

SERVICE DATE - MARCH 24, 1997

SURFACE TRANSPORTATION BOARD<sup>1</sup>

DECISION

No. 41470

CAPITOL MANUFACTURING CO.--PETITION FOR DECLARATORY  
ORDER--CERTAIN RATES AND PRACTICES OF  
JONES TRUCK LINES, INC.

Decided: March 10, 1997

We find that 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). Because of our finding under section 2(e) of the NRA, we will not reach the other issues raised in the proceeding.

BACKGROUND

This matter arises out of a court action in the United States District Court for the Western District of Arkansas, Fayetteville Division, in Jones Truck Lines, Inc. v. Capitol Manufacturing Co., Division of Harsco Corporation, Civil No. 94-5046. The court proceeding was instituted by Jones Truck Lines, Inc. (Jones or respondent), a former motor common and contract carrier, to collect undercharges from Capitol Manufacturing Co. (Capitol or petitioner). Jones seeks undercharges of \$39,540.26 (plus interest and costs) allegedly due, in addition to amounts previously paid, for the transportation of 377 less-than-truckload (LTL) shipments of iron pipe fittings between July 18, 1988, and May 10, 1989. All but seven of the shipments were transported from petitioner's facility in Crowley, LA, to points in Texas, Kansas, Missouri, Oklahoma, Georgia, Alabama, Tennessee, Florida, Arkansas, Mississippi, and New Mexico. The remaining seven shipments moved from petitioner's facility in Chicago, IL, to Owenton, KY. By order dated August 23, 1994, the court stayed the proceeding and directed Capitol to submit issues of contract carriage, unreasonable practice, and rate reasonableness to the ICC for determination.<sup>2</sup>

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<sup>1</sup> 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.

<sup>2</sup> The court directed administrative termination of the  
(continued...)

Pursuant to the court order, petitioner, on September 22, 1994, filed a petition for declaratory order requesting the ICC to resolve the court-referred issues. By decision served October 11, 1994, the ICC established a procedural schedule. Petitioner filed its opening statement on December 5, 1994. Respondent filed a reply statement on February 3, 1995. Petitioner filed a rebuttal statement on February 23, 1995.

Petitioner asserts that the shipments in question were transported by Jones under its contract carrier authority pursuant to a transportation agreement. Capitol further asserts that the rates that respondent is seeking to assess are unreasonable and that respondent's attempt to collect undercharges constitutes an unreasonable practice under section 2(e) of the NRA.

Capitol supports its argument with an affidavit from Michael Bange of Champion Transportation Services, Inc., a transportation consultant retained by petitioner. Mr. Bange's affidavit includes among its attachments copies of the "balance due" bills issued by respondent that reflect originally issued freight bill data as well as "corrected" balance due amounts. Mr. Bange states that nearly all of the copies of the original freight bills for these shipments show on their face the application of a 45 percent discount off the applicable class rates, usually subject to a minimum charge of \$38.00 (\$42.00 in a few instances), for shipments from Crowley to Jones' direct service points. He notes that the original freight bills for shipments from Crowley to points in Texas, Oklahoma, and Kansas not served directly by Jones were generally discounted at 25 percent off class rates. With respect to the seven Chicago to Owenton shipments, Mr. Bange states that the original freight bills show the application of a 35 percent discount off class rates. Petitioner asserts that all 377 shipments at issue were billed and paid in full in accordance with the original freight bills.

Also included in Mr. Bange's affidavit is a document entitled "Transportation Agreement" (TA), which is dated December 28, 1987, and which bears the signatures of representatives of Jones and Capitol (Exhibit D). The document provides for the application of a 45 percent discount off class rates on outbound prepaid and collect shipments from petitioner's Crowley facility to respondent's direct service points. The TA also provides for a 25 percent discount off class rates for petitioner's outbound prepaid and collect shipments to points in Texas, Oklahoma, and Kansas not served directly by respondent and establishes a minimum charge of \$38.00 on all shipments subject to the discount provisions.<sup>3</sup>

Mr. Bange states that his review of respondent's balance-due bills indicates that, with minor variations, the rates set forth in the TA are the same as the rates applied by Jones in the original freight bills. To explain the minor variations from the

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<sup>2</sup>(...continued)  
proceedings, without prejudice to the right of the parties to reopen.

<sup>3</sup> Mr. Bange acknowledges that he found no "contract" discount provision specifically relating to petitioner's traffic originating at Chicago.

TA, Mr. Bange states that it was a common practice for contract carriers to agree orally to amendments to existing agreements.

Jones argues that the shipments at issue moved in common carriage, not contract. It points to the language of the TA itself--that its "sole purpose is to provide reductions and allowances" from Jones' tariffs and that "provisions of common carriage apply to all shipments"--to establish that common carrier rates apply. To determine the appropriate common carrier rate, Jones' auditors<sup>4</sup> analyzed its lawfully filed tariffs. They concluded that the discounts originally granted to Capitol were not supported by an applicable tariff. The auditors determined that the filed tariff containing the applicable discount for the Crowley shipments (ICC JTLS 650, item 3267) first became effective on May 10, 1989, and did not apply to the subject shipments. With respect to the Chicago shipments, the auditors determined that the tariff offering the discount (ICC JTLS 630, item 5035)<sup>5</sup> required written notification of participation therein, which Capitol had failed to provide. Respondent maintains, therefore, that the corrected bills reflect the appropriate charge for the services rendered.

Respondent also claims that section 2(e) of the NRA does not govern this matter. Jones contests the applicability of that provision on both statutory and constitutional grounds.<sup>6</sup>

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<sup>4</sup> The audit was performed by Carrier Services, Inc. (CSI), a rate audit company authorized to provide rate audit and collection services on behalf of Jones as debtor in possession. Mr. Stephen L. Swezey, Senior Transportation Consultant for CSI, submitted a verified statement in this proceeding, in which he adopted the verified statement of Charles E. Shinn, another CSI analyst, that had been submitted in the underlying court case.

<sup>5</sup> This tariff item provided for a discount of 35 percent.

<sup>6</sup> Jones argues that section 2(e) of the NRA is inapplicable to bankrupt carriers, may not be applied retroactively, and is unconstitutional. 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 provided in section 2 of the NRA apply to the undercharge claims of bankrupt carriers such as Jones'. 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 Lifshultz 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 (1996); 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.,

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## 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 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."<sup>7</sup>

We note that section 2(e)'s availability is not limited to situations where the originally billed rate was unfiled. In evaluating whether a carrier's collection would be an "unreasonable practice" under section 2(e), the Board must consider, inter alia, whether the shipper was offered a rate by the carrier "other than that legally on file with the Board for the transportation service." Section 2(e)(2)(A) (emphasis added). If the carrier and shipper agreed to a price that was embodied in a filed rate that cannot be applied to the involved shipments, then the shipper was offered a rate not legally on file "for [that] transportation service." Thus, even if "some of [a carrier's undercharge claims] are based on it billing and collecting an erroneous [filed] rate, if the so-called erroneous rate was negotiated between the shipper and [carrier] and if the shipper reasonably relied on the rate, the rate would meet the definition of a 'negotiated rate' and trigger the application of

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

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); Lewis v. Squareshooter Candy Co. (In re Edson Express), 176 B.R. 54 (D. Kan. 1994).

<sup>7</sup> 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 exemption 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.

the provisions of the NRA." American Freight System, Inc. v. ICC (In re American Freight System), 179 B.R. 952, 957 (Bankr. D. Kan. 1995).

It is undisputed that Jones no longer transports property.<sup>8</sup> Accordingly, we may proceed to determine whether Jones' 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 on 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 a 1987 TA signed by the parties confirming the existence of a negotiated discount rate for the Crowley movements and a tariff provision containing a 35 percent discount proposed to apply to Chicago movements. In addition, the record contains balance due bills indicating that the original freight bills issued by respondent consistently applied rates that reflected the stated discounts and minimum charge called for in the TA and the Chicago-related tariff provision. 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>

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<sup>8</sup> Board records confirm that Jones' motor carrier operating rights were revoked on February 18, 1992.

<sup>9</sup> Jones, at pp. 13-14 of its statement filed February 3, 1995, argues that freight bills do not constitute 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 "unreasonable practice." This section, according to Jones, 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. Jones 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.

The ICC and the Board have consistently rejected this argument. Section 2(e)(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 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  
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In this case, the evidence is substantial that the rates originally billed by the carrier and paid by the shipper were rates agreed to in negotiations between the parties. The original freight bills issued by the carrier confirm the rates set forth in the 1987 agreement and the Chicago-related tariff provision and thus reflect the existence of negotiated rates.

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 on 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, Jones concedes at page 11 of its statement that if section 2(e) is read to apply to this case, it will preclude the Trustee from collecting on his claims. The evidence establishes that discounted rates were offered to Capitol by Jones; that Capitol tendered freight in reliance on the agreed-to rate; that the negotiated rate was billed and collected by Jones; and that Jones 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 2(e) of the NRA, we find that it is an unreasonable practice for Jones to attempt to collect undercharges from Capitol 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 March 24, 1997.
3. A copy of this decision will be mailed to:

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

The Honorable H. Franklin Waters  
United States District Court for the  
Western District of Arkansas,  
Fayetteville Division  
P. O. Box 1908  
Fayetteville, AR 72702-1908

Re: Civil No. 94-5046

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams  
Secretary