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SERVICE DATE - AUGUST 27, 1997

SURFACE TRANSPORTATION BOARD¹

DECISION²

No. 41632

CONTINENTAL BAKING CO.--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF J.H. WARE TRUCKING, INC.

No. 41633

KRONOS, INC.--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF J.H. WARE TRUCKING, INC.

No. 41635

RECKITT & COLEMAN, INC.--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF J.H. WARE TRUCKING, INC.

No. 41636

CLIFF STAR CORPORATION--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF J.H. WARE TRUCKING, INC.

No. 41637

GOLUB CORPORATION--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF J.H. WARE TRUCKING, INC.

No. 41638

HYPONEX CORPORATION--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF J.H. WARE TRUCKING, INC.

No. 41640

VILLAGE MEATS DIVISION, BIRCHWOOD MEAT & PROVISION
--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF J.H. WARE TRUCKING, INC.

Decided: August 21, 1997

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 proceedings that were 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 these proceedings. Unless otherwise indicated, citations are to the former sections of the statute.

² This decision embraces seven proceedings involving the same respondent and similar facts and issues.

We find that the collection of undercharges sought in these proceedings 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 these proceedings.

BACKGROUND

These matters arise out of the efforts of The Plan Committee on behalf of J.H. Ware Trucking, Inc. (Ware or respondent), a former motor common and contract carrier,³ to collect undercharges from Continental Baking Co. (Continental), in No. 41632; Kronos, Inc. (Kronos), in No. 41633; Reckitt & Coleman, Inc. (Reckitt), in No. 41635; Cliff Star Corporation (Cliff Star), in No. 41636; Golub Corporation (Golub), in No. 41637; Hyponex Corporation (Hyponex), in No. 41638; and Village Meats Division, Birchwood Meat & Provision (Village Meats), in No. 41640 (collectively petitioners).

The proceedings are before the Board on referral from the United States District Court for the Eastern District of Missouri, Eastern Division, in *J.H. Ware Trucking, Inc.--Debtor v. Continental Baking Co.*, No. 4:93CV1898SNL (TIA), *J.H. Ware Trucking, Inc.--Debtor v. Kronos, Inc.*, No. 4:93CV1899SNL (TIA), *J.H. Ware Trucking, Inc.--Debtor v. Reckitt & Coleman, Inc.*, No. 4:93CV1897SNL (TIA), *J.H. Ware Trucking, Inc.--Debtor v. Cliff Star Corporation*, No. 4:93CV1900SNL (TIA), *J.H. Ware Trucking, Inc.--Debtor v. Golub Corporation*, No. 4:93CV1896SNL (TIA), *J.H. Ware Trucking, Inc.--Debtor v. Hyponex Corporation*, No. 4:93CV1895SNL (TIA), and *J.H. Ware Trucking, Inc.--Debtor v. Village Meats Division, Birchwood Meat & Provision*, No. 4:93 CV1902SNL (TIA). By orders dated September 18, 1995, the court stayed the proceedings and directed petitioners to submit issues of contract carriage and rate reasonableness to the ICC for determination.

Pursuant to the court orders, petitions were filed in the subject proceedings on October 17, 1995, requesting the ICC to resolve issues of contract carriage, tariff participation, unreasonable practice, and rate reasonableness. Answers to the petitions were filed by Ware on November 8, 1995, in Nos. 41636, 41637, and 41638; November 9, 1995, in Nos. 41632, 41633, and 41635; and November 13, 1995, in No. 41640. By decisions served October 24, 1995, in No. 41632; October 25, 1995, in Nos. 41633, 41635, and 41640; and October 27, 1995, in Nos. 41636, 41637, and 41638, the ICC established procedural schedules for the submission of evidence on non-rate reasonableness issues. Opening statements along with affidavits from Michael Bange, president of Champion Transportation Services, Inc., a transportation consulting firm, were filed by petitioners on February 15, 1996, in Nos. 41633, 41638, and 41640; February 22, 1996, in No. 41632; April 26, 1996, in No. 41636; August 9, 1996, in No. 41637; and September 11, 1996, in No. 41635. Ware did not reply.

In No. 41632, respondent seeks to collect \$7,020.30, plus interest and costs, for services rendered in transporting 32 shipments of Freight All Kinds (FAK) between September 18, 1989, and December 26, 1991. The shipments were transported from points in Kansas, Missouri, and Nebraska, to Continental's⁴ facilities in Utah, Iowa, Colorado, Indiana, Ohio, New York, Massachusetts, California, and Oklahoma.

³ On May 20, 1991, Ware filed for bankruptcy under Chapter 11 of the United States Bankruptcy Code. From May 20, 1991, to April 14, 1992, Ware operated as a debtor-in-possession under Chapter 11. On April 14, 1992, a second amended plan of liquidation was confirmed pursuant to which causes of action belonging to Ware were authorized to be brought in the name of The Plan Committee, through Wendi S. Alper, Distribution Agent, on behalf of Ware.

⁴ Continental is a subsidiary of Ralston Purina Company.

In No. 41633, respondent seeks to collect \$4,997.62, plus interest and costs, for services rendered on behalf of Kronos⁵ in transporting 22⁶ shipments of FAK between October 11, 1988, and December 29, 1989. The shipments were transported from points in New Jersey, Georgia, California, West Virginia, and Maryland, to points in California, Texas, Virginia, Michigan, and Illinois.

In No. 41635, respondent seeks to collect \$15,499.29, plus interest and costs, for services rendered on behalf of Reckitt and its subsidiary Airwick Industries, Inc. (Airwick), in transporting 122 shipments of FAK between October 12, 1988, and March 13, 1991. The shipments were transported (a) from or to the Airwick facilities located at St. Peters, MO, Carlstadt, NJ, and Cumberland, RI, and (b) from the Monarch Warehouse in Moonachie, NJ, to Springfield, MO.

In No. 41636, respondent seeks to collect \$3,031.12, plus interest and costs, for services rendered on behalf of Cliff Star in transporting 6 FAK shipments on April 25 and 26, 1991. The shipments were transported from Dayville, CT, to Cliff Star's facility at Dunkirk, NY.

In No. 41637, respondent seeks to collect \$12,146.70,⁷ plus interest and costs, for services rendered on behalf of Golub in transporting 81 FAK shipments between July 14, 1989, and January 3, 1991. The shipments were transported from points in New York, New Jersey, Pennsylvania, Maryland, Connecticut, Massachusetts, Ohio, and Washington, to points in 13 states.

In No. 41638, respondent seeks to collect \$3,040.87, plus interest and costs, for services rendered on behalf of Hyponex in transporting 7 FAK shipments between February 12 and 25, 1991. The shipments were transported from Hyponex's facilities in Vance, AL, to Sand Springs, OK.

In No. 41640, respondent seeks to collect \$21,182.50, plus interest and costs, for services rendered on behalf of Village Meats in transporting 211 FAK shipments between June 9, 1988, and August 9, 1989. The shipments were transported from Norcross, GA, to Charlotte, NC, Birmingham, AL, and Memphis, TN.

Petitioners assert that the filed tariffs that provide the basis for respondent's undercharge claims are void and unenforceable in that they depend on mileage governed by the HGB Mileage Guide, a mileage tariff in which Ware is not a common carrier participant.⁸ They further assert that respondent's efforts to collect undercharges in these proceedings constitute an unreasonable practice under section 2(e) of the NRA and that the rates respondent seeks to assess are unreasonable. In Nos. 41632, 41633, and 41637, petitioners also contend that the shipments at issue were transported by Ware under its contract carrier authority pursuant to duly executed contractual agreements.

⁵ Kronos was formerly known as N.L. Chemicals, Inc. (opening statement, page 6).

⁶ Although the court complaint filed by respondent identifies 27 specific shipments for which undercharges are claimed, no balance due amount is indicated for 5 of the shipments listed in claim 80810.

⁷ Ware seeks \$3,670.53 in additional common carrier freight charges for transporting 28 shipments between July 14, 1989, and June 6, 1990 (Count I of its court complaint), and \$8,476.17 in additional contract carrier freight charges for transporting 53 shipments between December 27, 1989, and January 3, 1991 (Count II of its court complaint). With respect to the 53 shipments embraced within Count II, Ware acknowledges (and indeed contends) that the service provided for these movements was contract carriage. As legitimate claims for undercharges must be based on filed common carrier tariffs, respondent has presented under Count II no claim for undercharges that requires resolution by the Board.

⁸ Specifically, Mileage Guide No. ICC HGB 107, 107-A and 107-B in which Ware's only listing is that of a contract carrier participant.

The supporting affidavits submitted by Mr. Bange for each of the petitioners include (a) statement of claim forms⁹ which collectively list each of the subject shipments, the charge originally assessed and paid for that shipment, the total shipment charge that should have been assessed based on the Ware undercharge claim, and the asserted balance due for the shipment (Exhibit A) and (b) representative samples of the “balance due” bills issued by respondent that reflect originally issued freight bill data as well as the “corrected” balance due amounts (Appendix B). Also attached to Mr. Bange’s affidavits are executed copies of contractual agreements (a) in No. 41632, between Ware and Ralston Purina Company and subsidiaries and (with various rate schedules, correspondence, and amendments appended), dated December 29, 1986 (Exhibit L); (2) in No. 41633, between Ware and Kronos f/k/a N.L. Chemicals (with a rate schedule appended), dated October 14, 1988 (Exhibit K); and (3) in No. 41637, between Ware and Golub (with various rate schedules, correspondence, and amendments appended), dated June 7, 1989 (Exhibit K). From his examination of the complaints filed by respondent in the respective court proceedings and the “balance due” bills, Mr. Bange maintains that petitioners were offered freight rates that were not properly or timely filed in tariffs; that petitioners tendered their freight to Ware in reliance upon the offered rates; and that respondent originally billed petitioners for its services at the offered rates, which rates were paid by petitioners. Mr. Bange is of the opinion that these circumstances provide the basis for findings of unreasonable practice.

Respondent contends in all proceedings that the rates quoted and paid in full by petitioners were not the applicable rates, alleging that the applicable rates are contained in Tariffs ICC WARJ 460A and 100A.¹⁰

DISCUSSION AND CONCLUSIONS

We dispose of these proceedings under section 2(e) of the NRA. Accordingly, we do not reach the other issues raised.

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.”¹¹

Here, it is undisputed that Ware is no longer an operating carrier.¹² Accordingly, we may proceed to determine whether Ware’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 in each of the subject proceedings 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 . . .

⁹ The statement of claim forms were attached to the original court complaints filed on behalf of respondent against each of the respective petitioners.

¹⁰ Respondent’s contentions are on the record through information and materials contained in the opening statements submitted by petitioners.

¹¹ 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. Thus, the remedies in section 2(e) may be invoked as to all of the shipments in these proceedings, including those shipments that were transported after September 30, 1990.

¹² Board records disclose that Ware held common carrier and contract carrier authority under Docket No. MC-139973 until the certificates and permits were revoked on July 27, 1992.

. 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 1986 contractual agreement between Ware and Continental (a Ralston Purina subsidiary) in No. 41632, a 1988 contractual agreement between Ware and Kronos in No. 41633, and a 1989 contractual agreement between Ware and Golub in No. 41637, signed by representatives of each party, that clearly reference the existence of negotiated rates. In addition, petitioners have submitted representative balance due bills in each of the proceedings indicating that the rates originally assessed by respondent were consistently and substantially below those that respondent is here attempting to collect. We find this evidence sufficient to satisfy the written evidence requirements of section 2(e). *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).

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 petitioners were offered negotiated rates by Ware; that petitioners tendered traffic to Ware in reasonable reliance on the offered rates; that Ware billed and collected the negotiated rates; and that Ware now seeks to collect additional payments from petitioners, 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 Ware to attempt to collect undercharges from Continental, Kronos, Reckitt, Cliff Star, Golub, Hyponex, and Village Meats for transporting the shipments at issue in these proceedings.¹³

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

- 1 These proceedings are discontinued.
2. This decision is effective on its service date.
3. A copy of this decision will be mailed to:

The Honorable Stephen N. Limbaugh
United States District Court for the
Eastern District of Missouri, Eastern Division
U.S. Court & Custom House
1114 Market Street, Room 315
St. Louis, MO 63101

¹³ Although our decision here is based on our finding under section 2(e) of the NRA, we note that petitioners’ allegation that Ware’s undercharge claims are invalid because it was not a common carrier participant in the mileage guide on which its filed tariffs are based is not without basis. See *Security Services, Inc. v. Kmart Corp.*, 114 S. Ct. 1702 (1994) (*Kmart*).

No. 41632 *et al.*

Nos. 4:93CV1898SNL (TIA), 4:93CV1899SNL (TIA),
4:93CV1897SNL (TIA), 4:93CV1900SNL (TIA),
4:93CV1896SNL (TIA), 4:93CV1895SNL (TIA),
and 4:93CV1902SNL (TIA)

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary