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SERVICE DATE - FEBRUARY 19, 1999

SURFACE TRANSPORTATION BOARD¹

DECISION

No. 41296

INTERNATIONAL ENVIRONMENTAL CORPORATION--PETITION FOR
DECLARATORY ORDER--CERTAIN RATES AND
PRACTICES OF JONES TRUCK LINES, INC.

Decided: February 16, 1999

We find that the collection of 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 issue raised in this proceeding.

BACKGROUND

This matter arises out of a court action filed in the United States District Court for the Western District of Oklahoma in Jones Truck Lines, Inc., Debtor-in-Possession v. International Environmental Corporation, Case No. CIV-93-1184-W. The court proceeding was instituted by Jones Truck Lines, Inc. (Jones or respondent), a former motor common and contract carrier, to collect undercharges from International Environmental Corporation (IEC or petitioner). Jones sought to collect undercharges in the amount of \$46,277.74 allegedly due, in addition to amounts previously paid, for services rendered in transporting 451 shipments over a two year period. By order entered December 9, 1993, the court granted summary judgment in favor of IEC with respect to 450 of the 451 shipments. The court found that 448 of the shipments were less-than-truckload (LTL) movements transported by Jones in its capacity as a contract carrier pursuant to the terms of a contract carrier agreement between the parties for which the higher tariffs claimed by respondent

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) 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.

were not applicable. The court further found that no additional amounts were due on two of the remaining three shipments.

The sole remaining shipment in dispute involves a truckload movement of aluminum lineal shapes transported by Jones from Arlington, TX, to Oklahoma City, OK, on June 25, 1991.² Respondent originally billed and accepted petitioner's payment of \$1,330.85 for its services. Thereafter, Jones presented IEC with a "corrected" freight bill of \$2,367.93, indicating that an additional \$1,037.08 in excess of the original amount billed was due for its services. After discovering an error in the "corrected" bill, Jones subsequently reduced its undercharge claim for this shipment to \$293.77. By order entered April 26, 1994, the court stayed the proceeding to allow the parties an opportunity to present the issue of the reasonableness of the rate sought to be collected for the shipment to the ICC for resolution.

Pursuant to the court order, IEC, on August 5, 1994, filed a petition for declaratory order requesting the ICC to resolve the rate reasonableness issue. By decision served August 17, 1994, a procedural schedule was established for development of the record. On October 31, 1994, petitioner filed its opening statement. Respondent filed its statement of facts and argument on December 1, 1994, and petitioner submitted its rebuttal statement on December 23, 1994.

Petitioner asserts that respondent is attempting to collect a rate significantly above the market rate available from other motor carriers at the time the subject shipment was transported. IEC states that the rate now being sought by Jones is in excess of the amount originally agreed upon by the parties, and that petitioner would not have tendered its shipment to Jones for transport had Jones quoted the rate it here seeks to assess.

Petitioner supports its assertions with an affidavit from Charles B. Grant, director of Transportation for petitioner's parent company LSB Industries, Inc. (LSB).³ Attached to Mr. Grant's affidavit is a copy of the "corrected" freight bill for the subject shipment issued on behalf of respondent that indicates the original charge assessed by respondent and paid by petitioner, the revised assessed charge, and the corrected balance due claimed by respondent. Mr. Grant states that the amount now being sought by Jones represents a 22.5% increase above the amount originally agreed upon by IEC and Jones. He maintains that, had the charge now being sought by respondent been quoted to IEC, Jones would not have transported the subject shipment.

Jones contends that the record in this proceeding fails to support a conclusion that the tariff rate it here seeks to assess is unreasonable. In support of its position respondent submits the verified

² The court viewed this truckload shipment to be not expressly included within the terms of the contract agreement.

³ IEC is a wholly owned subsidiary of LSB.

statement of Stephen L. Swezey, Senior Transportation Consultant of Carrier Service, Inc. (CSI).⁴ Mr. Swezey describes the process used by CSI in re-rating the originally assessed charge at an asserted applicable tariff rate based on Tariff JTLS-510, REN# 344, Item 13515 Sub-1, Class 60. Respondent maintains that the corrected freight bill reflects the appropriate charge for the service rendered.

DISCUSSION AND CONCLUSIONS

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

At the outset, we recognize that the parties focused on the issue of rate reasonableness and did not address section 2(e) of the NRA.⁵ Nevertheless, our use of section 2(e)'s "unreasonable practice" provisions to resolve this matter is fully appropriate. The Board, as a general rule, is not limited to deciding only those issues explicitly referred by the court or raised by the parties. Rather, we may instead decide cases on other grounds within our jurisdiction, and, in cases where section 2(e) provides a dispositive resolution, we rely on it rather than the more subjective rate reasonableness provisions. 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."

⁴ By order entered February 25, 1992, the Bankruptcy Court authorized CSI to provide rate audits and collection services for Jones.

⁵ Respondent states that, because the shipment at issue moved in June of 1991, section 2(e) of the NRA is not applicable to this proceeding. The ICC Termination Act removed the limitation that made section 2(e) of the NRA applicable only to transportation service provided prior to September 30, 1990. 49 U.S.C. 13711(g). Thus, the remedies in section 2(e) may be invoked for the June 25, 1991 shipment here at issue.

It is undisputed that Jones no longer transports property.⁶ Accordingly, we may proceed to determine whether Jones' 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, the record contains a copy of the "corrected" freight bill for the shipment at issue that contains the original charge assessed by respondent and paid by petitioner, the revised assessed charge that exceeds the originally assessed charge by 22.5%, and the claimed corrected balance due. 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) (E.A. Miller). 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 subject shipment was transported by Jones pursuant to a negotiated rate agreed to by the parties. The rates identified in the "corrected" freight bill, which reveal an originally assessed charge that respondent is attempting to increase by 22.5%, confirms the unrefuted testimony of Mr. Grant and reflects the existence of a negotiated rate. The evidence further indicates that IEC relied upon the agreed-to rate in tendering the subject shipment to Jones.

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 on 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, the evidence establishes that a negotiated rate was offered by Jones to IEC; that IEC tendered the subject shipment to Jones in reasonable reliance on the negotiated rate; that Jones did

⁶ Board records confirm that Jones' motor carrier operating authorities were revoked on February 18, 1992.

not file a tariff incorporating the negotiated rate; that Jones billed and collected the negotiated rate; and that Jones 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 Jones to attempt to collect undercharges from IEC for transporting the shipment 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 its service date.
3. A copy of this decision will be mailed to:

The Honorable Lee R. West
United States District Court
for the Western District of Oklahoma
3321 U.S. Courthouse
200 NW 4th St.
Oklahoma City, OK 73102

Re: CIV-93-1184-W

By the Board, Chairman Morgan and Vice Chairman Clyburn.

Vernon A. Williams
Secretary