

IN THE UNITED STATES BANKRUPTCY COURT FOR
THE EASTERN DISTRICT OF TENNESSEE

IN RE)
)
EXPRESS TRANSPORTATION CO., INC.) NO. 87-01758
)
Debtor) Chapter 7

SCOTT N. BROWN JR., TRUSTEE)
)
Plaintiff)
)
v.)
)
HAWKINS CHEMICAL, INC.) ADV. 89-0115
STROH BREWERY COMPANY) ADV. 89-0121
A & E PLASTICS, a Division of)
Packaging Corporation) ADV. 89-0138
PACKAGE COMPANY OF CALIFORNIA) ADV. 89-0150
KRACO ENTERPRISES, INC.) ADV. 89-0153
DAYLIGHT TRANSPORT) ADV. 89-0164
SOUTHWIRE COMPANY) ADV. 89-0192
PASQUIRE PANEL PRODUCTS, INC.) ADV. 89-0301
UNIVERSAL OIL PRODUCTS) ADV. 89-0328
PET SPECIALTIES, INC. and)
SPECIALTY PET PRODUCTS) ADV. 89-0341
)
Defendants)

[ENTERED: 3-11-93]

M E M O R A N D U M

These adversary proceedings are before the court upon the defendants' motions to reconsider the denial of the defendants' motions for summary judgment and motions to refer certain questions to the Interstate Commerce Commission ("ICC").

In ruling on the defendants' motions for summary judgment, the court was called upon to construe 46 C.F.R. § 1312.4(d) which provides in relevant part as follows:

[A] carrier may not participate in a tariff issued in the name of another carrier or an agent unless a power of attorney or concurrence has been executed. Absent effective concurrences or powers of attorney, tariffs are void as a matter of law. Should a challenge to a tariff be made on this basis, carriers will be required to submit the necessary proof.

49 C.F.R. § 1312.4(d) (1991).

As the court pointed out in its earlier memorandum opinion, the word "tariffs" contained in § 1312.4(d) can either mean the carrier's entire tariff, or it can mean the tariffs that are being referred to. For the reasons stated in the previous memorandum, the court concluded the word "tariffs" in § 1312.4(d) means the tariffs being referred to and not the carrier's entire tariff. This conclusion was based in substantial part upon several ICC decisions containing language that appears to support the notion that the ICC interprets "tariffs" in the second sentence of § 1312.4(d) to mean the tariffs that are being referred to. In this regard, the court noted the well-settled principle that an agency's interpretation of its own regulations is entitled to substantial deference. *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984); *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965); *Rebel Motor Freight v. I.C.C.*, No. 91-6091 (6th Cir. 1992); *Flour Constructors v. OSHRC*, 861 F.2d 936, 939 (6th Cir. 1988).

In its motion for reconsideration, the defendants have cited language from several other ICC decisions they contend support a conclusion that the ICC would interpret the word "tariffs" in §

1312.4(d) to mean the carrier's entire tariff. The defendants also request that if the court is not inclined to grant their motions for summary judgment that the court at least refer the § 1312.4(d) question to the ICC under the doctrine of primary jurisdiction to obtain a direct ruling from the agency concerning its interpretation of its regulation under the facts of these cases. Finally, the defendants have requested that the court allow the ICC to pass upon the defendants' claims that the rates at issue in these cases, if not void, are unreasonable.

The Supreme Court has now ruled that shippers may assert unreasonable-rate claims as counterclaims in undercharge cases and that a court may stay the undercharge action to permit a defendant to apply to the ICC for a ruling as to the reasonableness of the rate pursuant to the doctrine of primary jurisdiction. *Reiter v. Cooper*, 1993 WL 56762 (U.S. Mar. 8, 1993). In light of the *Reiter* holding, and given the issues presented in these particular adversary proceedings, the court believes the best way to proceed in these actions is to permit the defendants the opportunity to obtain a ruling from the ICC on the issues raised by their motions for summary judgment and upon the rate-reasonableness issues. A direct ruling from the ICC on the § 1312.4(d) issue would eliminate the guesswork inherent in attempting to predict from language in agency opinions not directly on point how the agency would interpret its regulation under the facts and circumstances presented here. Also, the ICC could at the same time consider the alternative arguments

of the defendants that the rates charged were unreasonable or that some other filed tariff governed the shipments at issue in these cases.

The court will hold in abeyance the defendants' motions to reconsider pending a ruling by the ICC on the § 1312.4 (d) issue. Furthermore, these adversary proceedings will be stayed in order to give the defendants a reasonable opportunity to file an administrative complaint with the ICC to obtain a ruling, both on the issues raised in the defendants' motions for summary judgment and on the rate-reasonableness issues. *Reiter v. Cooper*, 1993 WL 56762 at *7 n.3.

An order will enter in accordance with this memorandum.

JOHN C. COOK
United States Bankruptcy Judge