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SERVICE DATE - JULY 10, 1998

SURFACE TRANSPORTATION BOARD¹

DECISION

No. 40383

HUSSMANN CORPORATION--PETITION FOR DECLARATORY ORDER—
CERTAIN RATES AND PRACTICES OF WESCAR FREIGHT SYSTEM, INC.

Decided: June 26, 1998

BACKGROUND

This matter arises out of a court action in the United States District Court for the Eastern District of Missouri, Eastern Division, in Case No. 89-0240C, Wescar Freight System, Inc. v. Hussmann Corporation. The court proceeding was instituted by Wescar Freight Systems, Inc. (Wescar or respondent), a former licensed nonhousehold goods freight forwarder, to collect undercharges from Hussmann Corporation (Hussmann or petitioner). Wescar seeks undercharges in the amount of \$114,602.88² allegedly due, in addition to amounts previously paid, for transportation services provided on behalf of Hussmann. The shipments were transported from the

¹ The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (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 Based on an affidavit submitted on behalf of respondent in this proceeding, it appears that respondent's initial court-filed claim for undercharges has been reduced to \$26,184.94.

facilities of petitioner's Butcher Boy, Toastmaster, and Victory Refrigeration divisions located in Harvard, IL, Algonquin, IL, and Plymouth Meeting, PA, respectively, between February 10, 1986, and December 20, 1986. By order dated November 29, 1989, the court stayed the proceeding and referred issues relating to respondent's undercharge claims to the ICC for resolution.

Pursuant to the court order, Hussmann, on January 9, 1990, filed a petition for declaratory order requesting the ICC to resolve issues of tariff applicability, unreasonable practice, and rate reasonableness. By decision served January 26, 1990, the ICC established a procedural schedule. Petitioner filed its opening statement on April 4, 1990. Wescar filed its response on May 4, 1990, and Hussmann submitted its rebuttal on May 23, 1990.

Hussmann asserts that, during 1985 and 1986, Wescar negotiated freight rate agreements with Hussman's Butcher Boy, Toastmaster, and Victory Refrigeration divisions that were represented by Wescar to be authorized under a filed tariff. Petitioner states that it relied upon the negotiated rates, agreed to pay the negotiated rates, and received and paid freight bills that assessed the negotiated rates. Attached to Hussmann's opening statement are representative corrected billings issued on behalf of respondent that reflect original freight bill data as well as "corrected" balance due amounts (Exhibit A).³ An examination of the representative corrected billings indicates that Wescar originally assessed class rates to which discounts were applied and that the corrected billings

³ These representative freight bills were issued for Toastmaster and Victory Refrigerated shipments. According to petitioner, respondent provided no corrected billings for Butcher Boy shipments.

eliminated the discounts. Also attached to petitioner's opening statement are copies of exhibits attached to respondent's court complaint that list the date, pro number, original assessed charge, asserted corrected charge, and claimed balance due for each of the shipments that were the subject of Wescar's original undercharge claim (Exhibit H).

Hussmann supports its assertions with affidavits submitted by employees of Toastmaster and Butcher Boy as well as former employees of Wescar. Charles Schild, traffic manager for Toastmaster during the involved period, states that his responsibilities included negotiating freight rates and that he engaged in such negotiations with Wescar sales representative Paul Mayer. According to Mr. Schild, Wescar agreed to provide discount rates to Toastmaster as a result of these negotiations; Toastmaster relied on the quoted discount rates when tendering traffic to Wescar; and the freight bills issued to Toastmaster and paid by petitioner were based on the quoted rates. Theodore G. Patterson, traffic manager for Butcher Boy in 1985 and 1986, states that he and Mr. Mayer negotiated an agreement under which Butcher Boy's west coast traffic would be handled exclusively by Wescar and Butcher Boy would be provided a 45% discount rate. Mr. Patterson asserts that he was provided with a Special Discount Quote rate form indicating that the freight rate was authorized in Item 616 of Wescar Tariff 121 (hereinafter referred to as Item 616). He maintains that Butcher Boy relied on Wescar's representations and paid its freight invoices as they came due. Charles E. Blanck, regional director of traffic for the midwestern region and later director of traffic for Wescar during the subject period; Richard H. Hampton, Wescar vice president of sales for the midwest and northeast regions; and L. W. Burford, Wescar vice president for the northwestern region, each confirm that it was standard practice for Wescar to issue special discount

quote forms establishing discount rates relied upon by shippers. A copy of a representative special discount quote form extending a 45% discount to Butcher Boy is included as an attachment to these affidavits.

Mr. Blanck also testified that Wescar published and filed an average rate rule tariff as Item 616. He indicates that Wescar interpreted Item 616 to authorize its salespersons to make the types of rate quotes that were made to Hussman.

In reply, Wescar contended that “average rate rules,” such as that contained in Item 616, were invalidated in Regular Common Carrier Conference v. United States, 793 F.2d 376 (D.C. Cir. 1986) (RCCC), so that there is no legal basis for the rates negotiated by the parties. Therefore, according to Gordon Stevens, a rate auditor employed by Transport Audit Services (TAS), a company retained by Wescar, the shipments at issue were not covered by discounts and should be rated at full class rates. Attached as exhibits to Mr. Stevens’ affidavit are revised lists of corrected freight bills identifying those shipments subject to Wescar’s undercharge claims.

In a decision served in this proceeding on October 28, 1992 (the 1992 Decision), the ICC found that Item 616 was legally available for shipments transported prior to September 26, 1986 (the ICC-ordered effective date for revoking all freight forwarder tariff provisions providing for “average rate” special tariff authority).⁴ The ICC noted, however, that the record did not contain

⁴ The tariff cancellation order was issued by the ICC in Freight Forwarder Tariff Bureau, Inc.—Average Rates—Petition to Reject, No. 39928 (ICC served Sept. 16, 1986), to comply with

adequate information to allow for a determination of the applicable filed rate based on average rate pricing. Therefore, it reopened the proceeding to receive additional evidence. The ICC stated that the burden was on respondent to produce evidence of the filed tariff rate in order to ultimately collect its claimed undercharges and that if Wescar “fails to submit evidence with respect to the applicable average rate in response to this decision, it is our determination that it will have failed to show that undercharges are due on shipments moving prior to the cancellation effective date.” Wescar did not respond to the 1992 Decision, or to the ICC’s subsequent decision directing Wescar to show cause why it should not forfeit its right to collect undercharges on shipments that were governed by the average rate tariff.

The ICC then undertook to review the undercharge claims for shipments transported after September 26, 1986. On November 27, 1992, Hussmann filed a "Memorandum of Reasonableness" indicating that eight shipments, involving undercharge claims of \$733.09, were transported after September 26, 1986. The undercharge claims listed in the exhibits attached to the Stephens affidavit show that Wescar applied a 45% discount, which it seeks to collect as undercharges.

On December 3, 1993, the Negotiated Rates Act, Pub. L. No. 103-180 (NRA), became law. The NRA substantially restored the ability of the ICC (and now the Board) to find that assessment of

the court’s directive in RCCC.

undercharges is an unreasonable practice.⁵

DISCUSSION AND CONCLUSIONS

As indicated above, the ICC has already determined that, for shipments moving before September 26, 1986, Item 616 was legally available for this transportation. Although ample opportunity has been provided to Wescar to establish applicable rates under the average rate pricing option, it has failed to do so. Accordingly, we find that Wescar has failed to demonstrate that any undercharges are due on shipments that were transported prior to the September 26, 1986 cancellation effective date.⁶

With respect to the shipments that were transported on or after September 26, 1986, we find that the attempt to collect undercharges would be an unreasonable practice under section 2(e) of the NRA. Accordingly, we do not reach the other issues raised.

We recognize that the issues raised by the parties for our consideration focus primarily on tariff applicability and rate reasonableness. Nevertheless, our use of section 2(e)'s "unreasonable practice" provisions to resolve this matter is fully appropriate. The Board, as a general rule, is not

⁵ The ICC's prior unreasonable practice policy was invalidated by the Supreme Court in Maislin Indus. v. Primary Steel, 497 U.S. 116 (1990).

⁶ For the reasons outlined below, we also find that, in any event, it would be an unreasonable practice under section 2(e) of the NRA for Wescar to attempt to collect undercharges for these shipments.

limited to deciding only those issues explicitly referred by a court or raised by the parties. Rather, we may instead decide cases on other grounds within our jurisdiction and, in cases where section 2(e) provides a dispositive resolution, we rely on it rather than the more subjective rate reasonableness and tariff applicability provisions. Cf. Amoco Fabrics and Fibers Co. v. Max C. Pope, Trustee of the Estate of A.T.F. Trucking, No. 40526 (ICC served Feb. 26, 1992). Thus, we have jurisdiction to issue a ruling under section 2(e) of the NRA here. The Ormond Shops, Inc., Thomas J. Lipton, Inc. and Lionel Leisure, Inc. v. Oneida Motor Freight, Inc. Debtor-in-Possession, and Delta Traffic Service, Inc., No. MC-C-30156 (ICC served Apr. 20, 1994); and Have a Portion, Inc. v. Total Transportation, Inc., and Thomas F. Miller, Trustee of the Bankruptcy Estate of Total Transportation, Inc., No. 40640 (ICC served Feb. 7, 1995).

Section 2(e)(1) of the NRA provides, in pertinent part, that "it shall be an unreasonable practice for . . . a freight forwarder . . .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 . . . freight forwarder is no longer transporting property . . . or is transporting property . . . for the purpose of avoiding the application of this subsection."

It is undisputed that Wescar is no longer an operating freight forwarder.⁷ Accordingly, we may proceed to determine whether Wescar's attempt to collect undercharges (the difference between

⁷ Wescar ceased operations on February 20, 1987.

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 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, the record contains a copy of a representative special discount quote form extending a 45% discount to Butcher Boy, copies of representative corrected freight bills indicating originally assessed class rates to which discounts were applied, and a listing of shipments attached to respondent’s court complaint seeking recovery of undercharges indicating the application by respondent of discounts to the charges original assessed. 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). See William J. Hunt, Trustee for Ritter Transportation, Inc. v. Gantrade Corp., C.A. 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 rate and that the rates were agreed upon by the parties).

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)].

In this case, the evidence is substantial that the parties conducted business in accordance with agreed-to negotiated rates. The consistent application of discounts confirms the testimony of the Hussmann witnesses and reflects the existence of negotiated rates. As required in order for a shipper to prevail under section 2(e), the evidence establishes that a negotiated rate was offered by Wescar; that Hussmann tendered freight to Wescar in reliance on the negotiated rate; that the negotiated rate was billed and collected by Wescar; and that Wescar now seeks to collect additional payment based on a higher rate filed in a tariff. Therefore, under section 2(e) of the NRA, we find that it is an unreasonable practice for Wescar to attempt to collect undercharges from Hussmann for the transportation at issue in this proceeding.

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

It is ordered:

No. 40383

1. This proceeding is discontinued.
2. This decision is effective on its service date.
3. A copy of this decision will be mailed to:

United States District Court for the
Eastern District of Missouri, Eastern Division
U. S. Court & Customs House
1114 Market Street
St. Louis, MO 63101

Re: Case No. 89-0240C (A)

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary