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SERVICE DATE - DECEMBER 6, 2000

SURFACE TRANSPORTATION BOARD

DECISION

STB No. 42016

A. SCHULMAN, INC.; AGATE COVE ENTERPRISES D/B/A SOUND BUSINESS FORMS; ALCAN ALUMINUM CORPORATION; ANSUL FIRE PROTECTION; AVERY DENNISON CORPORATION; B&S SUPPLY; BAYSIDE BUSINESS FORMS; BLOCK GRAPHICS, INC. F/K/A MEDALLION ENVELOPE CO.; BLOCK GRAPHICS, INC. F/K/A SYSTEMS DISTRIBUTION, INC.; BLOUNT SPORTING EQUIPMENT; CAL-TAB SYSTEMS, INC.; CENTRAL VALLEY OAK DIST.; CHEMITHON SURFACE FINISHING, INC.; COSTCO WHOLESALE CORPORATION; DATAFORM PRINT COMMUNICATIONS; DUCKBACK PRODUCTS INC.; DURODYNE, INC.; EVEREADY BATTERY COMPANY, INC.; FEDERAL PAPER BOARD COMPANY, INC.; FMC CORPORATION; GRAN'PA DON'S, INC.; HEHR INTERNATIONAL, INC.; HOLLANDER GLASS, INC.; LYNX GOLF, INC.; MICHELMAN, INCORPORATED; NATIONAL STARCH & CHEMICAL; NATIONWIDE PAPERS; REPUBLIC BAG, INC.; STAR BLENDS, INC.; STOODY COMPANY; SYNSOR CORPORATION; TRAVIS INDUSTRIES, INC.; THE VALSPAR CORPORATION; WALTER E. NELSON; AND WESTERN NEVADA SUPPLY COMPANY--PETITION FOR DECLARATORY ORDER--CERTAIN RATES AND PRACTICES OF WILLIG FREIGHT LINES, INC.

Decided: December 4, 2000

We find that collection of the 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 court actions in the United States Bankruptcy Court for the Northern District of California. The court proceedings were instituted by Willig Freight Lines, Inc. (Willig or respondent),¹ a former motor common and contract carrier, to collect undercharges from A. Schulman, Inc. (Schulman); Agate Cove Enterprises d/b/a Sound Business Forms (Agate); Alcan Aluminum Corporation (Alcan); Ansul Fire Protection (Ansul); Avery Dennison Corporation (Avery); B&S Supply (B&S); Bayside Business Forms (Bayside); Block Graphics, Inc. f/k/a Medallion Envelope Co. (Medallion); Block Graphics, Inc. f/k/a Systems Distribution, Inc. (Systems); Blount Sporting Equipment (Blount); Cal-Tab Systems, Inc. (Cal-

¹ On October 19, 1995, Willig filed for bankruptcy under Chapter 11 of the United States Bankruptcy Code, in the United States Bankruptcy Court for the Northern District of California, Case No. ND 95-33940-DM.

Tab); Central Valley Oak Dist. (Central); Chemithon Surface Finishing, Inc. (Chemithon); Costco Wholesale Corporation (Costco); Dataform Print Communications (Dataform); Duckback Products Inc. (Duckback); Durodyne, Inc. (Durodyne); Eveready Battery Company, Inc. (Eveready); Federal Paper Board Company, Inc. (Federal); FMC Corporation (FMC); Gran'Pa Don's, Inc. (Gran'Pa); Hehr International, Inc. (Hehr); Hollander Glass, Inc. (Hollander); Lynx Golf, Inc. (Lynx); Michelman, Incorporated (Michelman); National Starch & Chemical (National Starch); Nationwide Papers (Nationwide); Republic Bag, Inc. (Republic); Star Blends, Inc. (Star); Stoodly Company (Stoodly); Synsor Corporation (Synsor); Travis Industries, Inc. (Travis); The Valspar Corporation (Valspar); Walter E. Nelson (Nelson); and Western Nevada Supply Company (Westem) (collectively, shippers or petitioners). In the court actions, Willig seeks to collect undercharges, including interest, in the amount of \$621,608.80 allegedly due, in addition to amounts previously paid, for transportation services rendered on behalf the 35 respective petitioners between October 18, 1992, and August 25, 1994.

By order dated March 31, 1997, the court stayed the adversary proceedings filed by Willig to enable petitioners to seek a Board determination of issues of rate reasonableness, unreasonable practice, and tariff applicability.² Pursuant to the court order, petitioners, on September 19, 1997, jointly filed a petition for declaratory order requesting the Board to resolve all disputed issues within its primary jurisdiction related to the Willig instituted claims for undercharges. By decision served September 29, 1997, the Board issued a procedural schedule for the submission of evidence. On January 20, 1998, a joint opening statement was filed on behalf of petitioners. Respondent filed its reply on March 18, 1998, and petitioners submitted their rebuttal on April 8, 1998.

By decision served June 15, 1998, 25 petitioners listed in Appendix A by name and respective court adversary proceeding number were dismissed as parties to this proceeding.³ As a consequence, only Schulman, Alcan, Blount, Costco,⁴ Hehr, Lynx, Nationwide, Star, Travis, and Western remain as parties to this proceeding.⁵ Elimination of the claims directed against the

² The court order was issued in the underlying bankruptcy proceeding as a case management order for the handling of undercharge claim adversary proceedings instituted by Willig.

³ The decision was issued in response to a letter filed June 4, 1998, on behalf of the named petitioners.

⁴ Although respondent indicated in its statement that a settlement had been reached with respect to its Costco claim, that assertion was disputed in the rebuttal statement filed by petitioners. The record contains nothing to establish that the claim against Costco has been settled or that Costco has requested that it be dismissed as a party to this proceeding.

⁵ These petitioners are listed by name and court adversary proceeding number in
(continued...)

25 dismissed petitioners reduces respondent's collective undercharge claims, including interest, to \$268,859.28.

Petitioners assert that respondent's efforts to collect the claimed undercharges constitute an unreasonable practice under section 13711(a) and that the rates respondent now seeks to collect are unreasonable. Petitioners maintain that the freight charges originally billed by Willig and paid by petitioners were freight charges mutually agreed upon by the parties and that they relied on the agreed-upon rates in tendering their traffic to Willig to the exclusion of services provided by other carriers.

Each petitioner supports its argument with an affidavit from Michael Bange, president of Champion Transportation Services, Inc., a transportation consultant retained by petitioners. Mr. Bange conducted an audit and analysis of respondent's balance due claims. Attached to each Bange affidavit is a copy of the original court complaint filed by respondent against the respective shipper (Exhibit A), a listing of the undercharge claims assertedly due from the shipper (Exhibit A-1), and copies of the "balance due" bills issued by respondent that contain originally issued freight bill data as well as "corrected" balance due amounts (Exhibit B). Mr. Bange's affidavits discussing the shipments of Lynx and Star include copies of Willig internal working documents⁶ calling for the application of percentage discounts that conform with the percentage discounts applied in the original freight bills issued by respondent to these shippers. In addition, attached to the Bange affidavits discussing the claims against Schulman, Alcan, Costco, Lynx, and Nationwide are copies of Willig tariffs providing for percentage discounts that conform to the percentage discounts originally applied in the freight bills issued to these petitioners.⁷ According to Mr. Bange, the shipments at issue were originally billed by Willig based upon class rates to which discounts ranging from 35% to 64% were applied, flat charges, commodity rates, or minimum rates. Mr. Bange states that these originally assessed charges were subsequently disallowed and re-rated. An examination of the balance due bills issued by respondent indicates the elimination of all originally applied discounts, the re-rating of

⁵(...continued)
Appendix B.

⁶ These documents were Willig Traffic Analysis forms prepared by Willig sales representatives (Bange Lynx affidavit Exhibit C and Bange Star affidavit Exhibits C and D).

⁷ The tariffs that have relevance to the claims against Lynx and Nationwide specifically apply to these two petitioners. The tariffs that have relevance to the claims against Alcan, Schulman, and certain of the claims against Costco apply to shippers that had previously been dismissed from this proceeding (Synsor) or were not parties to this proceeding. The Willig claims asserted against Alcan, Costco, and Schulman were for shipments originated by these non-party shippers that are directed against Alcan and Costco as consignees and against Schulman as the debtor or designated payee of the freight charges.

originally applied commodity and flat rates, and the application of higher minimum rates that result in charges substantially higher than those originally assessed.

Respondent's evidence consists of legal argument of counsel and declarations of Rodney Johnson, President of Trans-Allied Audit Co. Inc.⁸ Counsel contends that the facts submitted are insufficient to sustain an unreasonable practice finding and that petitioners have failed to demonstrate that the rates Willig here seeks to collect are unreasonable. He maintains that petitioners have not provided evidence sufficient to establish their reasonable reliance on the asserted negotiated rates.

In separate declarations directed to each of the petitioners, Mr. Johnson explains the process used in auditing the freight bills at issue. Each declaration includes a total amount claimed to be due from each petitioner, an attestation from Mr. Johnson of the accuracy of the balance due amounts claimed, and copies of the balance due bills issued to each of the respective petitioners.

⁸ Trans-Allied was the organization retained by the estate of Willig to audit freight undercharges for the 3-year period that preceded respondent's bankruptcy filing.

Set forth below is an information summary of the undercharge claims at issue based on respondent's balance due statements and the submissions of Mr. Bange and Mr. Johnson.

Summary: Balance Due Bills Issued by Respondent to Shippers

Shipper	Number of Shipments	Date of Shipment	Original Bill	Corrected Bill	Balance Due	Interest	Total Due
Schulman	19	01/08/93 - 05/09/94	4,255.67	8,677.61	4,421.94	383.83	4,805.77
Alcan	18	08/06/93- 05/13/94	7,156.90	16,915.23	9,758.33	843.26	10,601.59
Blount	39	10/19/92- 05/09/94	5,506.20	10,403.20	4,897.00	482.02	5,379.02
Costco	10	11/11/92- 03/08/94	4,615.52	53,522.83	48,907.31	5,558.80	54,466.11
Hehr	7	11/16/92- 08/09/93	2,305.58	6,067.29	3,761.71	406.04	4,167.75
Lynx	393	10/21/92- 05/17/94	90,498.82	231,690.28	141,191.46	13,104.16	154,295.62
Nationwide	73	10/21/92- 04/20/94	9,915.80	18,663.12	8,747.32	927.87	9,675.19
Star	41	04/05/93- 11/10/93	16,819.36	30,380.60	13,561.24	1,283.85	14,845.09
Travis	2	02/25/94- 03/04/94	1,270.00	7,763.76	6,493.76	557.26	7,051.02
Western	55	10/19/92- 05/12/94	4,059.68	7,339.87	3,280.19	291.93	3,572.12

DISCUSSION AND CONCLUSIONS

We will dispose of this proceeding under section 13711. Accordingly, we do not reach the other issues raised.⁹

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.”

It is undisputed that Willig no longer transports property. Accordingly, we may proceed to determine whether respondent’s attempts to collect undercharges (the difference between the applicable filed rate and the negotiated rate) are 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, the record contains copies of all the balance due freight bills issued to petitioners by Willig that include originally assessed charges, commodity rates, and charges to which discounts of 35 to 64% were applied that are consistently and substantially below the charges respondent is now attempting to collect. The record also contains copies of internal Willig documents containing recommendations to apply discounts and published tariffs providing for the application of discounts that conform with the percentage discounts applied in the original freight bills issued by respondent to six petitioners. 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. Mar. 31, 1997) (mem.) (finding that written evidence need not include the

⁹ Typically, a court hearing undercharge cases will direct the shipper to bring to the Board all defenses that have been raised in court; as a result, in addition to section 13711 issues, petitioners before the Board typically raise issues of contract carriage, rate applicability and rate reasonableness. When it is able to resolve a case fully on section 13711 grounds, however, the Board does not address those other more complex issues. See, e.g., Rhineland Paper Company v. The Bankruptcy Estate of Murphy Motor Freight Lines, Inc., No. 40837 (STB served Oct. 23, 1997). We will not address the other issues raised here because our section 13711 findings fully resolve the question of petitioners’ liability for the rates sought.

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 rates and that the rates were agreed upon by the parties).

In this proceeding, the evidence indicates that petitioners and Willig conducted business in accordance with agreed-to negotiated rates that were originally billed by Willig and paid by petitioners. The consistent application in the original freight bills of charges to which percentage discounts were applied that conform to percentage discounts referred to in internal Willig documents and published Willig tariffs, as well as assessed flat rates, commodity rates, and minimum rates that were substantially below the rates respondent here seeks to assess, support the unrefuted assertions of petitioners 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)].

In each of the matters raised in this proceeding, the evidence establishes that negotiated discount rates were offered to the petitioners by Willig; that petitioners reasonably relied on the offered rates in tendering their traffic to Willig; that Willig did not properly or timely file tariffs providing for such discount rates and has not entered into agreements for contract carriage; that the negotiated rates were billed and collected by Willig; and that Willig now seeks to collect additional payment based on higher rates filed in a tariff. Therefore, under 49 U.S.C. 13711, we find that it is an unreasonable practice for Willig to attempt to collect undercharges from the petitioners herein 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.

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 Dennis Montali

United States Bankruptcy Court for
the Northern District of California
P.O. Box 7341
San Francisco, CA 94120

Re: Case No. ND 95-33940-DM
Adversary Case Nos. listed in Appendix B

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

Vernon A. Williams
Secretary

APPENDIX A

Petitioners dismissed as parties to this proceeding by decision served June 15, 1998

Petitioner	Adversary Proceeding No.
(1) Agate Cove Enterprises d/b/a Sound Business Forms	96-3842-DM
(2) Ansul Fire Protection	96-3558-DM
(3) Avery Dennison Corporation	97-3416-DM
(4) B&S Supply	96-3566-DM
(5) Bayside Business Forms	96-3755-DM
(6) Block Graphics, Inc. f/k/a Medallion Envelope Co.	96-3701-DM
(7) Block Graphics, Inc. f/k/a Systems Distribution, Inc.	96-3848-DM
(8) Cal-Tab Systems, Inc.	96-3761-DM
(9) Central Valley Oak Dist.	96-3580-DM
(10) Chemithon Surface Finishing, Inc.	96-3764-DM
(11) Dataform Print Communications	96-3638-DM
(12) Duckback Products Inc.	96-3858-DM
(13) Durodyne, Inc.	96-3621-DM
(14) Eveready Battery Company, Inc.	96-3260-DM
(15) Federal Paper Board Company, Inc.	96-3263-DM
(16) FMC Corporation	96-3745-DM
(17) Gran'Pa Don's, Inc.	97-3378-DM
(18) Hollander Glass, Inc.	96-3677-DM
(19) Michelman, Incorporated	96-3707-DM
(20) National Starch & Chemical	96-3648-DM
(21) Republic Bag, Inc.	97-3380-DM
(22) Stody Company	96-3793-DM
(23) Synsor Corporation	97-3397-DM
(24) The Valspar Corporation	97-3209-DM
(25) Walter E. Nelson	96-3798-DM

APPENDIX B

Petitioners that remain as parties to this proceeding

Petitioner	Adversary Proceeding No.
(1) A. Schulman, Inc.	96-3669-DM
(2) Alcan Aluminum Corporation	96-3549-DM
(3) Blount Sporting Equipment	96-3571-DM
(4) Costco Wholesale Corporation	96-3702-DM
(5) Hehr International, Inc.	97-3075-DM
(6) Lynx Golf, Inc.	97-3144-DM
(7) Nationwide Papers	96-3717-DM
(8) Star Blends, Inc.	96-3793-DM
(9) Travis Industries, Inc.	97-3092-DM
(10) Western Nevada Supply Company	96-3692-DM