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SERVICE DATE - MARCH 24, 2000

SURFACE TRANSPORTATION BOARD¹

DECISION

No. 41665

MAKITA U.S.A., INC.--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF AMERICAN FREIGHT SYSTEM, INC.

Decided: March 20, 2000

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). Because of our finding under section 2(e) of the NRA, we will not reach the other issue raised in this proceeding.

BACKGROUND

This matter arises out of a court action in the United States Bankruptcy Court for the District of Kansas in American Freight System, Inc. v. Makita U.S.A., Inc., Adversary No. 90-8229. The court proceeding was instituted by American Freight System, Inc. (American or respondent), a former motor common and contract carrier, to collect undercharges from Makita U.S.A., Inc. (Makita or petitioner). American seeks undercharges of \$7,504.09 (plus interest) allegedly due, in addition to amounts previously paid, for services rendered in transporting 86 shipments of hand electric power tools and parts thereof between January 5, 1988, and July 5, 1988. The shipments were less-than-truckload (LTL) movements transported from petitioner's facilities in Denver, CO, to points in Iowa, South Dakota, and Nebraska. By order dated June 20, 1995, the court directed petitioner to institute an administrative action before the ICC for the purpose of resolving issues of rate reasonableness and unreasonable practice.

Pursuant to the court order, Makita, on November 24, 1995, filed a petition for declaratory order requesting the ICC to resolve all disputed issues within its primary jurisdiction relating to the

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 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.

claims for undercharges raised by American. By decision served December 6, 1995, the ICC established a procedural schedule for the submission of evidence on non-rate reasonableness issues. On September 16, 1996, Makita filed its opening statement. Respondent failed to submit a reply and indeed has failed to make an appearance or otherwise participate in any aspect of this proceeding.²

Makita asserts that respondent's attempt to collect additional freight charges constitutes an unreasonable practice under section 2(e) of the NRA, and that the rates respondent seeks to assess are unreasonable. Petitioner maintains that the rates originally billed by American and paid by petitioner were rates mutually agreed upon by the parties; that the subject shipments were tendered to respondent in reliance upon the agreed-upon rates; that the originally applied negotiated discounted rates paid by Makita were initially accepted by American and were not subject to question until bankruptcy proceedings were instituted by respondent; and that respondent's claims for undercharges are without merit. Attached to petitioner's opening statement are copies of the "balance due" bills issued by respondent for the shipments at issue that reflect originally issued freight bill data as well as the asserted "corrected" balance due amounts. An examination of the "balance due" bills indicates the original application of a discounted class 85 rate³ and a newly-assessed charge substantially higher than the amount originally billed based on re-rated charges that eliminate the discount. Each of the balance due bills contain the notation "Discount N/A - Publication Does Not Name the NMFC Commodity That Was Shipped."

Also attached to petitioner's opening statement are affidavits from Bruce Hocum, Vice President of Samuel Rubenstein Freight Transportation Consultants Inc. (Rubenstein),⁴ a transportation consultant and expert retained by Makita; Harold Butterfield, a freight salesman for American in the Wichita, KS, area; and Roger Sellman, a sales supervisor for American responsible for sales efforts in Minnesota, Iowa and Wisconsin. Mr. Hocum states that he supervised the rate

² By corrected decision served April 22, 1997, the Board directed American either to file a reply or to show cause why this proceeding should not be decided on the existing record. American did not respond.

Under 49 CFR 1112.3, a party that fails to comply with the schedule for submission of verified statements is deemed to be in default and to waive any further participation in the proceeding. The failure of American to participate in this agency proceeding should bind it in the court proceeding to the record developed before the agency. See Carriers Traffic Serv. v. Toastmaster, 707 F. Supp. 1498, 1505-06 (N.D. Ill. 1988) (carrier on court referral must "live with the record it has made (or failed to make)" before the Board when pursuing its undercharge proceeding in the courts).

³ This is the classification rating for the subject commodities (Item 186590) identified in Exhibit 4 to petitioner's opening statement.

⁴ Rubenstein is a firm specializing in handling rate and tariff matters for shipper and carrier clients.

negotiations with American on behalf of Rubinstein clients and had first hand knowledge of the rate negotiations as well as how American published its tariffs. Mr. Hocum asserts that American placed little emphasis on identifying commodities for which published discounts were applicable and that the clear intention of the carrier was to apply the agreed-upon discount to all of the commodities handled for a particular shipper.

Both Mr. Butterfield and Mr. Sellman affirm that the sales representative would negotiate a discount pricing program with the shipper and that discount provisions were intended to apply on all NMFC items handled for that particular shipper.

DISCUSSION AND CONCLUSIONS

We dispose of this proceeding under section 2(e) of the NRA. Accordingly, we do not reach the other issue 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.”⁵

It is undisputed that American no longer transports property.⁶ Accordingly, we may proceed to determine whether American’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 agreement.

⁵ 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.

⁶ See American Freight System, Inc. v. ICC 174 B.R. 604 (Bankr. D. Kan. 1994).

Here, petitioner has submitted balance due bills indicating originally assessed charges that were consistently and substantially below those that respondent is here seeking to assess that conform with rates assertedly agreed to by the parties. 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. March 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 evidence submitted establishes that specific amounts were paid that were less than the filed rate and that the rates were agreed upon by the parties).

In this case, the evidence indicates that the parties conducted business in accordance with agreed-to negotiated discount rates that were originally billed by American and paid by Makita. The consistent application in the original freight bills of assessed charges based on discounted class 85 rates confirm the testimony of Mr. Hocum, Mr. Butterfield, and Mr. Sellman and the assertions of petitioner that discounted rates were applicable to the shipments at issue, and it reflects the existence of negotiated rates. The evidence further indicates that Makita relied upon the agreed-to rates in tendering its traffic to American.

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)].

Here, the unrefuted evidence submitted by petitioner establishes that a negotiated discount rate was offered by American to Makita; that Makita reasonably relied on the offered rate in tendering its traffic to American; that American did not properly or timely file a tariff providing for such a discounted rate and has not entered into an agreement for contract carriage; that the negotiated rate was billed and collected by American; and that American 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 American to attempt to collect undercharges from Makita 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.

No. 41665

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

The Honorable James A. Pusateri
United States Bankruptcy Court
for the District of Kansas
204 U.S. Courthouse
44 Quincy
Topeka, KS 66683

Re: Adversary No. 90-8229

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

Vernon A. Williams
Secretary