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SERVICE DATE - OCTOBER 14, 1997

SURFACE TRANSPORTATION BOARD[1]

DECISION

No. 40886

WISCONSIN PAPER GROUP, INC.
v.
M.T.I. TRANSPORT, INC. D/B/A SAFE TRANSPORT, INC.

Decided: October 6, 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 District Court of the State of Minnesota, Fourth Judicial District, County of Hennepin, in *M.T.I. Transport, Inc. v. Wisconsin Paper Group, Inc.*, File No. CT 92-12403. The court proceeding was instituted by M.T.I. Transport, Inc. d/b/a Safe Transport, Inc. (MTI or defendant), a former motor common carrier, to collect undercharges from Wisconsin Paper Group, Inc. (WPG or complainant). MTI seeks to collect undercharges in the amount of $17,613.40 (plus interest) allegedly due, in addition to amounts previously paid, for services rendered in transporting 98 less-than-truckload (LTL) shipments of paper and paper products between January 4, 1988, and September 15, 1988. The shipments moved from points in Outagamie, Winnebago, and Brown Counties, WI (primarily Green Bay and Neehah), to points in Alabama, Arkansas, Florida, Missouri, and Oklahoma. By order dated September 28, 1992, the court stayed the proceeding to enable complainant to submit for determination by the ICC all matters lying within the primary jurisdiction of the agency, including issues of tariff applicability, rate reasonableness, and unreasonable practice.

Pursuant to the court order, WPG, by complaint filed November 30, 1992, requested the ICC to resolve issues of rate reasonableness, unreasonable practice, and tariff applicability. By decision served January 11, 1993, the ICC established a procedural schedule. On March 12, 1993, complainant filed its opening statement. Defendant filed its reply on April 12, 1993. Complainant's rebuttal was filed on May 3, 1993.

WPG[2] maintains that freight charges originally assessed for the subject shipments were billed by MTI and paid by WPG pursuant to tariff ICC MITY 2000, Item 1540, page 137 and various properly filed revisions thereof. It further contends that the rates MTI seeks to assess are unreasonable. According to complainant, the originally applied rate levels had been established by MTI to meet competition. WPG states that defendant now contends that the tariffs that provided the basis for the originally assessed charges were not filed with the ICC and that it is entitled to the

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[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] WPG is a shipper association and shipper of paper and paper products on behalf of its member companies.

undercharges claimed. Complainant asserts that the originally billed rates were based on freight charges set forth in the allegedly unfiled 5th through 7th revisions to page 137 of MITY 2000, Item 1540, revisions that had been provided to complainant by defendant at the time of their stated issue and effective dates.[3] Attached as Exhibit A to complainant's opening statement is an abstract of the subject undercharge claims that lists for each shipment the billed and claimed rate, the billed and claimed charges, and the asserted balance due claim.[4]

Complainant supports its contentions with a verified statement from Andrew F. Schmanski, its General Manager. Mr. Schmanski states that the freight charges for all of the involved shipments were originally billed by MTI in conformity with the rates set forth in tariff ICC MITY 2000, Item 1540, page 137 and revisions thereof. Attached as Exhibit B-1 are copies of Item 1540, page 137 and page 137 revisions 1 through 11. He notes that specific reference to WPG is found in the bottom portion of the 8th revised page 137.[5] An examination of the rates set forth in the respective page 137 revisions indicate that the rates originally billed for each shipment match the rates set forth in the applicable page 137 revision. Mr. Schmanski asserts that competing carriers were available to provide the transportation services involved here at rates comparable to the rates originally billed and substantially below the rates defendant here seeks to assess. He notes further that, while MTI remained an operating carrier, no undercharge claims similar to those here being raised were asserted against WPG.

In reply, defendant acknowledges that it engaged in negotiations for motor common carrier services with complainant and quoted rates on a number of shipments to complainant. It asserts, however, that the rates negotiated with complainant were never filed with the ICC and that the filed rates it is here seeking to assess are reasonable. In an affidavit submitted by Dennis K. Steele, President of Southwest Tariff Auditing, Inc., the auditor of defendant's freight bills, Mr. Steele maintains that the revised pages of tariff ICC MITY 2000, on which complainant relies, were not properly on file with the ICC. He contends that freight charges for the subject shipments were properly re-rated in accordance with tariff ICC MITY 2000, Item 1530, and tariff ICC MITY 2000, Item 2000, tariffs that were actually on file with the ICC.

By decision served September 8, 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 8, 1993, complainant submitted a supplemental statement.
Defendant did not file a reply.

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.[6]

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[3] The page 137 revisions pertinent to this proceeding are the 5th revised page, effective September 1, 1987; the 6th revised page, effective March 14, 1988; and the 7th revised page, effective April 13, 1988. In addition, the 8th revised page that became effective July 20, 1988, a tariff page acknowledged by defendant to be a properly filed tariff, contains rates that are applicable to certain of the subject shipments.

[4] The information provided in the abstract was derived from the summary of claims submitted by MTI in its complaint filed in the Minnesota court and the underlying freight bills and balance due bills submitted to WPG by MTI.

[5] The same reference is contained in the 7th revised page 137.

[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).

On December 27, 1993, WPG submitted a supplemental reply statement filed pursuant to the September 8th decision asserting that the provisions of section 2(e) of the NRA are applicable to this proceeding and that defendant's efforts to collect the subject undercharges are an unreasonable practice.[7]

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 MTI no longer transports property.[9] Accordingly, we may proceed to determine whether MTI'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.

Here, complainant has presented an abstract of the subject undercharge claims, based on MTI's original freight and balance due bills and defendant's court filed claim summary, revealing originally assessed charges that consistently applied rates in total conformity with the rates set forth in the documents identified as the 5th through 8th revisions to page 137 of tariff ICC MITY 2000, Item 1540. 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. 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 rate and that the rates were agreed upon by the parties).

In this case, the evidence indicates that the rates originally billed by defendant and paid by WPG were rates agreed upon in negotiations between the parties. Indeed, MTI admits that it negotiated rates with WPG. Further, the abstracts from the original freight bills issued by the defendant and the purported tariff pages that the defendant provided to complainant support complainant's position and reflect the existence of negotiated rates.

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[7] By decision served January 3, 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. Neither party filed a formal pleading in response to that decision.

[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] In its reply statement, MTI states that it is no longer is an operating carrier (Defendant's Reply at p. 1).

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 by MTI to WPG; that WPG reasonably relied on the offered rate in tendering its traffic to MTI; that the negotiated rate was billed and collected by MTI; and that MTI 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 MTI to attempt to collect undercharges from WPG 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 Peter J. Lindberg
District Court of the State of Minnesota
Fourth Judicial District
Room C-12
300 South Sixth Street
Minneapolis, MN 55487

Re: File No. CT 92-12403

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary