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SERVICE DATE - AUGUST 24, 1998

SURFACE TRANSPORTATION BOARD

DECISION

No. 41686

J. SOSNICK & SON--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF INDUSTRIAL FREIGHT SYSTEM, INC.
AND ITS CORONA TRUCKING DIVISION

Decided: August 18, 1998

We find that the collection of 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 Central District of California in Duke Salisbury, Chapter 7 Trustee of the Bankruptcy Estate of Industrial Freight System, Inc. v. J. Sosnick & Son, Adversary Proceeding No. AD 95-02195 ER. The court proceeding was instituted by Duke Salisbury, Chapter 7 Trustee of the Bankruptcy Estate of Industrial Freight System, Inc. and its Corona Trucking Division (Industrial or respondent), a former motor common and contract carrier, to collect undercharges from J. Sosnick & Son (Sosnick or petitioner). Industrial seeks unspecified undercharges allegedly due, in addition to amounts previously paid, for transportation services rendered on behalf of Sosnick. By order entered January 30, 1996, the court approved a stipulation between Industrial and Sosnick to enable petitioner to seek Board resolution of transportation issues within the primary jurisdiction of the Board.

Pursuant to the court order, petitioner, on April 5, 1996, filed a petition for declaratory order requesting the Board to resolve issues of unreasonable practice, tariff applicability, and rate reasonableness. By decision served April 26, 1996, the Board established a procedural schedule. On June 25, 1996, Sosnick filed its opening statement. Industrial failed to submit a reply, and indeed has failed to make an appearance or otherwise participate in any aspect of this proceeding.¹

¹ Under 49 CFR 1112.3, a party that fails to comply with the schedule for submission of verified statements is deemed to be in default and to waive any further participation in the proceeding. Industrial's failure to participate in this proceeding should bind it in the court proceeding to the record developed before the agency. See Carriers Traffic Serv. v. Toastmaster, 707 F. Supp. 1498, 1505-06(N.D. Ill. 1998) (carrier on court referral must "live with the record it has made (or failed to make)" before the Board when pursuing its undercharge proceeding in the courts).

Sosnick asserts that respondent's efforts to collect the claimed undercharges constitute an unreasonable practice under section 2(e) of the Negotiated Rates Act of 1993 (NRA),² now codified at 49 U.S.C. 13711. It further contends that the rates respondent now seeks to collect are unreasonable. Petitioner maintains that the freight charges originally billed by Industrial and paid by Sosnick were rates agreed upon by the parties, that Sosnick relied upon the agreed-to rates in tendering its traffic to Industrial, that the offered rates were billed and collected by respondent, and that respondent accepted petitioner's payment of these rates as payment in full.

Sosnick supports its argument with the sworn declaration of Barbara Tilley, petitioner's Purchasing Coordinator. Ms. Tilley states that her responsibilities include supervising the transportation arrangements and negotiating rates with various trucking companies for the movement of petitioner's products within the United States. She asserts that she is the custodian of the transportation documents maintained by petitioner for the period 1990 to 1994 and is familiar with the transportation service that Industrial provided to petitioner during that period. According to Ms. Tilley, Industrial offered to transport the shipper's products at discounted freight rates and petitioner relied on the discounted rates in tendering its traffic to respondent. Ms. Tilley asserts that the discounted rates were assessed in the original freight bills issued by Industrial and that petitioner paid and respondent accepted petitioner's payment without objection. Ms. Tilley states that Sosnick would not have used respondent's services in the absence of the originally agreed-to discounted rates, but rather would have used the available services of other motor carriers that offered rates that compared favorably with respondent's discounted rates.

Attached as Exhibit A to Ms. Tilley's declaration is a representative sample of original and corresponding revised balance due freight bills issued by respondent. The sample contains the freight bills issued for 10 representative shipments transported from Phoenix, AZ, to Blythe and South San Francisco, CA, between February 15, 1991, and October 29, 1992. The documents indicate the original amount billed by respondent and paid by Sosnick, the asserted corrected charge, and the claimed balance due. An examination of the balance due bills reveals that respondent originally applied a 50% discount to its originally assessed charge for nine of the shipments, and a \$50 minimum charge for the remaining shipment. The balance due bills indicate the elimination the originally applied discount and originally applied \$50 minimum charge and the rerating of the assessed charges.

DISCUSSION AND CONCLUSIONS

We 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] . . .

² Pub. L. No. 103-180, 107 Stat. 2044.

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 Industrial 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, petitioner has submitted a representative sample of original and revised freight bills indicating originally assessed charges that were consistently and substantially below those that respondent here seeks to assess and conform with 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). See William J. Hunt, Trustee for Ritter Transportation, Inc. v. Gantrade Corp., C.A. No. 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 this case the evidence indicates that the original rates assessed by Industrial and paid by Sosnick were rates agreed to in negotiations between the parties. The representative sample of original and revised balance due freight bills confirm the unrefuted testimony of Ms. Tilley and reflect the existence of negotiated rates.

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)].

Here, the unrefuted evidence submitted by petitioner establishes that a negotiated rate was offered to Sosnick by Industrial; that Sosnick reasonably relied on the offered rate in tendering its traffic to Industrial; that the negotiated rate was billed and collected by Industrial; and that Industrial

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 Industrial to attempt to collect undercharges from Sosnick for transporting the shipments at issue in this proceeding.³

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

The Honorable Ernest M. Robles
United States Bankruptcy Court for
the Central District of California
Edward Roybal Federal Building and Courthouse
255 East Temple Street
Los Angeles, CA 90012

Re: Adv. No. 95-02195 ER

³ Although the record here does not contain all of the freight bills for which respondent seeks undercharges, it does contain sample freight bills which appear to be representative of all of respondent's undercharge claims. These freight bills constitute written evidence of a negotiated rate as to the specific shipments identified in the freight bills. The record also contains the uncontroverted testimony of Ms. Tilley as to petitioner's reliance on the originally negotiated rate.

As to any other shipment with respect to which specific freight bills were not submitted, where the documentation is similar to that presented in the sample freight bills, it would be an unreasonable practice for respondent "to attempt to recover the difference between the applicable tariff rate . . . and the negotiated rate." Accordingly, we advise the court of our legal opinion that, to the extent other undercharge demands follow the pattern outlined here, they too would constitute an unreasonable practice.

No. 41686

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary