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SERVICE DATE - LATE RELEASE OCTOBER 28, 1999

SURFACE TRANSPORTATION BOARD¹

DECISION

No. 41291

THE CLOROX COMPANY

v.

GROSS COMMON CARRIER, INC.

Decided: October 25, 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 issues raised in this proceeding.

BACKGROUND

This matter arises out of a court action in the United States District Court for the Western District of Wisconsin in Gross Common Carrier, Inc. v. The Clorox Company, Inc., No. 94-C-2162-S. The court proceeding was instituted by Gross Common Carrier, Inc. (Gross or defendant), a former motor common and contract carrier, to collect undercharges from The Clorox Company (Clorox or complainant). Gross seeks unspecified undercharges allegedly due, in addition to amounts previously paid, for services rendered in transporting 120 shipments of bleach or cleaning compounds from complainant's Chicago, IL facility to points in Minnesota and surrounding states between August 1988 and June 18, 1991. By order entered July 12, 1994, the court dismissed the proceeding without prejudice and referred the matter to the ICC for resolution.

Pursuant to the court order, Clorox, by complaint filed July 19, 1994, requested the ICC to resolve issues of contract carriage and rate reasonableness. On August 16, 1994, Gross filed its

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.

answer to the complaint. By decision served October 14, 1994, the ICC established a procedural schedule for the submission of evidence.² On December 2, 1994, complainant filed its opening statement. Defendant filed its reply statement on February 1, 1995, and Clorox submitted its rebuttal on February 10, 1995.³

Clorox asserts that the shipments at issue were transported by Gross in contract carriage pursuant to a series of contractual agreements between the parties and that defendant's claims for undercharges are without foundation. Complainant supports its assertions with an affidavit from Steven Childers, Traffic Manager for Clorox. Mr. Childers states that Clorox entered into a series of one-year contractual agreements with Gross for the transportation of the subject shipments. Attached to Mr. Childers' affidavit as Exhibits 2, 3, and 4, are copies of three documents entitled TRANSPORTATION AGREEMENT with effective dates of July 1, 1988, July 1, 1989, and July 1, 1990, respectively, containing commodity rates applicable only for the Clorox account.⁴ Mr. Childers maintains that Clorox relied upon the rates set forth in the agreements in tendering its traffic to Gross; that, during the period the subject shipments were transported, Clorox could have tendered its traffic to other motor carriers under similar rate arrangements; and that the rates here being sought by Gross are unreasonable.

Clorox also submits an affidavit from William R. Nicol, an employee of Don H. Norman Associates, Inc., a tariff research company. Mr. Nicol states, that under applicable transportation law and ICC precedents, Gross could not void its contract with Clorox by unilaterally tendering

² Subsequent to that decision, Clorox, in a letter filed October 20, 1994, requested bifurcation of the evidentiary phase of this proceeding so as to allow for consideration of the rate reasonableness issue at a later date if necessary. The ICC took no action on this request, nor, in light of our disposition of this matter, is any action necessary at this time.

³ On May 8, 1995, Clorox submitted as a supplemental "submission of authority" a then recent decision of the 7th Circuit in Gross Common Carrier v. Baxter Health Care Corp., 51 F.3d 703 (7th Cir. 1995) (Baxter). Clorox maintains that the factual situation in Baxter is identical to that presented here, and that the Baxter decision is thus dispositive of the instant proceeding. In Baxter, the court rejected Gross' contention that interlining with a common carrier automatically converts contract carriage into common carriage. The court stated (51 F.3d at 709): "We believe that once the parties have established a legitimate contract carrier relationship, the shipper is entitled to rely on that relationship without risking a later claim for undercharges because of the carrier's unilateral conduct." The court also determined that: "Gross's allegation that [the shipper] was aware of the practice of interlining does not alter our conclusion."

⁴ Each of the agreements contained a provision prohibiting the carrier from assigning its transportation responsibilities to another carrier without the consent of the shipper. The parties have stipulated that Gross was the only carrier referred to in the "route" portion of the subject shipment bills of lading. (Stipulation dated November 24, 1994, attached to complainant's opening statement).

complainant's traffic to another carrier. Rather, he asserts, the rates Gross negotiated with Clorox are the rates that should be assessed to the traffic.

In its reply, Gross acknowledges that the parties did enter into transportation contracts that remained in effect during the period involved in this proceeding. Gross maintains, however, that the service provided did not constitute motor contract carriage and that the transportation contracts were not applicable because the subject shipments were involved in interline movements. Gross argues that, under long-standing ICC rule, contract carrier shipments that are interlined lose their contract carrier status and become common carrier movements subject to applicable common carrier tariffs.

Gross supports its position with affidavits from Roger Placzek, defendant's Vice President-Sales and Marketing, and Oscar P. Peck, founder of Truck Rates Co., Inc.⁵ Mr. Placzek asserts that decisions to interline shipments originated by Gross were based on whether interlining was necessary to effect delivery of the shipment with reasonable dispatch. He states that regular users of defendant's service were familiar with the fact that some of their shipments would involve the use of interline carriers and points out that in most instances the use of an interlining carrier was reflected in the routing section and other portions of the freight bills issued by Gross.

Mr. Peck was engaged by Mark/AGL, Inc., the court-appointed auditor in defendant's bankruptcy proceeding, to audit defendant's freight records. Mr. Peck states that he specifically reviewed the freight bills for the subject shipments to determine whether the shipments moved in joint-line service. He asserts that all of the subject shipments involve interline movements, that such movements constitute common carrier service, and that the rates contained in the transportation contracts with Clorox were inapplicable. Accordingly, freight correction notices were issued in which the original charges assessed by Gross were re-rated based on applicable joint line tariffs.⁶ Attached as Appendix C to Mr. Peck's affidavit are three representative balance due bills issued by defendant that reflect the originally issued freight bill data as well as the "corrected" balance due amounts. A review of these balance due bills shows that the defendant now seeks to assess rates that are substantially higher than those originally sought.⁷

⁵ Truck Rates is a Texas corporation specializing in the audit of motor carrier freight bills and the collection of undercharge claims.

⁶ In re-rating the subject shipments, defendant relied on bureau class rate tariffs published in the Central States and Middle West rate bureau tariffs in which both Gross and the involved connecting carriers were participants.

⁷ The representative freight bills documents relate to: (1) a shipment from Chicago to Aberdeen, SD, dated June 8, 1989, in which a \$12.22 originally assessed rate was re-rated to \$19.23; (2) a shipment from Chicago to Hibbing, MN, dated February 13, 1991, in which an originally assessed \$11.45 rate was re-rated to \$22.68; and (3) a shipment from Chicago to Hermantown, MN, dated March 7, 1991, in which an originally assessed \$5.63 rate was re-rated to \$11.16 for one part of the (continued...)

DISCUSSION AND CONCLUSIONS

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

At the outset, we recognize that the issues raised for our consideration focus primarily on contract carriage and rate reasonableness issues. 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 a court or raised by the parties. Rather, we may instead decide cases on other dispositive grounds within our jurisdiction, and, in cases where section 2(e) provides a dispositive resolution--one that was adopted by Congress as a surrogate for the more complicated rate reasonableness provisions--we rely on it. 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."⁸

Federal Highway Administration records now confirm that Gross no longer transports property.⁹ Accordingly, we may proceed to determine whether Gross' attempt to collect

⁷(...continued)
shipment and \$12.17 for the remainder of the shipment.

⁸ The ICC Termination Act removed the limitation that made section 2(e) of the NRA applicable only to transportation services provided prior to September 30, 1990. Thus, the remedies in section 2(e) may be invoked as to all the shipments at issue in this proceeding, including those which were transported after September 30, 1990.

⁹ While the record in this proceeding includes assertions to the effect that Gross was continuing to function as an operating motor carrier, Federal Highway Administration records reveal that Gross' motor carrier operating authorities were revoked on September 19, 1996.

undercharges (the difference between the applicable filed tariff 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 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 copies of three transportation agreements between the parties containing commodity rates specifically applicable to Clorox shipments, as well as three representative balance due bills issued by defendant that indicate originally assessed charges substantially below the amounts that defendant is now attempting to collect. 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 rate and that the rates were agreed upon by the parties).

In this case, the evidence indicates that the parties conducted business in accordance with agreed-to negotiated rates that were originally billed by Gross and paid by Clorox. Gross readily acknowledges the existence and validity of the contractual agreements between the parties, although it argues that they do not prove that the traffic was handled in contract carriage. The contractual agreements contain commodity rates specifically applicable to the Clorox account. These commodity rates on which the charges originally assessed by Gross are based reflect the existence of negotiated rates. The evidence further indicates that Clorox relied upon the agreed-to commodity rates in tendering its traffic to Gross and that complainant would not have used defendant to handle its traffic had defendant attempted to charge the rates it here seeks to assess.

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, the evidence establishes that negotiated rates were offered by Gross to Clorox; that Clorox reasonably relied upon the offered rates in tendering its traffic to Gross; that the negotiated rates were billed and collected by Gross; and that Gross now seeks to collect additional payment

based on higher rates 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 Gross to attempt to collect undercharges from Clorox for transporting the shipments 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 date of service.
3. A copy of this decision will be mailed to:

The Honorable John C. Shabaz
United States District Court for the
Western District of Wisconsin
P.O. Box 591
Madison, WI 53701

Re: No. 94-C-2162-S

By the Board, Chairman Morgan, Vice Chairman Clyburn and Commissioner Burkes.

Vernon A. Williams
Secretary