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EB

SERVICE DATE - FEBRUARY 9, 1998

SURFACE TRANSPORTATION BOARD¹

DECISION

No. 41639

POLYCLAD LAMINATES, INC.--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF J.H. WARE TRUCKING, INC.

Decided: February 3, 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 Missouri, Eastern Division, in J.H. Ware Trucking, Inc.--Debtor v. Polyclad Laminates, Inc., No. 4:93CV1903SNL (TIA). The court proceeding was instituted by The Plan Committee on behalf of J.H. Ware Trucking, Inc. (Ware or respondent), a former motor common and contract carrier,² to collect undercharges from Polyclad Laminates, Inc. (Polyclad or petitioner). Ware seeks

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. While this decision generally applies the law in effect prior to the Act, new 49 U.S.C. 13711(g) provides that new section 13711 applies to cases pending as of January 1, 1996, and hence section 13711 will be applied to the factual situation presented in this proceeding. Unless otherwise indicated, citations are to the former sections of the statute.

² On May 20, 1991, Ware filed for bankruptcy under Chapter 11 of the United States Bankruptcy Code. From May 20, 1991, to April 13, 1992, Ware operated as a debtor-in-possession under Chapter 11. On April 14, 1992, a second amended plan of liquidation was confirmed pursuant to which causes of action belonging to Ware were authorized to be brought in the name of
(continued...)

undercharges of \$31,135.05 (plus interest and costs) allegedly due, in addition to amounts previously paid, for services rendered in transporting 44 shipments of Freight All Kinds (FAK) between June 28, 1988, and September 5, 1989. All but 6 of the shipments were transported from Polyclad's Millbury, MA facility to points in Minnesota and Illinois. The remaining shipments moved from Polyclad's Franklin, NH facility to points in Massachusetts, where additional freight was loaded for delivery to points in Minnesota and Illinois. By order dated September 18, 1995, the court stayed the proceeding and directed petitioner to submit issues of contract carriage and rate reasonableness to the ICC for determination.

Pursuant to the court order, Polyclad, on October 17, 1995, filed a petition for declaratory order requesting the ICC to resolve issues of contract carriage, tariff participation, unreasonable practice, and rate reasonableness. By decision served October 25, 1995, a procedural schedule was established for the submission of evidence on non-rate reasonableness issues. On November 29, 1995, Ware filed an answer to the Polyclad petition. Polyclad filed its opening statement on February 22, 1996. Ware did not reply.

Polyclad asserts that the filed tariffs that provide the basis for respondent's undercharge claims are void and unenforceable in that they depend on mileage governed by the HGB Mileage Guide, a mileage tariff in which Ware is not a common carrier participant.³ Petitioner further asserts that respondent's efforts to collect additional freight charges constitute an unreasonable practice under section 2(e) of the NRA and that the rates respondent seeks to assess are unreasonable. Petitioner states that the originally assessed freight charges for the subject shipments were billed by Ware to Spartan Freight Sales, Inc. (Spartan), a licensed property broker,⁴ at rate levels agreed to by Ware and petitioner. The originally assessed charges were paid to Ware by Spartan. Spartan then billed its freight charges to Traffic Audit Bureau, Inc. (TABS), Polyclad's freight bill payment service, and TABS, on behalf of Polyclad, paid Spartan.

Polyclad supports its argument with an affidavit submitted by Michael Bange, president of Champion Transportation Services, Inc., a transportation consultant retained by petitioner. Attached to Mr. Bange's affidavit are: (1) statement of claim forms which list each of the subject shipments, the charge originally assessed and paid for that shipment, the total shipment charge that should have been assessed based on the Ware undercharge claim, and the asserted balance due for the shipment (Exhibit A); (2) representative samples of the "balance due" bills issued by respondent that reflect originally issued freight bill data, as well as the "corrected" balance due amounts (Appendix B); (3)

²(...continued)

The Plan Committee, through Wendi S. Alper, Distribution Agent, on behalf of Ware.

³ Specifically, Mileage Guide No. ICC HGB 107 and 107-A, in which Ware's only listing is that of a contract carrier participant.

⁴ Broker License No. MC-204423 was issued by the ICC to Spartan on June 7, 1988 (Bange affidavit Exhibit C).

copies of Ware's original freight bills issued to Spartan (Exhibit D); and (4) copies of the freight bills issued by Spartan to TABS (Exhibit E). Mr. Bange states that the revised freight charges which respondent seeks to assess are, in most cases, three times higher than the amounts originally billed by Ware. From his examination of the complaint filed by respondent in the court proceeding and the "balance due" bills, Mr. Bange maintains that petitioner was offered a freight rate that was not properly or timely filed in a tariff; that petitioner tendered its freight to Ware in reliance upon the offered rate; and that the rates originally billed by respondent were paid.⁵ Mr. Bange is of the opinion that these circumstances provide the basis for a finding of unreasonable practice.

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."

Here, it is undisputed that Ware is no longer an operating carrier.⁶ Accordingly, we may proceed to determine whether Ware's attempt to collect undercharges (the difference between the applicable filed 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

⁵ Mr. Bange points out that all of Ware's originally assessed charges were billed to and paid by Spartan. For this reason, Mr. Bange is of the opinion that Spartan, rather than petitioner, would be responsible for any of the asserted undercharge claims found to be due. The record in this proceeding fails to provide an adequate description of the relationship between Spartan and Ware or between Spartan and Polyclad. We note that the charges billed by Spartan to TABS as paying agent for Polyclad (Bange Exhibit E) exceed the original freight charges billed to Spartan by Ware (Bange Exhibit D). It would appear that the additional amounts assessed by Spartan constitute Spartan's broker fee for services provided to Polyclad. Considering the facts available on this record, we will assume for purposes of this decision that Spartan's activities were those of an agent acting on behalf of Polyclad.

⁶ Board records disclose that Ware held common carrier and contract carrier authority under Docket No. MC-139973 until the certificates and permits were revoked on July 27, 1992.

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, petitioner has submitted representative balance due bills indicating that the rates originally assessed by respondent were consistently and substantially below those that respondent is here attempting to collect. We find this evidence sufficient to satisfy the written evidence requirements of section 2(e). 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).

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)].

The evidence filed in this case, which is unrebutted, reflects a pattern that we have seen again and again in this type of case: Polyclad was offered a negotiated rate by Ware; Polyclad tendered its traffic to Ware in reliance upon the offered rate; Ware billed and collected the negotiated rate; and Ware 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 Ware to attempt to collect undercharges from Polyclad 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.

⁷ Although our decision here is based on our finding under section 2(e) of the NRA, we note that petitioner’s allegation that Ware’s undercharge claims are invalid because it was not a common carrier participant in the mileage guide on which its filed tariffs are based is not without basis. See Security Services, Inc. v. Kmart Corp., 114 S. Ct. 1702 (1994) (Kmart).

No. 41639

2. This decision is effective on its service date.
3. A copy of this decision will be mailed to:

The Honorable Stephen N. Limbaugh
United States District Court for the
Eastern District of Missouri, Eastern Division
U.S. Court & Custom House
1114 Market Street, Room 315
St. Louis, MO 63101

Re: No. 4:93CV1903SNL (TIA)

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

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By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary