

SURFACE TRANSPORTATION BOARD<sup>1</sup>

DECISION

No. 41260

CASTLEBERRY'S FOOD COMPANY--PETITION FOR  
DECLARATORY ORDER--CERTAIN RATES AND PRACTICES OF  
JONES TRUCK LINES, INC.

Decided: December 10, 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 matter arises out of a court action in the State Court of Fulton County, GA, in Jones Truck Lines, Inc. Debtor-In-Possession v. Castleberry's Foods Company, File No. 93vs74651-F. The court proceeding was instituted by Jones Truck Lines, Inc. (Jones or respondent), a former motor common and contract carrier, to collect undercharges from Castleberry's Food Company (Castleberry's or petitioner). Jones seeks undercharges of \$40,110.33 allegedly due, in addition to amounts previously paid, for the transportation of 170 shipments of foodstuffs between July and December, 1988. The shipments were less-than-truckload movements transported from petitioner's facility in Augusta, GA, to points in Alabama, Arkansas, Louisiana, Mississippi, and Tennessee. By order dated April 6, 1994, and entered May 6, 1994, the court stayed the proceeding and directed petitioner to submit the issue of unreasonable practice to the ICC for determination.

Pursuant to the court order, petitioner, on June 2, 1994, filed a petition for declaratory order requesting the ICC to resolve the court-referred issue. By decision served June 14, 1994, the ICC established a procedural schedule setting the due dates for the parties' pleadings and directing respondent to provide petitioner with certain information underlying its

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<sup>1</sup> 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.

undercharge claims. Petitioner filed its opening statement on August 8, 1994.<sup>2</sup> Respondent filed its reply statement on October 27, 1994.<sup>3</sup> Petitioner filed its rebuttal on November 30, 1994.

Petitioner in its opening statement asserts that the shipments in question were billed and paid based upon rates negotiated between Jones and Castleberry's, and that Castleberry's tendered its freight in reliance upon the negotiated rate. Petitioner further asserts that respondent's attempt to collect undercharges constitutes an unreasonable practice under section 2(e) of the NRA.

Castleberry's supports its argument with the affidavit of Sandra Lee Huskey, petitioner's Senior Traffic Assistant during the subject period.<sup>4</sup> Ms. Huskey states that, in her capacity as Senior Traffic Assistant, she arranged with representatives of Jones and other carriers for the movement of petitioner's products from its Augusta facility. She asserts that the amounts assessed in the freight bills originally issued by Jones and paid by petitioner were negotiated amounts agreed to by the parties. Ms. Huskey further states that petitioner was informed by representatives of Jones that the discounts offered to petitioner by Jones were properly filed with the ICC.

In its reply statement, Jones argues that petitioner has not submitted any evidence in this proceeding to which respondent can offer a factual response. In addition, Jones contests the applicability of section 2(e) on statutory and constitutional grounds.<sup>5</sup>

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<sup>2</sup> By motion filed August 2, 1994, petitioner, alleging that Jones had failed to provide petitioner with the information required by the ICC's procedural decision, requested the ICC to issue an order advising the court that respondent had not shown itself entitled to collect any of the disputed undercharges. In its reply filed August 24, 1994, respondent asserts that there is no basis for the relief sought as the information required by the ICC's procedural decision had previously been supplied to petitioner during the course of the corresponding court proceeding. The facts of record confirm respondent's assertion. Petitioner's motion is denied.

<sup>3</sup> Jones' reply statement was accompanied by a motion requesting acceptance of the statement as late-filed, citing certain mitigating circumstances. Respondent's motion for leave to late-file its reply statement is granted.

<sup>4</sup> Ms. Huskey's affidavit was submitted as an appendix to the petition for declaratory order and was resubmitted as a supplement to petitioner's opening statement.

<sup>5</sup> 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 Brake Supply, Inc., 68 F.3d 1304 (11th Cir. 1995) (Power Brake); Jones Truck Lines, Inc. v. Whittier Wood

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In rebuttal, Castleberry's disputes Jones' claim that no evidence has been submitted, and attaches a summary provided by Jones which identifies, for each individual undercharge claim, the amount of the undercharge, the interest due, the asserted total due on the individual claim, and the overall totals. Castleberry's also attaches copies of the corrected freight bills issued by Jones, which reflect originally issued freight bill data, including the rate originally assessed, to which a discount of 54% was applied.<sup>6</sup>

#### DISCUSSION AND CONCLUSIONS

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

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<sup>5</sup>(...continued)

Products, Inc., 57 F.3d 642 (8th Cir. 1995) (Whittier Wood); In re Matter of Lifshultz 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).

<sup>6</sup> Although it is unusual for a petitioner to submit its corroborating evidence in its rebuttal, we will accept this evidence in this proceeding. We note that respondent does not dispute the existence of the freight bills--indeed, Jones could not do so because it originally proffered this evidence in the State Court proceeding--and has not moved to strike the documents submitted by petitioner.

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."<sup>7</sup>

It is undisputed that Jones no longer transports property.<sup>8</sup> Accordingly, we may proceed to determine whether Jones' 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, petitioner has submitted copies of the corrected freight bills, which include original freight bill data for each of the shipments at issue. Those bills clearly indicate that Jones initially offered Castleberry's a 54 percent discount when transporting the subject shipments. 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).<sup>9</sup>

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<sup>7</sup> 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 exemption 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.

<sup>8</sup> Board records confirm that Jones' motor carrier operating rights were revoked on February 18, 1992.

<sup>9</sup> Jones, at pp. 10-11 of its statement filed October 27, 1994, 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 the Board must examine the freight bills reflecting the negotiated rate that were issued by the carrier 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

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In this case, 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 freight bills issued by the carrier confirm the testimony of Ms. Huskey that a negotiated discount rate agreed to by the parties was originally assessed by Jones and paid by Castleberry's. The fact that the rate discount was originally applied reflects the existence of a negotiated rate.

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 discounted rates were offered to Castleberry's by Jones; that Castleberry's 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 Castleberry's 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.

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<sup>9</sup>(...continued)

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.

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 Melvin K. Westmoreland  
State Court for the County of Fulton  
185 Central Avenue SW  
Atlanta, GA 30303

Re: File No. 93vs74651-F

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

Vernon A. Williams  
Secretary