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SERVICE DATE - DECEMBER 8, 1997

SURFACE TRANSPORTATION BOARD¹

DECISION

No. 41458

THOMAS & BETTS CORPORATION--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF
TSC EXPRESS COMPANY

Decided: November 25, 1997

We find that the collection of undercharges sought in this proceeding would be an unreasonable practice under former 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 Northern District of Georgia, Atlanta Division in *L. Lou Allen, Trustee on Behalf of The Bankruptcy Estate of TSC Express Company. v. Thomas & Betts Corporation*, Civil Action No. 1:93-CV-1240-FMH. The court proceeding was instituted by L. Lou Allen, Trustee on behalf of the Bankruptcy Estate of TSC Express Company (TSC or respondent), a former motor common and contract carrier, to collect undercharges from Thomas & Betts Corporation (T&B or petitioner). TSC seeks undercharges of \$31,886.07 (plus interest and costs) allegedly due, in addition to amounts previously paid, for services rendered in transporting 983 less-than-truckload (LTL) shipments of electric connectors, fittings, plastic or rubber articles, consumer products, spotlights, streetlights, and related items, between May 9, 1988, and October 2, 1989. The shipments were transported from T&B's facilities located in Austell, GA, to points in Florida, Tennessee, Alabama, Mississippi,

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 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.

Texas, and North Carolina. By order dated July 12, 1994, the court stayed the proceeding and referred the parties to the ICC to seek resolution of the issues raised.²

Pursuant to the court order, T&B, on August 29, 1994, filed a petition for declaratory order requesting the ICC to resolve issues of tariff applicability, unreasonable practice, and rate reasonableness. By decision served September 20, 1994, as supplemented by decision served December 5, 1994, a procedural schedule was established for the submission of evidence on non-rate-reasonableness issues. Petitioner filed its opening statement on August 31, 1995. Respondent filed a reply statement on September 26, 1995, and petitioner filed its statement in rebuttal on October 17, 1995.

T&B asserts that respondent's attempt to collect additional freight charges constitutes an unreasonable practice under section 2(e) of the NRA, that the charges originally billed were properly assessed in conformity with respondent's published tariffs, and that the rates respondent seeks to assess are unreasonable.

T&B supports its argument with an affidavit from Michael Bange of Champion Transportation Services, Inc., a transportation consultant retained by petitioner. Mr. Bange conducted an audit of the balance due bills issued by respondent and provided an analysis of respondent's undercharge claims. According to Mr. Bange all of the original freight bills indicate the application of a 52% discount off class rates, subject to a minimum charge floor of \$29.00 or \$35.00. Included among the attachments to Mr. Bange's affidavit is a representative sample of nine "balance due" freight bills issued for shipments transported between May 25, 1988, and November 23, 1988, containing originally issued freight bill data as well as "corrected" balance due amounts (Exhibit A). Each of the representative freight bills indicates either the application of a 52% discount off the originally assessed rate (six bills) or the assessment of a minimum \$29.00 charge (three bills). Mr. Bange's affidavit also includes copies of (1) respondent's tariff ICC TSCP 601, effective August 22, 1987 (Exhibit B); (2) Item 1052 of tariff TSCP 601, which provides for a 52% discount off class rates (Exhibit C); (3) Items 615-29 and 615-35 of tariff Supplement 1 to TSCP 601, effective January 27, 1988, which provide for minimum shipment charges of \$29.00 and \$35.00, respectively (Exhibit D); and (4) two TSC Discount Plan Participation Request Form letters dated March 7, 1989, and August 8, 1989, signed by representatives of TSC and T&B, which provide discounts of 52% for shipments from Austell, subject to minimum charges of \$31 for direct (single line) movements and \$35 for joint line movements (Exhibit F).

TSC asserts that the discounted rates and minimum charges originally assessed were not authorized by an applicable filed tariff and that balance due bills were issued to recover the applicable charges. It further contends that section 2(e) of the NRA is inapplicable to bankrupt

² The court administratively closed the proceeding but directed the parties to advise the court of the ICC's determinations. It also found that the Bankruptcy Code does not invalidate the NRA.

carriers, may not be applied retroactively, and is unconstitutional.³ In support of its contentions, respondent submits the verified statement of Stephen L. Swezey, Senior Transportation Consultant for Carrier Service, Inc. (CSI).⁴ Mr. Swezey maintains that petitioner was not a proper participant in tariff ICC TSCP 601 until March 7, 1989, and as a result was not entitled to the benefits of the discount or minimum charge provisions of that tariff prior to that date. He also states that, as of August 16, 1989, the provisions of tariff ICC TSCP 601 were not applicable to joint-line shipments to Florida, because of the Florida connecting carrier's cancelled participation in the tariff.⁵

³ As noted, the judge in the underlying proceeding here has already determined that TSC's arguments as to the applicability of the NRA to bankrupt carriers are without merit. Additionally, 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 TSC. See *Whitaker v. Power 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 the 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 Product's, 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).

⁴ CSI is the organization authorized by the bankruptcy court to provide rate, audit, and collection services on behalf of TSC.

⁵ Neither Mr. Swezey nor respondent dispute the fact that TSC published a tariff providing for a
(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 . . . or is transporting property . . . for the purpose of avoiding application of this subsection."⁶

It is undisputed that TSC no longer transports property.⁷ Accordingly, we may proceed to determine whether TSC's attempt to collect undercharges (the difference between the applicable filed tariff rate and the rate originally collected) 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.

⁵(...continued)

conditional 52% discount in Item 1052 of TSCP 601. They maintain, however, that this tariff was not applicable to T&B's traffic during the time period at issue because T&B did not provide TSC with the requisite written notification of participation in that tariff until March 7, 1989. (Swezey statement at 6). We note that, although Mr. Swezey apparently concedes that the discount rate was applicable to shipments transported after March 7, 1989 (Swezey statement at 4, where he reduced the number of shipments at issue by 36), he does assert that, effective August 16, 1989, because of the lack of a participating connecting line carrier to Florida, Tariff ICC TSCP 601 did not apply to joint-line shipments to Florida.

⁶ 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.

⁷ See Court Order of July 12, 1994, at 7.

Here, the record contains a representative sample of nine "balance due" freight bills submitted by petitioner and ten "balance due" freight bills submitted on behalf of respondent⁸ indicating the application to T&B shipments of a 52% discount off originally assessed rates or the assessment of a \$29 minimum charge. In addition, petitioner has submitted copies of tariff provisions as well as two TSC Discount Plan Participation Request Form letters providing for shipment discounts of 52% and minimum shipment charges ranging from \$29.00 to \$35.00. 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).⁹ See *William J. Hunt Trustee for Ritter Transportation, Inc. v. Gantrade Corp.*, C. A. 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 rate and that the rates were agreed upon by the parties).

⁸ Swezey statement, Appendix A.

⁹ TSC, at p. 14 of its reply statement, 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 TSC, 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. TSC 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 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.

In this case the evidence is substantial that the parties conducted business in accordance with agreed-to negotiated discount rates. While the rates originally billed by TSC and paid for by T&B may not always have been the rates set forth in the assertedly applicable tariff provisions,¹⁰ the original freight bills, the provisions of tariff ICC TSCP 601, and the March 7, 1989, and August 8, 1989 TSC Discount Plan Participation Request Form letters confirm the intent and agreement of the parties to have discounts and minimum charges applied to shipments of T&B traffic. The consistent application in the original freight bills of discounts and minimum charges that were in conformity with the discount and minimum charge levels set forth tariff ICC TSCP 601 and the tariff participation requests reflect the existence of negotiated rates.

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

¹⁰ TSC argues that its undercharge claims are proper because (at least prior to March 7, 1989) T&B did not submit a participation letter that was required to implement the applicable discount set forth in its Tariff ICC TSCP 601. That tariff, which was on file with the ICC, was a "trigger" or "range" tariff that provides for a range of discounts. The application of the discount is triggered by specified action, such as the shipper's filing of a letter of participation with the carrier. Thus, TSC argues, absent notification the discount rate is not triggered and the undiscounted class rate is applicable.

In light of section 2(e), however, whether T&B submitted a participation letter prior to March 7, 1989, and thus complied with the specific provisions of TSC's trigger tariff is not a determining factor. Section 2(e)'s availability is not limited to situations where the originally billed rate was unfiled; nor is its use precluded when a condition precedent for an otherwise applicable filed tariff has not been satisfied. Rather, in evaluating whether a carrier's collection efforts 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 the rate 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, which TSC alleges is the case here, 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 Systems, Inc. v. ICC* 179 B.R. 952, 957 (Bankr. D. Kan. 1995). Here, if no participation letter was actually submitted by T&B prior to March 7, 1989, then Tariff ICC TSCP 601 may not have been applicable to the involved shipments prior to that date. If that is the case, however, then TSC offered a rate to T&B that was not legally on file for those shipments, and section 2(e) is applicable.

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, respondent concedes (respondent's statement at 11) that if section 2(e) is read to apply to this case, it will preclude the Trustee from collecting on his claims. We agree. The evidence establishes that a negotiated rate was offered to T&B by TSC; that T&B, reasonably relying on the offered rate, tendered the subject traffic to TSC; that the negotiated rate was billed and collected by TSC; and that TSC now seeks to collect additional payment based on a higher rate filed in a tariff. Therefore, under former 49 U.S.C. 10701(a) and section 2(e) of the NRA, we find that it is an unreasonable practice for TSC to attempt to collect undercharges from T&B for transporting the shipments at issue in this proceeding.

This decision 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 its service date.
3. A copy of this decision will be mailed to:

The Honorable Frank M. Hull
United States District Court
Northern District of Georgia,
Atlanta Division
2321 U.S. Courthouse
75 Spring St., S.W.
Atlanta, GA 30303-3361

Re: Civil Action No. 1:93-CV-1240-FMH

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary