

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42073

NEWELL WINDOW FURNISHINGS, INC., AND NEWELL RUBBERMAID, INC.

v.

UNITED PARCEL SERVICE, INC., AN OHIO CORPORATION., AND UNITED PARCEL
SERVICE, INC., A NEW YORK CORPORATION

Decided: June 28, 2002

This proceeding arises out of the efforts of Newell Window Furnishings, Inc., and Newell Rubbermaid, Inc. (collectively Newell), to resolve issues with United Parcel Service, Inc., an Ohio Corporation, and United Parcel Service Inc., a New York Corporation (collectively UPS), concerning transportation charges. This matter is currently before the United States District Court for the Northern District of Georgia, Atlanta Division, Civil Action No. 1:01-cv-1788-GET, United Parcel Service, Inc., an Ohio Corporation; and United Parcel Service, Inc., a New York Corporation v. Newell Window Furnishings, Inc., a Delaware Corporation; and Newell Rubbermaid, Inc., a Delaware Corporation.

On June 8, 2001, UPS instituted a court proceeding to collect payments allegedly owed by Newell for transportation services provided by UPS. Newell filed a motion to dismiss or stay the court proceeding until the Board issued a decision on this matter. By order dated January 25, 2002, the court stayed its proceeding without prejudice for 90 days to permit the matter to be brought before the Board.

On March 28, 2002, Newell filed a petition for declaratory order, requesting that the Board resolve issues raised by the court involving: the applicability of rates contained in a document entitled "Consignee Billing Brochure;" the applicability of residential delivery surcharges; the applicability of third-party "collect" charges;¹ and the applicability of "additional handling charges." In addition to the issues raised by the court, Newell asks the Board to resolve the issues raised in its informal complaint,² including: whether UPS violated 49 U.S.C. 14101 by threatening to discontinue service; whether UPS

¹ Newell alleges that UPS billed it for handling charges that should have been billed to J.C. Penney as a consignee.

² On June 8, 2001, Newell had filed an informal complaint asking the Board to determine the applicability of certain transportation charges.

violated loss and damage claim regulations at 49 CFR 370; whether UPS improperly assessed residential delivery surcharges, additional handling charges, and other charges; and whether UPS has violated 49 U.S.C. 13710(a)(3)(A) by billing customers beyond the 180-day time limit. Finally, in its declaratory order request, Newell asked the Board to open a general inquiry into UPS practices.

On April 18, 2002, UPS filed a motion to dismiss Newell's petition for a declaratory order.³ UPS contends that this is simply a breach of contract case for which the exclusive remedy is in court. UPS asserts that the court is seeking guidance from the Board on the sole question of which rates apply to the packages Newell shipped. UPS answers this question by stating that the applicable rates are those described in the parties' private contracts and urges the Board to decline the court's invitation to determine the applicable rates. On May 8, 2002, Newell filed a reply to UPS's motion to dismiss. On May 23, 2002, as corrected by a pleading filed May 28, 2002, UPS filed a reply brief in support of its motion to dismiss. On June 10, 2002, Newell filed a motion to strike the reply brief as a reply to a reply prohibited under 49 CFR 1104.13(c).

The Board has discretionary authority under 5 U.S.C. 554(e) to issue a declaratory order to terminate a controversy or remove uncertainty. The Board and its predecessor, the Interstate Commerce Commission (ICC), have exercised broad authority in handling such requests. In doing so, both agencies have considered a number of factors, including the significance to the industry and the ripeness of the controversy. See Delegation of Authority — Declaratory Order Proceedings, 5 I.C.C.2d 675, 676 (1989). There, the ICC noted that petitions for issuance of a declaratory order premised on referral from a federal court are routinely accepted.

Under 5 U.S.C. 554(e) and 49 U.S.C. 721, a proceeding is instituted to resolve the controversy here. This matter appears to be within the Board's primary jurisdiction and has been referred by a federal court.

The Board will address the motions to strike and dismiss and, to the extent the proceeding is not dismissed, the Board will set a schedule for further development of the record, if necessary. If the Board determines that more information is necessary, however, it will issue an order setting a procedural schedule.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

³ UPS' motion was filed one day late but because the delay did not harm or prejudice either party and the Board has an interest in developing a full and complete record, the late filing will be accepted.

It is ordered:

1. A declaratory order proceeding is instituted.
2. This decision is effective on its service date.
3. A copy of this decision will be served on: G. Ernest Tidwell, Senior Judge, United States District Court, 1967 Richard B. Russell Federal Building & United States Courthouse, 75 Spring Street, S.W., Atlanta, GA 30303-3809.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams
Secretary