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SERVICE DATE - NOVEMBER 17, 1997

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 41726

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

Decided: November 5, 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 Avnet, Inc.*, 95-Civ 5080, Adv. No. 95-9224A. The court proceeding was instituted by St. Johnsbury Trucking Co., Inc. (St. Johnsbury or respondent),¹ a former motor common and contract carrier, to collect undercharges from Avnet, Inc. (Avnet or petitioner). St. Johnsbury seeks undercharges of \$10,541.98 (plus interest) allegedly due, in addition to amounts previously paid, for the transportation of 163 shipments of computer parts, machines, or systems; data processing devices; and electronic equipment, between November 14, 1990, and June 10, 1993. Most of the shipments were prepaid, less-than-truckload (LTL), or minimum charge movements, transported from Avnet's facility in Peabody, MA, to points in 15 states and the District of Columbia. Three of the subject shipments were transported to Peabody from Easton, PA. By order dated March 29, 1996, the district court directed petitioner to initiate administrative proceedings before the Board for the purpose of resolving issues of tariff applicability, unreasonable practice, contract carriage, and rate reasonableness.²

Pursuant to the court order, Avnet, on May 16, 1996, filed a petition for declaratory order requesting that the Board resolve the issues referred to by the court. By decision served May 24,

¹ 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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1996, the Board issued a procedural schedule. On April 22, 1997, Avnet filed its opening statement. St. Johnsbury failed to submit a timely reply.³

Petitioner asserts that respondent's attempt to collect the claimed undercharges constitutes an unreasonable practice under section 13711(a). It further contends that the rates respondent now seeks to collect are unreasonable. Petitioner maintains that the freight charges originally billed by St. Johnsbury and paid by Avnet were rates mutually agreed upon by the parties, and that Avnet relied upon the agreed-upon rates in tendering its traffic to St. Johnsbury to the exclusion of services provided by other carriers.

Avnet supports its argument with an affidavit from Michael Bange of Champion Transportation Services, Inc., a transportation consultant retained by petitioner. Attached to Mr. Bange's affidavit is a copy of the original court complaint filed by respondent that lists 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. Bange's affidavit includes a representative sample of 29 of the "balance due" bills issued by respondent that reflect originally issued freight bill data as well as revised balance due amounts (Exhibits B, C, and D). Mr. Bange states that his review of balance due bills issued by respondent⁴ indicates that a 40% discount off applicable class rates, subject to minimum charges of \$45.95, \$46.95, or \$47.95, was applied to the charges originally assessed for the subject shipments. According to Mr. Bange, the revised freight bills have eliminated the originally applied discounts and rerated the freight bills using full, undiscounted class rates. Mr. Bange notes that the balance due bills have increased freight charges more than 66% for most shipments.

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."

³ By letter filed October 27, 1997, respondent requested an extension of time to file its reply, which was due on July 22, 1997. The request was denied.

⁴ St. Johnsbury's original undercharge claim against Avnet included an additional \$1,932.93 in claims for 58 intrastate movements. These claims were subsequently dismissed. See *St. Johnsbury Trucking Co., Inc. v. Mead Johnson*, 199 B.R. 84 (S.D.N.Y. 1996).

It is undisputed that St. Johnsbury no longer transports property.⁵ 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) 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. Bange has submitted a list of the shipments subject to this proceeding as well as samples of the 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).

In this case the evidence indicates that the original rates assessed by St. Johnsbury and paid by Avnet 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 unrefuted evidence submitted by petitioner establishes that a negotiated rate was offered to Avnet by St. Johnsbury; that Avnet reasonably relied on the offered rate in tendering its

⁵ Prior to filing for bankruptcy, St. Johnsbury held motor common and contract carrier operating authority, issued by the Interstate Commerce Commission (ICC) under various sub-numbers of No. MC-108473.

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 Avnet 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 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-5080,
Adv. No. 95-9224A

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

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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 Avnet, Inc.*, 95-Civ 5080, Adv. No. 95-9224A. The court proceeding was instituted by St. Johnsbury Trucking Co., Inc. (St. Johnsbury or respondent),¹ a former motor common and contract carrier, to collect undercharges from Avnet, Inc. (Avnet or petitioner). St. Johnsbury seeks undercharges of \$10,541.98 (plus interest) allegedly due, in addition to amounts previously paid, for the transportation of 163 shipments of computer parts, machines, or systems; data processing devices; and electronic equipment, between November 14, 1990, and June 10, 1993. Most of the shipments were prepaid, less-than-truckload (LTL), or minimum charge movements, transported from Avnet's facility in Peabody, MA, to points in 15 states and the District of Columbia. Three of the subject shipments were transported to Peabody from Easton, PA. By order dated March 29, 1996, the district court directed petitioner to initiate administrative proceedings before the Board for the purpose of resolving issues of tariff applicability, unreasonable practice, contract carriage, and rate reasonableness.²

Pursuant to the court order, Avnet, on May 16, 1996, filed a petition for declaratory order requesting that the Board resolve the issues referred to by the court. By decision served May 24,

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1996, the Board issued a procedural schedule. On April 22, 1997, Avnet filed its opening statement. St. Johnsbury failed to submit a timely reply.³

Petitioner asserts that respondent's attempt to collect the claimed undercharges constitutes an unreasonable practice under section 13711(a). It further contends that the rates respondent now seeks to collect are unreasonable. Petitioner maintains that the freight charges originally billed by St. Johnsbury and paid by Avnet were rates mutually agreed upon by the parties, and that Avnet relied upon the agreed-upon rates in tendering its traffic to St. Johnsbury to the exclusion of services provided by other carriers.

Avnet supports its argument with an affidavit from Michael Bange of Champion Transportation Services, Inc., a transportation consultant retained by petitioner. Attached to Mr. Bange's affidavit is a copy of the original court complaint filed by respondent that lists 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. Bange's affidavit includes a representative sample of 29 of the "balance due" bills issued by respondent that reflect originally issued freight bill data as well as revised balance due amounts (Exhibits B, C, and D). Mr. Bange states that his review of balance due bills issued by respondent⁴ indicates that a 40% discount off applicable class rates, subject to minimum charges of \$45.95, \$46.95, or \$47.95, was applied to the charges originally assessed for the subject shipments. According to Mr. Bange, the revised freight bills have eliminated the originally applied discounts and rerated the freight bills using full, undiscounted class rates. Mr. Bange notes that the balance due bills have increased freight charges more than 66% for most shipments.

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."

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It is undisputed that St. Johnsbury no longer transports property.⁵ 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) 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. Bange has submitted a list of the shipments subject to this proceeding as well as samples of the 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).

In this case the evidence indicates that the original rates assessed by St. Johnsbury and paid by Avnet 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 unrefuted evidence submitted by petitioner establishes that a negotiated rate was offered to Avnet by St. Johnsbury; that Avnet reasonably relied on the offered rate in tendering its

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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 the service date.
3. A copy of this decision will be mailed to:

The Honorable Sonia Sotomayor
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