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SERVICE DATE - MAY 8, 2000

SURFACE TRANSPORTATION BOARD

DECISION

STB No. 41844

NICE-PAK PRODUCTS, INC.

v.

BE-MAC TRANSPORT COMPANY, INC.

Decided: May 3, 2000

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 Eastern District of Missouri, Eastern Division, in Be-Mac Transport Company, Inc., and the Plan Committee for Be-Mac Transport Company, Inc., v. Nice-Pak Products, Inc., Adv. No. 95-4506-293. The court proceeding was instituted by Be-Mac Transport Company, Inc. and the Plan Committee for Be-Mac Transport Company, Inc. (Be-Mac or defendant),¹ a former motor common and contract carrier, to collect undercharges from Nice-Pak Products, Inc. (Nice-Pak or complainant). Be-Mac seeks undercharges of \$61,875.07 (plus interest) allegedly due, in addition to amounts previously paid, for services rendered in transporting 264 shipments of such commodities as paper towels, cleaning products, chemicals, and medicines between May 14, 1992, and September 21, 1992. The shipments were transported from Nice-Pak's facility in Indianapolis, IN, to points in Ohio, Illinois, Kentucky, Iowa, Kansas, Missouri, Nebraska, and Tennessee. By order dated May 20, 1996, the court directed complainant to initiate administrative proceedings before the Board for determination of the applicable issues raised and administratively closed the proceeding.²

Pursuant to the court order, Nice-Pak, by complaint filed June 26, 1996, requested the Board to resolve issues of tariff applicability, unreasonable practice, and rate reasonableness. By decision served August 14, 1996, the Board issued a procedural schedule. On November 4, 1996,

¹ On January 22, 1993, Be-Mac filed for bankruptcy under Chapter 11 of the United States Bankruptcy Code, in the United States Bankruptcy Court for the Eastern District of Missouri, Eastern Division, Case No. 93-40022-293.

² The court retained exclusive jurisdiction over the proceeding for such future action as may be necessary.

complainant filed its opening statement. Defendant filed its statement of facts and argument on November 14, 1996, and Nice-Pak submitted its rebuttal on December 24, 1996.

Complainant asserts that defendant's attempt to collect the claimed undercharges constitutes an unreasonable practice under section 13711(a) and that the rates defendant now seeks to collect are unreasonable. Nice-Pak states that defendant's originally issued freight bills were paid in full in a timely fashion and that the payments made were accepted by Be-Mac without objection. Complainant suggests that the originally assessed charges were based on a published discount tariff issued for its account by Middlewest Freightways, Inc. (Middlewest), a motor carrier acquired by Be-Mac, apparently in 1992. The tariff, Middlewest Tariff ICC MFIC 445, provides for a 45% discount and identifies Be-Mac as a participant. Included with Nice-Pak's opening statement are copies of the rerated freight bills issued on behalf of defendant that contain originally issued freight bill data as well as "corrected" balance due amounts. An examination of these freight bills indicates originally assessed charges based on class 60 rates, to which were applied discounts of 45%, and newly assessed charges, substantially higher than the amounts originally billed, based on rerated class 70 rates to which no discounts are applied. Nice-Pak maintains that the originally assessed discount rates were mutually agreed upon by the parties as reflected by Be-Mac's participation in the Middlewest tariff and its billing and collecting of the rates set forth in that tariff. Complainant further maintains that Nice-Pak relied on the agreed-upon rates in tendering its traffic to Be-Mac.

Nice-Pak supports its position with an affidavit from John N. Mecchella, Executive Vice President of Technical Traffic Consultants Corporation (TTC), a transportation consulting and freight processing firm retained by complainant. Mr. Mecchella states that the rates originally assessed by Be-Mac appear to be the rates published in Middlewest's Tariff ICC MFIC 445 series, in which, as indicated in Appendix A to his affidavit, Be-Mac was a participating carrier. Attached as Appendix B to his affidavit are various pages of the subject tariff that include a provision calling for the application of a 45% discount off class 60 commodity rates set forth in the tariff. Mr. Mecchella maintains that, if for some reason the provisions of the referred-to discount tariff are not applicable to the shipments at issue, the efforts exerted by Be-Mac to collect additional charges constitute an unreasonable practice.

Defendant maintains that the rates and charges initially assessed were not authorized by an applicable filed tariff in effect at the time the shipments at issue were transported, and that the undiscounted rates it here seeks to assess have not been shown to be unreasonable. Be-Mac further asserts that complainant has provided no evidence that the originally assessed charges were negotiated.

Be-Mac supports its arguments with a verified statement from Stephen L. Swezey, Senior Transportation Consultant for Carrier Service, Inc., the auditor authorized by the court to provide rate audit and collection services on behalf of defendant. Mr. Swezey asserts that the originally assessed charges were based on Middlewest Tariff ICC MFIC 445-D, a tariff that, per Item 120, applies only to shipments that are originated on an MFIC freight bill. Because the shipments at issue were originated by Be-Mac, Mr. Swezey maintains that the Middlewest tariff was not

applicable to those movements and that undiscounted bureau class rates should have been assessed. Mr. Swezey notes that Be-Mac did not publish discount provisions for complainant's traffic until October 30, 1992, and asserts that the undiscounted corrected freight charges are applicable and have not been shown to be unreasonable.

DISCUSSION AND CONCLUSIONS

We will dispose of this proceeding under section 13711. Accordingly, we do not reach the other issues raised.³

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 Be-Mac no longer transports property. Accordingly, we may proceed to determine whether defendant's 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 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, the record contains copies of the rerated freight bills issued on behalf of defendant that indicate the application of 45% discounts to originally assessed charges based on class 60 rates, as well as relevant portions of Middlewest Tariff ICC MFIC 445-D, in which Be-Mac is identified as a participant, that provide for a 45% discount off class 60 commodity rates to be applied to Nice-Pac traffic. We find this evidence sufficient to satisfy the written evidence requirement. E. A. Miller,

³ Typically, a court hearing undercharge cases will direct the shipper 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 of contract carriage, rate applicability 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. 40836 (STB served Oct. 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.

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) (mem.) (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).⁴

In this case, the evidence indicates that the parties conducted business in accordance with agreed-to negotiated discount rates that were originally billed by Be-Mac and paid by Nice-Pak. The consistent application in the original freight bills of assessed charges based on class 60 rates, to which discounts of 45% were applied — assessed charges that conform with the class rates and discount called for in the Middlewest tariff to which defendant is a participant — support petitioner's contentions and reflect the existence of a negotiated discount rate. The evidence further indicates that Nice-Pak relied upon the negotiated discount rate in tendering its traffic to Be-Mac.

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

⁴ Be-Mac, at pp. 4-5 of its statement filed November 14, 1996, argues that freight bills do not constitute written evidence. Defendant asserts that allowing freight bills to satisfy the written evidence requirement would make the written evidence provision of section 13711(f) superfluous because the Board, under section 13711(b)(2)(D), must independently consider whether the carrier submitted and collected freight bills reflecting the unfiled agreed-upon rate.

The ICC and the Board have consistently rejected this argument. Section 13711(b)(2)(D) requires the Board to consider “whether the [unfiled] rate was billed and collected by the carrier.” There is no requirement under this provision that the Board use a carrier's freight bills for that determination. A carrier may separately attest, or submit or concede in a pleading, that the negotiated, unfiled rate was billed and collected, and there is nothing to preclude the Board from using such statements (or other evidence) in finding that section 13711(b)(2)(D) was satisfied.

Even if the Board uses freight bills to satisfy this element, however, it is not inappropriate for it to use those same bills to satisfy the “written evidence” requirement of section 13711(f). Defendant's argument might be more persuasive if the written evidence requirement was a “sixth” element of the merits determination under section 13711(b)(2), but it is not. Rather, as the ICC previously indicated, it is simply a threshold requirement needed to invoke section 13711. See E.A. Miller, supra, at 239-40. Once that requirement is satisfied by freight bills (or other contemporaneous written evidence), there is nothing to suggest that the same evidence could not be used as part of the Board's separate five-part analysis under section 13711(b)(2) to determine whether the carrier's undercharge collection effort is an unreasonable practice.

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)].

Here, the evidence establishes that a negotiated discount rate was offered to Nice-Pak by Be-Mac; that Nice-Pak reasonably relied on the offered discount rate in tendering its traffic to Be-Mac; that Be-Mac did not properly or timely file a tariff providing for the discount rate and has not entered into an agreement for contract carriage; that the negotiated discount rate was billed and collected by Be-Mac; and that Be-Mac now seeks to collect additional payment based on a higher rate filed in a tariff. Therefore, under 49 U.S.C. 13711, we find that it is an unreasonable practice for Be-Mac to attempt to collect undercharges from Nice-Pak 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 service date.
3. A copy of this decision will be mailed to:

The Honorable David P. McDonald
United States Bankruptcy Court for
the Eastern District of Missouri, Eastern Division
211 North Broadway, 7th Floor
One Metropolitan Square
St Louis, MO 64050

Re: Adv. No. 95-4506.293

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

Vernon A. Williams
Secretary