

SERVICE DATE - OCTOBER 14, 1997

SURFACE TRANSPORTATION BOARD¹

DECISION

No. 41448

MADIX STORE FIXTURES--PETITION FOR DECLARATORY
ORDER--CERTAIN RATES AND PRACTICES OF
JONES TRUCK LINES, INC.

Decided: October 6, 1997

We find that collection of the 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 matter arises out of a court action in the United States District Court for the Northern District of Texas, Dallas Division, in *Jones Truck Lines, Inc. v. Madix Store Fixtures*, No. 3:93-CV-0925-T. The court proceeding was instituted by Jones Truck Lines, Inc. (Jones or respondent), a former motor common and contract carrier, to collect undercharges from Madix Store Fixtures (Madix or petitioner). Jones seeks undercharges of \$24,438.20, plus interest, for the transportation of 332 less-than-truckload (LTL) shipments of such items as metal shelving, wood panels or sheets, and steel channels or related items, between July 18, 1988, and March 8, 1991. Three hundred and seventeen of the shipments were transported from petitioner's facility at Terrell, TX, to points in Arkansas, Louisiana, Missouri, Georgia, Alabama, Kansas, Missouri, Kentucky, Oklahoma, Tennessee, Wisconsin, and Mississippi. The remaining fifteen shipments were collect inbound shipments transported from points in Minnesota, Arkansas, Mississippi, Oklahoma and Louisiana to Madix's Terrell, TX facility. By order dated April 6, 1994, the court stayed the proceeding and referred issues of contract carriage, unreasonable practice, and rate reasonableness to the ICC for determination.²

Pursuant to the court order, petitioner, on August 23, 1994, filed a petition for declaratory order requesting the ICC to resolve the court-referred issues. By decision served September 13, 1994, the ICC established a procedural schedule for the submission of evidence on non-rate reasonableness issues. Petitioner filed its opening statement on December 14, 1994, respondent filed

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. While this decision generally applies the law in effect prior to the Act, new 49 U.S.C. 13711(g) provides that new section 13711 applies to cases pending as of January 1, 1996, and hence section 13711 will be applied to the factual situation presented in this proceeding. Unless otherwise indicated, citations are to the former sections of the statute.

² The court administratively closed the proceeding subject to possible reopening upon application by any party within 30 days of the ICC determination of the issues raised.

a reply statement on January 27, 1995, and petitioner filed a rebuttal statement on February 20, 1995.

Petitioner asserts that the shipments in question were transported by Jones under its contract carrier authority pursuant to a transportation agreement. Madix further asserts that the rates which respondent is seeking to assess are unreasonable and that respondent's attempt to collect undercharges constitutes an unreasonable practice under section 2(e) of the NRA.

Madix supports its argument with an affidavit from Michael Bange of Champion Transportation Services, Inc., a transportation consultant retained by petitioner. Mr. Bange's affidavit includes among its attachments a sample of copies of the "balance due" bills issued by respondent, which reflect originally issued freight bill data as well as "corrected" balance due amounts (Exhibit A). Mr. Bange states that nearly all of the original freight bills for these shipments show on their face the application of a 42% discount off class rates on outbound LTL shipments and a 35% discount on inbound shipments, subject to a minimum charge of \$34.00 or \$42.00, to and from Madix's Terrell, TX facility. Petitioner states that all 332 shipments at issue were billed and paid in full in accordance with the terms of the original freight bills.

Also included in Mr. Bange's statement is a document dated February 15, 1988, bearing the signatures of representatives of Jones and Madix entitled "Transportation Agreement" (Exhibit C).³ Mr. Bange claims that the agreement indicates that transportation services are to be performed by Jones under its contract carrier permit.

Mr. Bange further states that his review of respondent's balance due bills indicates that, subject to minor variations, the rates set forth in the 1988 transportation agreement are the same as the rates applied by Jones in the original freight bills. Mr. Bange explains the minor variations by noting that it was a common practice for contract carriers to orally agree to amendments to existing agreements.

Jones argues that the shipments at issue moved in common rather than contract carriage. It points to the language of the transportation agreement itself--that its "sole purpose is to provide reductions and allowances" from Jones' tariffs and that "provisions of common carriage apply to all shipments"--to establish that common carrier rates apply. To determine the appropriate common carrier rate, Jones' auditors⁴ analyzed its lawfully filed tariffs. They concluded that the 35 and 42% discounts originally granted to Madix were not supported by an applicable tariff. They maintain that the filed tariff, which contained 35 and 42% discounts, required written notification of participation therein, and that, since Madix did not provide the notification, the only applicable rate was the undiscounted class rate. Respondent maintains, therefore, that the revised bills reflect the appropriate charge for the service rendered.

Respondent also claims that section 2(e) of the NRA does not govern this matter. Jones contests the applicability of that provision on both statutory and constitutional grounds.⁵

³ Mr. Bange also includes two other transportation agreements, dated September 14, 1987 and December 28, 1987, signed by the respective parties.

⁴ The audit was performed by Carrier Services, Inc. (CSI), a rate audit company authorized to provide rate audit and collection services on behalf of Jones as debtor in possession. Mr. Stephen L. Swezey, Senior Transportation Consultant for CSI, submitted a verified statement in this proceeding.

⁵ Jones argues that section 2(e) of the NRA is inapplicable to bankrupt carriers, may not be applied retroactively, and is unconstitutional. We point out that six federal circuit courts of appeals and virtually every other federal court that has considered respondent's applicability arguments have determined that the remedies provided in section 2 of the NRA apply to the undercharge claims of bankrupt carriers such as Jones. *See Whitaker v. Power* (continued...)

DISCUSSION AND CONCLUSIONS

We dispose of this proceeding under section 2(e) of the NRA. Accordingly, we do not reach the other issues 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 . . ." ⁶ Since it is undisputed that Jones no longer transports property, we may proceed to determine whether Jones'

⁵(...continued)

Brake Supply, Inc., 68 F.3d 1304 (11th Cir. 1995) (*Power Brake*); *Jones Truck Lines, Inc. v. Whittier Wood Products, Inc.*, 57 F.3d 642 (8th Cir. 1995) (*Whittier Wood*); *In re Matter of Lifschultz Fast Freight Corporation*, 63 F.3d 621 (7th Cir. 1995); *In re Transcon Lines*, 58 F.3d 1432 (9th Cir. 1995) *cert. denied*, 116 S. Ct. 1016 (1996); *In re Bulldog Trucking, Inc.*, 66 F.3d 1390 (4th Cir. 1995); *Hargrave v. United Wire Hanger Corp.*, 73 F.3d 36 (3d Cir. 1996); *see also, e.g., Jones Truck Lines, Inc. v. AFCO Steel, Inc.*, 849 F. Supp. 1296 (E.D. Ark. 1994).

Further, as the courts have also held consistently, section 2(e), by its own terms and as more recently amended by the ICC Termination Act, may be applied retroactively against the undercharge claims of defunct, bankrupt carriers that were pending on the NRA's enactment. *See, e.g., Jones Truck Lines, Inc. v. Scott Fetzer Co.*, 860 F. Supp. 1370, 1375-76 (E.D. Ark. 1994); *North Penn Transfer, Inc. v. Stationers Distributing Co.*, 174 B.R. 263 (N.D. Ill. 1994); *Gold v. A.J. Hollander Co.* (In re Maislin Indus.), 176 B.R. 436 (Bankr. E.D. Mich. 1995); *cf. Jones Truck Lines, Inc. v. Phoenix Products Co.*, 860 F. Supp. 1360 (W.D. Wisc. 1994).

Lastly, in response to respondent's "takings" challenge, the Eighth Circuit in *Whittier Wood* and the Eleventh Circuit in *Power Brake* have concluded that the NRA does not work an unconstitutional taking under the Fifth Amendment. 57 F.3d at 649-52; 68 F.3d at 1306 n.3. We point out that the courts have consistently rejected that argument, as well as respondent's "separation of powers" argument and its other constitutional challenges to the NRA. *See, e.g., Gold v. A.J. Hollander, supra; American Freight System, Inc. v. ICC* (In re American Freight System, Inc.), 179 B.R. 952 (Bankr. D. Kan. 1995); *Rushton v. Saratoga Forest Products, Inc.* (In re Americana Expressways), 177 B.R. 960 (D. Utah 1995), *rev'g* 172 B.R. 99 (Bankr. D. Utah 1994); *Zimmerman v. Filler King Co.* (In re KMC Transport), 179 B.R. 226 (Bankr. D. Idaho 1995); *Lewis v. Squareshooter Candy Co.* (In re Edson Express), 176 B.R. 54 (D. Kan. 1994).

⁶ The ICC Termination Act removed the limitation that made section 2(e) of the NRA applicable only to transportation service provided prior to September 30, 1990. Thus, the remedies in section 2(e) may be invoked as to all of the shipments in this proceeding, including all shipments transported after September 30, 1990.

attempt to collect undercharges (the difference between the applicable filed tariff rate⁷ and the negotiated rate) is an unreasonable practice.

Initially, we must address the threshold issue of whether a negotiated rate exists. 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 satisfied unless there is written evidence of a negotiated rate agreement.

Here, the record contains a 1988 transportation agreement signed by the parties confirming the existence of a negotiated discount rate, as well as two earlier transportation agreements also signed by the parties. Also submitted are copies of the modified freight bills, which include original freight bill data for the shipments at issue. 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).⁸ See *William J. Hunt, Trustee for Ritter Transportation, Inc. v. Gantrade Corp.*,

⁷ We note that section 2(e)'s availability is not limited to situations where the originally billed rate was unfiled. In evaluating whether a carrier's collection would be an "unreasonable practice" under section 2(e), the Board must consider, *inter alia*, whether the shipper was offered a rate by the carrier "other than that legally on file with the Board for the transportation service." Section 2(e)(2)(A) (emphasis added). If the carrier and shipper agreed to a price that was embodied in a filed rate that cannot be applied to the involved shipments, then the shipper was offered a rate not legally on file "for [that] transportation service." Thus, even if "some of [a carrier's undercharge claims] are based on it billing and collecting an erroneous [filed] rate, if the so-called erroneous rate was negotiated between the shipper and [carrier] and if the shipper reasonably relied on the rate, the rate would meet the definition of a 'negotiated rate' and trigger the application of the provisions of the NRA." *American Freight System, Inc. v. ICC* (In re American Freight System), 179 B.R. 952, 957 (Bankr. D. Kan. 1995). In the situation at issue, a rate was negotiated and filed (see discussion, *infra*); however, it arguably does not apply to the involved shipments, in spite of Jones' billing and collecting the filed discount rate, because Madix may not have submitted written notice of its participation in the tariff. Thus, the discounted rate arguably was not legally on file for the transportation service.

⁸ Jones, at pp. 13-14 of its statement filed January 27, 1995, argues that freight bills do not constitute written evidence. Respondent contends that, under section 2(e)(2)(D) of the NRA, the Board must consider whether the negotiated rate "was billed and collected by the carrier" in making its merits determination as to whether a carrier's conduct was an "unreasonable practice." This section, according to Jones, contemplates that freight bills reflecting the negotiated rate were issued by the carrier, and the Board must examine these freight bills to determine if section 2(e) has been satisfied. Jones asserts that allowing freight bills to satisfy the written evidence requirement would make the written evidence provision superfluous because the Board, under section 2(e)(2)(D), must independently consider the collected freight bill.

The ICC and the Board have consistently rejected this argument. Section 2(e)(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 or the NRA's legislative history 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 2(e)(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 2(e)(6)(B). The carrier's argument might be more persuasive if the written evidence requirement were a "sixth" element of the merits determination under section 2(e)(2), but it is not. Rather, as the ICC previously indicated it is simply a threshold definitional requirement

(continued...)

C.A. No. H-89-2379 (S.D. Tex. March 31, 1997) (where the court found 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).

Similarly, the evidence is substantial that the rates originally billed by the carrier and paid for by the shipper were rates agreed to in negotiations between the parties. The original freight bills issued by the carrier indicate that Jones initially offered Madix 35 and 42% discounts when transporting the subject shipments, confirm the rates set forth in the 1988 agreement, and reflect the existence of a negotiated rate. Thus, the threshold criteria have been satisfied, and we turn to the criteria for making our determination as to an unreasonable practice.

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 on 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)].⁹

Here, the evidence establishes that discounted rates were offered to Madix by Jones; that Madix tendered freight in reliance on the agreed-to rate; that the negotiated rate was billed and collected by Jones; and that Jones 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 Jones to attempt to collect undercharges from Madix 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.

⁸(...continued)

needed to invoke section 2(e). *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 2(e)(2) to determine whether the carrier's undercharge collection is an unreasonable practice.

⁹ We note that respondent concedes (respondent's statement at 1) that if section 2(e) is read to apply to this case, it will preclude the Trustee from collecting on his claims.

3. A copy of this decision will be mailed to:

The Honorable Robert B. Maloney
United States District Court for the
Northern District of Texas, Dallas Division
United States Court House
Room 15A3
Dallas, TX 75242

Re: No. 3:93-CV-0925-T

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary