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SERVICE DATE - AUGUST 24, 1998

SURFACE TRANSPORTATION BOARD¹

DECISION

No. 40980

MO-ARK TRUCK SERVICES, INC.--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF ATLANTIS EXPRESS, INC.

Decided: August 19, 1998

This matter arises out of a court action in the District Court for the State of Minnesota, Fourth Judicial District, County of Hennepin in Atlantis Express, Inc. v. Mo-Ark Truck Services, Inc., File No. CT. 92-8666. The court proceeding was instituted by Atlantis Express, Inc. (Atlantis or respondent), a former motor common and contract carrier,² to collect undercharges from Mo-Ark Truck Services, Inc. (Mo-Ark or petitioner). Atlantis sought to collect undercharges in the amount of \$5,502.96 (plus interest and costs) allegedly due, in addition to amounts previously paid, for services rendered in transporting 25 shipments between September 30, 1987, and July 30, 1988. By order dated March 22, 1993, the court stayed the proceeding and directed petitioner to submit for determination by the ICC all issues lying within the primary jurisdiction of the agency.

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. Therefore, this decision applies the law in effect prior to the Act, and citations are to the former sections of the statute, unless otherwise indicated.

² Before it ceased operating, Atlantis held common carrier authority under No. MC-187977 and contract carrier authority under No. MC-187977 (Sub-No 1).

Pursuant to the court order, Mo-Ark, on April 29, 1993, filed a petition for declaratory order requesting the ICC to determine issues of contract carriage³ and rate reasonableness. By decision served May 7, 1993, a procedural schedule was established for the submission of evidence on non-rate reasonableness issues. Mo-Ark filed its opening statement on July 6, 1993. Atlantis filed its reply on August 2, 1993, and petitioner filed its rebuttal on August 13, 1993.

In a decision served February 9, 1994, the ICC found that those shipments transported on and after May 18, 1988 (19 of the 25 subject shipments) moved in contract, not common, carriage pursuant to respondent's contract carrier permit No. MC-187977 (Sub-No. 1) in accordance with a May 18, 1988 agreement entered into by the parties. The ICC concluded that Mo-Ark was not liable to Atlantis for undercharges claimed for the 19 shipments subject to the May 18, 1988 agreement and discontinued the proceeding with respect to those shipments.

As to the 6 shipments transported prior to May 18, 1988 (involving undercharge claims amounting to \$1,076.34), however, the ICC found that the record lacked sufficient information to enable it to resolve this aspect of the subject undercharge claim dispute. The ICC noted that respondent did identify the carrier pro numbers, shipment dates, and claimed balance due for each of the six shipments, but provided no other information. Similarly, Mo-Ark offered no information with respect to any agreement or contract to support its apparent assertion that these 6 shipments moved in contract carriage. In light of these circumstances, the ICC reopened the proceeding and established a procedural schedule to enable the parties to supplement the record with respect to the issues of contract carriage, tariff applicability, and rate reasonableness. In addition, the ICC permitted petitioner to invoke the alternative resolution procedures of the Negotiated Rates Act of 1993, Pub. L. No. 103-180 (NRA) (now codified at 49 U.S.C. 13711), more specifically the section 2(e) NRA alternative procedure.

Neither party has submitted additional evidence or argument under the February 9, 1994 decision. As a result, the Board is unable to consider the merits of the undercharge claims for the shipments which moved between September 30, 1987, and May 18, 1988. Nor is the Board able to determine whether claims may be resolved under the NRA. The record lacks original freight bill data, revised freight bills, or alternative written materials which would reflect the original shipment charges assessed by Atlantis and paid by Mo-Ark, the tariff charges Atlantis is now seeking to assess, and the basis for the revised charges. In view of their failure to file a response to the February 4, 1994 decision, this proceeding will be dismissed for lack of prosecution.

³ If the subject transportation service was determined to be common carriage, the filed rate doctrine would require that Atlantis charge, and Mo-Ark pay, the filed common carrier tariff rate applicable at the time of shipment. On the other hand, if the service provided by Atlantis was determined to be contract carriage, the filed rate doctrine would not apply, and the appropriate rate to be assessed would be based on the terms of the contractual arrangement between the parties.

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 dismissed for lack of prosecution.
2. This decision is effective on its date of service.
3. A copy of this decision will be mailed to:

The Honorable Peter J. Lindberg
District Court of the State of Minnesota
Fourth Judicial District, County of Hennepin
1251-C Government Center
Minneapolis, MN 55487

By the Board, Vernon A. Williams, Secretary

Vernon A. Williams
Secretary