

SURFACE TRANSPORTATION BOARD¹

DECISION

No. 41239

ASCO HARDWARE COMPANY, INC.-PETITION FOR DECLARATORY
ORDER--CERTAIN RATES AND PRACTICES OF
JONES TRUCK LINES, INC.

Decided: December 10, 1996

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 Eastern District of Arkansas, Western Division, in Jones Truck Lines, Inc. Debtor-In-Possession v. Asco Hardware, Inc., LR-C-93-459. The court proceeding was instituted by Jones Truck Lines, Inc. (Jones or respondent), a former motor common and contract carrier, to collect undercharges from Asco Hardware Company, Inc. (Asco or petitioner). Jones seeks undercharges in the amount of \$2,508.20 (plus interest) allegedly due, in addition to amounts previously paid, for the transportation of 55 shipments of hardware, hollow metal, and building specialties between July 18, 1988, and February 10, 1989. The shipments were less-than-truckload (LTL) movements transported from petitioner's facilities in North Little Rock, AR, to points in Alabama, Georgia, Mississippi, Kansas, Ohio, Missouri, Oklahoma, Tennessee, and Texas. By order dated March 8, 1994, the court dismissed the proceeding without prejudice pending resolution by the ICC of issues of contract carriage,

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.

unreasonable practice, and rate reasonableness raised with respect to the claimed undercharges.²

Pursuant to the court order, petitioner, on April 4, 1994, filed a petition for declaratory order requesting the ICC to resolve the court-referred issues. By decision served April 12, 1994, the ICC established a procedural schedule. Petitioner filed its opening statement on June 13, 1994. Respondent filed its reply statement on July 13, 1994. Petitioner filed a rebuttal statement on August 8, 1994.

Petitioner asserts that the shipments in question were transported by Jones under its contract carrier authority pursuant to a transportation agreement. Asco further asserts that the rates which 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.

Included in Asco's opening statement is an executed agreement dated April 18, 1988, bearing the signatures of representatives of Jones and Asco entitled "Transportation Agreement" (Exhibit B). The agreement indicates that transportation services are to be performed by Jones under its contract carrier Permit No. 111231 Sub 382 (Exhibit A). It provides for the application of a 40% discount for LTL inbound and outbound shipments, between Asco's North Little Rock facility and the carrier's direct service points, subject to a minimum charge of \$40.00.

Petitioner also submits the affidavit of J.A. Russenberger, president of Asco. Mr. Russenberger asserts that he is familiar with the shipping patterns of Asco and has been involved in carrier freight rate negotiations on behalf of petitioner. He states that, on April 18, 1988, Asco signed a "Transportation Agreement" with Jones which provided Asco with a 40% discount for its inbound and outbound shipments. He further states that Asco tendered freight to Jones based on the offered discount, that Jones applied the discount to the shipments here at issue, and that Asco paid the bills as rendered. Mr. Russenberger asserts that comparable discounts were available from other motor carriers and that Asco would not have tendered its traffic to Jones in the absence of its agreement with that carrier.

Jones argues that there is no evidence to support a finding of contract carriage, and that the mere existence of a writing does not establish contract carriage. It argues, through a verified statement submitted by Stephen L. Swezey, Senior Transportation consultant for Carrier Service, Inc. (CSI),³ that

² The court order allows the parties to move to reinstate the proceeding within 30 days of the ICC ruling. The court order further provides that, in the absence of such a motion, the case will be dismissed with prejudice.

³ CSI is a rate audit company authorized to provide rate audit and collection services on behalf of Jones as debtor in possession. The authorization was granted by the United Bankruptcy Court for the Western District of Arkansas, Fayetteville Division, by order entered February 25, 1992, in Case No. 91-15475-M, Chapter 11. CSI concluded as a result of

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the rates assessed initially should have been those on file with the ICC without a discount.⁴ With respect to petitioner's claim that section 2(e) of the NRA governs this matter, respondent contests the applicability of that provision on statutory and constitutional grounds.⁵

DISCUSSION AND CONCLUSIONS

³(...continued)

its audit that the discount provided to Asco by Jones did not become applicable to Asco traffic until February 13, 1989. CSI also rerated the minimum charges originally assessed by Jones.

⁴ Attached to Mr. Swezey's statement are representative balance due bills issued by CSI. These balance due bills contain pertinent shipment information, the charges as originally billed, an explanation for the issuance of the asserted freight bill correction, and the balance due amount.

⁵ 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., 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).

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."⁶

It is undisputed that Jones no longer transports property. 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 1988 transportation agreement signed by the parties confirming the existence of a negotiated discount rate. In addition, the record contains balance due bills indicating that the original freight bills issued by respondent consistently applied rates which reflected the stated discount (40%) and minimum charge (\$40.00) called for in the 1988 transportation agreement. We find that this evidence satisfies the written evidence requirement. E.A. Miller, Inc.--Rates and Practices of Best, 10 I.C.C.2d 235, 239-40 (1994) (E.A. Miller).⁷

⁶ 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 the January 1, 1996.

⁷ Jones, at pg. 22 of its statement filed July 13, 1994, argues 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 "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
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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, respondent concedes (respondent's statement at 20) 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 Asco by Jones; that Asco tendered freight in reliance on the negotiated rate; that the negotiated rate was billed and collected by the 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 Asco 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.

⁷(...continued)
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 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, 10 I.C.C.2d 239-40 (1994). 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. This decision is effective on December 18, 1996.
3. A copy of this decision will be mailed to:

The Honorable William R. Wilson
United States District Court for the
Eastern District of Arkansas
312 Federal Building
Jonesboro, AR 72401

Re: LR-C-93-459

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

Vernon A. Williams
Secretary