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SERVICE DATE - FEBRUARY 3, 2000

SURFACE TRANSPORTATION BOARD¹

DECISION

No. 41607

WILLIAMHOUSE-REGENCY, INC.--PETITION FOR DECLARATORY
ORDER--CERTAIN RATES AND PRACTICES OF
JONES TRUCK LINES, INC.

Decided: January 27, 2000

We find that the collection of undercharges sought in this proceeding would be an unreasonable practice under former 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). Because of our finding under section 2(e) of the NRA, 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 Southern District of New York, in Jones Truck Lines, Inc. v. Williamhouse-Regency, Inc., Civil Action No. 93 Civ. 4772. The court proceeding was instituted by Jones Truck Lines, Inc. (Jones or respondent), a former motor common and contract carrier, to collect undercharges from Williamhouse-Regency, Inc. (Williamhouse or petitioner). Jones seeks undercharges of

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.

\$31,326.67² (plus interest) allegedly due, in addition to amounts previously paid, for services rendered in transporting 398 shipments of envelopes between July 18, 1988, and June 13, 1991. The shipments were less-than-truckload (LTL) movements transported from petitioner's facilities in Corsicana, TX, to points in Arkansas, Louisiana, Missouri, Georgia, Alabama, Oklahoma, Texas, Mississippi, Tennessee, Kansas, Colorado, Kentucky, and New Mexico.³ By order dated July 31, 1995, the court stayed the proceeding and advised petitioner to institute a proceeding with the ICC to seek resolution of contested issues within the jurisdiction of the agency.⁴

Pursuant to the court order, Williamhouse, on August 17, 1995, filed a petition for declaratory order requesting the ICC to resolve issues of contract carriage, unreasonable practice, and rate reasonableness. By decision served August 28, 1995, the ICC established a procedural schedule for the submission of evidence on non-rate reasonableness issues. Petitioner filed its opening statement on January 31, 1996, and respondent filed its statement of facts and argument on February 28, 1996. Petitioner did not submit a rebuttal statement.

Petitioner asserts that the shipments at issue were contract carrier movements transported pursuant to a transportation agreement entered into between the parties. It further asserts that the originally billed discounted rates were in conformity with respondent's lawfully filed tariffs and were properly assessed, that respondent's attempt to collect undercharges constitutes an unreasonable practice under section 2(e) of the NRA, and that the rates Jones now seeks to assess are unreasonable.

Williamhouse supports its assertions with an affidavit from Michael Bange, president of Champion Transportation Services, Inc., a transportation consultant retained by petitioner who conducted an audit and analysis of the balance due bills and claims of respondent. Mr. Bange asserts that the original freight bills for nearly all of the subject shipments indicate on their face the assessment of class 50 rates to which were applied discounts of 35%, 40%, or 45%. He states that the freight bill "corrections" issued on behalf of respondent are based on a re-rating of the originally assessed charges and the disallowance or reduction of the originally applied discounts that, in most instances, result in increased charges more than double the amounts originally assessed and paid. Attached to Mr. Bange's affidavit are copies of 13 sample "balance due" bills issued by respondent

² Jones originally sought undercharges of \$31,286.17. In the course of the underlying court proceeding, respondent amended five of its undercharge claims, assertedly increasing the total of its undercharge claim to \$31,626.67. An examination of the five amended claims based on the record in this proceeding indicates claim adjustments increasing respondent's claim for undercharges by \$40.50 to a total of \$31,326.67.

³ One of the subject shipments was an inbound movement to Corsicana from Tennessee.

⁴ The court administratively closed the proceeding subject to reopening upon motion by either party within 30 days of a final determination by the ICC. It also specifically found that the NRA applies to bankrupt motor carriers and does not conflict with the Bankruptcy Code.

that reflect originally issued freight bill data as well as “corrected” balance due amounts (Exhibit A). An examination of the sample balance due bills indicates that discounts of 35% or 40% originally applied to 10 of the shipments transported between July 21, 1988, and December 28, 1988, were totally eliminated in the re-rated “corrected charges” and that discounts of 45% originally applied to 3 shipments transported between December 18, 1989, and January 22, 1990, were reduced to 38% in the re-rated “corrected charges.”

Also attached to Mr. Bange’s affidavit are an executed document bearing the signatures of representatives of Jones and Williamhouse entitled “Transportation Agreement” (TA) indicating that effective May 16, 1988, respondent would provide petitioner with a 35% discount off class 50 rates for outbound , prepaid and collect shipments from petitioner’s Dallas, TX⁵ facility to Jones’ direct service points (Exhibit D); a copy of Item 20045 of tariff ICC JTLS 630 that provides for a 45% discount off class 50 rates for outbound LTL shipments (Exhibit I); and a document entitled “Customer Participation Request” signed by a representative of Jones indicating that Williamhouse is a participating shipper in Item 20045 of tariff JTLS 630, effective November 6, 1989 (Exhibit J).

From his examination of the complaint filed by respondent in the court proceeding, the responses provided by respondent to discovery, the “balance due” bills, the TA, and the Customer Participation Request form, Mr. Bange maintains that petitioner was offered a freight rate that was not properly or timely filed; that petitioner tendered its freight to Jones in reliance upon the offered rate; that respondent originally billed petitioner for its services at the offered rate; and that the amounts originally billed by respondent were collected. Mr. Bange is of the opinion that these circumstances provide the basis for a finding of unreasonable practice.

Jones contends that the transportation services provided to petitioner were those of a common carrier, and that the initially assessed discounted rates were not authorized by an applicable filed tariff in that petitioner did not, as required by the terms of the tariff, provide written notification of its participation in the tariff. Respondent further contends that section 2(e) of the NRA does not govern this proceeding and contests the applicability of that provision on both statutory and constitutional grounds.⁶

⁵ In June of 1988, after the execution of the TA, petitioner moved its facility from Dallas to Corsicana.

⁶ As noted, the court in the underlying proceeding had previously determined respondent’s arguments as to the applicability of the NRA to bankrupt motor carriers to be without merit. Additionally, we point out that six federal circuit courts of appeals and virtually every other federal court that has considered respondent’s applicability arguments have determined that the remedies provided in section 2 of the NRA apply to the undercharge claims of bankrupt carriers such as Jones. See Whitaker v. Power Brake Supply, Inc., 68 F.3d 1304 (11th Cir. 1995) (Power Brake); Jones Truck Lines, Inc. v. Whittier Wood Products, Inc., 57 F.3d 642 (8th Cir. 1995) (Whittier) (continued...)

Respondent supports its position with a verified statement from Stephen L. Swezey, Senior Transportation Consultant for Carrier Services, Inc. (CSI), the organization authorized by the bankruptcy court to provide rate audit and collection services for Jones.⁷ Mr. Swezey states that charges originally assessed for 265 shipments at class 50 rates subject to a 35% discount were re-rated at class 70 levels without a discount because no published discount or class exemption ratings were applicable during the dates of shipment; that a 45% discount applied to the originally assessed charges for 102 shipments was adjusted to 38% per Item 5677 of tariff ICC JTLS 631, which under published tariff rules took precedence over tariff ICC JTLS 631; that originally assessed charges for three shipments were re-rated to correct miscellaneous errors; and that 28 of the subject shipments were Texas intrastate movements and should not be the subject of this proceeding. He maintains that the subject shipments did not move in contract carriage and that the tariff rates set forth in the re-rated freight bills are applicable.

(...continued)

Wood); In the Matter of Lifschultz Fast Freight Corporation, 63 F.3d 621 (7th Cir. 1995); In re Transcon Lines, 58 F.3d 1432 (9th Cir. 1995) cert. denied, 116 S. Ct. 1016 (1996); 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); see also, e.g., Jones Truck Lines, Inc. v. AFCO Steel, Inc., 849 F. Supp. 1296 (E.D. Ark. 1994).

Further, as the courts have also held consistently, section 2(e), by its own terms and as more recently amended by the ICC Termination Act, may be applied retroactively against the undercharge claims of defunct, bankrupt carriers that were pending on the NRA's enactment. See, e.g., Jones Truck Lines, Inc. v. Scott Fetzer Co., 860 F. Supp. 1370, 1375-76 (E.D. Ark. 1994); North Penn Transfer, Inc. v. Stationers Distributing Co., 174 B.R. 263 (N.D. Ill. 1994); Gold v. A.J. Hollander Co. (In re Maislin Indus.), 176 B.R. 436 (Bankr. E.D. Mich 1995); cf. Jones Truck Lines, Inc. v. Phoenix Products Co., 860 F. Supp. 1360 (W.D. Wisc. 1994).

Lastly, in response to respondent's "takings" challenge, the Eighth Circuit in Whittier Wood and the Eleventh Circuit in Power Brake have concluded that the NRA does not work an unconstitutional taking under the Fifth Amendment. 57 F.3d at 649-52; 68 F.3d at 1306 n.3. We point out that the courts have consistently rejected that argument, as well as respondent's "separation of powers" argument and its other constitutional challenges to the NRA. See, e.g., Gold v. A.J. Hollander, supra; American Freight System, Inc. v. ICC (In re American Freight System, Inc.), 179 B.R. 952 (Bankr. D. Kan. 1995); Rushton v. Saratoga Forest Products, Inc. (In re Americana Expressways), 177 B.R. 960 (D. Utah 1995), rev'g 172 B.R. 99 (Bankr. D Utah 1994); Zimmerman v. Filler King Co. (In re KMC Transport), 179 B.R. 226 (Bankr D. Idaho 1995); Lewis v. Squareshooter Candy Co. (In re Edson Express), 176 B.R. 54 (D. Kan. 1994).

⁷ Attached as Appendix A to Mr. Swezey's statement is an affidavit submitted by Mr. Charles E. Shinn, another CSI analyst, in the underlying court case. This affidavit, which Mr. Swezey adopts as his own for purposes of this proceeding, describes the rationale used by respondent in re-rating the original freight bills.

DISCUSSION AND CONCLUSIONS

We dispose of this proceeding 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.”⁸

We note that section 2(e)’s availability is not limited to situations where the originally billed rate was unfiled. In evaluating whether a carrier’s collection would be an “unreasonable practice” under section 2(e), the Board must consider, *inter alia*, whether the shipper was offered a rate by the carrier “other than that legally on file with the Board for the transportation service.” Section 2(e)(2)(A) (emphasis added). If the carrier and shipper agreed to a price that was embodied in a filed rate that cannot be applied to the involved shipments, then the shipper was offered a rate not legally on file “for [that] transportation service.” Thus, even if “some of [a carrier’s undercharge claims] are based on it billing and collecting an erroneous [filed] rate, if the so-called erroneous rate was negotiated between the shipper and [carrier] and if the shipper reasonably relied on the rate, the rate would meet the definition of a ‘negotiated rate’ and trigger the application of the provisions of the NRA.” American Freight System, Inc. v. ICC (In re American Freight System), 179 B.R. 952, 957 (Bankr. D. Kan. 1995).

It is undisputed that Jones no longer transports property. Accordingly, we may proceed to determine whether Jones’ attempt to collect 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.

⁸ 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 for all of the shipments at issue in this proceeding, including the June 13, 1991 shipment transported subsequent to September 30, 1990.

Here, the record contains representative sample “balance due” bills issued by respondent indicating originally assessed class 50 rate charges to which discounts of 35%, 40%, or 45% were consistently applied; a TA effective May 16, 1988, indicating respondent’s intent to provide petitioner with a 35% discount off class 50 rates; a tariff provision that provides for a 45% discount off class 50 rates; and an executed customer participation request form indicating an effective date of November 6, 1989, for the 45% discount rate. 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) (E.A. Miller).⁹ 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).

In this case, the evidence indicates that the parties conducted business in accordance with agreed-to negotiated discount rates that were originally billed by Jones and paid by Williamhouse. The consistent application in the original freight bills of assessed charges based on class 50 rates to

⁹ Jones, at pp. 14-15 of its statement filed February 28, 1996, argues that freight bills do not constitute written evidence. Respondent contends that, under section 2(e)(2)(D) of the NRA, the Board must consider whether the negotiated rate “was billed and collected by the carrier” in making its merits determination as to whether a carrier’s conduct was an “unreasonable practice.” This section, according to Jones, contemplates that the Board must examine the freight bills reflecting the negotiated rate that were issued by the carrier to determine if section 2(e) has been satisfied. Jones asserts that allowing freight bills to satisfy the written evidence requirement would make the written evidence provision superfluous because the Board, under section 2(e)(2)(D), must independently consider the collected freight bill.

The ICC and the Board have consistently rejected this argument. Section 2(e)(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 or the NRA’s legislative history that the Board use a carrier’s freight bills for that determination. A carrier may separately attest, or submit or concede in 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 2(e)(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 2(e)(6)(B). The carrier’s argument might be more persuasive if the written evidence requirement were a “sixth” element of the merits determination under section 2(e)(2), but it is not. Rather, as the ICC previously indicated, it is simply a threshold definitional requirement needed to invoke section 2(e). 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 2(e)(2) to determine whether the carrier’s undercharge collection is an unreasonable practice.

which were applied discounts of 35%, 40%, and 45% that in general conform with the class rates and discounts called for in the TA and Item 20045 of tariff ICC JTLS 630 reflect the existence of negotiated discount rates. The evidence further indicates that Williamhouse relied upon the agreed-to rates in tendering the subject shipments to Jones.

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 on 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, Jones concedes at page 14 of its statement that, if section 2(e) is read to apply to this case, it will preclude the Trustee from collecting on his claims. We agree. The evidence establishes that discounted rates were offered to Williamhouse by Jones; that Williamhouse tendered freight in reliance on the agreed-to discounted rates; that the negotiated rates were billed and collected by Jones; that Jones has raised a serious challenge to the applicability of filed tariffs providing for such discounted rates and has seriously questioned the existence of an agreement for contract carriage; and that Jones now seeks to collect additional payment based on a higher rate 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 Jones to attempt to collect undercharges from Williamhouse 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 the date of service.
3. A copy of this decision will be mailed to:

The Honorable John F. Keenan
United States District Court for the
Southern District of New York
U.S. Courthouse
40 Foley Square
New York, NY 10007

No. 41607

Re: Civil Action No. 93 Civ. 4772

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

Vernon A. Williams
Secretary