

UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of :
ROSE WAY, INC., : Case No. 89-1273-C H
Debtor. : Chapter 7
- - - - - :
THOMAS G. McCUSKEY, TRUSTEE OF :
THE BANKRUPTCY ESTATE OF :
ROSE WAY, INC., : Adv. No. 90-115
Plaintiff, :
v. :
J.T. McCARTY, d/b/a :
COLONIAL GARDEN CENTER, :
Defendant. :

PROPOSED FINDINGS AND CONCLUSIONS ON DEFENDANT'S MOTION
FOR REFERRAL TO THE INTERSTATE COMMERCE COMMISSION
SUBMITTED PURSUANT TO 28 U.S.C. § 157(C)(1)
AND FED.R.BANKR.P. 9033

1. A complaint was filed on June 1, 1990, in which the Trustee/Plaintiff sought the recovery of freight undercharges from the Defendant.

2. On September 7, 1990, the Defendant filed a motion for referral to the Interstate Commerce Commission and a brief in support of its motion.

3. On September 17, 1990, the Plaintiff filed a resistance to the Defendant's motion for referral to the Interstate Commerce Commission.

4. On February 19, 1991, the Plaintiff filed a

memorandum in opposition to the Defendant's motion to refer the question of rate reasonableness to the Interstate Commerce Commission.

5. The hearing on the motion for referral was held on March 7, 1991. Thomas E. Wolff appeared on behalf of the Plaintiff and Steven C. Reed appeared for the Defendant.

DISCUSSION

The Debtor had transportation rates filed with the Interstate Commerce Commission (ICC). 49 U.S.C. § 10762. A rate related to transportation or service provided by a carrier subject to the jurisdiction of the ICC must be reasonable. 49 U.S.C. § 10701(a). The Debtor rendered transportation services to the Defendant and the Trustee now seeks to recover the difference between the rates charged and the filed rates. Defendant challenges the reasonableness of the filed rates and contends the matter is within the exclusive primary jurisdiction of the ICC. The Trustee resists the Defendant's motion for referral and asserts the ICC does not have primary jurisdiction to determine any matters involved in this proceeding.

Referral of issues to the ICC secures uniformity and the utilization of expert and specialized agency knowledge.

[T]he ICC has primary jurisdiction over any matter that "raises issues of transportation policy which ought to be

considered by the commission in the interests of a uniform and expert administration of the regulatory scheme laid down by that Act." Thus, even where an issue is initially cognizable by the district court, the doctrine of primary jurisdiction suspends the judicial progress pending referral of the matter to the appropriate administrative agency for its ruling.

Iowa Beef Processors v. Ill. Cent. Gulf R.R. Co., 685 F.2d 255, 259 (8th Cir. 1982) (citations omitted).

Although no fixed formula exists for applying the doctrine of primary jurisdiction, referral is appropriate when uniformity and consistency in the regulation of business are sought. "[T]he doctrine of primary jurisdiction should be exercised if the issues in the proceeding...raise a question of the validity of a rate or practice." Maislin Industries v. Primary Steel, 879 F.2d 400, 403 (8th Cir. 1989) (quoting Nader v. Allegheny Airlines, Inc., 426 U.S. 290 304-06, 96 S. Ct. 1978, 1987-88, 48 L. Ed. 2d 643 (1976), rvsd on other grounds, 110 S. Ct. 2759, 111 L. Ed. 2d 94 (1990))

If the only defense raised to the trustee's complaint was that a negotiated rate was an equitable defense to attempts to collect the filed rate, then the recent U.S. Supreme Court decision in Maislin Industries, U.S. v. Primary Steel, Inc., ___ U.S. ___, 110 S.Ct. 2759, 111 L. Ed. 2d 94 (1990), would control and referral would probably serve no useful purpose. However, the defendant in this adversary raises additional defenses in its motion for referral. It specifically

challenges the reasonableness of the filed rates. This situation is similar to that presented in Maislin where there were allegations of both unreasonable practices and unreasonable rates. The Supreme Court specifically noted the issue of the reasonableness of the tariff rates was subject to examination upon remand. ____ U.S. at ____ n.10, 110 S.Ct. at 767 n.10, 111 L.Ed.2d at ____ n.10. Subsequent to the Supreme Court's decision in Maislin, several courts have referred rate reasonableness issues to the ICC. Delta Traffic Service Inc. v. Transtop, Inc., 902 F.2d 101, 107 (1st Cir. 1990); In re Sharm Express, Inc., 122 B.R. 999, 1004 (D. Minn. 1991); In re RFI Transport, Inc., 122 B.R. 124, 127 (D. Col. 1990); Maislin Industries, U.S. Inc. v. Primary Steel, Inc. (W.D. Mo. Nov. 21, 1990) [Westlaw #264536].

The Trustee raises several grounds for resisting the Defendant's motion. The Trustee claims Defendant has submitted inadequate evidence and the record is inadequate to warrant referral to the ICC. The Trustee also contends a shipper cannot raise the reasonableness of rates as a defense to a collection action but must instead bring a separate reparations action against the carrier.

With regard to the latter point, the court finds a party may raise the reasonableness of rates as a defense to a collection action. The Interstate Commerce Act clearly provides a shipper with the right to argue a particular filed

rate is unreasonable and allowing unreasonableness to be raised as a defense to a collection action does not undermine the purposes underlying the Interstate Commerce Act. In re Sharm Express, Inc., 122 B.R. at 1004.

This court rejects the Trustee's argument that the record in this case won't support referral to the ICC. The allegations contained in the Defendant's motion for referral set forth specific challenges to the reasonableness of the filed rates (i.e. application of a full truckload rate or the Household Goods Carriers Bureau Mileage Guide) and the technical question of whether Defendant can introduce sufficient evidence of unreasonableness is a matter better left to the expertise of the ICC. Sharm Express Inc., 122 B.R. at 1005.

IT IS HEREBY THIS COURT'S PROPOSED ORDER that:

1) the issue of the reasonableness of the Debtor's filed rates should be referred to the primary jurisdiction of the ICC and further proceedings in this adversary action should be stayed; and

2) the Defendant should be responsible for seeing that this matter is referred to the jurisdiction of the ICC and should file a report with this Court every 60 days regarding the status of the matter before the ICC.

Dated this 4th day of April, 1991.

RUSSELL J. HILL
U.S. BANKRUPTCY JUDGE