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SERVICE DATE - FEBRUARY 24, 1998

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. 41933

TJX COMPANIES, INC. DBA NEWTON BUYING--PETITION FOR DECLARATORY
ORDER--CERTAIN RATES AND PRACTICES OF INDUSTRIAL FREIGHT SYSTEM, INC.
AND ITS CORONA TRUCKING DIVISION

Decided: February 18, 1998

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 Bankruptcy Court for the Central District of California, in Duke Salisbury, Chapter 7 Trustee of the Bankruptcy Estate of Industrial Freight System, Inc. v. Newton Buying Corporation, Adv. No. AD 95-03544 ER. The proceeding was instituted by Duke Salisbury, trustee of the Bankruptcy Estate of Industrial Freight System, Inc. (Industrial or Respondent), a former motor common and contract carrier.¹ Industrial seeks to collect undercharges of \$264,874.17,² allegedly due from TJX Companies, Inc., dba Newton Buying (TJX or Petitioner),³ in addition to amounts previously paid by TJX, for the interstate or foreign transportation of shipments of miscellaneous commodities from and to various points in the United States between 1991 and 1993. On or about September 17, 1996, the bankruptcy court approved a stipulation between Industrial and TJX to allow the parties to proceed before us to resolve the transportation issues raised in the court case.

¹ In 1993, Industrial filed for bankruptcy under Chapter 7 of the United States Bankruptcy Code, in the United States Bankruptcy Court for the Central District of California, Case No. LA 93-41245-ER.

² Respondent has withdrawn its claim for \$678.59 in late pay penalties.

³ The petition for declaratory order was filed by Newton Buying Corp. In its opening statement, petitioner identifies itself as The TJX Companies, Inc., dba Newton Buying, but provides no explanation for the change of name. Testimony of its principal witness suggests that, at the time of the shipments involved here, the shipper was named T.J. Maxx/Newton Buying Corp. Because neither party explains or questions these changes, we will assume a corporate identity among these entities, and will refer to them collectively as TJX.

Pursuant to the court's approval, TJJ filed a petition for declaratory order requesting that the Board resolve those issues.⁴ The Board issued procedural schedules, and TJJ filed an opening statement. Industrial submitted a reply, and Petitioner filed a rebuttal.

Petitioner asserts that Respondent's attempts to collect the claimed undercharges constitute an unreasonable practice under section 13711(a). Petitioner maintains that the freight charges originally billed by Industrial and paid by TJJ were rates mutually agreed upon by the parties, and that TJJ relied on the agreed-upon rates in tendering its traffic to Industrial to the exclusion of services provided by other carriers.

Attached as an exhibit to TJJ's opening statement is a declaration from Susan Bonaccorso, Transportation Claims Manager for TJJ, along with a copy of a Statement of Account (SOA) issued by Respondent asserting the undercharge claims against TJJ, and setting forth Respondent's claims by freight bill number, together with the original billing dates, the amounts originally paid, and balance due amounts claimed for each shipment. Also attached to the declaration are samples of the "balance due" bills issued by Respondent to TJJ, which reflect originally issued freight bill data, as well as revised balance due amounts.

Ms. Bonaccorso testifies that the rates originally charged by Industrial were rates mutually agreed upon by the parties, and that TJJ relied on the agreed-upon rates in tendering its traffic to Industrial to the exclusion of services provided by other carriers. The SOA was the first notice TJJ received that Industrial was disavowing the rates originally billed. The originally issued freight bills, according to Ms. Bonaccorso, reflect the discounts that Petitioner had negotiated with Industrial. On their face, the revised bills indicate that Industrial disallowed the discounts and rates that Industrial originally applied to the shipments because they were not authorized by tariff provisions, and that Industrial then re-rated the shipments using tariff-based charges.

Respondent, rather than attempting, through rebuttal evidence, to counter the voluminous evidence submitted by TJJ, instead relies solely on argument of counsel. First, Industrial contends that TJJ proffered no written evidence of the original rate charged, the agreement to charge that rate, or Petitioner's reasonable reliance on the rate. Second, Respondent contends that section 13711(a) does not pertain to its claims because it cannot be applied retroactively to claims which were pending when that section was enacted as section 2(e) of the Negotiated Rates Act of 1993 (NRA), Pub. L. No. 103-180, 107 Stat. 2044 (1993).

⁴ The issues in the court case that TJJ sought to pursue before the Board included rate reasonableness and unreasonable practices.

DISCUSSION AND CONCLUSIONS

We will dispose of these proceeding under section 13711. Accordingly, we do not reach the other issues raised.⁵

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 Industrial no longer transports property.⁶ Accordingly, we may proceed to determine whether Respondent’s attempts to collect undercharges (the difference between the applicable filed rate and the negotiated rate) constitute 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, TJX submitted a list of the shipments subject to Respondent’s collection efforts, as well as sample revised freight bills. That evidence indicates that the rates originally charged by

⁵ Typically, a court hearing undercharge cases will direct or allow shippers 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 such as contract carriage 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 October 23, 1997). We will not address the other more complex issues raised here because our section 13711 findings fully resolve the question of Petitioner’s liability for the rates sought.

Having found against Respondent on its undercharge claims, we find no basis for imposing interest on Petitioner, as requested by Respondent. We also decline to find that Petitioner is entitled to fees and costs. *See General Mills, Inc.--Petition for Declaratory Order*, 8 I.C.C.2d 313, 325 (1992), *aff’d sub nom. Bankruptcy Estate of United Shipping Co. v. General Mills, Inc.*, 34 F.3d 1383 (8th Cir. 1994).

⁶ Prior to filing for bankruptcy, Industrial held motor common and contract carrier operating authority, issued by the Interstate Commerce Commission.

Industrial were consistently and substantially below those that Respondent is now seeking to assess and were in conformity with the rates assertedly agreed to by the parties. 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).⁷

Not only do these lists, along with the written freight bills, satisfy the “written evidence” requirement of the statute, but, together with the unrefuted testimony of Ms. Bonaccorso, they provide evidence establishing that the original rates assessed by Industrial and paid by TJX were rates agreed to in negotiations between the parties. The original freight bills issued by Respondent for the subject shipments, as well as the additional evidence, support Petitioner’s contentions and reflect the existence of negotiated rates. The evidence indicates that TJX relied on Industrial’s agreement to charge the negotiated rates, and that TJX would not have used Industrial had it quoted the rates it now seeks to collect.

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)].

The evidence submitted by TJX reflects a pattern that we have seen again and again in this type of case: a negotiated rate was offered to it by Industrial; TJX reasonably relied on the offered rate in tendering its traffic to Industrial; the negotiated rate was billed and collected by Industrial; and Industrial now seeks to collect additional payments based on a higher rate filed in a tariff.

⁷ Industrial contends that TJX failed to provide “written evidence of the original rate charged or that Petitioner reasonably relied on this rate.” It argues that the absence of such written evidence defeats Petitioner’s assertions. But section 13711(f) requires merely that there be written evidence of an agreement to charge the agreed-upon rate, and as noted, the list of claims, the sample freight bills and other documentation submitted by TJX constitute written evidence of those agreements.

Therefore, under 49 U.S.C. 13711, we find that it is an unreasonable practice for Industrial to attempt to collect undercharges from TJX for transporting the shipments at issue in this proceeding.⁸

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 Ernest M. Robles
United States Bankruptcy Court for
the Central District of California
Edward Roybal Federal Building and Courthouse
255 East Temple Street
Los Angeles, CA 90012

Re: Adv. No. AD 95-03544 ER

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

⁸ With respect to Respondent's claim that section 13711 cannot be applied retroactively, we point out that the courts have consistently held that that section, by its own terms, may be applied retroactively against the undercharge claims of defunct, bankrupt carriers that were pending on the NRA's enactment. *See, e.g., Gold v. A.J. Hollander Co. (In re Maislin Indus.)*, 176 B.R. 436, 443-44 (Bankr. E.D. Mich. 1995); *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); *Allen v. National Enquirer*, 187 B.R. 29, 33 (Bankr. N.D. Ga. 1995); *cf. Jones Truck Lines, Inc. v. Phoenix Products Co.*, 860 F.Supp. 1360 (W.D. Wisc. 1994). Moreover, if, as Petitioner claims, Industrial did not begin to file its claims until 1994, after the NRA had been enacted, application of the NRA here is not retroactive.