28937 SERVICE DATE - AUGUST 12, 1998
EB

SURFACE TRANSPORTATION BOARD

DECISION

STB No. 42024

PHILIPS LIGHTING CO.—PETITION FOR DECLARATORY ORDER—
CERTAIN RATES AND PRACTICES OF J. K. HUTCH, INC.

Decided: August 6, 1998

This proceeding arises out of the efforts of J.K. Hutch, Inc. (Hutch or respondent) to collect undercharges for certain transportation services performed on behalf of Philips Lighting Co. (Philips or petitioner) in a matter pending before the Superior Court of New Jersey, Law Division, Somerset County in J.K. Hutch, Inc. v. Philips Lighting Co., Docket No. SOM-L-408-96. Hutch ceased operations on April 19, 1994, and is no longer transporting property.

Hutch instituted the court proceeding to collect undercharges based on the difference between its applicable filed tariff rate allegedly due for services rendered in transporting 918 shipments between February 8, 1994, and April 19, 1994, and its originally assessed discounted contract rate specified in an assertedly invalid contract (Count 1). The court action also included one count of alleged fraud for the failure to include the weight of required pallets in the bills of lading issued by Philips,[1] two counts of breach of contract, one count of intentional interference with business/contractual relations, and one count of breach of the covenant of good faith and fair dealing (Counts 2 through 6) for which compensatory and punitive damages were sought. Hutch subsequently withdrew its Count 1 filed tariff rate undercharge claim. By order dated March 7, 1997, the court stayed the proceeding and referred the matter to the Surface Transportation Board (Board) for determination of the issues.

Pursuant to the court order, Philips, on April 18, 1997, filed a petition for declaratory order requesting the Board to resolve issues of unreasonable practice, interstate and intrastate commerce, rate reasonableness, and contract carriage. The matter was designated as STB No. 41999, Philips Lighting Co.—Petition for Declaratory Order—Certain Rates and Practices of J. K. Hutch, Inc., and a procedural schedule for the submission of evidence was established. In the course of the evidentiary submissions, Hutch advised that it was withdrawing its undercharge claims against Philips based on its filed tariff rate (Count 1 of the court-filed complaint) and requested the Board to issue a new procedural schedule limiting the matters to be considered to the fraud issue.[2] In a

---

[1] Hutch relied on the total weights stated in the bills of lading generated by Philips in originally billing Philips at specified weight/mileage rates for services rendered.

[2] Hutch further averred that the remaining issues were subject to state law and were not

(continued...)

decision served July 30, 1997, the Board indicated that the Hutch withdrawal of its filed rate undercharge claim raised questions as to the Board's jurisdiction over the subject matter of this proceeding.[3] The Board directed the parties to show cause why the proceeding should not be dismissed. Neither party responded to the show cause directive. In a decision served September 24, 1997, the Board concluded that the parties, by their silence, must be deemed to have agreed that the issues may be resolved without a determination by the Board and dismissed the proceeding.

On December 10, 1997, Philips filed a petition for declaratory order in this proceeding requesting the Board to resolve issues of interstate or intrastate commerce, contract carriage, unreasonable practice, and rate reasonableness.[4] By decision served December 17, 1997, the Board established a procedural schedule for the submission of evidence and directed Hutch to supply Philips with tariff and other documentation required by Vertex Corp.—Pet. for Decl. Order—Rates and Practices, 9 I.C.C.2d 688 (1993), modified at 10 I.C.C.2d 367 (1994) (Vertex).

On January 7, 1998, Hutch filed a motion to dismiss this proceeding, contending that the matter is currently pending in the Superior Court of New Jersey; that the Board previously addressed the issues raised by petitioner in STB No. 41999; and that Philips has not shown material error, new evidence, or substantially changed circumstances to warrant reconsideration of the prior decision. Hutch asserts that, following the Board's decision to dismiss the petition filed in STB No. 41999, the New Jersey court reopened its proceeding and directed that the matter be assigned for mandatory, non-binding arbitration. The arbitration, which was held on December 10, 1997, resulted in a $626,000 award in favor of Hutch. Hutch states that Philips has appealed the arbitration award and has requested a trial de novo.

Hutch asserts that the New Jersey court has not referred this matter back to the Board. Respondent maintains that it is not now seeking to collect filed tariff rates, nor are any of its claims premised on a "misclassification" of goods as alleged by petitioner. Hutch contends that the subject

---

[2](...continued)
within the Board's purview.

[3] Specifically, the Board stated:

> In view of the determination by Hutch to withdraw its filed rate undercharge claim and limit its claim to allegations of shipper fraud based on a contractual agreement, Board jurisdiction over this matter is questionable. In withdrawing its claim based on its filed tariff rate, Hutch admits that it may not assert that undercharges are due it under the filed rate. What remains is Hutch's claim that Philips committed fraud in connection with billings for shipments under a contract between Hutch and Philips. Issues involving allegations of fraud and interpretation of contracts may be resolved by the court without a determination by the Board.

[4] Philips acknowledged that it had previously petitioned for similar relief in the proceeding dismissed in STB No. 41999.

petition is frivolous, not based upon reasonable inquiry, and was filed to interfere with the authority and jurisdiction of the court. Hutch further contends that Philips was aware of the Board's show cause directive in STB No. 41999, did not object to the dismissal of that proceeding, and is here simply reiterating issues previously decided by the Board.

In its reply filed February 9, 1998, in opposition to the motion to dismiss, Philips asserts that the pending matter presents issues of contract carriage and rate reasonableness that, pursuant to the Board's primary and exclusive jurisdiction, must be addressed by the Board.[5] Philips supports its contention with an affidavit from Michael Bange, president of Champion Transportation Services, Inc., a transportation consultant retained by petitioner. Mr. Bange conducted an audit and analysis of the "balance due" claims of respondent and examined and reviewed various documents submitted in the underlying court action and the subject proceeding before the Board. Mr. Bange maintains that the principal and threshold transportation issue in this proceeding involves the nature of the carriage performed by Hutch. He concludes that no valid contract existed between the parties and that Hutch acted in the capacity of a common carrier in providing transportation services to Philips. Mr. Bange asserts that, to the extent that Hutch may have any claim against Philips for damages, the claim would have to be based on its filed tariff, ICC HJKI 200. He further contends that, since the rates originally charged by Hutch were lower than the rates set forth in its published tariff, the originally assessed rates were negotiated rates subject to the unreasonable practice defense of the Negotiated Rates Act (now codified at 49 U.S.C. 13711).

In response to the Philips reply, Hutch contends that, having withdrawn its filed tariff undercharge claim, a determination by the Board as to whether Hutch rendered its transportation services as a common or contract carrier or whether the collection of undercharges would be an unreasonable practice under section 13711 would be irrelevant and a waste of Board resources. Hutch asserts further that the issues to be resolved are whether a contractual relationship existed between the parties and whether Hutch is entitled to damages for its claims based on that relationship. These issues, it argues, are questions of contract law to be resolved by the court.

By decision served February 20, 1998, this proceeding was held in abeyance pending disposition of the Hutch motion to dismiss.

DISCUSSION AND CONCLUSIONS

---

[5] Petitioner also contends that Hutch has failed to provide the Vertex information and documentation required by the December 17 decision. In a reply filed on February 26, 1998, Hutch asserts that it has already supplied all documents and information in its possession to Philips and that Philips has previously acknowledged that it is in possession of the bills of lading, invoices, billing documents, and records. Hutch further notes that the Vertex information is relevant to a filed tariff rate undercharge claim and that its filed tariff rate undercharge claim has been withdrawn.

We will grant the motion to dismiss. We agree with Hutch that Philips has failed to provide justification for Board involvement in this dispute. In STB No. 41999, Philips was provided an opportunity to show cause why the issues raised in its dispute with Hutch require Board determination. Rather than file a timely response to the Board's directive, Philips simply allowed its opportunity to lapse, with the result that the matter was returned to the active docket of the New Jersey court. Subsequently, after the court instituted proceedings in accordance with New Jersey court rules, petitioner filed a new petition with the Board raising the same issues that were posed in STB No. 41999.

As was indicated in our decisions issued in STB No. 41999, had Hutch not withdrawn its filed rate undercharge claims, there would have been no question as to our jurisdiction to consider the matter, particularly with respect to determining whether the collection of undercharges would be an unreasonable practice under 49 U.S.C. 13711. However, by withdrawing its claim for undercharges based on the filed rate doctrine, Hutch conceded the issue of undercharges to Philips and attempted to pursue Board consideration of the pallet weight fraud issue. Resolution of the fraud issue does not require a determination of the contract or common carrier nature of the transportation services performed by Hutch.

We agree with Hutch that the court can resolve questions of fraud, breach of contract, intentional interference with business/contractual relations, and breach of the covenant of good faith and fair dealing for which it seeks compensatory and punitive damages. These issues are questions of law which can be resolved by the court without a determination by the Board.

We further note that the court has not again referred the matter to the Board, but has apparently decided to go forward to resolve the issues raised in Hutch's complaint. As indicated above, the dispute has been submitted to arbitration, and Philips has sought a trial de novo. In these circumstances, we will not intrude on the court's processing of this matter. Accordingly, we will grant Hutch's motion and dismiss Philips's petition for declaratory order.

This action will not significantly affect either the quality of the human environment or conservation of energy resources.

It is ordered:

1. This proceeding is dismissed.

2. This decision is effective on the date served.

3. A copy of this decision will be mailed to:

The Honorable Victor Ashrafi
Superior Court of New Jersey,
Law Division, Somerset County

20 North Bridge Street
P. O. Box 3000
Somerville, NJ 08876

Re: Docket No. SOM-L-408-96

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary