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SERVICE DATE - DECEMBER 5, 1997

SURFACE TRANSPORTATION BOARD¹

DECISION

No. 41453

MAKITA U.S.A. INC.--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF
TSC EXPRESS COMPANY

Decided: November 25, 1997

We find that the collection of undercharges sought in this proceeding would be an unreasonable practice under former 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 this proceeding.

BACKGROUND

This matter arises out of a court action in the United States District Court for the Northern District of Georgia, Atlanta Division, in *L. Lou Allen, Trustee on Behalf of The Bankruptcy Estate of TSC Express Company v. Makita U.S.A. Inc.*, Civil Action No. 1:93-CV-1238-FMH. The court proceeding was instituted by L. Lou Allen, Trustee on behalf of the Bankruptcy Estate of TSC Express Company (TSC or respondent), a former motor common and contract carrier, to collect undercharges from Makita U.S.A. Inc. (Makita or petitioner). TSC seeks undercharges of \$27,768.66 (plus interest) allegedly due, in addition to amounts previously paid, for services rendered in transporting 652 less-than-truckload (LTL) shipments of electric hand tools, parts for electric hand tools, printed materials, display stands, and related items, between May 13, 1988, and April 16, 1990. The shipments were transported from Makita's facility located in Atlanta, GA, to

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points in Alabama, Florida, and South Carolina. By order dated July 28, 1994, the court stayed the proceeding and referred the parties to the ICC to seek resolution of the issues raised.²

Pursuant to the court order, Makita, on August 25, 1994, filed a petition for declaratory order requesting the ICC to resolve issues of tariff applicability, unreasonable practice, and rate reasonableness. By decision served September 12, 1994, a procedural schedule was established for the submission of evidence on non-rate reasonableness issues. Petitioner filed its opening statement on January 3, 1995. Respondent filed a reply statement on February 2, 1995, and petitioner filed its statement in rebuttal on February 22, 1995.

Makita asserts that the shipments at issue were rated in accord with respondent's lawfully filed tariffs, that respondent's attempt to collect additional freight undercharges constitutes an unreasonable practice under section 2(e) of the NRA, and that the rates respondent seeks to assess are unreasonable.

Makita supports its argument with an affidavit from Michael Bange of Champion Transportation Services, Inc., a transportation consultant retained by petitioner. Mr. Bange conducted an audit of the balance due bills issued by respondent and provided an analysis of respondent's undercharge claims. Mr. Bange states that nearly all of the original freight bills for the subject shipments show on their face the application of a 52% discount off the applicable class rate.³ Included among the attachments to Mr. Bange's affidavit is a representative sample of 49 "balance due" freight bills containing originally issued freight bill data as well as "corrected" balance due amounts (Exhibit A). Each of the representative freight bills indicates the application of a 52% discount off the originally assessed rate. Mr. Bange's affidavit also includes (1) a copy a letter, dated June 25, 1987, from TSC Account Representative Charles Robinson to Greg Stevens of Makita, confirming that TSC had agreed to provide a 52% discount for all Makita interstate shipments handled directly by TSC (Exhibit I) and (2) a TSC Discount Plan Participation Request Form, dated July 10, 1989, signed by representatives of TSC and Makita providing for a 52% discount on direct (single line) shipments and joint line shipments to points in Florida, subject to minimum charges (Exhibit D).

TSC argues that it did not have an applicable discount tariff for Makita's traffic until July 10, 1989.⁴ It further contends that section 2(e) of the NRA is inapplicable to bankrupt carriers, may

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not be applied retroactively, and is unconstitutional.⁵ Respondent submits as part of its reply the verified statement of Stephen L. Swezey, Senior Transportation Consultant for Carrier Service, Inc.,

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1052 of TSCP 601. However, it argues that this tariff was not applicable to Makita's traffic during the time period at issue because Makita did not provide TSC with the requisite written notification of participation in that tariff until July 10, 1989. (TSC Reply statement at 3). We note that, while TSC apparently concedes that the discount rate was applicable to shipments transported after July 10, 1989, it appears from Exhibit J of Mr. Bange's affidavit (at 13 and 14) that TSC does claim undercharges for four shipments transported subsequent to that date (July 31, 1989, August 8, 1989, December 29, 1989, and March 16, 1990).

⁵ As noted, the judge in the underlying proceeding here has already determined that TSC's arguments as to the applicability of the NRA to bankrupt carriers are without merit. Additionally, 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 TSC. See *Whitaker v. Power Brake Supply, Inc.*, 68 F.3d 1304 (11th Cir. 1995) (*Power Brake*); *Jones Truck Lines, Inc. v. Whittier Wood Products, Inc.*, 57 F.3d 642 (8th Cir. 1995) (*Whittier Wood*); *In the Matter of Lifschultz 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 Product's, 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. (D. Kan. 1994).

(CSI).⁶ Mr. Swezey states that the balance due bills issued to Makita eliminated the discounts applied in the original freight bills because TSC did not have an applicable discount in effect at the time the time subject shipments were transported.

DISCUSSION AND CONCLUSIONS

We dispose of this proceeding under section 2(e) of the NRA. Accordingly, we do not reach the other issues raised.

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 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."⁷

It is undisputed that TSC no longer transports property. Accordingly, we may proceed to determine whether TSC's attempt to collect undercharges (the difference between the applicable filed tariff rate and the rate originally collected) 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, the record contains a June 1987 letter from TSC confirming an agreement to provide a 52% discount when handling Makita shipments direct; a representative sample of 49 "balance due" freight bills indicating the consistent application of a discount off originally assessed rates; and a TSC Discount Plan Participation Request Form, dated July 10, 1989, providing for a 52% discount on direct (single line) shipments and joint line shipments to points in Florida. We find this evidence sufficient to satisfy the written evidence requirement. E.A. Miller, Inc.--Rates and Practices of Best,

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

In this case the evidence is substantial that the parties conducted business in accordance with agreed-to negotiated discount rates. While the rates originally billed by the carrier and paid for by the shipper may not always have been the rates set forth in the assertedly applicable tariff provisions,⁹ the June 1987 letter from TSC and the July 10, 1989 TSC Discount Plan Participation

⁸ TSC, at pp. 13-14 of its reply statement, 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 TSC, contemplates that freight bills reflecting the negotiated rate were issued by the carrier, and the Board must examine these freight bills to determine if section 2(e) has been satisfied. TSC 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 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.

⁹ TSC argues that its claimed undercharges have been properly assessed because (at least prior to July 10, 1989) Makita had not submitted the participation letter required to implement the applicable discount set forth in Tariff ICC TSCP 601. That tariff, which was on file with the ICC, is a "trigger" or "range" tariff that provides for a range of discounts. The application of the discount is
(continued...)

Request Form confirm the intent and agreement of the parties to have discounts applied to movements of Makita traffic. The consistent application in the original freight bills of discounts which, with the exception of the fifteen shipments described in footnote 3, were in complete conformity with the discount level referred to in the June 1987 letter and the 1989 participation request reflect the existence of negotiated rates.

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 upon 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, respondent concedes (respondent's statement at 11) that if section 2(e) is read to apply to this case, it will preclude the Trustee from collecting on his claims. We agree. The evidence establishes that a negotiated rate was offered to Makita by TSC; that Makita, reasonably relying on

⁹(...continued)

triggered by specified action, such as the shipper's filing of a letter of participation with the carrier. TSC argues that, absent notification, the discount rate is not triggered, and the undiscounted class rate is applicable.

In light of section 2(e), however, whether Makita submitted a participation letter prior to July 10, 1989, and thus complied with the specific conditions of TSC's trigger tariff is not a determining factor. Section 2(e)'s availability is not limited to situations where the originally billed rate was unfiled; nor is its use precluded when a condition precedent for an otherwise applicable filed tariff has not been satisfied. Rather, in evaluating whether a carrier's collection would be an "unreasonable practice" under section 2(e), the Board must consider, *inter alia*, whether the shipper was offered a rate by the carrier "other than the rate legally on file with the Board *for the transportation service.*" Section 2(e)(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, which TSC alleges is the case here, 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 the NRA." *American Freight Systems, Inc. v. ICC* 179 B.R. 952, 957 (Bankr. D. Kan. 1995). Here, if no participation letter was actually submitted by Makita prior to July 10, 1989, then Tariff ICC TSCP 601 may not have been applicable to the involved shipments prior to that date. If that is the case, however, then TSC offered a rate to Makita that was not legally on file for those shipments, and section 2(e) is applicable.

the offered rate, tendered the subject traffic to TSC; that the negotiated rate was billed and collected by TSC; and that TSC now seeks to collect additional payment based on a higher rate filed in a tariff. Therefore, under former 49 U.S.C. 10701(a) and section 2(e) of the NRA, we find that it is an unreasonable practice for TSC to attempt to collect undercharges from Makita 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 the service date.
3. A copy of this decision will be mailed to:

The Honorable Frank M. Hull
United States District Court
for the Northern District of Georgia,
Atlanta Division
2321 U.S. Courthouse
75 Spring St., S.W.
Atlanta, GA 30303-3361

Re: Civil Action No. 1:93-CV-1238-FMH

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

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⁸ TSC, at pp. 13-14 of its reply statement, 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 TSC, contemplates that freight bills reflecting the negotiated rate were issued by the carrier, and the Board must examine these freight bills to determine if section 2(e) has been satisfied. TSC 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 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.

⁹ TSC argues that its claimed undercharges have been properly assessed because (at least prior to July 10, 1989) Makita had not submitted the participation letter required to implement the applicable discount set forth in Tariff ICC TSCP 601. That tariff, which was on file with the ICC, is a "trigger" or "range" tariff that provides for a range of discounts. The application of the discount is
(continued...)

Request Form confirm the intent and agreement of the parties to have discounts applied to movements of Makita traffic. The consistent application in the original freight bills of discounts which, with the exception of the fifteen shipments described in footnote 3, were in complete conformity with the discount level referred to in the June 1987 letter and the 1989 participation request reflect the existence of negotiated rates.

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 upon 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, respondent concedes (respondent's statement at 11) that if section 2(e) is read to apply to this case, it will preclude the Trustee from collecting on his claims. We agree. The evidence establishes that a negotiated rate was offered to Makita by TSC; that Makita, reasonably relying on

⁹(...continued)

triggered by specified action, such as the shipper's filing of a letter of participation with the carrier. TSC argues that, absent notification, the discount rate is not triggered, and the undiscounted class rate is applicable.

In light of section 2(e), however, whether Makita submitted a participation letter prior to July 10, 1989, and thus complied with the specific conditions of TSC's trigger tariff is not a determining factor. Section 2(e)'s availability is not limited to situations where the originally billed rate was unfiled; nor is its use precluded when a condition precedent for an otherwise applicable filed tariff has not been satisfied. Rather, in evaluating whether a carrier's collection would be an "unreasonable practice" under section 2(e), the Board must consider, *inter alia*, whether the shipper was offered a rate by the carrier "other than the rate legally on file with the Board *for the transportation service.*" Section 2(e)(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, which TSC alleges is the case here, 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 the NRA." *American Freight Systems, Inc. v. ICC* 179 B.R. 952, 957 (Bankr. D. Kan. 1995). Here, if no participation letter was actually submitted by Makita prior to July 10, 1989, then Tariff ICC TSCP 601 may not have been applicable to the involved shipments prior to that date. If that is the case, however, then TSC offered a rate to Makita that was not legally on file for those shipments, and section 2(e) is applicable.

the offered rate, tendered the subject traffic to TSC; that the negotiated rate was billed and collected by TSC; and that TSC now seeks to collect additional payment based on a higher rate filed in a tariff. Therefore, under former 49 U.S.C. 10701(a) and section 2(e) of the NRA, we find that it is an unreasonable practice for TSC to attempt to collect undercharges from Makita 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 the service date.
3. A copy of this decision will be mailed to:

The Honorable Frank M. Hull
United States District Court
for the Northern District of Georgia,
Atlanta Division
2321 U.S. Courthouse
75 Spring St., S.W.
Atlanta, GA 30303-3361

Re: Civil Action No. 1:93-CV-1238-FMH

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary