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SERVICE DATE - DECEMBER 22, 1997

SURFACE TRANSPORTATION BOARD

DECISION

STB No. 41688

WHIRLPOOL CORPORATION--PETITION FOR DECLARATORY ORDER--  
CERTAIN RATES AND PRACTICES OF  
ST. JOHNSBURY TRUCKING COMPANY, INC.

Decided: December 15, 1997

We find that collection of the undercharges sought in this proceeding 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 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 *St. Johnsbury Trucking Co., Inc. v. Whirlpool Corporation*, 95-Civ 7996, Adv. No. 95-1567A. The court proceeding was instituted by St. Johnsbury Trucking Co., Inc. (St. Johnsbury or respondent),<sup>1</sup> a former motor common and contract carrier, to collect undercharges from Whirlpool Corporation (Whirlpool or petitioner). St. Johnsbury seeks undercharges of \$224,672.32 (plus interest) allegedly due, in addition to amounts previously paid, for the transportation of 9,326 less-than-truckload shipments between 1990 and 1993. Most of the shipments moved outbound from petitioner's facilities in Carlisle, PA, to customer locations throughout New England and the Middle Atlantic States from New York to Maryland. A small number of shipments moved inbound to Carlisle, while others moved from Kearny and Edison, NJ, and Dayton, Clyde, Findlay, Columbus and Marion, OH. By order dated March 29, 1996, the district court stayed the proceeding to enable referral of several issues, including tariff applicability, rate reasonableness, and unreasonable practice, to the Board for determination.<sup>2</sup>

Pursuant to the court order, Whirlpool, on May 1, 1996, filed a petition for declaratory order requesting that the Board resolve the issues referred to by the court. By decision served May 15, 1996, the Board issued a procedural schedule. On July 17, 1996, Whirlpool filed its opening

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<sup>1</sup> On June 15, 1993, St. Johnsbury filed for bankruptcy under Chapter 11 of the United States Bankruptcy Code, in the United States Bankruptcy Court for the Southern District of New York, Case No. 93 B 43136 (FGC).

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statement. St. Johnsbury submitted its reply on August 16, 1996, and petitioner filed its rebuttal statement on September 5, 1996.

Petitioner asserts that respondent's attempt to collect the claimed undercharges constitutes an unreasonable practice under section 13711. Petitioner maintains that written evidence it has submitted demonstrates that the freight charges originally billed by St. Johnsbury and paid by Whirlpool were rates mutually agreed upon by the parties, that the payments it made were accepted as payment in full, and that Whirlpool relied upon the agreed-upon rates in tendering its traffic to St. Johnsbury to the exclusion of services provided by other carriers.

Whirlpool supports its argument with a verified statement from Robert Petz, Manager of Transportation Operations for Whirlpool, who is responsible for the ongoing analysis of petitioner's transportation functions. Attached to Mr. Petz's statement is a copy of the list attached to the Court complaint, identifying each of the subject undercharge claims by freight bill number together with the original billing date and balance due amount claimed (Exhibit A). In addition, Mr. Petz's affidavit includes representative "balance due" bills issued by respondent that reflect originally issued freight bill data as well as revised balance due amounts (Exhibit B).

Respondent maintains that the rates and charges initially assessed were not authorized by an applicable filed tariff in effect at the time of the shipments. It relies on a verified statement submitted by Stephen L. Swezey, Senior Transportation Consultant for Carrier Service, Inc., the auditor authorized by the bankruptcy court to provide rate audit and collection services on behalf of respondent, who asserts that the discounts initially allowed by St. Johnsbury had been canceled before these shipments moved. Respondent also contends that petitioner has not proffered written proof that the rates negotiated had been agreed upon, *i.e.*, written evidence of the original rate charged or evidence that petitioner reasonably relied on the rate.

#### DISCUSSION AND CONCLUSIONS

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

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."

It is undisputed that St. Johnsbury no longer transports property.<sup>3</sup> Accordingly, we may proceed to determine whether respondent's attempt to collect undercharges (the difference between the applicable filed rate and the negotiated rate) is an unreasonable practice.

Initially, we must address the threshold issue of whether 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, Mr. Petz has submitted a list of the shipments subject to this proceeding as well as a sample revised freight bills. The revised freight bills indicate that the rates originally charged were consistently and substantially below those that respondent is here 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).<sup>4</sup>

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<sup>3</sup> Prior to filing for bankruptcy, St. Johnsbury held motor common and contract carrier operating authority, issued by the Interstate Commerce Commission under various sub-numbers of No. MC-108473.

<sup>4</sup> St. Johnsbury, at p. 4 of its reply statement, argues that freight bills do not constitute written evidence of an agreement for a negotiated rate under section 13711(f). Respondent contends that under section 13711(b)(2)(D), 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 St. Johnsbury, contemplates that freight bills reflecting the negotiated rate were issued by the carrier, and that the Board must examine the freight bills to determine if section 13711(b)(2)(D) has been satisfied. St. Johnsbury asserts that allowing freight bills to satisfy the written evidence requirement would make the written evidence provision superfluous because the Board, under section 13711(b)(2)(D), must separately consider the collected freight bill.

The ICC and the Board have consistently rejected this argument. Section 13711(b)(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 that the Board use a carrier's freight bills for that determination. A carrier may separately attest, or submit or concede in a pleading, that the negotiated, unfiled rate was billed and collected, and there is nothing to preclude the Board from

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In this case, the evidence indicates that the original rates assessed by St. Johnsbury and paid by Whirlpool were rates agreed to in negotiations between the parties. The original freight bills issued by respondent for the subject shipments support petitioner's contentions and reflect the existence of negotiated rates.

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 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)].

Here, the evidence establishes that a negotiated rate was offered to Whirlpool by St. Johnsbury; that Whirlpool reasonably relied on the offered rate in tendering its traffic to St. Johnsbury; that the negotiated rate was billed and collected by St. Johnsbury; and that St. Johnsbury 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 St. Johnsbury to attempt to collect undercharges from Whirlpool for transporting the shipments at issue in this proceeding.<sup>5</sup>

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

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<sup>4</sup>(...continued)

using such statements (or other evidence) in finding that section 13711(b)(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 13711(f). The respondent's argument might be more persuasive if the written evidence requirement was a "sixth" element of the merits determination under section 13711(b)(2), but it is not. Rather, as the ICC previously indicated, it is simply a threshold requirement needed to invoke section 13711. *See E.A. Miller, supra*, 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 13711(b)(2) to determine whether the carrier's undercharge collection effort is an unreasonable practice.

<sup>5</sup> Though Respondent contends that it is entitled to collect the charges it seeks because the rates originally billed were not contained in an effective tariff, whether the rate originally charged had been filed is not relevant to an unreasonable practices determination.

*It is ordered:*

1. This proceeding is discontinued.
2. This decision is effective on the service date.
3. A copy of this decision will be mailed to:

The Honorable Sonia Sotomayor  
United States District Court for  
the Southern District of New York  
500 Pearl Street, Room 1340  
New York, NY 10038

Re: 95-Civ-7996,  
Adv. No. 95-1567A

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams  
Secretary

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#### DISCUSSION AND CONCLUSIONS

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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.

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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 13711(f). The respondent's argument might be more persuasive if the written evidence requirement was a "sixth" element of the merits determination under section 13711(b)(2), but it is not. Rather, as the ICC previously indicated, it is simply a threshold requirement needed to invoke section 13711. *See E.A. Miller, supra*, 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 13711(b)(2) to determine whether the carrier's undercharge collection effort is an unreasonable practice.

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