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SERVICE DATE - JANUARY 27, 1998
SURFACE TRANSPORTATION BOARD

DECISION

STB No. 41868

CONTINENTAL BAKING COMPANY--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF BE-MAC TRANSPORT CO., INC.

Decided: January 20, 1998

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 Bankruptcy Court for the Eastern District of Missouri, Eastern Division in Be-Mac Transport Co., Inc. v. Continental Baking Company, Adv. No. 95/4301. The court proceeding was instituted by Be-Mac Transport Co., Inc. (Be-Mac or respondent),¹ a former motor common and contract carrier, to collect undercharges from Continental Baking Company (Continental or petitioner). Be-Mac seeks undercharges of \$49,996.48 (plus interest) allegedly due, in addition to amounts previously paid by Continental, for the interstate transportation of 263 shipments of various commodities, including a variety of foodstuffs, printed advertising material and machine parts and supplies. These shipments moved between March 13, 1990, and December 21, 1992, from and to various points, including certain of petitioner's facilities. By order dated May 20, 1996, the bankruptcy court stayed the proceeding and referred the transportation issues raised in the case to the Board.²

Pursuant to the court order, petitioner filed a petition for declaratory order requesting that the Board resolve the issues raised by the court. The Board issued a procedural schedule, and petitioner filed its opening statements. Be-Mac submitted a reply, and Continental filed a rebuttal.

Petitioner asserts that respondent's attempts to collect the claimed undercharges constitute an unreasonable practice under section 13711(a), that the transportation was contract, rather than common, carriage, and that the rates respondent now seeks to collect are unreasonable. Petitioner maintains that the freight charges originally billed by Be-Mac and paid by Continental were rates

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mutually agreed upon by the parties, and that Continental relied on the agreed-upon rates in tendering its traffic to Be-Mac to the exclusion of services provided by other carriers.

Continental 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 against Continental, listing respondent's undercharge claims by freight bill number, together with the original billing date and balance due amount claimed. In addition, Mr. Bange's affidavit includes representative sample "balance due" bills issued by respondent to Continental, which reflect originally issued freight bill data as well as revised balance due amounts. Moreover, attached to Mr. Bange's affidavit are Be-Mac's answers to petitioner's requests for admissions and accompanying interrogatories, filed in the court proceeding. Finally, Mr. Bange attaches a copy of an "Agreement for Trucking Services" (with rate schedules attached) between respondent and Continental's parent company, on behalf of itself and its subsidiaries. According to Mr. Bange, in most cases Be-Mac originally applied a discount of 56%, 60% or 62% off class rates, subject to a minimum charge of \$45.00. Other bills show that Be-Mac billed at a flat rate. Mr. Bange states that his review of balance due bills issued by respondent for the shipments indicates the higher charges were arrived at by either disallowing the discounts and re-rating shipments at higher rates contained in rate bureau tariffs or by disallowing the original rates and applying higher rates in conjunction with percentage discounts.

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, that the transportation did not qualify as contract carriage, and that the rates it now seeks to collect have not been shown to be unreasonable. 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 allowed and rates initially applied by Be-Mac were inapplicable, that the transportation agreement does not establish the existence of contract carriage, and that the rates Be-Mac now seeks to collect have not been shown to be unreasonable. 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.³

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 Be-Mac no longer transports property.⁴ 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 respondent’s collection efforts, as well as revised freight bills. Those revised freight bills indicate that the rates originally charged were consistently and substantially below those that respondent is 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*

³ Typically, a court hearing undercharge cases will direct the shipper to bring to the Board all defenses that have been raised in court; as a result, in addition to section 13711 issues, petitioners before the Board typically raise issues of contract carriage, rate applicability and rate reasonableness. When it is able to resolve a case fully on section 13711 grounds, however, the Board does not address those other more complex issues. See, e.g., *Rhineland Paper Company v. The Bankruptcy Estate of Murphy Motor Freight Lines, Inc.*, No. 40837 (STB served October 23, 1997). We will not address the other more complex issues raised here because our section 13711 findings fully resolve the question of petitioner’s liability for the rates sought.

⁴ Prior to filing for bankruptcy, Be-Mac held motor common and contract carrier operating authority, issued by the Interstate Commerce Commission (ICC) under various sub-numbers of No. MC-10872.

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).⁵ Additional written evidence is afforded by the transportation agreement and rate schedules produced by Mr. Bange.

Not only do these written freight bills satisfy the “written evidence” requirement of the statute, but, together with the transportation agreement and rate schedules and Mr. Bange’s testimony, they provide evidence establishing that the original rates assessed by Be-Mac and paid by Continental were rates agreed to in negotiations between the parties. The original freight bills issued by respondent for the subject shipments, as well as the additional evidence, support petitioner’s contentions and reflect the existence of negotiated rates. The evidence indicates that Continental relied on the Be-Mac agreement to charge the negotiated rates, and that Continental would not have used Be-Mac had it quoted the rates it now seeks to collect.

⁵ Be-Mac, at pp. 7-8 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 Be-Mac 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. Be-Mac 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 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). 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.

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)].

The evidence submitted by petitioner establishes that a negotiated rate was offered to Continental by Be-Mac; that Continental reasonably relied on the offered rate in tendering its traffic to Be-Mac; that the negotiated rate was billed and collected by Be-Mac; and that Be-Mac 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 Be-Mac to attempt to collect undercharges from the petitioner for transporting the shipments at issue in this proceeding.⁶

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:

⁶ 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.

STB No. 41868

The Honorable David P. McDonald
United States Bankruptcy Court for
the Eastern District of Missouri, Eastern Division
211 North Broadway, 7th Floor
One Metropolitan Square
St. Louis, MO 64050

Re: Adv. No. 95/4301

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
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Not only do these written freight bills satisfy the “written evidence” requirement of the statute, but, together with the transportation agreement and rate schedules and Mr. Bange’s testimony, they provide evidence establishing that the original rates assessed by Be-Mac and paid by Continental were rates agreed to in negotiations between the parties. The original freight bills issued by respondent for the subject shipments, as well as the additional evidence, support petitioner’s contentions and reflect the existence of negotiated rates. The evidence indicates that Continental relied on the Be-Mac agreement to charge the negotiated rates, and that Continental would not have used Be-Mac had it quoted the rates it now seeks to collect.

⁵ Be-Mac, at pp. 7-8 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 Be-Mac 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. Be-Mac 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 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). 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.

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)].

The evidence submitted by petitioner establishes that a negotiated rate was offered to Continental by Be-Mac; that Continental reasonably relied on the offered rate in tendering its traffic to Be-Mac; that the negotiated rate was billed and collected by Be-Mac; and that Be-Mac 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 Be-Mac to attempt to collect undercharges from the petitioner for transporting the shipments at issue in this proceeding.⁶

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:

⁶ 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.

STB No. 41868

The Honorable David P. McDonald
United States Bankruptcy Court for
the Eastern District of Missouri, Eastern Division
211 North Broadway, 7th Floor
One Metropolitan Square
St. Louis, MO 64050

Re: Adv. No. 95/4301

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary