STB DOCKET NO. 41082

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

Decided April 15, 1997

The Board finds 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 the Board's finding under section 2(e) of the NRA, it will not reach the other issues raised in the proceeding.

BY THE BOARD:[1]

BACKGROUND

This matter arises out of a court action in the United States District Court for the Northern District of Illinois, Eastern Division, in *Jones Truck Lines, Inc. v. Ardco, Inc.*, Civil Action No. 93 C 2265. The court proceeding was instituted by Jones Truck Lines, Inc. (Jones or respondent), a former motor common and contract carrier, to collect undercharges from Ardco, Inc. (Ardco or petitioner). Jones seeks undercharges of $10,307.29, plus interest of $2,430.50, allegedly due, in addition to amounts previously paid, for the transportation of 117 less-

[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.

than-truckload (LTL) shipments of such items as doors, glass doors, shelves, posts, ballast, and controllers between July 20, 1988, and January 10, 1990. All but two of the shipments were transported from petitioner's facility in Elkton, KY, to points in 19 states.[2] By order dated August 26, 1993, the court dismissed the proceeding without prejudice and referred the matter to the ICC to resolve issues of contract carriage and rate reasonableness.[3]

Pursuant to the court order, Ardco, on August 30, 1993, filed a petition for declaratory order requesting the ICC to resolve the court-referred issues. By decision served September 7, 1993, the ICC established a procedural schedule. Petitioner filed its opening statement on November 9, 1993. Respondent filed its reply on December 22, 1993.[4] Petitioner submitted its rebuttal on January 24, 1994.

Ardco, in its opening statement, asserts that the shipments in question were transported by Jones under its contract carrier authority pursuant to a transportation agreement. Petitioner further asserts that the rates respondent is seeking to assess are unreasonable.

Petitioner supports its argument with an affidavit from Mr. Michael Bange of Champion Transportation Services, Inc., a transportation consultant retained by petitioner. Mr. Bange's affidavit includes among its attachments a representative sample of the "balance due" bills issued by respondent that reflect originally issued freight bill data as well as the "corrected" balance due amounts (Exhibit A). Mr. Bange states that nearly all of the original freight bills for the subject shipments indicate the application of a 38% discount or a minimum

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[2] The other two shipments were inbound movements to the Elkton facility.

[3] The court order provides for leave to reinstate the proceeding within 30 days of the ICC ruling.

[4] Jones in its reply objects to considering the statement of petitioner's witness Michael Bange (Exhibit A of petitioner's opening statement) as the submission of an expert witness and specifically moves to strike that portion of Mr. Bange's statement at 9-12 set forth under the heading *The History of the Jones "Transportation Agreement."* The challenged segment attempts to discuss matters relating to agreements between Jones and other shippers, not parties to this proceeding, which appear in form and substance to be similar to an agreement bearing the title "Transportation Agreement" that has been submitted into the record in this proceeding. Petitioner in its rebuttal statement, asserts that the challenged statements contained in Mr. Bange's affidavit provide relevant factual background information that will assist the Board in fully understanding the issues in this proceeding. Petitioner has established an adequate basis for Mr. Bange's submissions. The motion by Jones to strike is denied.

charge of $36.00.[5] Also attached to Mr. Bange's affidavit is a document bearing an effective date of March 14, 1988, entitled "Transportation Agreement" (TA), signed by representatives of Jones and Ardco (Exhibit C). The document provides for the application of a 38% discount off FAK Class 85 rates on outbound shipments from Ardco's Elkton facility and a 38% discount off applicable class rates for collect inbound shipments to the Elkton facility, subject to a minimum charge of $36.00.

Mr. Bange states that his review of respondent's "balance due" bills indicates that, with minor variations, the rates set forth in the TA are the same as the rates assessed by Jones in the original freight bills. As an explanation for the minor variations from the TA, Mr. Bange asserts that it was common practice for contract carriers to agree orally to amendments to existing agreements.

Petitioner also submits the affidavit of Michael Kennedy, supervisor of traffic operations for Ardco. Mr. Kennedy states that he personally engaged in the negotiations with Jones that resulted in the TA. He asserts that his review of the balance due bills issued by Jones indicates that the discounts applied in the originally issued freight bills are in full accord with the provisions of the TA and that the rates and discounts set forth in the original freight bills were correct. Mr. Kennedy further states that the rates quoted and originally assessed by Jones were competitive with the freight charges offered by competing motor carriers, and that Ardco would not have used the services of Jones had respondent quoted the "corrected" rates here being sought.

Respondent asserts that the TA does not comport with ICC regulations or statutory provisions for contract carriage, that the TA is no more than an offer to provide common carrier transportation at off-tariff discounts, and that the transportation service provided by the carrier was in fact common carriage. Jones claims that no filed tariffs reflect discounts for the shipments at issue, and that the undiscounted rates set forth in the "corrected" bills are the correct and applicable rates to be assessed for transporting the subject shipments. Respondent further claims that those undiscounted rates are not unreasonable.

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

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[5] With respect to the two inbound shipments to Elkton, a 42% discount was applied.

undercharges is an unreasonable practice, and it provided several new grounds on which shippers may defend against payment of undercharges.[6]

By decision served December 21, 1993, 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 directing the parties to notify the ICC of elections or invocations of other provisions of the new law. On March 21, 1994, Ardco submitted a supplemental opening statement asserting that Jones' efforts to collect undercharges in this proceeding constitute an unreasonable practice under section 2(e) of the NRA. On April 21, 1994, Jones filed its supplemental reply statement stating that section 2(e) of the NRA is not applicable in this proceeding on statutory and constitutional grounds.[7] In the alternative, Jones argues that petitioner has not produced written evidence of a

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

[7] Jones argues that section 2(e) of the NRA is inapplicable to bankrupt carriers, may not be applied retroactively, and is unconstitutional. 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 Wood*); *In the Matter of Lifshultz Fast Freight Corporation*, 63 F.3d 621 (7th Cir, 1995); *Transcon Lines*, 58 F.3d 1432 (9th Cir. 1995) *cert. denied*, 116 S. Ct. 1016 (1996); *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.* (*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* (*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. (KMC Transport)*, 179 B.R. 226 (Bankr. D. Idaho 1995); *Lewis v. Squareshooter Candy Co.* (Edson Express), 176 B.R. 54 (D. Kan. 1994).

negotiated rates agreement warranting relief under section 2(e) of the NRA. Petitioner filed a supplemental rebuttal statement on May 11, 1994.

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]

It is undisputed that Jones no longer transports property.[9] 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.

Here, the record contains a 1988 TA signed by the parties confirming the existence of a negotiated rate. In addition, petitioner has submitted representative balance due bills indicating that the original freight bills issued by respondent consistently applied rates which reflected the stated discount and

[8] 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.

[9] Board records confirm that Jones' motor carrier operating rights were revoked on February 18, 1992.

minimum charge called for in the 1988 TA. 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*).[10] *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).

In this case, the evidence is substantial that the rates originally billed by the carrier and paid by the shipper were rates agreed to in negotiations between the parties. The original freight bills issued by the carrier and the rates set forth in the 1988 TA confirm the testimony of Mr. Kennedy and reflect the existence of negotiated rates.

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

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[10] Jones, at 9-10 of its supplemental reply statement, 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 freight bills reflecting the negotiated rate were issued by the carrier, and the Board must examine these freight bills 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 was 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.

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, respondent concedes (respondent's supplemental statement at 7) 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 a negotiated rate was offered by Jones to Ardco; that Ardco tendered freight to Jones in reliance on the negotiated rate; that the negotiated rate was billed and collected by Jones; 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 Ardco 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 April 28, 1997.
3. A copy of this decision will be mailed to:

The Honorable Ann Claire Williams
United States District Court for the
Northern District of Illinois
Eastern Division
219 South Dearborn St.
Chicago, IL 60604

Re: Case No. 93 C 2265

By the Board, Chairman Morgan and Vice Chairman Owen.