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SERVICE DATE - FEBRUARY 23, 1998

SURFACE TRANSPORTATION BOARD¹

DECISION

No. 41634

NATIONAL BEEF PACKING COMPANY, LP
--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF J.H. WARE TRUCKING, INC.

Decided: February 11, 1998

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). Accordingly, 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 Missouri, Eastern Division, in *J.H. Ware Trucking, Inc., Debtor v. National Beef Packing Company, LP.*, No. 4:93CV1894SNL (TIA). The court proceeding was instituted by The Plan Committee on behalf of J.H. Ware Trucking, Inc. (Ware or respondent), a former motor common and contract carrier,² to collect undercharges from National Beef Packing Company, LP (National Beef or petitioner). Ware seeks undercharges of \$321,887.17 (plus interest and costs)

¹ 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. While this decision generally applies the law in effect prior to the Act, new 49 U.S.C. 13711(g) provides that new section 13711 applies to cases pending as of January 1, 1996, and hence section 13711 will be applied to the factual situation presented in this proceeding. Unless otherwise indicated, citations are to the former sections of the statute.

² On May 20, 1991, Ware filed for bankruptcy under Chapter 11 of the United States Bankruptcy Code. From May 20, 1991, to April 14, 1992, Ware operated as a debtor-in-possession under Chapter 11. On April 14, 1992, a second amended plan of liquidation was confirmed pursuant to which causes of action belonging to Ware were authorized to be brought in the name of The Plan Committee, through Wendi S. Alper, Distribution Agent, on behalf of Ware.

allegedly due, in addition to amounts previously paid for services rendered in transporting 1,848 shipments of Freight All Kinds (FAK) from petitioner's facility at Liberal, KS, to points in 24 states³ between June 8, 1988, and July 13, 1991.⁴ By order dated September 18, 1995, the court stayed the proceeding and directed petitioner to submit issues of contract carriage and rate reasonableness to the ICC for determination.

Pursuant to the court order, National Beef, on October 17, 1995, filed a petition for declaratory order requesting the ICC to resolve issues of contract carriage, tariff participation, unreasonable practice, and rate reasonableness. By decision served October 25, 1995, a procedural schedule was established for the submission of evidence on non-rate reasonableness issues. On November 13, 1995, Ware filed an answer to the National Beef petition. National Beef filed its opening statement on September 22, 1997. Ware did not file a reply.

Petitioner asserts that Ware's attempt to collect the additional charges claimed constitutes an unreasonable practice under section 2(e) of the NRA and that the rates respondent seeks to assert are unreasonable. National Beef further asserts that the filed tariffs that provide the basis for Ware's undercharge claims are void and unenforceable in that they depend on mileage governed by the Household Goods Bureau (HGB) Mileage Guide, a mileage tariff in which Ware is not a common carrier participant.⁵ With respect to those shipments subject to Count II, petitioner notes that respondent has rerated these shipments in the same manner and in accord with the same tariffs as was done in its rerating of the Count I shipments. Petitioner states that, as respondent has failed to provide any evidence to support its contract carriage allegations, it will not differentiate between Count I and Count II shipments in addressing the issues raised in this proceeding.

National Beef supports its argument with an affidavit from Michael Bange, president of Champion Transportation Services, Inc., a transportation consultant retained by petitioner. Attached

³ Kansas is included among the 24 named destination states. One shipment referenced in CTS Claim No. 81430 as CTS file No. 8178 (Exhibit B-2 to the Bange affidavit) refers to a shipment destined to Kansas City, KS. Although respondent has characterized all of the subject shipments as interstate in nature, the record in this proceeding provides no basis for determining whether movements between points in Kansas are interstate or intrastate movements. As the Board has no jurisdiction over intrastate shipments, this decision has applicability solely to interstate movements.

⁴ The court complaint contained two counts. Under Count I, Ware seeks \$319,352.39 in additional freight charges for common carrier services rendered in transporting 1,841 shipments between June 8, 1988, and July 13, 1991. Under Count II, Ware seeks \$2,534.78 in additional freight charges for services rendered as a contract carrier in transporting 7 shipments between September 10, 1990, and October 1, 1990.

⁵ Specifically, Mileage Guide No. ICC HGB 107 and 107-A, in which Ware's only listing is that of a contract carrier participant.

to Mr. Bange's affidavit are: (1) statement of claim forms which list each of the subject shipments, the charge originally assessed and paid for each shipment, the total shipment charge sought in the Ware undercharge claim, and the asserted balance due for the shipment (Exhibit A), and (2) representative samples of the "balance due" bills issued by respondent that reflect originally issued freight bill data, as well as the "corrected" balance due amounts (Exhibits B and C). Mr. Bange states that the revised freight charges which respondent seeks to assess are, in most instances, substantially higher than the amounts originally billed by Ware. From his examination of the complaint filed by respondent in the court proceeding and the "balance due" bills, Mr. Bange maintains that petitioner was offered a freight rate that was not properly or timely filed in a tariff; that petitioner tendered its freight to Ware in reliance upon the offered rate; and that the amounts originally billed by Ware were paid by petitioner. Mr. Bange is of the opinion that these circumstances provide the basis for a finding of unreasonable practice.

Respondent, in its answer, states that, with respect to the shipments identified in Count 1, in most instances, the tariff *rate* is not in dispute. It contends, however, that the applicable rate included accessorial charges contained in Tariffs ICC WARJ 460A and ICC WARJ 100A that were not originally assessed or paid.⁶ As to the Count II shipments, respondent maintains that these were contract carrier movements for which accessorial charges under the contract had not been properly assessed or paid.⁷ Ware further contends that the Board has no authority, under the court order, to consider any matters other than whether the shipments at issue moved in contract or common carriage and if in common carriage whether the rates respondent here seeks to assess are reasonable.⁸

DISCUSSION AND CONCLUSIONS

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

⁶ Respondent's contentions as set forth in this decision are derived from information and materials contained in the petitioner's opening statement as well as respondent's filed answer.

⁷ Respondent contends that the contract between the parties established the charges due respondent, but that petitioner failed to pay the full amount due under the contract.

⁸ We disagree with respondent's contentions with respect to the court order. We are not limited to deciding only those issues explicitly raised by the parties, but may choose to decide cases on other dispositive grounds within our jurisdiction. *Cf. Amoco Fabrics and Fibers Co. v. Max C. Pope, Trustee of the Estate of A.T.F. Trucking*, No. 40526 (ICC served Feb. 26, 1992). Thus, we have jurisdiction to issue a ruling under section 2(e) of the NRA here. *The Ormond Shops, Inc., Thomas J. Lipton, Inc. and Lionel Leisure, Inc. v. Oneida Motor Freight, Inc. Debtor-in-Possession, and Delta Traffic Service, Inc.*, No. MC-C-30156 (ICC served Apr. 20, 1994); and *Have a Portion, Inc. v. Total Transportation, Inc., and Thomas F. Miller, Trustee Of The Bankruptcy Estate of Total Transportation, Inc.*, No. 40640 (ICC served Feb. 7, 1995).

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.”

Here, it is undisputed that Ware is no longer an operating carrier.⁹ Accordingly, we may proceed to determine whether Ware’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 2(e) determination. Section 2(e)(6)(B) 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 2(e) cannot be satisfied unless there is written evidence of a negotiated rate agreement.

Here, petitioner has submitted representative balance due bills indicating the rates originally assessed by respondent that were consistently and substantially below those that respondent is here attempting to collect.¹⁰ We find this evidence sufficient to satisfy the written evidence requirements of section 2(e). *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 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

⁹ Board records disclose that Ware held common carrier and contract carrier authority under Docket No. MC-139973 until the certificates and permits were revoked on July 27, 1992.

¹⁰ The representative balance due bills submitted by Bange, many of which are not legible, contain higher rerated individual shipment freight charges that exceed the originally assessed charges by amounts that range from \$75.00 (CTS Claim No. 81416, file No. 7636) to well over \$2,000 (CTS Claim No. 81486, file No. 9506).

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)].

The evidence filed in this case, which is un rebutted, reflects a pattern that we have seen again and again in this type of case: National Beef was offered a negotiated rate by Ware; National Beef reasonably relied on the offered rate in tendering its traffic to Ware; the negotiated rate was billed and collected by Ware; and Ware 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 Ware to attempt to collect undercharges from National Beef for transporting the shipments at issue in this proceeding.¹¹

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 Stephen N. Limbaugh
United States District Court for
the Eastern District of Missouri, Eastern Division
U.S. Court & Custom House
1114 Market Street, Room 315
St. Louis, MO 63101

Re: No. 4:93CV1894SNL (TIA)

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

¹¹ Although our decision here is based on our finding under section 2(e) of the NRA, we note that petitioner's allegation that Ware's undercharge claims are invalid because it was not a common carrier participant in the mileage guide on which its filed tariffs are based is not without basis. *See Security Services, Inc. v. Kmart Corp.*, 114 S. Ct. 1701 (1994).