMICALS, INC.; THE FLECTO COMPANY, INC.; FLORAL SUPPLY SYNDICATE, INC.; GEORGIA-PACIFIC CORP.; GRUNER & JAHR PRINTING AND PUBLISHING COMPANY DBA FIRST WESTERN GRAPHICS; HERSHEY FOODS CORPORATION; HIGHLAND SUPPLY CORPORATION; LEVI STRAUSS & CO., INC.; THE MEAD CORP.; THE MUSICLAND GROUP, INC.; SHINODA DESIGN CENTER; SUNSHINE BISCUITS, INC.; AND WHIRLPOOL CORPORATION --PETITION FOR DECLARATORY ORDER-- CERTAIN RATES AND PRACTICES OF INDUSTRIAL FREIGHT SYSTEM, INC. AND ITS CORONA TRUCKING DIVISION¹

Decided: February 18, 1998

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 court actions in the United States Bankruptcy Court for the Central District of California,² instituted by Duke Salisbury, trustee of the Bankruptcy Estate of Industrial Freight System, Inc. (Industrial or Respondent),³ a former motor common and contract carrier. Respondent seeks to collect undercharges of varying amounts allegedly due from 15 shippers (shippers or Petitioners), in addition to amounts previously paid by the shippers, for the interstate or foreign transportation of shipments of miscellaneous commodities from and to various points in the United States. On or about September 24, 1996, the bankruptcy court approved a stipulation

¹ During the course of this proceeding, a number of shippers have withdrawn from the case. Only the following shippers are still active: Georgia-Pacific Corporation; Gruner & Jahr Printing and Publishing Company dba First Western Graphics; Hershey Foods Corporation; The Musicland Group, Inc.; and The Mead Corporation. The term "Petitioner" is used here to refer only to the active petitioners.

² The Appendix identifies these proceedings, listing the names of the shippers/Petitioners, and the respective bankruptcy court docket numbers for each.

³ In 1993, Industrial filed for bankruptcy under Chapter 7 of the United States Bankruptcy Code, in the United States Bankruptcy Court for the Central District of California, Case No. LA 93-41245-ER.

between Industrial and the shippers to allow the parties to proceed before us to resolve the transportation issues raised in the court cases.

Pursuant to the court's approval, Petitioners filed a joint petition for declaratory order requesting that the Board resolve those issues.⁴ The Board issued procedural schedules, and certain Petitioners filed opening statements. Industrial submitted replies, and certain Petitioners filed rebuttals.

Petitioners assert that Respondent's attempts to collect the claimed undercharges constitute unreasonable practices under section 13711(a). Petitioners maintain that the freight charges originally billed by Industrial 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 Industrial to the exclusion of services provided by other carriers.

Attached as exhibits to the shippers' opening statements are declarations from officials of each shipper, with copies of Statements of Account (SOA) issued by Respondent asserting the undercharge claims against each, and setting forth Respondent's claims by freight bill number, together with the original billing dates, the amounts originally paid, and balance due amounts claimed for each shipment. Also attached to each of the declarations 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. Some of the shipper representatives (such as Hershey Foods Corporation and The Musicland Group, Inc.) attached copies of letters, agreements, or other documentation reflecting Industrial's agreement to apply stated discounts off of tariff rates.

Each of the shippers' representatives testifies that the rates originally charged by Industrial were rates mutually agreed upon by the parties, and that each shipper relied on the agreed-upon rates in tendering its traffic to Industrial to the exclusion of services provided by other carriers. In each case, the SOA was the first notice shippers received that Industrial was disavowing the rates originally billed. The originally issued freight bills, according to each witness, reflect the discounts that each of the Petitioners had negotiated with Industrial. On their face, the revised bills indicate that Industrial disallowed the discounts and rates that Industrial originally applied to the shipments because they were not contained in tariffs, and that Industrial then re-rated the shipments using tariff-based charges.

Respondent, rather than attempting, through rebuttal evidence, to counter the voluminous evidence submitted by the shippers, instead relies solely on argument of counsel. First, Industrial 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 pertain to its claims because it cannot be applied retroactively to claims

⁴ The issues that Petitioners sought to pursue before the Board included contract carriage, rate reasonableness, and unreasonable practices.

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).

DISCUSSION AND CONCLUSIONS

We will dispose of these proceeding under section 13711. Accordingly, we do not reach the other issues raised.⁵

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 Industrial no longer transports property.⁶ 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

⁵ Typically, a court hearing undercharge cases will direct or allow shippers 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, like these Petitioners, typically raise issues such as contract carriage 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 Petitioners' liability for the rates sought.

Having found against Respondent on its undercharge claims, we find no basis for imposing fees, costs, or interest on Petitioners, as requested by Respondent. We also decline to find that Petitioners are entitled to fees and costs. *See General Mills, Inc.--Petition for Declaratory Order*, 8 I.C.C.2d 313, 325 (1992), *aff'd sub nom. Bankruptcy Estate of United Shipping Co. v. General Mills, Inc.*, 34 F.3d 1383 (8th Cir. 1994). Finally, we deem it unnecessary to resolve the dispute over the intrastate or interstate nature of transportation for certain shippers, because section 13711(a) declares it an unreasonable practice to depart from negotiated rates, regardless of the basis for the attempted departure.

⁶ Prior to filing for bankruptcy, Industrial held motor common and contract carrier operating authority, issued by the Interstate Commerce Commission.

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 Industrial 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).⁷ Moreover, the correspondence, rate quotations and agreements submitted by various shippers constitute additional written evidence as to their agreements with Industrial to apply a negotiated rate.

Not only do these lists, along with the written freight bills, satisfy the “written evidence” requirement of the statute, but, together with the unrefuted testimony of each shipper’s representative, they provide evidence establishing that the original rates assessed by Industrial 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 Industrial’s agreement to charge the negotiated rates, and that the shippers would not have used Industrial 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)].

⁷ Industrial contends that each Petitioner has failed to provide “written evidence of the original rate charged or that Petitioners 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, the sample freight bills and other documentation submitted by Petitioners constitute written evidence of those agreements.

The evidence submitted by each Petitioner reflects a pattern that we have seen again and again in this type of case: a negotiated rate was offered to each shipper by Industrial; each shipper reasonably relied on the offered rate in tendering its traffic to Industrial; the negotiated rate was billed and collected by Industrial; and Industrial 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 Industrial to attempt to collect undercharges from the Petitioners for transporting the shipments at issue in this proceeding.⁸

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

⁸ With respect to Respondent's claim that section 13711 cannot be applied retroactively, 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). Moreover, if, as Petitioners claim, Industrial did not begin to file its claims until 1994, after the NRA had been enacted, application of the NRA here is not retroactive.

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 Ernest M. Robles
United States Bankruptcy Court for
the Central District of California
Edward Roybal Federal Building and Courthouse
255 East Temple Street
Los Angeles, CA 90012

Re: See Appendix

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

APPENDIX

Petitioner - Shipper	Adversary Proceeding No.
ACORN SUPPLY COMPANY, INC.	AD 94-04771 ER
ANDERSON MOULDS, INC.	AD 95-02462 ER
AQUA TREAT CHEMICALS, INC.	AD 95-04087 ER
THE FLECTO COMPANY, INC.	AD 95-01099 ER
FLORAL SUPPLY SYNDICATE, INC.	AD 95-02336 ER
GEORGIA-PACIFIC CORP.	AD 95-02339 ER
GRUNER & JAHR PRINTING AND PUBLISHING COMPANY dba FIRST WESTERN GRAPHICS	AD 95-02347 ER
HERSHEY FOODS CORPORATION	AD 95-02441 ER
HIGHLAND SUPPLY CORPORATION	AD 95-02029 ER
LEVI STRAUSS & CO., INC.	AD 95-03101 ER
THE MEAD CORP.	AD 95-03279 ER
THE MUSICLAND GROUP, INC.	AD 95-03103 ER
SHINODA DESIGN CENTER	AD 95-01703 ER
SUNSHINE BISCUITS, INC.	AD 95-03156 ER
WHIRLPOOL CORPORATION	AD 95-04086 ER