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EB

SERVICE DATE - JANUARY 16, 1998  
SURFACE TRANSPORTATION BOARD

DECISION

STB No. 41803

INACOM CORP.--PETITION FOR DECLARATORY ORDER--  
CERTAIN RATES AND PRACTICES OF  
BE-MAC TRANSPORT COMPANY, INC.

Decided: January 12, 1998

We find that collection of the undercharges sought in this proceeding would be an unreasonable practice under 49 U.S.C. 13711. Because of our finding under section 13711, we will not reach the other issues raised in this proceeding.

BACKGROUND

This matter arises out of a court action in the United States Bankruptcy Court for the Eastern District of Missouri, Eastern Division, in *Be-Mac Transport Company, Inc. and the Plan Committee for Be-Mac Transport Company, Inc., v. Inacom Corp.*, Adv. No. 95-4086-293. The court proceeding was instituted by Be-Mac Transport Company, Inc., a former motor common and contract carrier, and the Plan Committee for Be-Mac Transport Company, Inc. (Be-Mac or respondent), to collect undercharges from Inacom Corp. (Inacom or petitioner). Be-Mac seeks undercharges of \$19,625.63 (plus interest) allegedly due, in addition to amounts previously paid, for services rendered in transporting 231 less than truckload (LTL) shipments of computer equipment between April 21, 1992, and June 24, 1992.<sup>1</sup> The shipments were transported from Inacom's facility in Omaha, NE, to points in Wisconsin, Indiana, Missouri, Kentucky, Michigan, and Iowa.<sup>2</sup> By order dated June 6, 1996, the bankruptcy court directed petitioner to initiate administrative proceedings before the Board for the purpose of resolving issues of contract carriage, unreasonable practice, and rate reasonableness.<sup>3</sup>

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<sup>1</sup> In the court action, respondent sought undercharges in the amount of \$19,652.73 based on claims set forth in 232 balance due freight bills. In the course of developing the record in this proceeding, respondent canceled one freight bill claim amounting to \$27.10 and reduced the total of its claimed undercharges to \$19,625.63.

<sup>2</sup> One shipment moved from Middleton, WI, to Inacom's Omaha facility.

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Pursuant to the court order, Inacom, on June 11, 1996, filed a petition for declaratory order requesting that the Board resolve the issues referred by the court. By decision served June 25, 1996, the Board issued a procedural schedule. On August 23, 1996, Inacom filed its opening statement. Be-Mac filed its reply on September 5, 1996, and Inacom filed its rebuttal on September 10, 1996.

Petitioner asserts that respondent's attempt to collect the claimed undercharges constitutes an unreasonable practice under section 13711(a). Inacom maintains that it tendered the shipments at issue to Be-Mac for transportation in reliance upon rates quoted to it by Be-Mac and that Be-Mac regularly invoiced petitioner at the quoted rates. Petitioner states that it made payment to Be-Mac in accordance with the invoiced rates and that its payment was accepted by Be-Mac as payment in full for the transportation services rendered.

Inacom supports its argument with an affidavit from Jerry J. Adams, petitioner's National Traffic Manager. Attached to Mr. Adams' affidavit is a list of shipments contained in the original court complaint filed by respondent that identifies each of the subject undercharge claims by freight bill number together with the original billing date and balance due amount claimed (Exhibit A). In addition, Mr. Adams' affidavit includes a representative sample of 20 of the "balance due" bills issued by respondent that reflect originally issued freight bill data as well as revised balance due amounts (Exhibit B). The representative freight bills indicate the application of a 57% discount off class rates, subject to a minimum charge of \$45.00. Mr. Adams states that the originally assessed discount rates were the rates offered to Inacom at the time Be-Mac solicited petitioner's traffic and conform with the rates set forth in Be-Mac tariff BMTC ICC 405, Supplement 5, attached to his statement as Exhibit C.<sup>4</sup> According to Mr. Adams, the discounted LTL rates that Inacom paid to Be-Mac were the marketplace rates prevailing at the time of shipment. Mr. Adams asserts that the rates Be-Mac now seeks to collect are much higher than the originally assessed rates and in many instances are almost twice the amount originally billed. He states that Inacom would never have tendered its traffic to Be-Mac at the rates now being sought.

Respondent Be-Mac asserts that the discounted rates initially assessed were not authorized by an applicable filed tariff in effect at the time of shipment and that the balance due bills were issued to recover the applicable charges. Respondent further contends that the record contains no written evidence or other information that the originally assessed charges were negotiated. In support of its contentions, respondent submits the verified statement of Stephen L. Swezey, Senior Transportation Consultant for Carrier Service, Inc. (CSI).<sup>5</sup> Mr. Swezey states that all of the subject shipments were transported before June 17, 1992, and that the tariff to which petitioner refers (ICC BMTC 405, Supplement 5) did not become effective until June 17, 1992. Accordingly, he asserts

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that the rates and charges assessed in the original freight bills were not applicable and that the correct charges to be assessed are the undiscounted rates set forth in the balance due bills.<sup>6</sup>

### DISCUSSION AND CONCLUSIONS

We will dispose of this proceeding under section 13711. Accordingly, we do not reach the other issues raised.

Section 13711(a) 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 (1) the applicable rate that was lawfully in effect pursuant to a [filed] tariff . . . and (2) 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 section.”

It is undisputed that Be-Mac no longer transports property. Accordingly, we may proceed to determine whether respondent's attempt to collect undercharges (the difference between the applicable filed 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 13711(a) determination. Section 13711(f) 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 13711(a) cannot be satisfied unless there is written evidence of a negotiated rate agreement.

Here, the record contains a list of the shipments subject to this proceeding, representative samples of the revised freight bills issued by respondent, and tariff BMTC ICC 405, Supplement 5. The revised freight bills submitted by Mr. Adams and Mr. Swezey indicate that the rates originally charged were consistently and substantially below those that respondent is here seeking to assess and were in conformity with the rates set forth in tariff BMTC ICC 405, Supplement 5, and the 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) (*E.A. Miller*).<sup>7</sup> See *William J. Hunt, Trustee for Ritter Transportation, Inc. v. Gantrade Corp., C.A.*

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<sup>7</sup> Be-Mac, at p. 4 of its reply statement, argues that freight bills do not constitute written evidence. Respondent contends that, under section 13711(b)(2)(D), the Board must consider whether the negotiated rate “was billed and collected by the carrier” in making its merits

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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 parties conducted business in accordance with agreed-to negotiated rates. The consistent application in the original freight bills of a 57% discount off class rates, subject to a minimum charge of \$45.00 called for in tariff BMTC ICC 405, Supplement 5, support petitioner's contentions and reflect the existence of a negotiated rate.

In exercising our jurisdiction under section 13711(b), 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 13711(b)(2)(A)]; (2) whether the shipper tendered freight to the carrier in reasonable reliance upon the offered rate [section 13711(b)(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 13711(b)(2)(C)]; (4) whether the transportation rate was billed and collected by the carrier [section 13711(b)(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 13711(b)(2)(E)].

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determination as to whether a carrier's conduct was an "unreasonable practice." This section, according to Be-Mac, contemplates that freight bills reflecting the negotiated rate were issued by the carrier, and that the Board must examine these freight bills to determine if section 13711(b) has been satisfied. Be-Mac asserts that allowing freight bills to satisfy the written evidence requirement would make the written evidence provision superfluous because the Board, under section 13711(b)(2)(D), must independently consider the collected freight bill.

The Interstate Commerce Commission (ICC) and the Board have consistently rejected this argument. Section 13711(b)(2)(D) requires the Board to consider "whether the [unfiled] rate was billed and collected by the carrier." There is no requirement under this provision that the Board use a carrier's freight bills for that determination. A carrier may separately attest, or submit or concede in pleading, that the negotiated, unfiled rate was billed and collected, and there is nothing to preclude the Board from using such statements (or other evidence) in finding that section 13711(b)(2)(D) was satisfied.

Even if the Board uses freight bills to satisfy this element, however, it is not inappropriate for it to use those same bills to satisfy the "written evidence" requirement of section 13711(f). The carrier's argument might be more persuasive if the written evidence requirement were a "sixth" element of the merits determination under section 13711(b)(2), but it is not. Rather, as the ICC previously indicated, it is simply a threshold requirement needed to invoke section 13711. *See E.A. Miller, supra*, at 239-40. Once that requirement is satisfied by freight bills (or other contemporaneous written evidence), there is nothing to suggest that the same evidence could not be used as part of the Board's separate five-part analysis under section 13711(b)(2) to determine whether the carrier's undercharge collection effort is an unreasonable practice.

Here, the unrefuted evidence submitted by petitioner establishes that a negotiated rate was offered to Inacom by Be-Mac; that Inacom reasonably relied on the offered rate in tendering its traffic to Be-Mac; that the negotiated rate was billed and collected by Be-Mac; and that Be-Mac now seeks to collect additional payment based on a higher rate filed in a tariff. Therefore, under 49 U.S.C. 13711, we find that it is an unreasonable practice for Be-Mac to attempt to collect undercharges from Inacom 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 the service date.
3. A copy of this decision will be mailed to:

The Honorable David P. McDonald  
United States District Court for  
the Eastern District of Missouri,  
Eastern District  
211 North Broadway, 7th Floor  
St. Louis, MO 63102

Re: Adv. No. 95-4086-293

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams  
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Re: Adv. No. 95-4086-293

By the Board, Chairman Morgan and Vice Chairman Owen.

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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 parties conducted business in accordance with agreed-to negotiated rates. The consistent application in the original freight bills of a 57% discount off class rates, subject to a minimum charge of \$45.00 called for in tariff BMTC ICC 405, Supplement 5, support petitioner's contentions and reflect the existence of a negotiated rate.

In exercising our jurisdiction under section 13711(b), 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 13711(b)(2)(A)]; (2) whether the shipper tendered freight to the carrier in reasonable reliance upon the offered rate [section 13711(b)(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 13711(b)(2)(C)]; (4) whether the transportation rate was billed and collected by the carrier [section 13711(b)(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 13711(b)(2)(E)].

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<sup>7</sup>(...continued)

determination as to whether a carrier's conduct was an "unreasonable practice." This section, according to Be-Mac, contemplates that freight bills reflecting the negotiated rate were issued by the carrier, and that the Board must examine these freight bills to determine if section 13711(b) has been satisfied. Be-Mac asserts that allowing freight bills to satisfy the written evidence requirement would make the written evidence provision superfluous because the Board, under section 13711(b)(2)(D), must independently consider the collected freight bill.

The Interstate Commerce Commission (ICC) and the Board have consistently rejected this argument. Section 13711(b)(2)(D) requires the Board to consider "whether the [unfiled] rate was billed and collected by the carrier." There is no requirement under this provision that the Board use a carrier's freight bills for that determination. A carrier may separately attest, or submit or concede in pleading, that the negotiated, unfiled rate was billed and collected, and there is nothing to preclude the Board from using such statements (or other evidence) in finding that section 13711(b)(2)(D) was satisfied.

Even if the Board uses freight bills to satisfy this element, however, it is not inappropriate for it to use those same bills to satisfy the "written evidence" requirement of section 13711(f). The carrier's argument might be more persuasive if the written evidence requirement were a "sixth" element of the merits determination under section 13711(b)(2), but it is not. Rather, as the ICC previously indicated, it is simply a threshold requirement needed to invoke section 13711. *See E.A. Miller, supra*, at 239-40. Once that requirement is satisfied by freight bills (or other contemporaneous written evidence), there is nothing to suggest that the same evidence could not be used as part of the Board's separate five-part analysis under section 13711(b)(2) to determine whether the carrier's undercharge collection effort is an unreasonable practice.

Here, the unrefuted evidence submitted by petitioner establishes that a negotiated rate was offered to Inacom by Be-Mac; that Inacom reasonably relied on the offered rate in tendering its traffic to Be-Mac; that the negotiated rate was billed and collected by Be-Mac; and that Be-Mac now seeks to collect additional payment based on a higher rate filed in a tariff. Therefore, under 49 U.S.C. 13711, we find that it is an unreasonable practice for Be-Mac to attempt to collect undercharges from Inacom 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 the service date.
3. A copy of this decision will be mailed to:

The Honorable David P. McDonald  
United States District Court for  
the Eastern District of Missouri,  
Eastern District  
211 North Broadway, 7th Floor  
St. Louis, MO 63102

Re: Adv. No. 95-4086-293

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams  
Secretary