

SURFACE TRANSPORTATION BOARD ¹

DECISION

No. 40830

BEDFORD INDUSTRIES, INC.

v.

THE BANKRUPTCY ESTATE OF MURPHY MOTOR FREIGHT LINES, INC.

Decided: September 23, 1997

We find that the collection of 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 in this proceeding.

BACKGROUND

This matter arises out of a court action in the United States Bankruptcy Court, District of Minnesota, Third Division, in *Murphy Motor Freight Lines, Inc., v. Bedford Industries*, BKY 3-87-577, Adv. 3-89-107. The court proceeding was instituted by Murphy Motor Freight Lines, Inc. (Murphy or defendant), a former motor common and contract carrier, to collect undercharges from Bedford Industries, Inc. (Bedford or complainant). Murphy seeks to collect undercharges in the amount of \$23,156.75 allegedly due, in addition to the amounts previously paid, for services rendered in transporting 485 less than truckload (LTL) shipments of plastic or paper covered small wire ties between February 27, 1984, and February 12, 1987. The shipments were transported from Bedford's Worthington, MN facilities to points throughout the United States. By order dated April 2, 1991, the court stayed the proceeding and referred all tariff rate issues, particularly the issue of rate reasonableness, to the ICC for determination.

Pursuant to the court order and 49 CFR 1131, Bedford, by complaint filed July 9, 1992, requested the ICC to resolve issues of tariff applicability, unreasonable practice, and rate reasonableness. By decision served November 10, 1992, the ICC established a procedural schedule. On January 15, 1993, complainant submitted its opening statement. Defendant failed to submit a reply and indeed has failed to make an appearance or otherwise participate in any aspect of this proceeding.²

Complainant asserts that, during the subject period, defendant offered to transport its traffic at discounts ranging from 20% to 35% off class rates. It further asserts that these discounts were included in Murphy's published tariffs and were reflected in the original freight bills issued by defendant. Bedford states that Murphy now maintains that the originally applied discounts are inapplicable for reasons including failure to comply with tariff notice requirements, tariff

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.

² By decision served March 26, 1993, the ICC directed Murphy either to file a reply or to show cause why this proceeding should not be decided on the existing record. Murphy did not respond.

cancellation, and reliance on a tariff commodity freight classification unrelated to the actual commodities shipped. Bedford, however, argues: (a) that failure to comply with the tariff notice requirement does not invalidate the applied discount, (b) that other filed tariffs providing comparable discounts are applicable to the subject shipments, and (c) that publication of the erroneous commodity freight classification, which was the result of a technical error on the part of Murphy, should not provide a basis for penalizing Bedford.

Complainant contends that Murphy transported the subject shipments and billed at the agreed-upon rates that were paid by Bedford. Attached to complainant's opening statement are copies of 22 balance due bills issued by the defendant, a representative sample of the subject undercharge claims that reflect originally issued freight bill data as well as the "corrected" balance due amount. A review of those balance due bills shows that discounts of 20% to 25% were applied to seven representative shipments transported between June 18, 1984, and August 30, 1984, and that a 35% discount³ was applied to 15 representative shipments transported between June 12, 1986, and December 19, 1986.

Complainant supports its argument with a verified statement from Robert E. Boushek, Bedford Vice President and General Manager. Mr. Boushek maintains that Murphy offered the discount rates to Bedford to meet competition and during the 1984-1987 period continuously applied the agreed-upon discounts in the invoices it issued to Bedford. Mr. Boushek contends that the increased rates that Murphy is now seeking to assess are unreasonable and that, in the absence of the offered discount rates, Bedford would never have used Murphy's services.

By decision of August 31, 1993, the ICC reopened the proceeding and, in recognition of its newly adopted standards for rate reasonableness announced in *Georgia-Pacific Corp.-- Pet. for Declar. Order*, 9 I.C.C.2d. 103 (1992), *reconsidered* 9 I.C.C.2d 796 (1993), extended an opportunity to the parties to supplement the record with respect to the rate reasonableness issue. On November 4, 1993, the complainant submitted a supplemental verified statement from Mr. Boushek.

On December 3, 1993, the NRA became law. The NRA substantially restored the ability of the ICC (and now the Board) to find that assessment of undercharges is an unreasonable practice, and it provided several new grounds on which shippers may defend against payment of undercharges.⁴ By decision served January 7, 1994, the ICC reopened the record and established a procedural schedule permitting the parties to invoke the alternative procedure under section 2(e) of the NRA and to submit new evidence and argument in light of the new law.

On January 25, 1994, Bedford submitted a supplemental statement asserting that it is entitled to relief from defendant's efforts to collect undercharges pursuant to the provisions of section 2(e) of the NRA. Complainant states that Murphy offered numerous discounts as an inducement to secure its business, and that Bedford relied on those discounts in tendering its traffic to Murphy. Attached as exhibits to the supplemental statement are copies of correspondence and pricing quotations representative of the discounts offered by Murphy and applied in its originally issued invoices to Bedford. These attachments include a letter dated April 27, 1984 granting Bedford a 25% discount plus other incentives effective May 1, 1984 (Exhibit A); a rate quotation prepared May 15, 1985, providing a 30% discount for Bedford traffic (Exhibit C); and a letter dated September 19, 1986, offering as an incentive an additional 5% refund on all revenues that exceeded Bedford's average monthly outbound revenues with Murphy (Exhibit D).

DISCUSSION AND CONCLUSIONS

We dispose of this proceeding under section 2(e) of the NRA. Accordingly, we do not reach the other issues raised.

³ One freight bill, Pro No. 07-0421034-5, dated June 16, 1986, applies a 40% discount.

⁴ The ICC's prior unreasonable practice policy was invalidated by the Supreme Court in *Maislin Indus. v. Primary Steel*, 497 U.S. 116 (1990).

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."⁵

It is undisputed that Murphy is no longer an operating carrier.⁶ Accordingly, we may proceed to determine whether defendant's attempt to collect undercharges (the difference between the applicable filed tariff rate and the rate originally collected) 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.

Here, the record contains correspondence and pricing quotations expressing the clear intent of Murphy to provide rate discounts when transporting Bedford traffic. In addition, the record contains representative samples of original freight bills issued by Murphy indicating the consistent application of a rate discount to the charges originally assessed by the defendant in general conformity with the discounts referred to in the Murphy correspondence and pricing quotations. 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. 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).

In this case, the evidence is substantial that the discounted rates originally billed by the carrier and paid by Bedford were rates negotiated by the parties. The freight bills and other written materials submitted on the record confirm the unrefuted testimony of Mr. Boushek and reflect the existence of a negotiated rate.

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 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 to Bedford by Murphy; that Bedford, reasonably relying on the offered rate, tendered the subject traffic to Murphy; that the negotiated rate was billed and collected by Murphy; and that Murphy 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

⁵ 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.

⁶ Murphy held both common and contract carrier operating authority issued by the ICC under various sub-numbers of No. MC 108937. All of Murphy's operating authorities were revoked on December 7, 1987.

2(e) of the NRA, we find that it is an unreasonable practice for Murphy to attempt to collect undercharges from Bedford for transporting the shipments at issue in this proceeding.

This decision 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 service date.
3. A copy of this decision will be mailed to:
The Honorable Dennis D. O'Brien
United States Bankruptcy Court for the
District of Minnesota, Third Division
627 Federal Building
St. Paul, MN 55101
Re: Case No. BKY-3-87-577
ADV-3-89-107

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary