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SERVICE DATE - FEBRUARY 25, 1997

SURFACE TRANSPORTATION BOARD¹

No. 41237

CAPITOL CORE COMPANY

v.

LLOYD T. WHITAKER, TRUSTEE OF THE ESTATE OF
OLYMPIA HOLDING CORPORATION F/K/A P*I*E NATIONWIDE

Decided: February 13, 1997

We find that 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 issues raised in the proceeding.

BACKGROUND

This proceeding arises out of the efforts of Lloyd T. Whitaker, trustee of Olympia Holding Corporation f/k/a P*I*E Nationwide (defendant or P*I*E), to collect undercharges for certain shipments from Capitol Core Company (complainant or Capitol Core). These matters came before the ICC on referral from the United States District Court, Middle District of Florida, Jacksonville Division, in Whitaker v. Capitol Core Co., Case No. 91-1074-Civ-J-16 (referral order dated Feb. 28, 1994).² The court had previously designated Capitol Core as the lead case on the question of whether the court or the ICC should decide whether underlying transportation in various P*I*E undercharge cases moved as common or contract carriage. The court determined that the ICC must make this ruling, referred to the ICC the nature-of-service issue involved in this case, and directed that the ICC (now the Board) could consider rate reasonableness or any other additional issue it deemed relevant to its resolution of the matters in dispute.

Pursuant to the court order, Capitol Core, in an administrative complaint filed April 4, 1994, requested the ICC

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.

² On January 2, 1996, the district court reassigned this case as No. 91-1074-Civ-J-99(H).

to resolve the court-referred issues.³ By decision served May 19, 1994, the ICC established a procedural schedule for the submission of evidence on all issues including rate reasonableness and directed P*I*E to furnish complainant with those materials generally required from carriers seeking undercharges, i.e., the information required in Vertex Corp.-Pet. Declar. Order-Rates and Practices, 9 I.C.C.2d 688 (1993)(Vertex II), so that the shipper can be properly apprised of the carrier's basis for its undercharge claims. Defendant was warned that failure to supply the relevant information to complainant would result in the ICC advising the court that defendant had not shown itself to be entitled to collect any claimed undercharges.

At complainant's request, by decision served July 1, 1994, the ICC bifurcated the rate reasonableness issue and established a new procedural schedule. The decision limited recordbuilding for this phase of the proceeding to issues other than rate reasonableness,⁴ and directed defendant to submit Vertex II information for each shipment for which it has made an undercharge claim against complainant.⁵

Capitol Core filed its opening statement on July 18, 1994. P*I*E filed its reply on September 19, 1994. Complainant filed its rebuttal on September 30, 1994. The parties directed their comments and arguments in these pleadings to the common versus contract carriage dispute.

Thereafter, Capitol Core, on March 15, 1995, submitted a supplemental pleading invoking section 2(e) of the NRA. Defendant filed a reply to the supplemental filing on March 24, 1995, asserting that complainant's attempt to invoke section 2(e) of the NRA at this stage of the proceeding was both untimely and inappropriate. Complainant filed its supplemental rebuttal on March 30, 1995.⁶

³ The complaint was filed on behalf of Capitol Core, the Automotive Parts Rebuilders Association (APRA), and the members of APRA. In its answer to Capital Core's complaint, P*I*E states that it has never filed a complaint against APRA and is without knowledge of APRA's membership.

⁴ The decision also stated that "The Commission has never approved, identified, or certified any class of shippers as complainants in this proceeding." (p. 4, n.3). While we note that the Capitol Core proceeding is a lead case for at least 287 other court cases (complainant's opening statement, pp. 2-4 and Exhibit B), this decision is limited to the consideration of matters related solely to the movement of Capitol Core traffic.

⁵ Defendant had provided complainant with Vertex II information for only one shipment, arguing that its obligation to provide Vertex II information was limited to shipments alleged to have been transported in contract carriage. The July 1 decision provided defendant with another opportunity to comply with the Vertex II requirement. Defendant, however, has refused to provide any additional Vertex II information on the second shipment at issue.

⁶ Subsequently, Power and Telephone Supply (PTS) filed a motion on May 2, 1996, in effect to intervene in this proceeding
(continued...)

The basic facts revolve around two written agreements, one shipment,⁷ and P*I*E's 8100 series contract rate schedule. The first agreement, dated November 15, 1988 (the 1988 agreement), is between Capitol Core and P*I*E. The agreement identifies Capitol Core as Acct. #12624 and is signed by Saul Goldfarb on behalf of Capitol Core⁸ and Kenneth J. Burroughs, P*I*E Vice-President-Pricing & Traffic, on behalf of P*I*E. The second agreement, dated October 13, 1989 (the 1989 agreement), is between APRA, a trade association in which Capital Core holds a membership, and P*I*E. It contains terms identical to those of the first agreement, identifies APRA as Acct. #04489, and is signed by William Gager on behalf of APRA⁹ and Mr. Burroughs on behalf of P*I*E. Each agreement is a two-page document, bears the title MOTOR CARRIER CONTRACT CARRIER AGREEMENT, and contains 13 numbered paragraphs.¹⁰ Paragraph 6 of each agreement specifies that the rates charged by the carrier are to be part of the agreement and are to be assessed under the terms of the PIEC Schedule 8100 series. The agreements submitted on the record by

(...continued)

for the purpose of obtaining Board consideration and resolution of a situation involving facts and issues similar to those presented by complainant. P*I*E submitted a reply opposing the motion. As indicated in n.2, the scope of this decision is limited to considering matters related to the movement of Capitol Core traffic. Accordingly, the PTS motion will be denied.

⁷ Defendant instituted court proceedings against Capitol Core to collect unpaid freight charges on a total of two shipments. Vertex II information has been provided for one of the shipments, which was originally billed by defendant as a contract carrier shipment (freight bill No. 130-200616). Defendant maintains that the second shipment (freight bill No. 130-204688) involves a claim to collect unpaid originally assessed common carrier charges plus a loss of discount penalty, rather than an undercharge claim. (P*I*E reply at 1, Appendix A at 6). P*I*E's effort to collect on the second shipment an open account receivable (unpaid originally assessed charges) is not properly before the Board, but instead must be resolved by the court. However, in contrast, credit regulation issues surrounding defendant's effort to collect a loss-of-discount penalty on this shipment are properly before the Board, Fidelcor Business Credit Corp. v. Dillard Dep't. Stores, Inc., No. 91-953-Civ-J-16 (M.D. Fla. July 30, 1992), and require P*I*E to submit appropriate Vertex II information. As P*I*E has failed to comply with our May 19 and July 1, 1994 orders to supply this information, we find defendant to be in default, and advise the court that P*I*E should not be permitted to collect that penalty.

⁸ Mr. Goldfarb signed the agreement as Manager of Capitol Core. Mr. Goldfarb is also President of Capitol Core.

⁹ Mr Gager signed the agreement as Executive Vice President of APRA. Mr. Gager is also President of APRA.

¹⁰ The form of the agreement was designed by P*I*E and was used in conjunction with that carrier's efforts to solicit traffic for movement under its contract carrier authority.

each of the parties included copies of PIEC Schedule 8100-B, in which local mileage contract rates are set forth.¹¹

The shipment at issue was transported on February 15, 1990, and was assessed charges based on P*I*E's 8100-B contract schedule of rates. Capitol Core argues that the 1989 agreement controlled the billing rate for the shipment and that the rate charged to and paid by Capitol Core was competitive and reasonable. P*I*E contends that only the 1988 agreement is at issue, and that, as the terms of that agreement did not conform to statutory and regulatory requirements for contract carriage, the common carrier tariff rate must be assessed. P*I*E claims undercharges in the amount of \$2,230, the difference between the originally-assessed charges and the then-existing tariff rates.

Mr. Goldfarb and Mr. Gager submitted affidavits in complainant's opening statement. Mr. Goldfarb states that Capitol Core participated in APRA's negotiated arrangement with P*I*E and was informed by P*I*E that the carrier would provide a low-cost, economical service under the arrangement.

Mr. Gager asserts that the subject shipment moved under APRA's contractual agreement with P*I*E and that the original invoice mailed to complainant reflects APRA's account number. He states that the APRA-P*I*E agreement contemplated that APRA members would tender traffic to P*I*E under a delayed routing pricing arrangement that would enable P*I*E to economically relocate excess equipment to its various terminals.¹²

¹¹ The schedule contained two sets of rates. One set was applicable to trailers not exceeding 29 feet in length with a maximum weight of 28,000 pounds. These rates ranged from 35 cents to 400 cents per mile. The second set was applicable to shipments loaded in two trailers, each not exceeding 29 feet in length, or one trailer, not less than 40 feet in length with a maximum weight of 48,000 pounds. These rates ranged from 55 cents to 500 cents per mile.

¹² Attached to Mr. Gager's statement is an undated letter from P*I*E to P*I*E customers signed by Mr. Burroughs which in part reads as follows:

Your company has requested participation in P*I*E Nationwide's Contract and schedule 8100-B. This contract permits us to negotiate "spot" prices with shippers to secure truckloads that will fill empty miles for P*I*E.

The rates on your truckload shipments are flexible depending on our back haul needs the day your shipment will move. Low rates are charged when back haul needs are the greatest.

In an affidavit submitted as Appendix A to P*I*E's reply, Robert A. Young¹³ states that, for a three-year period prior to June 1986, P*I*E published and filed common carrier tariff rates under P*I*E Excess Capacity Tariff, PIEC 407, a so-called range tariff. The purpose of this tariff was to permit P*I*E to negotiate on-the-spot prices with its customers on a shipment-by-shipment basis. According to Mr. Young, P*I*E caused Tariff ICC PIEC 407 to expire on June 14, 1986,¹⁴ at which time P*I*E shifted from providing service as a common carrier under the tariff to providing identical services as a contract carrier, replacing the tariff provisions with a contract accompanied by an attached rate schedule. The contract was known as P*I*E's "8100 Excess Capacity Contract."

Mr. Young describes transactions under what he refers to as the 8100 form agreement as follows:

After the negotiation of the exact price P*I*E was willing to charge and the shipper was willing to pay for the movement of a specific shipment and after the shipper tendered and P*I*E accepted a shipment for transportation, a contract for transportation services came into existence as reflected in the bill of lading for that shipment and in the 8100 service form agreement.

DISCUSSION AND CONCLUSIONS

We will dispose of this proceeding under section 2(e) of the NRA. We conclude that it is not necessary to reach the common/contract carriage issue that the court referred, or to reach other potential issues.

At the outset, we note that, contrary to the contentions in P*I*E's March 24, 1995 response, the Board's use of section 2(e)'s "unreasonable practice" provisions to resolve this matter is fully appropriate. The NRA does not state that timely election by a shipper is a prerequisite for use of section 2(e); it simply establishes Board jurisdiction to make unreasonable practice findings. The Board, as a general rule, is also not limited to deciding only those issues explicitly referred by the court or raised by the parties. Rather, it may choose to decide cases on other grounds within its jurisdiction, Gantrade Corp.--Pet. for Decl. Order--Ritter Transp., Inc., No. 40515 (ICC served May 8, 1995). In this case, the district court did not limit the Board's consideration to only the common/contract carriage issue. February 28, 1994 Order at 4. The Eleventh Circuit has now affirmed the district court's determination that the shipper-relief remedies of section 2 of the NRA are applicable to P*I*E's undercharge claims, and rejected defendant's additional

¹³ Mr. Young is the Manager of Traffic for Phoenix Advisors & Collections, Inc., the collection agent for the accounts receivable for the P*I*E estate. He was employed by P*I*E in various capacities, including Director of Rating Operations, from September 1973 until the carrier shut down operations in January 1991.

¹⁴ Mr. Young states that, because of questions about the legality of range tariffs, the ICC urged P*I*E to cancel this tariff. See also Appendix A to Mr. Young's affidavit.

contention that the NRA is unconstitutional. Whitaker v. Power Brake Supply, Inc., 68 F.3d 1304 (11th Cir. 1995), aff'g 188 B.R. 287 (M.D. Fla. 1994). That determination is consistent with all other governing authority addressing the NRA's applicability. See, e.g., In re Transcon Lines, Inc., 58 F.3d 1432 (9th Cir. 1995), cert. denied, 116 S. Ct. 1016 (1996).

With the question of NRA's applicability now beyond doubt, the Board has acted to use section 2(e) to more readily dispose of undercharge cases on its docket, even in those cases where, as here, the primary regulatory defense raised by the shipper against the undercharge claim has been contract carriage. E.g., Chiquita Brands, Inc.--Pet. for Decl. Order--Olympic Express, Inc., No. 41032 (STB served Oct. 22, 1996) and Southware Company et al.--Pet. for Decl. Order--Jones Truck Lines, Inc., No. 41543 (STB served Aug. 7, 1996). As illustrated by this case, infra, that has occurred because, in most instances, a contract establishes "written evidence" that the parties intended a negotiated, unfiled rate to supplant the filed tariff rate that a nonoperating carrier such as P*I*E now retroactively seeks to enforce, and for which the NRA, through section 2(e), provides a complete defense. Thus, while we acknowledge that the district court selected Capitol Core as a lead case for the Board's consideration of a contract carriage defense, our use of section 2(e), rather than a common/contract determination, to resolve this case is fully consistent with our present approach in all of the court-referred undercharge cases on our docket.

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."¹⁵

It is undisputed that P*I*E no longer transports property. Accordingly, we may proceed to determine whether defendant'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 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

¹⁵ Section 2(e), as originally drafted, applied only to transportation service provided prior to September 30, 1990. Here, we note, the shipment 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.

satisfied unless there is written evidence of a negotiated rate agreement.

In E.A. Miller, Inc.--Rates and Practices of Best, 10 I.C.C.2d 235 (1994), the ICC held that the original freight bills embodying the negotiated rate meet the "written evidence" standard of section 2(e). In Johnson Welding & Manufacturing Co. et al. v. Bankr. Estate of Murphy Motor Freight Lines, Inc., No. 40716 (ICC served May 9, 1995), the ICC explained that evidence of the existence of freight bills embodying the negotiated rate, sample freight bills, or some other contemporaneous writing evidencing the existence of a negotiated rate satisfies the section 2(e) standard.

As stated, the parties disagree as to which agreement should be applicable to the subject movement. Although it appears that either agreement could have applied to the shipment at issue, the real issue to be resolved with respect to these two agreements is whether they are sufficient to satisfy the section 2(e) written evidence requirement. Included among the data contained in the original freight bill are the numbers 04489 and 12624, numbers that correspond to the respective account numbers assigned to APRA and Capitol Core in their agreements with P*I*E. The fact that P*I*E provided APRA with an identifying account number in the 1989 agreement, which account number appears in the original freight bill issued to Capitol Core by P*I*E, indicates that P*I*E knew that APRA was a trade association, and not a shipper. Under the 1989 agreement, P*I*E agreed to apply the Series 8100 Excess Capacity Tariff for benefit of the APRA, and thus its members. As a member of APRA, Capitol Core is entitled to rely on agreements negotiated by that organization for the benefit of its members. We conclude that the 1989 agreement constitutes a contemporaneous writing that identifies a specific (unfiled) tariff schedule to be applied by P*I*E when transporting traffic tendered by members of APRA. Additionally, the 1988 agreement, being a direct agreement between Capitol Core and P*I*E, also constitutes a contemporaneous writing that satisfies the written evidence requirement.

Also submitted into the record is a copy of the corrected freight bill and a copy of a microfilm version of the original freight bill, each containing handwritten notes describing the basis for the charges assessed. Other written documents, such as defendant's PIEC 8100-B schedule of contract rates, satisfy the written evidence requirement, confirm the testimony of Mr. Goldfarb, Mr. Gager, and Mr. Young, and support the conclusion that the subject shipment was transported pursuant to a negotiated rate agreement.

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 evidence establishes that a negotiated rate was offered by P*I*E to Capitol Corp; that Capitol Core tendered freight to P*I*E in reliance on the negotiated rate; that the rate negotiated was billed and collected by P*I*E; and that P*I*E 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 P*I*E to attempt to collect undercharges from Capitol Core for transporting the shipment or 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. PTS's motion to adjudicate its claims is denied.
2. This proceeding is discontinued.
3. This decision is effective on the service date.
4. A copy of this decision will be mailed to:

United States District Court for the
Middle District of Florida,
Jacksonville Division
P.O. Box 53137
Jacksonville, FL 32201-3237

Re: Case No. 91-1074-Civ-J-99(H)

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary