

28743
EB

SERVICE DATE - JANUARY 14, 1998

SURFACE TRANSPORTATION BOARD

DECISION

STB No. 41859¹

THE L.D. KICHLER CO. D/B/A KICHLER LIGHTING
--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF
BE-MAC TRANSPORT COMPANY, INC.

STB No. 41860

DELTA FAUCET CORPORATION--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF BE MAC TRANSPORT COMPANY, INC.

STB No. 41877

POLYCOM-HUNTSMAN, INC.--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF BE-MAC TRANSPORT COMPANY, INC.

STB No. 41878

PACKAGING SERVICE CO., INC.--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF BE-MAC TRANSPORT COMPANY, INC.

STB No. 41884

SOUTHWIRE COMPANY, SENATOR WIRE & CABLE DIVISION--
PETITION FOR DECLARATORY ORDER--CERTAIN RATES AND
PRACTICES OF BE-MAC TRANSPORT COMPANY, INC.

STB No. 41887

SUPERIOR INDUSTRIES INTERNATIONAL, INC.--PETITION FOR
DECLARATORY ORDER--CERTAIN RATES AND PRACTICES OF
BE-MAC TRANSPORT COMPANY, INC.

¹ These proceedings are not consolidated. A single decision is being issued for administrative convenience.

STB No. 41859, ET AL.

STB No. 41889

DCA FOOD INDUSTRIES, INC., GOLDEN DIPT CO. DIVISION--
PETITION FOR DECLARATORY ORDER--CERTAIN RATES AND
PRACTICES OF BE-MAC TRANSPORT COMPANY, INC.

STB No. 41892

RICH PRODUCTS CORPORATION--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF BE-MAC TRANSPORT COMPANY, INC.

STB No. 41893

TWECO PRODUCTS--PETITION FOR DECLARATORY ORDER--CERTAIN
RATES AND PRACTICES OF BE-MAC TRANSPORT COMPANY, INC.

STB No. 41894

TRAILMOBILE, INC.--PETITION FOR DECLARATORY ORDER--CERTAIN
RATES AND PRACTICES OF BE-MAC TRANSPORT COMPANY, INC.

STB No. 41895

MONDIAL DISTRIBUTING, INC.--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF BE-MAC TRANSPORT COMPANY, INC.

STB No. 41904

THOMAS & BETTS CORPORATION--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF BE-MAC TRANSPORT COMPANY, INC.

STB No. 41988

ENCO MANUFACTURING COMPANY--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF BE-MAC TRANSPORT COMPANY, INC.

Decided: January 8, 1998

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

BACKGROUND

These matters arise out of court actions in the United States Bankruptcy Court for the Eastern District of Missouri, Eastern Division, identified in the Appendix.² The court proceedings were instituted by Be-Mac Transport Company, Inc. (Be-Mac or respondent),³ a former motor common and contract carrier, to collect undercharges from the shippers listed in the Appendix (shippers or petitioners). Be-Mac seeks undercharges of varying amounts (plus interest) allegedly due, in addition to amounts previously paid by the shippers, for the interstate transportation of shipments from and to various points in the United States. By order dated May 20, 1996, the bankruptcy court stayed the proceedings and referred the issues raised in the cases to the Board for the purpose of resolving issues of contract carriage, tariff applicability, unreasonable practice, and rate reasonableness.⁴

Pursuant to the court order, petitioners filed petitions for declaratory order requesting that the Board resolve the issues raised by the court. In each case, the Board issued a procedural schedule, and petitioners filed their opening statements. In each case, Be-Mac failed to submit a timely reply.⁵

Petitioners assert that respondent's attempts to collect the claimed undercharges constitute an unreasonable practice under section 13711(a). Certain shippers also contend that respondent served them as a contract, rather than a common, carrier, and that the rates respondent now seeks to collect are inapplicable and/or unreasonable. Petitioners maintain that the freight charges originally billed

² The Appendix lists these proceedings, identifying the Board docket numbers, the names of the shippers\petitioners, and the bankruptcy court docket numbers for each.

³ 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.

⁴ The court order was issued in a consolidated proceeding.

⁵ Be-Mac's replies were due at various times in 1997. By letter filed October 28, 1997, respondent requested extensions of time to file its replies in some of these cases. Because each of these extension requests was egregiously late, in many cases having been filed months after the statements were due, each of the requests was denied by decision served November 6, 1997. Be-Mac's failure to participate in these proceedings should bind it in the court proceedings to the record developed at the agency. *See Carriers Traffic Serv. v. Toastmaster*, 707 F.Supp. 1498, 1505-06 (N.D. Ill. 1988) (carrier on court referral must "live with the record it has made (or failed to make)" before the [Board] when pursuing its undercharge proceeding in the courts). We should point out that, even in those cases in which Be-Mac has filed evidence and argument, it has been unable to rebut petitioners' showings that collection of its sought rates would constitute an unreasonable practice.

by Be-Mac and paid by the shippers were rates mutually agreed upon by the parties, and that they relied on the agreed-upon rates in tendering their traffic to Be-Mac to the exclusion of services provided by other carriers.

Each shipper supports its argument with an affidavit from Michael Bange of Champion Transportation Services, Inc., a transportation consultant retained by petitioners. Attached to each of Mr. Bange's affidavits is a copy of the original court complaint filed by respondent against each respective shipper, listing respondent's undercharge claims by freight bill number, together with the original billing date and balance due amount claimed. In addition, each of Mr. Bange's affidavits includes all, or a representative sample, of the "balance due" bills issued by respondent to each respective shipper which reflect originally issued freight bill data as well as revised balance due amounts. Moreover, attached to each affidavit are Be-Mac's answers to petitioners' requests for admissions and accompanying interrogatories, filed in the respective court proceedings, and, as pertinent, copies of tariffs, contracts and confirmation letters on which the original charges were based. In each case, Mr. Bange states that his review of balance due bills issued by respondent for the shipments indicates that higher charges were arrived at by various means including disallowing discounts or commodity rates originally applied, adjusting the originally allowed discount, and re-rating shipments at higher rates contained in rate bureau and other tariffs.

DISCUSSION AND CONCLUSIONS

We will dispose of this proceeding under section 13711. Accordingly, we do not reach the other issues raised.⁶

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."

⁶ 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. 40837 (STB served October 23, 1997). We will not address the other more complex issues raised here because our section 13711 findings fully resolve the question of petitioners' liability for the rates sought.

It is undisputed that Be-Mac no longer transports property.⁷ Accordingly, we may proceed to determine whether the respondent's attempt to collect undercharges (the difference between the applicable filed rate and the negotiated rate) in each case 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, in each case, Mr. Bange has submitted a list of the shipments subject to respondent’s collection efforts, as well as many, if not all, of the revised freight bills. Those representative revised freight bills indicate that the rates originally charged were consistently and substantially below those that respondent is seeking to assess and were in conformity with the rates assertedly agreed to by the parties. 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). 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).

Not only do these written freight bills satisfy the “written evidence” requirement of the statute, but, together with copies of tariffs, contracts and confirmation letters which formed the basis for the original charges and Mr. Bange’s testimony, they provide evidence establishing that the original rates assessed by Be-Mac and paid by the shippers were rates agreed to in negotiations between the parties. The original freight bills issued by respondent for the subject shipments, as well as the additional evidence, support petitioners’ contentions and reflect the existence of negotiated rates. The evidence indicates that petitioners relied on the Be-Mac agreement to charge the negotiated rates, and that petitioners would not have used Be-Mac had it quoted the rates it now seeks to collect.

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

⁷ Prior to filing for bankruptcy, Be-Mac held motor common and contract carrier operating authority, issued by the Interstate Commerce Commission under various sub-numbers of No. MC-10872.

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)].

In all these cases, the unrefuted evidence submitted by petitioners establishes that a negotiated rate was offered to the petitioners by Be-Mac; that the petitioners reasonably relied on the offered rate in tendering their traffic to Be-Mac; that the negotiated 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 the petitioners for transporting the shipments at issue in these proceedings.

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 the service date.

STB No. 41859, ET AL.

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: Cases listed in the Appendix.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

APPENDIX A

STB Docket No.	Petitioner	Adv. Proc. No.
41859	The L.D. Kichler Co. d/b/a Kichler Lighting	95-4138
41860	Delta Faucet Corporation	95-4036
41877	Polycom-Huntsman, Inc.	95-4067
41878	Packaging Service Co., Inc.	95-4075
41884	Southwire Company, Senator Wire & Cable Division	95-4226
41887	Superior Industries International, Inc.	95-4219
41889	DCA Food Industries, Inc., Golden Dipt Co. Division	95-4037
41892	Rich Products Corporation	95-4166
41893	Tweco Products	95-4497
41894	Trailmobile, Inc.	95-4103
41895	Mondial Distributing, Inc.	95-4071
41904	Thomas & Betts Corporation	95-4251
41988	Enco Manufacturing Company	95-4156-293

28743
EB

SERVICE DATE - JANUARY 14, 1998

SURFACE TRANSPORTATION BOARD

DECISION

STB No. 41859¹

THE L.D. KICHLER CO. D/B/A KICHLER LIGHTING
--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF
BE-MAC TRANSPORT COMPANY, INC.

STB No. 41860

DELTA FAUCET CORPORATION--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF BE MAC TRANSPORT COMPANY, INC.

STB No. 41877

POLYCOM-HUNTSMAN, INC.--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF BE-MAC TRANSPORT COMPANY, INC.

STB No. 41878

PACKAGING SERVICE CO., INC.--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF BE-MAC TRANSPORT COMPANY, INC.

STB No. 41884

SOUTHWIRE COMPANY, SENATOR WIRE & CABLE DIVISION--
PETITION FOR DECLARATORY ORDER--CERTAIN RATES AND
PRACTICES OF BE-MAC TRANSPORT COMPANY, INC.

STB No. 41887

SUPERIOR INDUSTRIES INTERNATIONAL, INC.--PETITION FOR
DECLARATORY ORDER--CERTAIN RATES AND PRACTICES OF
BE-MAC TRANSPORT COMPANY, INC.

¹ These proceedings are not consolidated. A single decision is being issued for administrative convenience.

STB No. 41859, ET AL.

STB No. 41889

DCA FOOD INDUSTRIES, INC., GOLDEN DIPT CO. DIVISION--
PETITION FOR DECLARATORY ORDER--CERTAIN RATES AND
PRACTICES OF BE-MAC TRANSPORT COMPANY, INC.

STB No. 41892

RICH PRODUCTS CORPORATION--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF BE-MAC TRANSPORT COMPANY, INC.

STB No. 41893

TWECO PRODUCTS--PETITION FOR DECLARATORY ORDER--CERTAIN
RATES AND PRACTICES OF BE-MAC TRANSPORT COMPANY, INC.

STB No. 41894

TRAILMOBILE, INC.--PETITION FOR DECLARATORY ORDER--CERTAIN
RATES AND PRACTICES OF BE-MAC TRANSPORT COMPANY, INC.

STB No. 41895

MONDIAL DISTRIBUTING, INC.--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF BE-MAC TRANSPORT COMPANY, INC.

STB No. 41904

THOMAS & BETTS CORPORATION--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF BE-MAC TRANSPORT COMPANY, INC.

STB No. 41988

ENCO MANUFACTURING COMPANY--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF BE-MAC TRANSPORT COMPANY, INC.

Decided: January 8, 1998

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

BACKGROUND

These matters arise out of court actions in the United States Bankruptcy Court for the Eastern District of Missouri, Eastern Division, identified in the Appendix.² The court proceedings were instituted by Be-Mac Transport Company, Inc. (Be-Mac or respondent),³ a former motor common and contract carrier, to collect undercharges from the shippers listed in the Appendix (shippers or petitioners). Be-Mac seeks undercharges of varying amounts (plus interest) allegedly due, in addition to amounts previously paid by the shippers, for the interstate transportation of shipments from and to various points in the United States. By order dated May 20, 1996, the bankruptcy court stayed the proceedings and referred the issues raised in the cases to the Board for the purpose of resolving issues of contract carriage, tariff applicability, unreasonable practice, and rate reasonableness.⁴

Pursuant to the court order, petitioners filed petitions for declaratory order requesting that the Board resolve the issues raised by the court. In each case, the Board issued a procedural schedule, and petitioners filed their opening statements. In each case, Be-Mac failed to submit a timely reply.⁵

Petitioners assert that respondent's attempts to collect the claimed undercharges constitute an unreasonable practice under section 13711(a). Certain shippers also contend that respondent served them as a contract, rather than a common, carrier, and that the rates respondent now seeks to collect are inapplicable and/or unreasonable. Petitioners maintain that the freight charges originally billed

² The Appendix lists these proceedings, identifying the Board docket numbers, the names of the shippers\petitioners, and the bankruptcy court docket numbers for each.

³ 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.

⁴ The court order was issued in a consolidated proceeding.

⁵ Be-Mac's replies were due at various times in 1997. By letter filed October 28, 1997, respondent requested extensions of time to file its replies in some of these cases. Because each of these extension requests was egregiously late, in many cases having been filed months after the statements were due, each of the requests was denied by decision served November 6, 1997. Be-Mac's failure to participate in these proceedings should bind it in the court proceedings to the record developed at the agency. *See Carriers Traffic Serv. v. Toastmaster*, 707 F.Supp. 1498, 1505-06 (N.D. Ill. 1988) (carrier on court referral must "live with the record it has made (or failed to make)" before the [Board] when pursuing its undercharge proceeding in the courts). We should point out that, even in those cases in which Be-Mac has filed evidence and argument, it has been unable to rebut petitioners' showings that collection of its sought rates would constitute an unreasonable practice.

by Be-Mac and paid by the shippers were rates mutually agreed upon by the parties, and that they relied on the agreed-upon rates in tendering their traffic to Be-Mac to the exclusion of services provided by other carriers.

Each shipper supports its argument with an affidavit from Michael Bange of Champion Transportation Services, Inc., a transportation consultant retained by petitioners. Attached to each of Mr. Bange's affidavits is a copy of the original court complaint filed by respondent against each respective shipper, listing respondent's undercharge claims by freight bill number, together with the original billing date and balance due amount claimed. In addition, each of Mr. Bange's affidavits includes all, or a representative sample, of the "balance due" bills issued by respondent to each respective shipper which reflect originally issued freight bill data as well as revised balance due amounts. Moreover, attached to each affidavit are Be-Mac's answers to petitioners' requests for admissions and accompanying interrogatories, filed in the respective court proceedings, and, as pertinent, copies of tariffs, contracts and confirmation letters on which the original charges were based. In each case, Mr. Bange states that his review of balance due bills issued by respondent for the shipments indicates that higher charges were arrived at by various means including disallowing discounts or commodity rates originally applied, adjusting the originally allowed discount, and re-rating shipments at higher rates contained in rate bureau and other tariffs.

DISCUSSION AND CONCLUSIONS

We will dispose of this proceeding under section 13711. Accordingly, we do not reach the other issues raised.⁶

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."

⁶ 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. 40837 (STB served October 23, 1997). We will not address the other more complex issues raised here because our section 13711 findings fully resolve the question of petitioners' liability for the rates sought.

It is undisputed that Be-Mac no longer transports property.⁷ Accordingly, we may proceed to determine whether the respondent's attempt to collect undercharges (the difference between the applicable filed rate and the negotiated rate) in each case 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, in each case, Mr. Bange has submitted a list of the shipments subject to respondent’s collection efforts, as well as many, if not all, of the revised freight bills. Those representative revised freight bills indicate that the rates originally charged were consistently and substantially below those that respondent is seeking to assess and were in conformity with the rates assertedly agreed to by the parties. 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). 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).

Not only do these written freight bills satisfy the “written evidence” requirement of the statute, but, together with copies of tariffs, contracts and confirmation letters which formed the basis for the original charges and Mr. Bange’s testimony, they provide evidence establishing that the original rates assessed by Be-Mac and paid by the shippers were rates agreed to in negotiations between the parties. The original freight bills issued by respondent for the subject shipments, as well as the additional evidence, support petitioners’ contentions and reflect the existence of negotiated rates. The evidence indicates that petitioners relied on the Be-Mac agreement to charge the negotiated rates, and that petitioners would not have used Be-Mac had it quoted the rates it now seeks to collect.

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

⁷ Prior to filing for bankruptcy, Be-Mac held motor common and contract carrier operating authority, issued by the Interstate Commerce Commission under various sub-numbers of No. MC-10872.

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)].

In all these cases, the unrefuted evidence submitted by petitioners establishes that a negotiated rate was offered to the petitioners by Be-Mac; that the petitioners reasonably relied on the offered rate in tendering their traffic to Be-Mac; that the negotiated 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 the petitioners for transporting the shipments at issue in these proceedings.

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 the service date.

STB No. 41859, ET AL.

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: Cases listed in the Appendix.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

APPENDIX A

STB Docket No.	Petitioner	Adv. Proc. No.
41859	The L.D. Kichler Co. d/b/a Kichler Lighting	95-4138
41860	Delta Faucet Corporation	95-4036
41877	Polycom-Huntsman, Inc.	95-4067
41878	Packaging Service Co., Inc.	95-4075
41884	Southwire Company, Senator Wire & Cable Division	95-4226
41887	Superior Industries International, Inc.	95-4219
41889	DCA Food Industries, Inc., Golden Dipt Co. Division	95-4037
41892	Rich Products Corporation	95-4166
41893	Tweco Products	95-4497
41894	Trailmobile, Inc.	95-4103
41895	Mondial Distributing, Inc.	95-4071
41904	Thomas & Betts Corporation	95-4251
41988	Enco Manufacturing Company	95-4156-293

28743
EB

SERVICE DATE - JANUARY 14, 1998

SURFACE TRANSPORTATION BOARD

DECISION

STB No. 41859¹

THE L.D. KICHLER CO. D/B/A KICHLER LIGHTING
--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF
BE-MAC TRANSPORT COMPANY, INC.

STB No. 41860

DELTA FAUCET CORPORATION--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF BE MAC TRANSPORT COMPANY, INC.

STB No. 41877

POLYCOM-HUNTSMAN, INC.--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF BE-MAC TRANSPORT COMPANY, INC.

STB No. 41878

PACKAGING SERVICE CO., INC.--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF BE-MAC TRANSPORT COMPANY, INC.

STB No. 41884

SOUTHWIRE COMPANY, SENATOR WIRE & CABLE DIVISION--
PETITION FOR DECLARATORY ORDER--CERTAIN RATES AND
PRACTICES OF BE-MAC TRANSPORT COMPANY, INC.

STB No. 41887

SUPERIOR INDUSTRIES INTERNATIONAL, INC.--PETITION FOR
DECLARATORY ORDER--CERTAIN RATES AND PRACTICES OF
BE-MAC TRANSPORT COMPANY, INC.

¹ These proceedings are not consolidated. A single decision is being issued for administrative convenience.

STB No. 41859, ET AL.

STB No. 41889

DCA FOOD INDUSTRIES, INC., GOLDEN DIPT CO. DIVISION--
PETITION FOR DECLARATORY ORDER--CERTAIN RATES AND
PRACTICES OF BE-MAC TRANSPORT COMPANY, INC.

STB No. 41892

RICH PRODUCTS CORPORATION--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF BE-MAC TRANSPORT COMPANY, INC.

STB No. 41893

TWECO PRODUCTS--PETITION FOR DECLARATORY ORDER--CERTAIN
RATES AND PRACTICES OF BE-MAC TRANSPORT COMPANY, INC.

STB No. 41894

TRAILMOBILE, INC.--PETITION FOR DECLARATORY ORDER--CERTAIN
RATES AND PRACTICES OF BE-MAC TRANSPORT COMPANY, INC.

STB No. 41895

MONDIAL DISTRIBUTING, INC.--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF BE-MAC TRANSPORT COMPANY, INC.

STB No. 41904

THOMAS & BETTS CORPORATION--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF BE-MAC TRANSPORT COMPANY, INC.

STB No. 41988

ENCO MANUFACTURING COMPANY--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF BE-MAC TRANSPORT COMPANY, INC.

Decided: January 8, 1998

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

BACKGROUND

These matters arise out of court actions in the United States Bankruptcy Court for the Eastern District of Missouri, Eastern Division, identified in the Appendix.² The court proceedings were instituted by Be-Mac Transport Company, Inc. (Be-Mac or respondent),³ a former motor common and contract carrier, to collect undercharges from the shippers listed in the Appendix (shippers or petitioners). Be-Mac seeks undercharges of varying amounts (plus interest) allegedly due, in addition to amounts previously paid by the shippers, for the interstate transportation of shipments from and to various points in the United States. By order dated May 20, 1996, the bankruptcy court stayed the proceedings and referred the issues raised in the cases to the Board for the purpose of resolving issues of contract carriage, tariff applicability, unreasonable practice, and rate reasonableness.⁴

Pursuant to the court order, petitioners filed petitions for declaratory order requesting that the Board resolve the issues raised by the court. In each case, the Board issued a procedural schedule, and petitioners filed their opening statements. In each case, Be-Mac failed to submit a timely reply.⁵

Petitioners assert that respondent's attempts to collect the claimed undercharges constitute an unreasonable practice under section 13711(a). Certain shippers also contend that respondent served them as a contract, rather than a common, carrier, and that the rates respondent now seeks to collect are inapplicable and/or unreasonable. Petitioners maintain that the freight charges originally billed

² The Appendix lists these proceedings, identifying the Board docket numbers, the names of the shippers\petitioners, and the bankruptcy court docket numbers for each.

³ 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.

⁴ The court order was issued in a consolidated proceeding.

⁵ Be-Mac's replies were due at various times in 1997. By letter filed October 28, 1997, respondent requested extensions of time to file its replies in some of these cases. Because each of these extension requests was egregiously late, in many cases having been filed months after the statements were due, each of the requests was denied by decision served November 6, 1997. Be-Mac's failure to participate in these proceedings should bind it in the court proceedings to the record developed at the agency. *See Carriers Traffic Serv. v. Toastmaster*, 707 F.Supp. 1498, 1505-06 (N.D. Ill. 1988) (carrier on court referral must "live with the record it has made (or failed to make)" before the [Board] when pursuing its undercharge proceeding in the courts). We should point out that, even in those cases in which Be-Mac has filed evidence and argument, it has been unable to rebut petitioners' showings that collection of its sought rates would constitute an unreasonable practice.

by Be-Mac and paid by the shippers were rates mutually agreed upon by the parties, and that they relied on the agreed-upon rates in tendering their traffic to Be-Mac to the exclusion of services provided by other carriers.

Each shipper supports its argument with an affidavit from Michael Bange of Champion Transportation Services, Inc., a transportation consultant retained by petitioners. Attached to each of Mr. Bange's affidavits is a copy of the original court complaint filed by respondent against each respective shipper, listing respondent's undercharge claims by freight bill number, together with the original billing date and balance due amount claimed. In addition, each of Mr. Bange's affidavits includes all, or a representative sample, of the "balance due" bills issued by respondent to each respective shipper which reflect originally issued freight bill data as well as revised balance due amounts. Moreover, attached to each affidavit are Be-Mac's answers to petitioners' requests for admissions and accompanying interrogatories, filed in the respective court proceedings, and, as pertinent, copies of tariffs, contracts and confirmation letters on which the original charges were based. In each case, Mr. Bange states that his review of balance due bills issued by respondent for the shipments indicates that higher charges were arrived at by various means including disallowing discounts or commodity rates originally applied, adjusting the originally allowed discount, and re-rating shipments at higher rates contained in rate bureau and other tariffs.

DISCUSSION AND CONCLUSIONS

We will dispose of this proceeding under section 13711. Accordingly, we do not reach the other issues raised.⁶

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."

⁶ 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. 40837 (STB served October 23, 1997). We will not address the other more complex issues raised here because our section 13711 findings fully resolve the question of petitioners' liability for the rates sought.

It is undisputed that Be-Mac no longer transports property.⁷ Accordingly, we may proceed to determine whether the respondent's attempt to collect undercharges (the difference between the applicable filed rate and the negotiated rate) in each case 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, in each case, Mr. Bange has submitted a list of the shipments subject to respondent’s collection efforts, as well as many, if not all, of the revised freight bills. Those representative revised freight bills indicate that the rates originally charged were consistently and substantially below those that respondent is seeking to assess and were in conformity with the rates assertedly agreed to by the parties. 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). 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).

Not only do these written freight bills satisfy the “written evidence” requirement of the statute, but, together with copies of tariffs, contracts and confirmation letters which formed the basis for the original charges and Mr. Bange’s testimony, they provide evidence establishing that the original rates assessed by Be-Mac and paid by the shippers were rates agreed to in negotiations between the parties. The original freight bills issued by respondent for the subject shipments, as well as the additional evidence, support petitioners’ contentions and reflect the existence of negotiated rates. The evidence indicates that petitioners relied on the Be-Mac agreement to charge the negotiated rates, and that petitioners would not have used Be-Mac had it quoted the rates it now seeks to collect.

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

⁷ Prior to filing for bankruptcy, Be-Mac held motor common and contract carrier operating authority, issued by the Interstate Commerce Commission under various sub-numbers of No. MC-10872.

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)].

In all these cases, the unrefuted evidence submitted by petitioners establishes that a negotiated rate was offered to the petitioners by Be-Mac; that the petitioners reasonably relied on the offered rate in tendering their traffic to Be-Mac; that the negotiated 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 the petitioners for transporting the shipments at issue in these proceedings.

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 the service date.

STB No. 41859, ET AL.

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: Cases listed in the Appendix.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

APPENDIX A

STB Docket No.	Petitioner	Adv. Proc. No.
41859	The L.D. Kichler Co. d/b/a Kichler Lighting	95-4138
41860	Delta Faucet Corporation	95-4036
41877	Polycom-Huntsman, Inc.	95-4067
41878	Packaging Service Co., Inc.	95-4075
41884	Southwire Company, Senator Wire & Cable Division	95-4226
41887	Superior Industries International, Inc.	95-4219
41889	DCA Food Industries, Inc., Golden Dipt Co. Division	95-4037
41892	Rich Products Corporation	95-4166
41893	Tweco Products	95-4497
41894	Trailmobile, Inc.	95-4103
41895	Mondial Distributing, Inc.	95-4071
41904	Thomas & Betts Corporation	95-4251
41988	Enco Manufacturing Company	95-4156-293