

SURFACE TRANSPORTATION BOARD¹

DECISION

No. 41520

TRANSCO, INC.--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF TRANSCON LINES

Decided: August 21, 1997

We find that collection of the undercharges sought in this proceeding 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). Because of our finding under section 2(e) of the NRA, we will not reach the other issues raised.

BACKGROUND

This proceeding is before the Board on referral from the United States Bankruptcy Court, Central District of California, in *Leonard L. Gumpert, Chapter 7 Trustee of the Bankruptcy Estate of Transcon Lines v. Transco, Inc.* Case No. SB 93-22207 DN, Chapter 7, Adv. No. SB 94-1280 DN. This matter arises out of the efforts of the trustee in bankruptcy of Transcon Lines (Transcon or respondent), a former motor common and contract carrier, to collect undercharges from Transco, Inc. (Transco or petitioner). Transcon seeks undercharges of \$69,997.11, plus interest, allegedly due, in addition to amounts previously paid, for services rendered in transporting 348 shipments of electronic lighting equipment and other electrical products, during the period May 5, 1987, through March 6, 1990. The shipments moved between West Columbia, SC, and points in the United States. By order dated September 28, 1994, the court stayed the proceeding to enable petitioner to submit issues of unreasonable practice, tariff applicability, and rate reasonableness to the ICC for resolution.

Pursuant to the court order, petitioner, on December 27, 1994, filed a petition for declaratory order requesting the ICC to resolve the issues referred to by the court. By decision served January 9, 1995, the ICC established a procedural schedule for the submission of evidence on non-rate reasonableness issues. On March 10, 1995, petitioner filed its opening statement. Respondent filed its reply on April 11, 1995. Petitioner submitted its rebuttal on May 1, 1995.

Petitioner contends that Transcon's effort to collect the claimed undercharges constitutes an unreasonable practice under section 2(e) of the NRA. Transco maintains that written evidence submitted in this proceeding establishes that it negotiated a rate discount arrangement with Transcon on which petitioner relied in tendering its traffic to Transcon; that these negotiated rates were billed to Transco and paid by Transco; and that Transco would not have used the services of Transcon had the carrier not agreed to assess the discount rates originally charged.

Petitioner supports its argument with a verified statement submitted by Henry A. Brown, III, president of Transco. Mr. Brown states that, beginning in approximately 1984, Transcon approached Transco and offered to provide transportation services at Transco's South Carolina facility at rates that were competitive with those of other motor carriers. Following negotiations,

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.

Transcon offered a substantial discount to transport all Transco freight tendered at its South Carolina facility (generally a 45% discount off class rates). According to Mr. Brown, Transco relied upon the negotiated discount in tendering its traffic to Transcon and would not have done so had it been aware that the discount would not be applied. Mr. Brown maintains that Transcon originally billed for each of the subject shipments at the agreed-upon discounted rate, that the rates assessed were promptly paid by his company, and that these payments were accepted by Transcon without question.

Attached as Exhibit 1 to Mr. Brown's statement are representative samples of corrected freight bills that contain original freight bill data as well as "corrected" balance due amounts. An examination of the representative freight bills indicates the application of some form of discount to the originally assessed charges (usually 45%) which had been eliminated in calculating the "corrected" balance due amount.

Respondent argues that section 2(e) of the NRA does not apply in that Transco has not proffered written proof that the rates negotiated had been agreed upon, i.e., written evidence of the original rate charged or that petitioner reasonably relied on this rate.

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."²

It is undisputed that Transcon no longer transports property.³ Therefore, we may proceed to determine whether the respondent's attempt to collect undercharges 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 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 2(e) cannot be satisfied unless there is written evidence of a negotiated rate agreement.

Here, petitioner has submitted representative balance due bills indicating the consistent application of rate discounts in the original freight bills issued by respondent. 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*). 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).

² Section 2(e), as originally drafted, applied only to transportation service provided prior to September 30, 1990. Here, we note, the shipments at issue moved before September 30, 1990. In any event, 49 U.S.C. 13711(g), which was enacted in the ICC Termination Act as an exception to the general rule noted in footnote 1 to this decision, deletes the September 30, 1990 cut-off date as to proceedings pending as of January 1, 1996.

³ Transcon held both motor common and contract carrier operating authority, issued by the ICC under various sub-numbers of No. MC-110325. All of Transcon's operating authorities were revoked on September 21, 1990.

In this case, the evidence indicates that the discounted rates originally billed by Transcon and paid by Transco were rates agreed to in negotiations between the parties. The representative freight bills (approximately 92) which embody the originally assessed charges submitted by petitioner confirm the unrefuted testimony of Mr. Brown and reflect the existence of negotiated rates.

In exercising our jurisdiction under section 2(e), 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 a negotiated rate was offered by Transcon to Transco; that Transco tendered freight to Transcon in reliance on the negotiated rate; that the rate negotiated was billed and collected by Transcon; and that Transcon 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 Transcon to attempt to collect undercharges from Transco for transporting the shipments at issue in this proceeding.⁴

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 David N. Naugle
United States Bankruptcy Court,
Central District of California
200 Federal Building
699 North Arrowhead Avenue
San Bernardino, CA 92401

⁴ The exact number of shipments at issue as well as the exact dollar amount of the undercharge claim is unclear. Several different dollar figures have been used, throughout the pleadings, in referring to the total amount of the undercharge claim--the most recent being "over \$83,000", see petitioner's reply statement at 1. Also, the 347 shipment figure has been revised to 348. (Petitioner's opening statement, at 2). Petitioner, at page 6 of its opening statement, states that after the ICC issued its January 9, 1995 decision, Transcon submitted claims for \$83,271.59 (consisting of \$57,629.22 in additional freight charges and \$25,579.37 in interest) on 348 shipments, one more than the number of shipments embraced in its initial claim.

Re: Case No. SB 93-22207 DN, Chapter 7
Adv. No. SB 94-1280 DN

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary