

20609
EB

SERVICE DATE - JULY 15, 1998

SURFACE TRANSPORTATION BOARD¹

DECISION

No. 40894

GOODYEAR TIRE & RUBBER--PETITION FOR DECLARATORY ORDER--CERTAIN
RATES AND PRACTICES OF TRANSRISK CORPORATION, INC., ASSIGNEE OF
ALLEGHENY FREIGHT LINES, INC.

Decided: July 9, 1998

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 issues raised in this proceeding.

BACKGROUND

This matter arises out of a court action in the United States District Court for the District of Maryland in Transrisk Corporation, Inc., Assignee of Allegheny Freight Lines, Inc. v. Goodyear Tire & Rubber, Civil No. N-92-463. The court proceeding was instituted by Transrisk Corporation, Inc., Assignee of Allegheny Freight Lines, Inc. (Allegheny or respondent), a former motor common and contract carrier, to collect undercharges from Goodyear Tire & Rubber (Goodyear or petitioner). Allegheny seeks undercharges of \$9,000.07 (plus interest and costs) allegedly due, in addition to amounts previously paid, for services rendered in transporting 96 less-than-truckload (LTL) shipments of tires and various chemicals (resins, etc.) used in manufacturing processes, between March 1, 1989, and December 29, 1989. The shipments were transported principally from petitioner's facilities located in Brookpark, OH, Baltimore, MD, and Apple Grove, WV, to various

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.

points. By order dated November 5, 1992, the court stayed the proceeding and directed petitioner to submit the issue of contract carriage to the ICC for resolution.²

Pursuant to the court order, Goodyear, on December 18, 1992, filed a petition for declaratory order requesting the ICC to determine whether the shipments at issue were transported by Allegheny under its contract carrier authority. By decisions served December 30, 1992, and October 29, 1993, procedural schedules were established.³

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.⁴ By decision served December 30, 1993, the ICC established a procedural schedule permitting the parties to invoke the alternative procedure under section 2(e) of the NRA and to submit evidence and argument in light of the new law. Petitioner filed its opening statement on July 5, 1994. Respondent filed its statement in response on November 4, 1994, and petitioner submitted its rebuttal on November 25, 1994.

Goodyear asserts that the shipments at issue moved under Allegheny's contract carrier authority pursuant to duly executed contracts entered into between the parties. Goodyear further asserts that respondent's attempt to collect undercharges constitutes an unreasonable practice under section 2(e) of the NRA. Attached to petitioner's opening statement is a copy of the court complaint filed by respondent that lists each of the subject undercharge claims by freight bill number, date of shipment, and asserted amount due (Exhibit A). Also attached to petitioner's opening statement is a representative sample of 10 balance due bills issued on behalf of respondent that reflect original freight bill data as well as asserted balance due amounts (Exhibit B). An examination of the representative balance due freight bills indicates that they were issued for shipments transported between May 22, 1989, and June 7, 1989; that a 45% discount was applied to the charges originally assessed by respondent for each of the representative shipments; that the discounted charges originally assessed by respondent were fully paid by petitioner; and that elimination of the originally applied discounts for asserted nonapplicability provides the basis for respondent's claim for undercharges.

² The court administratively closed the proceeding without prejudice to the filing of a petition to reopen the case within 30 days of the issuance of a final ruling by the ICC.

³ The procedural schedule established in the October 29, 1993 decision was issued at the request of petitioner's counsel, who assertedly had not been apprised of the originally issued procedural schedule.

⁴ The ICC's prior unreasonable practice policy was invalidated by the Supreme Court in Maislin Indus. v. Primary Steel, 497 U.S. 116 (1990).

Goodyear supports its argument with an affidavit from Paul D. Fortney, a senior transportation analyst employed in petitioner's Corporate Logistics and Supply Department (Exhibit C to petitioner's opening statement).⁵ Mr. Fortney's responsibilities include the review and audit of freight bills as well as negotiating rates and transportation contracts with motor carriers. Mr. Fortney states that Goodyear and Allegheny first entered into contractual arrangements in the early part of 1987 and that all of the subject shipments were handled in conformity with the original and subsequently negotiated agreements.⁶ Attached to Mr. Fortney's affidavit are a Master Transportation Contract dated April 15, 1987; copies of 1987, 1988, and 1989 supporting rate or service agreements signed by representatives of Goodyear and Allegheny containing general class rate provisions providing for the application of a 45% discount for petitioner's minimum charge, LTL, or AQ shipments handled by respondent;⁷ and a letter dated April 15, 1989, from Goodyear's Director of Traffic to Allegheny confirming no change in applicable LTL minimum charges (which are to be discounted at 45% subject to a minimum charge of \$40) for 1989-1990. Mr. Fortney maintains that the freight bills originally issued by Allegheny were correct and in conformance with the agreement between the parties; that the full class rates, which respondent is here seeking to assess, are unreasonably high and would not have moved any appreciable amount of traffic; and that respondent's undercharge claims are totally without merit.

In reply, respondent contends that the carriage at issue does not meet the statutory definition of contract carriage and that petitioner has failed to establish the requisite facts necessary to sustain an unreasonable practice defense, particularly with respect to providing written proof of the specific rate originally agreed upon by the parties and petitioner's reasonable reliance upon that rate. Allegheny further contends that, as section 2(e) is only applicable to situations in which a shipper

⁵ Mr. Fortney's affidavit was dated June 24, 1992. It had been submitted in the underlying district court proceeding.

⁶ Mr. Fortney states that, during the subject period, Goodyear established a corporate policy to use motor contract carriers, as opposed to common carriers. He asserts that Goodyear developed its own uniform schedule of class rates so that the same rate base would apply to all motor carriers providing service to Goodyear. The "Goodyear 500" schedule was given, on magnetic tape, to each of the carriers that sought to do business with Goodyear, and all negotiations as to discounts were made off the "500" schedule. Goodyear also developed a uniform transportation contract which covered all movements to and from Goodyear facilities. Each carrier that provided service to Goodyear was required to enter into this contract. The contracts were renegotiated annually. Allegheny was one of the regional carriers that participated in this program.

⁷ The Master Transportation Contract (Contract No. MC-76) was signed by officials of Goodyear and Allegheny and became effective April 15, 1987. The Master Transportation Contract was supported by rate or service agreements that were renegotiated on an annual basis. These rate or service agreements had effective dates of April 15, 1987, April 15, 1988, and April 15, 1989, respectively. Copies of these transportation agreements are attached to Mr. Fortney's affidavit as Exhibits 1, 2, 3, and 5, respectively.

reasonably relies upon a negotiated common carrier rate, petitioner cannot raise the issue of contract carriage while at the same time asserting a section 2(e) unreasonable practice defense.⁸

DISCUSSION AND CONCLUSIONS

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

At the outset, we recognize that the issues raised for our consideration focus primarily on the question of contract carriage. Nevertheless, our use of section 2(e)'s "unreasonable practice" provisions to resolve this matter is fully appropriate. The Board, as a general rule, is not limited to deciding only those issues explicitly referred by a court or raised by the parties. Rather, we may instead decide cases on other grounds within our jurisdiction and, in cases where section 2(e) provides a dispositive resolution, we rely on it rather than the more subjective contract carriage, rate reasonableness, and tariff rate provisions. Cf. Amoco Fabrics and Fibers Co. v. Max C. Pope, Trustee of the Estate of A.T.F. Trucking, No. 40526 (ICC served Feb. 26, 1992). Thus, we have jurisdiction to issue a ruling under section 2(e) of the NRA here. The Ormond Shops, Inc., Thomas J. Lipton, Inc. and Lionel Leisure, Inc. v. Oneida Motor Freight, Inc. Debtor-in-Possession, and Delta Traffic Service, Inc., No. MC-C-30156 (ICC served Apr. 20, 1994); and Have a Portion, Inc. v. Total Transportation, Inc., and Thomas F. Miller, Trustee of the Bankruptcy Estate of Total Transportation, Inc., No. 40640 (ICC served Feb. 7, 1995).

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."⁹

⁸ Allegheny's argument that Goodyear 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 Allegheny 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).

⁹ 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.

It is undisputed that Allegheny no longer transports property. Accordingly, we may proceed to determine whether Allegheny'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.

Here, the record contains a representative sample of 10 balance due bills issued by respondent indicating the application of a 45% discount to each of the originally assessed charges; copies of executed 1987, 1988, and 1989 rate or service agreements that provide for the application of a 45% discount off assessed class rates; and a letter dated April 15, 1989, from Goodyear to Allegheny confirming no change in applicable LTL minimum charges (to be discounted at 45% subject to a minimum charge of \$40) for 1989-1990. 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. 89-2379 (S.D. Tex. March 31, 1997) (finding that the 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 rate and that the rates were agreed upon by the parties).

In this case the evidence is substantial that the parties conducted business in accordance with agreed-to negotiated rates. The consistent application in the original freight bills of the rates confirms the unrefuted testimony of Mr. Fortney and reflects the existence of negotiated rates. The evidence further indicates that Goodyear relied upon the agreed-to rates in tendering its traffic to Allegheny and would not have used respondent's service had it quoted the rates it now seeks to collect.

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 to Goodyear by Allegheny; that Goodyear tendered freight in reasonable reliance on the offered rate; that the negotiated rate was billed and collected by Allegheny; and that Allegheny 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 Allegheny to attempt to collect undercharges from Goodyear for transporting the shipments at issue in this proceeding.

This decision will not significantly affect 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 the service date.
3. A copy of this decision will be mailed to:

The Honorable Edward S. Northrop
United States District Court for the
District of Maryland
101 West Lombard Street
Baltimore, MD 21201

Re: Civil No. N-92-463

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary