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SERVICE DATE - OCTOBER 13, 2000

SURFACE TRANSPORTATION BOARD

DECISION

STB No. 42010

A.O. SMITH CORPORATION; ADVANCE TRANSFORMER CO., a division of PHILIPS ELECTRONICS NORTH AMERICA CORPORATION; ASSOCIATED GROCERS, INC.; FEDCO, INC. dba YOUR FURNITURE; J. SOSNICK & SON; KENNEDY ENDEAVORS, INC. dba TIM'S CASCADE STYLE POTATO CHIPS; MASTER-HALCO, INC.; McCORMICK & COMPANY, INC.; O.G. DEHYDRATED, INC.; POSER BUSINESS FORMS, INC.; OATEY fka OATEY CO.; THE GLIDDEN COMPANY; THE PILLSBURY COMPANY; THE STATE CHEMICAL MANUFACTURING COMPANY  
--PETITION FOR DECLARATORY ORDER--  
CERTAIN RATES AND PRACTICES OF WILLIG FREIGHT LINES, INC.

Decided: October 10, 2000

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 Northern District of California. The court proceedings were instituted by Willig Freight Lines, Inc. (Willig or respondent),<sup>1</sup> a former motor common and contract carrier, to collect undercharges from A. O. Smith Corporation (Smith), Advance Transformer Co. (Advance), Associated Grocers, Inc. (Associated), Fedco, Inc. (Fedco), J. Sosnick & Son (Sosnick), Kennedy Endeavors, Inc. (Kennedy), Master-Halco, Inc. (Master-Halco), McCormick & Company, Inc. (McCormick), OG Dehydrated, Inc. (OG), Poser Business Forms, Inc. (Poser), Oatey fka Oatey Co. (Oatey), The Glidden Company (Glidden), The Pillsbury Company (Pillsbury), and The State Chemical Manufacturing Company (State Chemical) ( collectively, shippers or petitioners). Willig seeks undercharges approximating \$350,048.63 (plus interest) allegedly due, in addition to amounts previously paid, for transportation services rendered on behalf of the respective shippers between October 19, 1992, and May 23, 1994, as indicated in the Appendix.<sup>2</sup> By order

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<sup>1</sup> Willig filed for bankruptcy under Chapter 11 of the United States Bankruptcy Code, in the United States Bankruptcy Court for the Northern District of California, Case No. 95-33940 DM.

<sup>2</sup> The Appendix identifies by petitioner the bankruptcy court adversary proceeding  
(continued...)

dated March 31, 1997, the court stayed the adversary proceedings filed by Willig to enable petitioners to seek a Board determination of issues of rate reasonableness, unreasonable practice, and tariff applicability.<sup>3</sup>

Pursuant to the court order, petitioners, on July 27, 1997, jointly filed a petition for declaratory order requesting the Board to resolve various issues, including those raised by the court. By decision served July 30, 1997, the Board issued a procedural schedule for the submission of evidence. On October 20, 1997, petitioners filed a joint opening statement. Petitioners explain that their joint filing is due to the commonality of their factual situations and the remedies that they seek. Respondent filed its reply on December 4, 1997, and petitioners submitted their rebuttal on December 23, 1997.

Petitioners assert that respondent's efforts to collect the claimed undercharges constitute an unreasonable practice under section 13711(a) and that the rates respondent now seeks to collect are unreasonable.<sup>4</sup> Petitioners maintain that Willig offered them freight rates upon which they relied in tendering their shipments to respondent; that the offered freight rates had been agreed upon by the parties, billed by Willig, and paid by petitioners; and that payment made by petitioners had been accepted by Willig as payment in full.<sup>5</sup>

Each petitioner supports its position with a declaration from an employee familiar with their employer's transportation arrangements with Willig during the period involved in this proceeding.<sup>6</sup> The declarants collectively state that Willig offered their respective companies freight rates represented to be discount rates that were relied upon by their companies in tendering their shipments to Willig. According to declarants, the discounted rates were agreed upon and were noted on each of the original freight bills issued by Willig. They assert that

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<sup>2</sup>(...continued)

instituted by Willig, the number of shipments subject to claimed undercharges, and, as can best be determined from the record, the asserted undercharge claim total.

<sup>3</sup> The court order was issued in the underlying bankruptcy proceeding as a case management order for the handling of undercharge claim adversary proceedings instituted by Willig.

<sup>4</sup> Petitioners Associated, Master-Halco, and State Chemical acknowledge that they have failed to provide evidentiary support for the rate reasonableness assertion.

<sup>5</sup> Petitioners Associated and Master-Halco were consignees responsible for the payment of freight charges billed by Willig. Arrangements for the "freight collect" delivery of their shipments were made by vendors of Associated and Master-Halco, subject to the approval of petitioners, based on offered freight rates relied upon by the two petitioners.

<sup>6</sup> Exhibits 1-14 to Petitioners' Opening Statement.

Willig freight bills were paid by their respective companies and that their payments to Willig were accepted without objection. Attached as Exhibit A to each of the declarations are copies of the revised freight bills issued by respondent that contain originally issued freight bill data as well as “corrected” balance due amounts. An examination of the revised freight bills indicates originally billed charges based on minimum rates, rates per hundredweight, and rates to which discounts were applied that were significantly below the newly assessed charges that reflect the elimination of originally applied discounts and the application of higher minimum rates and rates per hundredweight. Declarants assert that competitive motor carriers offering discount rates comparable to those originally billed by Willig were available to their companies and that their companies would not have engaged Willig to provide service had Willig attempted to assess the undiscounted charges it now seeks to collect.

Respondent’s statement consists of legal argument of counsel and declarations of Rodney Johnson, President of Trans-Allied Audit Co. Inc.<sup>7</sup> Counsel contends that the facts submitted are insufficient to sustain an unreasonable practice finding and that petitioners have failed to demonstrate that the rates Willig here seeks to collect are unreasonable. He maintains that Associated and Master-Halco have not provided written evidence of the original rate charged or that these petitioners reasonably relied on the original rates. As to the remaining petitioners, he argues that their reliance on the initially issued freight bills was misplaced in that those bills were rated in error and that balance due bills had been provided to them.

Mr. Johnson, in separate declarations directed to each of the petitioners (Exhibits 1-14 to respondent’s statement), explains the process used in auditing the freight bills at issue and attests to the rate accuracy of the amounts claimed in the balance due bills. Each declaration includes a total amount claimed to be due from each petitioner.<sup>8</sup> Included with the Johnson declarations are copies of most of the balance due bills issued to each of the respective petitioners.

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<sup>7</sup> Trans-Allied was the organization retained by the estate of Willig to audit freight undercharges for the 3-year period that preceded respondent’s bankruptcy filing.

<sup>8</sup> The balance due totals set forth in Mr. Johnson’s declarations appear to include interest charges that have been added to the basic undercharge claims.

## DISCUSSION AND CONCLUSIONS

We will dispose of this proceeding under section 13711. Accordingly, we do not reach the other issues raised.<sup>9</sup>

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 Willig no longer transports property. Accordingly, we may proceed to determine whether respondent’s attempts to collect undercharges (the difference between the applicable filed rate and the negotiated rate) are 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 13711(a) determination. Section 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, the record contains copies of virtually all of the revised balance due freight bills issued to petitioners by Willig that indicate originally assessed charges consistently and substantially below those that respondent is seeking to assess. 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. Mar. 31, 1997) (mem.) (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).

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<sup>9</sup> Typically, a court hearing undercharge cases will direct the shipper 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 typically raise issues of contract carriage, rate applicability, 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 Oct. 23, 1997). We will not address the other issues raised here because our section 13711 findings fully resolve the question of petitioners’ liability for the rates sought.

In this proceeding, the evidence indicates that petitioners and Willig conducted business in accordance with agreed-to negotiated discount rates that were originally billed by Willig and paid by petitioners.<sup>10</sup> The consistent application in the original freight bills of charges based on minimum rates, rates per hundredweight, and rates to which discounts were applied that were significantly below the charges respondent is here seeking to assess support the unrefuted testimony of petitioners' declarants and reflect the existence of negotiated rates. The evidence further indicates that petitioners relied on the agreed-to rates in tendering their shipments to Willig and that petitioners would not have used Willig's services had respondent attempted to charge the rates it here 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)].

In each of the matters raised in this proceeding, the evidence establishes that negotiated discount rates were offered to petitioners by Willig; that petitioners reasonably relied on the offered rates in tendering their traffic to Willig; that Willig did not properly or timely file tariffs providing for such discount rates and has not entered into agreements for contract carriage; that the negotiated rates were billed and collected by Willig; and that Willig now seeks to collect additional payment based on higher rates filed in a tariff. Therefore, under 49 U.S.C. 13711, we find that it is an unreasonable practice for Willig to attempt to collect undercharges from petitioners herein for transporting the shipments at issue in this proceeding.

One final matter requires comment. Petitioners seek damages (attorney's fees and costs incurred in defending against respondent's undercharge collection efforts) under 49 U.S.C. 14704. We decline to find that petitioners are entitled to fees and costs and deny their request. See Illinois Cent. Gulf R. Co. v. Delta Millwork, Inc., 802 F.2d 156, 157 (5th Cir. 1986); Ashley Creek Phosphate Co. v. Chevron Pipe Line Co., 5 I.C.C.2d 303, 314-15 (1989); and 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).

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<sup>10</sup> The business relationships between petitioners Associated and Master-Halco and Willig were based on agreements between vendors of these two petitioners, acting as agents on their behalf, and respondent.

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. Petitioners' request for attorney's fees is denied.
3. This decision is effective on its service date.
4. A copy of this decision will be mailed to:

The Honorable Dennis Montali  
United States Bankruptcy Court for  
the Northern District of California  
P.O. Box 7341  
San Francisco, CA 94120

Re: Case No. 95-33940 DM  
Adversary cases listed in the Appendix

By the Board, Chairman Morgan, Vice Chairman Burkes, and Commissioner Clyburn.

Vernon A. Williams  
Secretary

## APPENDIX

Shippers or Petitioners	Adv. Proc. No.	Shipments*	Total Balance Due* (Undercharge claim)
A.O. Smith Corporation	97-3191 DM	24	\$16,345.70
Advance Transformer Co., a division of Philips Electronics North America Corporation	96-3545 DM	92	\$9,045.42
Associated Grocers, Inc.	96-3536 DM	24	\$4,614.67
Fedco, Inc. d/b/a Your Furniture	97-3072 DM	17	\$30,117.00
J. Sosnick & Son	96-3704 DM	193	\$38,307.84
Kennedy Endeavors, Inc. dba Tim's Cascade Style Potato Chips	97-3389 DM	10	\$22,504.24
Master-Halco, Inc.	97-3079 DM	16	\$5,061.60
McCormick & Company, Inc.	97-3318 DM	121	\$28,984.16
OG Dehydrated, Inc.	97-3074 DM	27	\$66,259.12
Poser Business Forms, Inc.**	96-3787 DM	37	\$3,712.68
Oatey fka Oatey Co.	97-3118 DM	53	\$7,216.33
The Glidden Company	97-3153 DM	288	\$96,906.85
The Pillsbury Company	96-3747 DM	15	\$7,857.88
The State Chemical Manufacturing Company	97-3385 DM	270	\$13,115.14
TOTALS		1187	\$350,048.63

\*These totals were derived from information and materials contained in Exhibits 1-14 submitted by petitioners and respondent.

\*\*Includes only freight bills identifying Image Business Forms as shipper that are billed to Forms West, freight bills billed to Image of Nevada, and freight bill billed to Image Business Forms.