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SERVICE DATE - JANUARY 7, 1998

SURFACE TRANSPORTATION BOARD

DECISION

STB No. 41710

BRISTOL-MYERS SQUIBB COMPANY, MEAD JOHNSON & COMPANY,
AND CLAIROL, INC.--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF ST. JOHNSBURY TRUCKING COMPANY, INC.

Decided: December 15, 1997

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 a court action in the United States District Court for the Southern District of New York in *St. Johnsbury Trucking Co., Inc. v. Mead Johnson & Company, et al.*, 95 Civ 5520, Adv. No. 95-9596A. The court proceeding was instituted by St. Johnsbury Trucking Co., Inc. (St. Johnsbury or respondent),¹ a former motor common and contract carrier, to collect undercharges from Bristol-Myers Squibb Company (Bristol-Meyers), and two of its wholly-owned subsidiaries: Mead Johnson & Company (Mead), and Clairol, Inc. (Clairol) (collectively referred to as petitioners). St. Johnsbury seeks undercharges of \$434,376.49 (plus interest) allegedly due, in addition to amounts previously paid, for the transportation of 4,944 shipments of various commodities between May 2, 1992 and March 8, 1993. All of the shipments moved from or to the facilities of Bristol-Myers and Mead, both of which are located at Edison, NJ, and nearly all involve a dispute over the application of a rate contained in a single St. Johnsbury tariff item.² By order dated March 29, 1996, the district court stayed the proceeding to enable referral of several issues,

¹ On June 15, 1993, St. Johnsbury filed for bankruptcy under Chapter 11 of the United States Bankruptcy Code, in the United States Bankruptcy Court for the Southern District of New York, Case No. 93 B 43136 (FGC).

² Eleven claims do not relate to the primary dispute, but involve the allegation that Saturday pickup charges should have been applied. Our finding that freight bills establish an agreement between the parties to charge a negotiated rate (see pp. 3-5, *infra*) as to the primary dispute applies as well to these shipments.

including tariff applicability, rate reasonableness, and unreasonable practice, to the Board for determination.³

Pursuant to the court order, petitioners, on May 10, 1996, filed a verified petition for declaratory order requesting that the Board resolve the issues referred to by the court. By decision served May 22, 1996, the Board issued a procedural schedule. St. Johnsbury submitted its reply on June 28, 1996, and petitioners filed their rebuttal statement on July 11, 1996.

Petitioners assert that respondent's attempt to collect the claimed undercharges constitutes an unreasonable practice under section 13711.⁴ Petitioners maintain that written evidence demonstrates that the freight charges originally billed by St. Johnsbury and paid by petitioners were rates mutually agreed upon by the parties, that the payments they made were accepted as payment in full, and that petitioners relied upon the agreed-upon rates in tendering its traffic to St. Johnsbury to the exclusion of services provided by other carriers. Petitioners also assert that the rates which St. Johnsbury is now attempting to collect are unreasonable.

The facts and circumstances of the case are not in dispute. Prior to May 2, 1992, St. Johnsbury provided transportation service to all three petitioners under rates published in Item 2645 of its tariff ICC SJTC 235 — a “shipper-coded” tariff. The rates in Item 2645 applied “only for the account of 900487, 900126.” According to documents submitted by petitioners, account number 900487 was assigned to Bristol-Myers and Mead, and account number 900126 was assigned to Clairol.

On April 9, 1992, Carol O’Gorman, Clairol’s Supervisor Freight Payment, wrote to Carl Piemonte, St. Johnsbury’s Corporate Accounts, objecting to the use of account codes. She wrote that “We are requiring all carriers which publish rates for Clairol to indicate: ‘Applicable only for the account of CLAIROL, INC.’” She asked that the changes be made within 30 days and that copies of revised tariff be sent to her.

Effective May 2, 1992, St. Johnsbury amended Item 2645 to apply “only for the account of Clairol, Inc.,” and supplied a copy of the revision to Clairol. As a result, the rates in Item 2645, on their face, no longer applied to shipments by Bristol-Myers and Mead. However, St. Johnsbury continued to rate Bristol-Myers and Mead shipments using the rates contained in that item until March 8, 1993. At that time, St. Johnsbury entered into a contract with Bristol-Myers, Mead and Clairol to provide service to all of them under rates comparable to those published in Item 2645.

³ The court order was issued in a consolidated proceeding captioned *St. Johnsbury Trucking Co., Inc. v. Morrison Knudsen Co., Inc.*, bearing the docket number 95 Civ. 1344 (SS).

⁴ Some of St. Johnsbury’s claims included an additional amount for intrastate movements. These claims were subsequently dismissed. See *St. Johnsbury Trucking Co., Inc. v. Mead Johnson*, 199 B.R. 84 (S.D.N.Y. 1996).

The correspondence between Clairol and St. Johnsbury did not refer to the effect of the change in Item 2645 on Bristol-Myers or Mead. Petitioners surmise that Mr. Piemonte was confused and incorrectly excluded Bristol-Myers and Mead. They attribute the confusion to the fact that Mr. Piemonte was not assigned to those accounts. Moreover, the St. Johnsbury account manager responsible for Bristol-Myers and Mead did receive a copy of the letter transmitting the tariff revision to Clairol.

Respondent maintains that the rates and charges initially assessed were not authorized by an applicable filed tariff in effect at the time of the shipments. It relies on a verified statement of Stephen L. Swezey, Senior Transportation Consultant for Carrier Service Inc., the auditor authorized by the bankruptcy court to provide rate audit and collection services on behalf of respondent, who submitted several representative balance due bills. Mr. Swezey asserts that after the amendment to Item 2645, its provisions no longer applied to Bristol-Myers and Mead. Respondent also contends that its attempt to collect undercharges is not an unreasonable practice, because there is no evidence that the rates originally charged Bristol-Myers and Mead were negotiated.

DISCUSSION AND CONCLUSIONS

We will 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.”

It is undisputed that St. Johnsbury no longer transports property.⁵ 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

⁵ Prior to filing for bankruptcy, St. Johnsbury held motor common and contract carrier operating authority, issued by the Interstate Commerce Commission under various sub-numbers of No. MC-108473.

evidence of such agreement.” Thus, section 13711(a) cannot be satisfied unless there is written evidence of a negotiated rate agreement.

Here, Mr. Swezey has submitted a representative sample of revised freight bills. The revised freight bills indicate that the rates originally charged were consistently and substantially below those that respondent is here seeking to assess. The fact that no tariff existed covering shipments for Bristol-Myers and Mead, rather than undermining petitioners argument, tends to support it. The absence of a lawful tariff, together with freight bills indicating the rate actually agreed to by the parties, establishes written evidence of an agreement by the parties to charge something other than the tariff rate. 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 rates and that the rates were agreed upon by the parties).

In this case, the evidence indicates that the original rates assessed by St. Johnsbury and paid by petitioners were rates agreed to in negotiations between the parties. The original freight bills issued by respondent for the subject shipments support petitioner’s contentions and reflect the existence of negotiated rates. Bristol-Myers and Mead assert that they had an agreement with St. Johnsbury to pay the negotiated rates that in fact continued to be billed. Though Bristol-Myers and Mead appear to have been mistakenly excluded from Item 2645, St. Johnsbury, by its billing the rates contained in that item, confirmed its agreement to charge those rates.⁶

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 evidence establishes that a negotiated rate was offered to petitioners by St. Johnsbury; that petitioners reasonably relied on the offered rate in tendering its traffic to St. Johnsbury; that the negotiated rate was billed and collected by St. Johnsbury; and that St. Johnsbury

⁶ Although the agreement to charge Bristol-Myers and Mead the rates contained in Item 6245 was not embodied in a tariff (as was the agreement as to Clairol), that does not in any way imply that St. Johnsbury had not also agreed to charge the same rates to Bristol-Myers and Mead. Its agreement to do so is confirmed by the original freight bills issued to Bristol-Myers and Mead and by the contract containing equivalent rates to which all parties subsequently agreed.

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 St. Johnsbury to attempt to collect undercharges from petitioners 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 the service date.
3. A copy of this decision will be mailed to:

The Honorable Sonia Sotomayor
United States District Court for
the Southern District of New York
500 Pearl Street, Room 1340
New York, NY 10038

Re: 95 Civ 5520,
Adv. No. 95-9596A

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary