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SERVICE DATE - MARCH 24, 2000
SURFACE TRANSPORTATION BOARD

DECISION

STB No. 41713

CASE CORPORATION f/k/a J.I. CASE COMPANY
v.
MIDDLEWEST FREIGHTWAYS, INC.

Decided: March 20, 2000

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 District Court for the Eastern District of Wisconsin in Middlewest Freightways, Inc. v. Case Corporation f/k/a J. I. Case Company, Case No. 94-C-1095. The court proceeding was instituted by Middlewest Freightways, Inc. (Middlewest or defendant), a former motor common and contract carrier, to collect undercharges from Case Corporation, formerly known as J.I. Case Company (Case or complainant). Middlewest seeks undercharges of \$128,968.34¹ (plus interest) allegedly due, in addition to amounts previously paid, for services rendered in transporting 79 shipments of earthmoving equipment from Great Bend, KS, and Bay Springs, MS,² to various points in Canada between September 1991 and April 1992. The shipments were less-than-truckload (LTL) joint-line movements originated by Middlewest and transported to Chicago, Il, where they were interlined with connecting carrier Day & Ross, Inc. (Day & Ross), for delivery to Canadian destinations. By order dated March 28, 1996, the court stayed the proceeding to enable complainant to seek an administrative determination from the Interstate Commerce Commission (now the Board) with respect to the issue of tariff applicability.

¹ Middlewest originally sought \$131,703.04 for undercharges arising out of 80 shipment claims plus an originally assessed and assertedly unpaid charge of \$379.79 for one shipment. In the course of the underlying court proceeding, defendant canceled one of its undercharge claims and amended eight others, reducing the total of its undercharge claim to \$128,968.34. The \$379.79 shipment claim based on the originally billed charge constitutes an open account receivable and is not an undercharge claim requiring Board action.

² Except for one shipment that originated at Bay Springs, all of the shipments at issue were transported from Great Bend.

Pursuant to the court order, Case, by complaint filed May 15, 1996, requested the Board to resolve issues of tariff applicability and unreasonable practice. By decision served June 27, 1996, the Board issued a procedural schedule. On August 26, 1996, complainant filed its opening statement. Defendant filed its statement of facts and argument on September 11, 1996, and Case submitted its rebuttal on October 15, 1996.

Complainant contends that defendant relies on assertedly applicable tariffs of Day & Ross as the basis for its undercharge claims but has failed to establish that it was a participant in any of the Day & Ross tariffs. It argues, in the alternative, that if defendant is deemed to be a proper participant in the Day & Ross tariffs, the discount tariff originally applied to the subject shipments, ICC DAYR 601, is the applicable tariff. Case further contends that defendant's attempt to collect undercharges constitutes an unreasonable practice under section 13711.³ Case maintains that it negotiated several rate agreements with Middlewest, including the rates set forth in supplement 27 to Discount tariff ICC DAYR 601 that provided for a 64% discount off class 60 rates. Complainant asserts that the rates initially assessed for the subject shipments conformed with the rates contained in the discount tariff and were paid in full; that it tendered its traffic to Middlewest on the basis of the agreed-to discount rate; and that it would not have used Middlewest had defendant attempted to charge an undiscounted rate. Attached as Exhibit 6 to complainant's opening statement are sample copies of two freight bill corrections issued on behalf of defendant that reflect originally issued freight bill data as well as "corrected" balance due amounts. An examination of the sample freight bills indicates the original application of a 64% discount and a newly assessed charge substantially higher than the amount originally billed based on re-rated charges and the elimination of the discount.

Case supports its assertions with a verified statement from E.R. Johnson, complainant's traffic manager.⁴ Mr. Johnson states that he arranged for the transportation and negotiated the rates for the shipments at issue with Mr. O. Paul Taylor, defendant's traffic manager. He asserts that the rates initially charged by defendant and paid by complainant were based on a 64% discount off class 60 rates. Mr. Johnson maintains that the originally assessed rates were comparable to rates available from other motor carriers and that complainant would have used other carriers to transport its traffic had Middlewest attempted to charge the non-discounted rates it here seeks to assess.

³ Section 13711 was enacted in the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 stat. 803. Its provisions are similar to those contained in section 2(e) of the Negotiated Rates Act of 1993, Pub. L. No. 103-180, 107 Stat. 2044.

⁴ Complainant also submitted the affidavit of Thomas K. Lehman, a transportation consultant employed by Don H. Norman Associates, Inc., who analyzed the subject undercharge claims and discussed the issue of rate reasonableness. In a verified statement attached to complainant's rebuttal, Mr. Lehman expresses the opinion that the failure by Middlewest to produce a copy of an executed concurrence affirming its participation in the tariffs of Day & Ross establishes that Middlewest was not a valid participant in the Day & Ross tariffs.

Included among the attachments to Mr. Johnson's verified statement are documents represented by Middlewest to be excerpts from supplement 24 to tariff ICC DAYR 601, effective April 29, 1991 (Exhibit B), and supplement 27 to tariff ICC DAYR 601, effective June 1, 1991 (Exhibit C), indicating that a 64% discount off class 60 exception rating would be applicable to Case shipments originating in the United States and destined to points in Canada.

Middlewest contends that the initially assessed charges were not authorized by an applicable filed tariff in effect at the time the subject shipments were transported and that there were no published discount provisions applicable to the subject joint-line movements with Day & Ross. It asserts that it was not a participant in tariff ICC DAYR 601 until April 20, 1992, and that, prior to that date, there was no class 60 exception and no discount applicable to the subject shipments.

Defendant supports its argument with a verified statement from Stephen L. Swezey, Senior Transportation Consultant for Carrier Service, Inc. (CSI), the organization authorized by Middlewest to provide rate audit and collection services for defendant.⁵ Mr. Swezey states that, prior to April 20, 1992, there was no discount and class 60 exception rating applicable to shipments originated by Middlewest and handled in joint-line service with Day & Ross to destinations in Canada because tariff ICC DAYR 601 applied only to Day & Ross single-line movements and had no participating carriers. He asserts that all of the shipments at issue were transported prior to April 20, 1992, and maintains that the tariff rates defendant now seeks assess are applicable.⁶

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] . . . 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."

⁵ Attached as Appendix C to Mr. Swezey's statement is an affidavit submitted by Mr. Charles E. Shinn, another CSI analyst, in the underlying court case. This affidavit, which Mr. Swezey adopts as his own for this proceeding, describes the rationale used by defendant in re-rating the original freight bills.

⁶ Also attached to Mr. Swezey's statement are copies of five balance due freight bills described by him as representative of the shipments at issue. An examination of these freight bills indicates, as did the sample freight bills submitted by complainant, the original application of a 64% discount and a newly assessed charge based on re-rated charges and the elimination of the discount.

We note that the availability of section 13711 is not limited to situations where the originally billed rate was unfiled. In evaluating whether a carrier's collection would be an "unreasonable practice" under section 13711, the Board must consider, inter alia, whether the shipper was offered a rate by the carrier "other than that legally on file with the Board for the transportation service." Section 13711(b)(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, then 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 [section 13711]." American Freight System, Inc. v. ICC (In re American Freight System), 179 B.R. 952, 957 (Bankr. D. Kan. 1995).

It is undisputed that Middlewest no longer transports property.⁷ Accordingly, we may proceed to determine whether defendant'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 13711(a) determination. Section 13711(f) 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 13711(a) cannot be satisfied unless there is written evidence of a negotiated rate agreement.

Here, the record contains representative balance due freight bills submitted by both parties that indicate originally assessed charges based on a class 60 exception rating to which a 64% discount was applied, as well as excerpts of documents prepared by defendant purported to be provisions of tariff ICC DAYR 601 indicating that a 64% discount off class 60 exception rating was to be applied to the shipments at issue. 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).⁸ See William J. Hunt, Trustee for Ritter Transportation, Inc. v. Gantrade Corp., C.A. No.

⁷ Mr. Swezey, in his verified statement at 2, states that Middlewest ceased operations as a motor common carrier on April 2, 1992. Federal Highway Administration's records indicate that Middlewest's motor carrier operating authorities were revoked in 1992.

⁸ Middlewest, at p. 5 of its statement filed September 11, 1996, argues that freight bills do not constitute written evidence. Defendant asserts that allowing freight bills to satisfy the written evidence requirement would make the written evidence provisions of section 13711(f) superfluous because the Board, under 13711(b)(2)(D), must independently consider whether the carrier submitted and collected freight bills reflecting the unfiled agreed-upon rate.

(continued...)

H-89-2379 (S.D. Tex. March 31, 1997) (mem.) (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 parties conducted business in accordance with agreed-to negotiated discount rates that were originally billed by Middlewest and paid by Case. The consistent application in the original freight bills of assessed charges based on class 60 exception rates to which were applied discounts of 64%, assessed charges that conform with the class rates and discount called for in supplement 27 to tariff ICC DAYR 601, confirm the unrefuted testimony of Mr. Johnson and reflect the existence of negotiated discount rates. The evidence further indicates that Case relied upon the agreed-to discount rates in tendering the subject shipments to Middlewest and that complainant would not have used defendant to transport its traffic had defendant attempted to charge the rates it here seeks to assess.

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)].

(...continued)

The ICC and the Board have consistently rejected the argument that freight bills do not constitute written evidence. Section 13711(b)(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 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 13711(b)(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 13711(f). The carrier’s argument might be more persuasive if the “written evidence” requirement were a “sixth” element of a merits determination under section 13711(b)(2), but it is not. Rather, as the ICC previously indicated, it is simply a threshold definitional requirement needed to invoke section 13711. 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 13711(b)(2) to determine whether the carrier’s undercharge collection effort is an unreasonable practice.

Here, the evidence establishes that a negotiated discount rate was offered by Middlewest to Case; that Case reasonably relied on the offered discount rate in tendering its traffic to Middlewest; that Middlewest has raised a serious challenge to the applicability of filed tariffs providing for such discounted rates and has not entered into an agreement for contract carriage; that the negotiated rate was billed and collected by Middlewest; and that Middlewest 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 Middlewest to attempt to collect undercharges from Case 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 date of service.
3. A copy of this decision will be mailed to:

The Honorable Rudolph T. Randa
United States District Court for
the Eastern District of Wisconsin
247 U.S. Courthouse
517 East Wisconsin Avenue
Milwaukee, WI 53202

Re: Case No. 94-C-1095

By the Board, Chairman Morgan, Vice Chairman Burkes, and Commissioner Clyburn.

Vernon A. Williams
Secretary