

SURFACE TRANSPORTATION BOARD¹

DECISION

No. 40999

M, G & B SERVICES, INC.--PETITION FOR DECLARATORY
ORDER--CERTAIN RATES AND PRACTICES OF INTERMODAL
TRANSPORTATION SERVICES, INC.

Decided: November 25, 1996

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 proceeding arises out of efforts of LaSalle National Bank, Assignee of Intermodal Transportation Services, Inc. (ITS or respondent) to collect undercharges from M, G & B Services, Inc. (M, G & B or petitioner). On June 4, 1993, ITS formally filed suit² against M, G & B in the State of Minnesota, County of Hennepin, District Court, Fourth Judicial Circuit, in Court File No. CT 93-009255, LaSalle National Bank, Assignee of Intermodal Transportation Services, Inc. v. M, G & B Services, Inc. The court proceeding was instituted by ITS to recover undercharges in the amount of \$2,502.52, plus interest, allegedly due from M, G & B for services rendered by ITS between March 8, 1990 and April 23, 1990, in transporting three shipments of steel. M, G & B had arranged for the transportation services rendered pursuant to its authority as a licensed property broker.³

On May 11, 1993, M, G & B filed a petition for declaratory order requesting that the ICC declare certain tariff-based rates assessed by ITS to be unreasonable. On July 7, 1993, M, G & B

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 or about January 19, 1993, ITS originally "commenced" action against M, G & B.

³ M, G & B is authorized under Broker License No. MC-211111 issued by the ICC to operate as a property broker.

filed an amended petition for declaratory relief requesting that the ICC declare that the transportation services for which undercharges are being sought were provided by ITS in its capacity as a contract carrier. In the alternative, it requested the ICC to examine issues of broker liability, tariff applicability, rate reasonableness, and other filed rate doctrine issues arising under common carriage. By decision served November 19, 1993, the ICC established a procedural schedule for the submission of evidence on non-rate reasonableness issues.

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 January 3, 1994, the ICC established a procedural schedule permitting the parties to invoke the alternative procedure under section 2(e) of the NRA and directing the parties to notify the ICC of elections or invocations under the procedures of 49 U.S.C. 10701(f). On January 4, 1995, pursuant to a request by petitioner filed December 7, 1994, for a review of the status of the proceeding, the ICC issued a new procedural schedule for the submission of statements. Petitioner filed its opening statement on January 31, 1995, asserting that the collection of undercharges claimed by ITS would be an unreasonable practice under section 2(e) of the NRA. ITS failed to submit a reply and indeed has failed to make an appearance or otherwise participate in any aspect of this proceeding.

Attached as part of petitioner's statement is an affidavit of Mark Greenberg, President of M, G & B. Mr. Greenberg states that his responsibilities include negotiating and establishing the basis for services to be provided by various motor carriers to M, G & B shipper customers. He asserts that he participated in negotiations with representatives of ITS in which rates were established for the transportation of the shipments at issue. According to Mr. Greenberg, the rates offered and accepted by M, G & B were the rates originally billed by ITS and paid by petitioner. Mr. Greenberg further states that these were the rates relied on by M, G & B in tendering traffic to ITS. Attached to Mr. Greenberg's affidavit are copies of the original and corrected freight bills issued by ITS.

DISCUSSION AND CONCLUSIONS

We dispose of this proceeding under section 2(e) of the NRA. Accordingly, we do not reach the contract carriage or rate reasonableness issues.

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

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).

transportation service . . . if the carrier . . . is no longer transporting property . . . or is transporting property . . . for the purpose of avoiding application of this subsection."⁵

It is not disputed that ITS is no longer transporting property.⁶ Accordingly, we may proceed to determine whether respondent'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 satisfied unless there is written evidence of a negotiated rate agreement. Here, M, G & B has submitted copies of the original freight bills which confirm the testimony of Mr. Greenberg, reflect the existence of a negotiated rate, and satisfy the written evidence requirement. E. A. Miller, Inc.--Rates and Practices of Best, 10 I.C.C.2d 235 (1994).

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)].

Here, the evidence establishes that a negotiated rate was offered by ITS; that M, G & B tendered freight to ITS in reliance upon the negotiated rate; that the negotiated rate was billed and collected by ITS; and that ITS 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 ITS to attempt to collect undercharges from M, G & B 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:

⁵ 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.

⁶ Agency records conform that all of ITS's motor common and contract carrier authorities were revoked on June 22, 1991.

1. This proceeding is discontinued.
2. This decision is effective on December 3, 1996.
3. A copy of this decision will be mailed to:

Minnesota District Court
Fourth Judicial District
Hennepin County Government Center
300 South Sixth Street
Minneapolis, MN 55487

Re: Court File No. CT 93-009255

By the Board, Chairman Morgan, Vice Chairman Simmons, and
Commissioner Owen.

Vernon A. Williams
Secretary