

SERVICE DATE - APRIL 3, 1997

SURFACE TRANSPORTATION BOARD

DECISION

STB No. 41992

KMART CORPORATION
v.
INDUSTRIAL FREIGHT SYSTEM, INC.

Decided: March 31, 1997

This proceeding arises out of the efforts of Industrial Freight System, Inc. (defendant) to collect undercharges for certain transportation services performed on behalf of Kmart Corporation (complainant). This matter is before the Board on referral from the United States Bankruptcy Court for the Central District of California, for the Board's determination of unreasonable practice, rate unreasonableness, and/or other regulatory defenses asserted by complainant against defendant's undercharge claim.

Board records indicate defendant has not filed a timely answer. A procedural schedule will be established to develop a record upon which a decision can be made.

This decision provides a procedural schedule for the parties to submit evidence on these matters. Pursuant to Vertex Corp.- Pet. for Decl. Order-Rates and Practices, 9 I.C.C.2d 688 (1993) (Vertex II), modified at 10 I.C.C.2d 367 (1994) (Vertex III), defendant is directed to supply complainant with tariff and other documentation listed in Appendix A within 20 days of the service date of this decision, if it has not already done so. This will provide complainant with the specific basis for defendant's undercharge claim and enable complainant to submit, as part of its opening statement, necessary information and documentation. If defendant fails to supply complainant with relevant information, the Board may advise the court that defendant is in default of the Board's proceedings and should not be permitted to collect any undercharges from complainant.

The procedural schedule has been set to permit completion of discovery by the various parties before their respective filings are due, and extensions will not be favored. On the Board's own motion as provided by 49 CFR 1114.21(b)(2), use of discovery of all kinds is approved in this proceeding. Consensual discovery of all kinds may be undertaken without resort to the Board for an order, notwithstanding the provisions of 49 CFR 1114.22 requiring a Board order to take depositions. Any request for an order compelling discovery must clearly demonstrate that such discovery is necessary and that the material sought will aid the Board in the resolution of the case. See Trailways Lines, Inc. v. ICC, 766 F.2d 1537, 1546 (D.C. Cir. 1985). Such requests must be submitted within 30 days of the date of service of this decision to be considered timely.

OVERVIEW OF RECENT LEGISLATION

On December 3, 1993, President Clinton signed into law the Negotiated Rates Act of 1993, Pub. L. No. 103-180, 107 Stat. 2044 (NRA), which established a comprehensive framework for resolving undercharge claims of carriers, such as defendant, that no longer transport freight. The NRA reaffirms the courts' original

jurisdiction over undercharge claims, preserves all historic regulatory defenses, including rate reasonableness, and codifies the historic primary jurisdiction of the Commission, as now assumed by the Board, to resolve those issues. Section 2 of the NRA, as now reenacted in 49 U.S.C. 13709-13711, also provides three new remedies for resolving these claims: the section 2(a) "percentage settlement" procedure, now codified at 49 U.S.C. 13709(a)-(d); the section 2(a) "exemption" procedure, now codified at 49 U.S.C. 13709(h), by which qualifying small business concerns, charitable organizations, and recyclable shippers are relieved from any further undercharge liability beyond the rate originally billed and paid; and the alternative section 2(e) "unreasonable practice" procedure, now codified at 49 U.S.C. 13711. Congress also assigned the Board the responsibility to make most determinations concerning the application of these shipper-relief provisions. The courts have broadly upheld the applicability and constitutionality of the remedial provisions contained in section 2 of the NRA.¹

The remedies contained in section 2 of the NRA apply to undercharge claims for transportation service provided by a motor carrier of property (other than a household goods carrier), by a freight forwarder (other than a household goods freight forwarder), or by a party representing such a carrier or freight forwarder. With respect to the "percentage settlement" and "unreasonable practice" procedures, these remedies apply only if the carrier or freight forwarder is no longer transporting property, or is transporting property for the purpose of avoiding application of the NRA. The remedies apply to claims based on the difference between (a) the rate for such transportation service that is lawfully in effect pursuant to a tariff filed with the Board or the Commission, and (b) a negotiated rate originally billed and collected by the carrier or freight forwarder for the transportation.² As further explained below,

¹ See In re Transcon Lines, 58 F.3d 1432 (9th Cir. 1995), cert. denied, 116 S. Ct. 1016 (1996); Whitaker v. Power Brake Supply, Inc., 68 F.3d 1304 (11th Cir. 1995); Jones Truck Lines, Inc. v. Whittier Wood Products Co., 57 F.3d 642 (8th Cir. 1995); In re Lifschultz Fast Freight Corp., 63 F.3d 621 (7th Cir. 1995); In re Bulldog Trucking, Inc., 66 F.3d 1390 (4th Cir. 1995); Hargrave v. United Wire Hanger Corp., 73 F.3d 36 (3d Cir. 1996).

² Once it is established that the involved carrier is no longer operating, the "percentage settlement" and "unreasonable practice" remedies contained in sections 2(a) and 2(e) are properly invoked when five factors are satisfied: (1) whether the person against whom the claim is made was offered a transportation rate by the carrier or freight forwarder other than that legally on file for the transportation service at issue; (2) whether the person tendered freight to the carrier or freight forwarder in reasonable reliance upon the offered transportation rate; (3) whether the carrier or freight forwarder did not properly or timely file a tariff providing for such transportation rate or failed to enter into an agreement for contract carriage; (4) whether the transportation rate was billed and collected by the carrier or freight forwarder; and (5) whether the carrier or freight forwarder or party representing such carrier or freight forwarder demands additional payment of a higher rate filed in a tariff. See 49 U.S.C. 13709(a)(1)(B)(i)-(v); 49 U.S.C. 13711(b)(2)(A)-(E). The section 2(e) procedure,
(continued...)

the exemption against further undercharge liability contained in section 2(a) of the NRA for qualifying small business concerns, charitable organizations, and shippers of recyclables may be more broadly asserted against the claims of all carriers, regardless of operating status.

The NRA also provides two additional dispute resolution mechanisms. Section 4 of the NRA established a new procedure, now codified at 49 U.S.C. 14709, whereby motor carriers and shippers may, by mutual consent, resolve undercharge claims. And as particularly relevant to many undercharge proceedings, section 8 of the NRA, now codified at 49 U.S.C. 13710(b), provides that the Board shall resolve disputes as to whether certain transportation has been provided by a motor carrier in its common carrier capacity or, as often asserted by shippers in these proceedings, in its contract carrier capacity where tariff rates do not apply.

A. Percentage Settlement Procedure

Sections 13709(a)-(d) permit shippers to satisfy the involved undercharge claims by paying a prescribed percentage of the claim. Claims for shipments weighing 10,000 pounds or less may be satisfied by paying 20 percent of the difference between the applicable tariff rate and the rate originally billed and paid, [section 13709(b)]; claims for shipments weighing more than 10,000 pounds may be settled at 15 percent of the difference, [section 13709(c)]; and claims involving public warehousemen, notwithstanding the weight of the shipment, may be settled at 5 percent of the difference [section 13709(d)]. If disputed, the Board will determine the legally applicable tariff rate upon which the percentage settlement will be measured. 49 U.S.C. 13709(b)-(d).

The "percentage settlement" procedure provides that the person against whom a claim has been made must notify the carrier or freight forwarder of its election to proceed under one of the three stipulated payment percentage provisions, and that such election may be made at any time, subject to certain exceptions. 49 U.S.C. 13709(g)(2)-(4). However, section 13709(e) also provides that a person who chooses not to settle its claim under these provisions may pursue all rights and remedies existing under the reenacted Title 49, United States Code, or, for transportation provided before the January 1, 1996 effective date of the reenactment, all rights and remedies that existed under Title 49 the day before that date. These remedies include, among other defenses, the right to pursue a rate reasonableness challenge to the legally applicable rate.

B. Exemption Procedure

Section 13709(h)(1) provides that, notwithstanding the percentage settlement option, a shipper shall not be liable for the difference between the carrier's applicable tariff rate and the rate originally billed and paid if: (A) it qualifies as a

²(...continued)
as explained below, also requires that there be "written evidence" of the agreed-to rate. 49 U.S.C. 13711(f). Both procedures envision that any needed determinations respecting these five factors will be made by the Board.

small-business concern under the Small Business Act, 15 U.S.C. 631 et seq.; (B) it is an organization which is described in section 501(c)(3) of the Internal Revenue Code of 1986 and which is exempt from tax under section 501(a) of the Code; or (C) the cargo involved in the claim is recyclable materials, as defined in section 13709(h)(2).

The section 13709(h) "exemption" procedure may be asserted by qualifying parties against the undercharge claims of all carriers, regardless of their operating status. Paragraph (1) of subsection 13709(a), which contains the requirement that the carrier be nonoperating, is, by its terms, limited to the percentage settlement provisions of subsections 13709(b), (c), and (d). In contrast, subsection 13709(h) expressly affords relief "notwithstanding subsections (b), (c), and (d)." Thus, the evidentiary prerequisites contained in paragraphs (1)(A) and (B) of subsection 13709(a), including the requirement that the carrier be nonoperating, have not been engrafted onto subsection 13709(h), and the courts have consistently found that the exemption may be invoked against the undercharge claims of operating as well as defunct carriers.³

Section 13709(h) does not designate what forum will rule on a shipper's assertion of the section 13709(h) exemption, but traditional principles of administrative law suggest that, with one exception, the Board should not make that determination. A shipper claiming the exemption must demonstrate, inter alia, that it is either a small-business concern under the Small Business Act or a tax-exempt organization described in section 501(c)(3) of the Internal Revenue Code. The mandate of the Board includes making neither of these determinations; they would ordinarily be made either in the court in which the undercharge action is pending or, pursuant to the primary jurisdiction doctrine, before the federal agency charged with administering the relevant statute. However, the section 13709(h) exemption is also available if the cargo involved in the claim is recyclable materials, defined in section 13709(h)(2) as waste products for recycling or reuse in the furtherance of recognized pollution control programs. As the ICC historically made determinations as to whether particular shipments were shipments of recyclables, the Board is the proper forum for resolving whether cargo qualified as recyclable materials.

C. The Unreasonable Practice Procedure

Alternatively, shippers may invoke section 2(e) of the NRA, reenacted and now codified at 49 U.S.C. 13711, which provides that it shall be an "unreasonable practice" for a motor carrier (other than a household goods carrier), a freight forwarder (other than a household goods freight forwarder), or a party representing such a carrier or freight forwarder to attempt to charge or to charge for a transportation service the difference

³ Whitaker v. Power Brake Supply, Inc., 68 F.3d 1304 (11th Cir. 1995); Jones Truck Lines, Inc. v. Whittier Wood Products Co., 57 F.3d 642 (8th Cir. 1995); In re Lifschultz Fast Freight Corp., 63 F.3d 621 (7th Cir. 1995); In re Bulldog Trucking, Inc., 66 F.3d 1390 (4th Cir. 1995); Hargrave v. United Wire Hanger Corp., 73 F.3d 36 (3d Cir. 1996); cf. American Freight System, Inc. v. Valiant Products Corp., 185 B.R. 345 (Bankr. D. Kan. 1995).

between the applicable tariff rate and the negotiated rate for such transportation service.⁴ Like the "percentage settlement" procedures of section 2(a), the "unreasonable practice" remedy under section 2(e) is available only if the carrier or freight forwarder is no longer transporting property or is transporting property for the purpose of avoiding section 2(e).

The Board shall determine whether any particular collection effort is an unreasonable practice, and in making that determination, the Board considers the same five factors necessary for a shipper to invoke the "percentage settlement" option. 49 U.S.C. 13711(b)(2)(A)-(E); see also footnote 3. Section 2(e), however, may be invoked only where the "negotiated rate" agreed to by the parties is based on "written evidence" of such agreement. NRA section 2(e)(6)(B), codified at 49 U.S.C. 13711(f); E.A. Miller, Inc.--Rates & Practices of Best, 10 I.C.C.2d 235, 239-40 (1994); Johnson Welding & Manufacturing Co. v. Bankruptcy Estate of Murphy Freight Lines, No. 40716 (ICC served Aug. 30, 1995).

RATE REASONABLENESS

The Board's standards for assessing rate reasonableness challenges to the undercharge claims of defunct motor carriers like respondent were adopted in a series of decisions in Georgia-Pacific Corp.--Pet. for Decl. Order--Oneida Motor Freight, Inc., 9 I.C.C.2d 103 (1992), 9 I.C.C.2d 796 (1993), and 9 I.C.C.2d 1052 (1993). Under these guidelines, the Board:

determine[s] the reasonableness of a challenged rate by comparing it with a "market-based cluster of price/service alternatives for the issue traffic", or, in other words, rates at "which a shipper was willing to ship and a carrier was willing to transport the goods." . . . If it is established that a challenged rate is "significantly in excess of comparable rates that reflect the prevailing market rates at the time of the shipment(s) (i.e., that the contested rate would not have moved the traffic had it been quoted at that time), [then] the challenged rate will be deemed unreasonable."

Georgia-Pacific, 9 I.C.C.2d at 156-57, see also 9 I.C.C.2d 806-09. This "non-cost" based approach to rate reasonableness in defunct carrier undercharge cases was specifically endorsed by Congress in its enactment of the NRA, and the Georgia-Pacific rate reasonableness standards have now been judicially affirmed. Oneida Motor Freight, Inc. v. ICC, 45 F.3d 503 (D.C. Cir. 1995).

DEVELOPMENT OF THE RECORD

⁴ As reenacted in 49 U.S.C. 13711(a), the ICC Termination Act removed the limitation that made section 2(e) applicable only to transportation service provided prior to September 30, 1990. Further, section 13711(g) makes the amended "section 2(e)" alternative procedure applicable not only to cases originating after the January 1, 1996 effective date of the Act, but to all cases and proceedings pending on that date as well.

This proceeding will be treated under the Modified Procedures rules at 49 CFR part 1112. A procedural schedule will be established sufficient for the parties to use the Board's discovery rules (49 CFR part 1114, Subpart B).

Previously, the ICC bifurcated undercharge proceedings of this type, taking evidence on non-reasonableness issues first, and then, if necessary, taking evidence as to rate reasonableness. That approach was plainly warranted before the Georgia-Pacific standards had been put into place. Now that the Georgia-Pacific standards are in effect, however, the presentation of rate reasonableness evidence should not be particularly burdensome. Accordingly, it will be the practice of the Board to develop the record in these cases in a single phase. Thus, in its opening statement, complainant should assert all regulatory defenses that it wishes the Board to consider, including rate reasonableness.⁵

It is ordered:

1. Defendant is directed to furnish complainant with material called for by Appendix A hereto within 20 days of the service date of this decision.
2. Complainant's opening statement must be filed by June 2, 1997.
3. Defendant's reply must be filed by July 2, 1997.
4. Complainant's rebuttal must be filed by July 22, 1997.
5. Complainant is directed to notify the Board in writing, at the earliest practicable date, of its election of the percentage settlement provisions of section 13709(b), (c), or (d), or any assertion of the exemption under section 13709(h).
6. Defendant is directed to notify the Board in writing, at the earliest practicable date, if it has invoked section 13709(g)(3), giving petitioner 90 days to elect the percentage settlement procedure.
7. This decision is effective on the service date.
8. A copy of this decision will be mailed to:

The Honorable Ernest M. Robles
United States Bankruptcy Court for
the Central District of California
Edward Roybal Federal Building and Courthouse

⁵ It is recognized that many of these undercharge cases may be resolved in rather short order on section 2(e) grounds, and the Board intends to follow that approach when it is available. Section 2(e) may not always be available, however, and in some cases, it may be that other defenses are particularly strong. Therefore, parties should file, in their statements, all evidence and legal arguments on which they believe the Board could base its ruling.

255 East Temple Street
Los Angeles, CA 90012

Re: Case No. LA-93-41245-ER
Adv. No. LA-95-03695-ER

9. A copy of this decision will be served upon defendant's representatives:

Peter N. Scolney
Weiss, Scolney, Spees, Danker & Shinderman
1875 Century Park, Suite 800
East, Los Angeles, CA 90067

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams
Secretary

APPENDIX A

To facilitate effective and timely evaluation of issues involved in undercharge proceedings claimants should furnish the involved shippers the following information for each claim for undercharges (or representative claims in the event of multiple claims for repetitive shipments of identical traffic):¹

- carrier name, license number (MC number);
- carrier operating status; if nonoperating, date of cessation;
- range of dates that shipments moved;
- the name of claimant and the amount of undercharge and interest, if any, sought;
- a copy of the original shipping order;
- a description of the goods shipped (if not fully and accurately described on the shipping order);
- the quantity of goods shipped (if not accurately presented on the shipping order);
- the point of origin and the point of destination (and points of stop-off for pickup and delivery, if pertinent);
- the classification or exception rating assigned the goods, in the case of class rates;
- the mileage from origin to destination (via stop-off points, if pertinent) in the case of mileage rates;
- the discount factor, if any, applied in the original billing compared with the discount factor, if any, applied in re-billing;
- the per-unit line-haul rate as originally billed compared with the per-unit line-haul rate as re-billed;
- the rate or charge for accessorial services, if any, originally billed compared with the rate or charge for accessorial services as re-billed;
- total shipment charges as originally billed compared with total shipment charges as re-billed;
- complete tariff authority (e.g., item number, page number, rule number, etc.) of specifically cited tariffs (all) used in the calculation of applicable

¹ This information should be readily available to claimants because without it, they cannot properly formulate their claims. These requirements were modeled on the provisions of 49 CFR 1008.4 (Documentation of Claims) which sets forth the information required by carriers as they investigate overcharge claims filed by shipper interests. See Vertex II at 697, n.1.

rates and charges as originally billed and as re-billed;

- freight bill payment information (including identity of payers); and
- all other documents or data which is believed by claimant to substantiate its claim(s).

Appendix B contains a suggested format for furnishing this information.

APPENDIX B

Part I

Claimant _____ Amount sought: Undercharge _____; Interest _____;
 Bill of Lading No. _____ Amount Paid _____ by [] consignor, [] consignee, or [] third party.
 Original Freight Bill No. _____
 (If not attached, provide explanation)
 Description of Goods: _____ see bill of lading; otherwise, _____
 Weight of Shipment: _____ see bill of lading; otherwise, _____
 Origin: _____
 Destination: _____
 Stop-off Points: _____

Part II

ORIGINAL BILLING

SERVICE	(1) <u>Classification or</u> <u>Exception Rating</u>	Rating Unit			(4) <u>Per Unit</u> <u>Rate</u>	(5) <u>Discount</u> <u>Factor</u>	TOTAL
		Weight	(2) Miles	(3) Other			
A. Line Haul							
B. Accessorial							

TARIFF AUTHORITIES:

- (1) A.
- B.
- (2) A.
- B.
- (3) A.
- B.
- (4) A.
- B.
- (5) A.
- B.

Part III

REASONS FOR RE-BILLING (EXPLAIN)

_____	FREIGHT MISDESCRIBED	_____	TARIFF-STATED CONDITIONS NOT MET
_____	MATHEMATICAL ERROR	_____	ORIGINAL DISCOUNT DISALLOWED
_____	TARIFF-REQUIRED NOTATIONS OMITTED	_____	OTHER

Explanation:

Part IV

REBILLING

SERVICE	(1) <u>Classification or</u> <u>Exception Rating</u>	Rating Unit			(4) <u>Per Unit</u> <u>Rate</u>	(5) <u>Discount</u> <u>Factor</u>	TOTAL
		Weight	(2) Miles	(3) Other			
A. Line Haul							
B. Accessorial							

TARIFF AUTHORITIES:

- (1) A.
- B.
- (2) A.
- B.
- (3) A.
- B.
- (4) A.
- B.
- (5) A.
- B.