

SURFACE TRANSPORTATION BOARD¹

DECISION

No. 40684

COOK FAMILY FOODS LTD.--PETITION FOR DECLARATORY ORDER--CERTAIN
RATES AND PRACTICES OF SILVEY REFRIGERATED CARRIERS, INC.

Decided: July 17, 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 Bankruptcy Court for the District of Nebraska in *Silvey Refrigerated Carriers, Inc. v. Cook Family Foods, Ltd.*, Case No. BK89-468, A91-8098. The court proceeding was instituted by Silvey Refrigerated Carriers, Inc. (Silvey or respondent), a former motor common and contract carrier, to collect undercharges from Cook Family Foods, Ltd. (Cook or petitioner). Silvey seeks undercharges of \$4,756.85 allegedly due, in addition to amounts previously paid, for the transportation of 14 truckload shipments of refrigerated food products between December 27, 1989, and March 6, 1990. The shipments were transported from Cook's facilities at Lincoln, NE, to points in Florida, New Jersey, Colorado, Pennsylvania, and Virginia. By order dated October 8, 1991, the court stayed the proceeding and referred issues of rate reasonableness and unreasonable practice to the ICC for determination.

Pursuant to the court order, Cook, on November 4, 1991, filed a petition for declaratory order requesting the ICC to resolve issues of rate reasonableness, unreasonable practice, and rate applicability and construction. By decision served November 22, 1991, the ICC established a procedural schedule. Petitioner filed its opening statement and argument on January 21, 1992. Respondent filed its reply on April 6, 1992. Petitioner submitted its rebuttal on May 15, 1992.

Cook, in its opening statement, asserts that the shipments at issue were transported by Silvey in its capacity as a contract carrier and, accordingly, are not subject to claims for undercharges based on the filed rate doctrine. It further asserts that the common carrier rates that Silvey seeks to impose are unreasonable.

Petitioner supports its argument with a verified statement of Mark Anderson, Distribution Manager for Cook. Mr. Anderson states that all of the shipments at issue were tendered to Silvey pursuant to a contractual agreement dated October 9, 1989. He asserts that Silvey billed and Cook paid the rates originally assessed in accordance with the terms of the agreement and maintains that

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.

Cook would not have tendered any traffic to Silvey at the rates the carrier is now attempting to charge. Attached as exhibits to Mr. Anderson's statement are copies of the correction notices issued by Silvey containing original freight bill data along with the claimed balance due amounts (Exhibit B); a copy of a document dated October 9, 1989, entitled "Motor Freight Agreement" signed by Mr. Anderson and Silvey's Executive Vice President, Robert M. Cimino, containing a reference to rates and charges set forth in an attached Appendix A² (Exhibit C); a rate quotation for movements from Lincoln to Orlando, FL, of \$1.74 per mile dated December 27, 1989, signed by Mr. Cimino (Exhibit D);³ and a letter dated January 26, 1990, signed by Dwayne O. Haug, President of Silvey, that references a bid proposal (not attached) to which a 15% discount is to be applied for the period January 15, 1990, to March 1, 1990 (Exhibit E).⁴

Respondent's reply, for the most part, consists of legal argument to the effect that petitioner has failed to meet the necessary standards to support a rate reasonableness determination or to satisfy the statutory requirements for establishing the existence of a contract carrier relationship. It characterizes the October 1989 agreement as, at best, "an agreement to agree to do business."

On December 3, 1993, the NRA became law. The NRA substantially restored the ability of the ICC (and now the Board) to find that assessment of undercharges is an unreasonable practice, and it provided several new grounds on which shippers may defend against payment of undercharges.⁵ By decision served December 30, 1993, the ICC reopened the record and established a procedural schedule permitting the parties to invoke the alternative procedure under the section 2(e) of the NRA and to submit new evidence and argument in light of the new law.

On June 8, 1994, Cook submitted a supplemental statement⁶ asserting that, based on its previously submitted evidence, it is entitled to relief from respondent's efforts to collect undercharges pursuant to the provisions of section 2(e) of the NRA. In a supplemental statement filed June 24, 1994, Silvey argues that Cook has failed to sustain its unreasonable practice assertion in that it has not provided written evidence of the original rate charged or established that it reasonably relied on that rate. It further argues that Cook cannot assert a section 2(e) defense while at the same time claiming that the subject shipments moved in contract carriage.⁷

DISCUSSION AND CONCLUSIONS

² The referenced Appendix A was not included in petitioner's filing.

³ One of the shipments included in Exhibit B is a December 27, 1989 shipment to Orlando. According to Mr. Anderson, the Orlando shipment was mistakenly invoiced at a rate of \$6.06 per hundredweight. The amount billed, however, was virtually equivalent to the quoted rate of \$1.74 per mile applied to a 1,394 mile movement to Orlando. Mr. Anderson states that all of the other shipments at issue were invoiced on the basis of the mileage rates provided in the contract.

⁴ Of the 14 correction notices included in Exhibit B, 12 involve shipments transported between January 15 and March 1, 1990. The original freight bills for each of the shipments transported during that period reflect the application of a 15% discount to the mileage rate assessed.

⁵ The ICC's prior unreasonable practice policy was invalidated by the Supreme Court in *Maislin Indus. v. Primary Steel*, 497 U.S. 116 (1990).

⁶ Cook, stating that it had delayed submission of its supplemental statement in the hope that the matter at issue could be settled, accompanied its supplemental pleading with a request that it be accepted as late-filed. This request to late-file is not opposed by Silvey and is granted.

⁷ Silvey's argument that Cook is precluded from claiming section 2(e) as a defense in an undercharge case if it previously argued that contract carriage was involved is incorrect. Section 2(e) is not as narrow as Silvey contends, and there is nothing in the statute or its legislative history to suggest that a shipper is precluded from using section 2(e) if it also argued that the shipments moved in contract carriage. See *E.A. Miller, Inc.--Rates and Practices of Best*, 10 I.C.C. 2d 235, 238-39 (1994) (*E.A. Miller*).

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."⁸

It is undisputed that Silvey no longer transports property.⁹ Accordingly, we may proceed to determine whether Silvey's 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 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 2(e) cannot be satisfied unless there is written evidence of a negotiated rate.

Here, the record contains a 1989 motor freight agreement signed by the parties clearly referencing the existence of negotiated rates. In addition, petitioner has submitted corrected freight bills indicating that respondent's originally assessed rates were consistently applied at a level significantly below that which respondent is here attempting to collect; a rate quotation signed by a Silvey official that conforms to the rate level originally assessed for the only Orlando- destined shipment that is subject to this proceeding; and a letter signed by Silvey's president referencing a bid proposal and specifically identifying a 15% discount--a discount applied in the original freight bills issued by respondent to 12 of the 14 shipment subject to this proceeding. We find this evidence sufficient to satisfy the written evidence requirement. *E.A. Miller, supra. 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 this case, the evidence is substantial that the rates originally billed by the carrier and paid for by the shipper were rates agreed to in negotiations between the parties. The original freight bills issued by the carrier, the language contained in the 1989 agreement, the rate quotation signed by the Silvey official, and the January 1990 letter signed by Silvey's president confirm the testimony of Mr. Anderson and 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

⁸ 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 January 1, 1996.

⁹ Board records confirm that Silvey's motor carrier operating rights were revoked on September 1, 1990.

higher rate filed in a tariff [section 2(e)(2)(E)].

Here, the evidence establishes that negotiated rates were offered Cook by Silvey; that Cook tendered freight to Silvey in reliance on the rates negotiated; that the negotiated rates were billed and collected by Silvey; and that Silvey 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 Silvey to attempt to collect the sought undercharges from Cook 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 its service date.
3. A copy of this decision will be mailed to:

Chief Judge Timothy J. Mahoney
United States Bankruptcy Court
for the District of Nebraska
8309 U.S. Courthouse and Post Office Building
Omaha, NE 68101

Re: Case No. BK89-468 A91-8098

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary