

Plaintiff asserted the I.C.C. does not have primary jurisdiction to determine any matters involved in the proceeding.

4. After hearing, the Bankruptcy Court issued a proposed order on July 24, 1991, stating that the issue of the reasonableness of the debtor's transportation practices and charges should be referred to the primary jurisdiction of the I.C.C. and further proceedings in this adversary action should be stayed. The Bankruptcy Court further proposed the defendant should be responsible for seeing that this matter is referred to the jurisdiction of the I.C.C. and should file a report with the Bankruptcy Court every sixty (60) days regarding the status of the matter before the I.C.C.

5. On August 8, 1991, the Bankruptcy Court directed the Clerk of the Bankruptcy Court to forward the court's July 24, 1991 Proposed Order to the Clerk of the District Court for appropriate docketing and disposition in the District Court, specifically that the District Court determine whether to certify to the I.C.C. the question of whether the debtor's transportation practices and charges are reasonable.

6. On October 9, 1991, the Bankruptcy Court granted defendant counsel's application to withdraw counsel. Said application indicated that Richard Schaberg, president of Schaberg Lumber Company, had written counsel that the company had suffered a financial disaster and there was no need to

proceed further with the case. Counsel for the defendant moved to withdraw on the basis that defendant Schaberg Lumber Company had made it unreasonably difficult to pursue its defense by its complete failure to respond to communications.

7. On October 30, 1991, the plaintiff filed a motion to compel defendant to appear by counsel within thirty (30) days and proceed in its defense and further that if defendant fails to appear with counsel within said thirty (30) days, the Bankruptcy Court withdraw its Order dated August 8, 1991, recommending referral to the I.C.C. and enter judgment in favor of the plaintiff. Plaintiff gave the parties a twenty (20) day bar date notice to provide opportunity for objections to the motion; but no objections were filed.

8. On November 20, 1991, the Bankruptcy Court granted plaintiff's motion. Its order provided that if defendant failed to appear within thirty (30) days [December 20, 1991], the Bankruptcy Court would withdraw its August 8, 1991 Order recommending referral to the I.C.C. and would enter judgment in favor of the plaintiff and against the defendant, Schaberg Lumber Co., in the amount of \$19,439.50, plus court costs in the amount of \$120.00 and pre-judgment interest.

9. On December 19, 1991, the District Court approved and adopted the Bankruptcy Court's July 24, 1991 proposed order and certified to the I.C.C. the issue of the reasonableness of the rates charged by the carrier (debtor) to

the shipper (defendant).

10. Thirty days have passed since November 20, 1991 and no appearance or answer has been made by the defendant; nor has defendant filed any reports regarding the status of this matter.

DISCUSSION

This case stands in an unusual posture. An issue in the case has been referred to the I.C.C. by the District Court on recommendation of the Bankruptcy Court. Now, due to the defendant's failure to appear, the Bankruptcy Court has issued an order for withdrawal of its recommendation and for entry of a default judgement against to defendant. Pursuant to Federal Rule of Civil Procedure 55, applicable to the Bankruptcy Code through Fed. R. Bankr. P. 7055, the reference should be withdrawn and a default judgment, as per the November 20, 1991 Bankruptcy Court Order, should be entered.

Federal Rule of Civil Procedure 55 provides:

(a) Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default.

(b) Judgment. Judgment by default may be entered as follows:

(1) By the Clerk. When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for

that amount and costs against the defendant, if the defendant has been defaulted for failure to appear and is not an infant or incompetent person.

(2) By the Court. In all other cases the party entitled to a judgment by default shall apply to the court therefor If the party against whom judgment is sought has appeared in the action, the party (or, if appearing by representative, the party's representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. . . .

Defendant Schaberg Lumber Co. has failed to defend itself in these proceedings under Fed. R. Civ. P. 55(a) by its failure to appear and by its apparent abandonment of its defense. Defendant indicated as much in its letter to its counsel, which counsel related when he applied to withdraw. Defendant has been served notice far in excess of the three (3) days necessary under Fed. R. Civ. P. 55(b)(2). Hearing was held and defendant was given thirty (30) days to respond.

In addition, defendant will have ten days to object to this recommendation pursuant to Fed. R. Bankr. P. 9033. Defendant has abandoned its defense including any hearings before the I.C.C.; therefore, pursuant to Fed. R. Civ. P. 55, a default judgment should be entered in the amount specified.

IT IS HEREBY THIS COURT'S RECOMMENDATION that: as to this defendant, the order dated August 8, 1991, recommending referral to the I.C.C. be withdrawn, the District Court Order of December 19, 1991, certifying the issue of the reasonableness of the rates to the I.C.C. be withdrawn, and

judgment be entered in favor of

the plaintiff and against the defendant, Schaberg Lumber Company, in the amount of \$19,439.50, plus court costs in the amount of \$120.00 and pre-judgment interest.

Dated this 30th day of December 1991.

RUSSELL J. HILL
U.S. Bankruptcy Judge