

SERVICE DATE - JULY 2, 1997

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 41911

INFINITY SYSTEMS, INC. - PETITION FOR DECLARATORY ORDER -
CERTAIN RATES AND PRACTICES OF SUPERIOR FAST FREIGHT, INC.

Decided: June 23, 1997

This proceeding arises out of the efforts of Superior Fast Freight, Inc. (SFF) to collect undercharges for certain transportation performed for numerous shippers, including Infinity Systems, Inc. (Infinity), between December 16, 1990, and May 1, 1994. It is before the Board on referral from the United States Bankruptcy Court for the Central District of California in *In Re: Superior Fast Freight, Inc., et al.*, Case No. LA-93-54051ER, et al.; *Superior Fast Freight, Inc. v. Infinity Systems, Inc.*, Adv. No. 95-05854-ER. The bankruptcy court referred to us several issues on which Infinity's (and the other shippers') liability for the alleged undercharges depends. Based on the record before us, we find that the shippers are not liable for the alleged undercharges because (1) SFF did not act as a motor carrier as to the transportation at issue, but rather acted as a freight forwarder, whose charges are not subject to the filed rate doctrine, and (2) even if SFF had been acting as a motor carrier, it had no effective tariff on file that would engage the filed rate doctrine.

BACKGROUND

A. Proceedings before the bankruptcy court.

SFF filed its petition in bankruptcy on December 16, 1993, and has since been named debtor-in-possession. In late 1995, it began filing adversary complaints in the bankruptcy court, and elsewhere, seeking undercharges against shippers with which it once did business. These undercharge complaints alleged that each shipper owed SFF the difference between (1) the amounts originally charged and paid for the services and (2) the amounts allegedly published in motor carrier tariffs filed by SFF with the Interstate Commerce Commission (ICC).¹ Among the defenses raised by the shippers were the following: (1) that SFF acted as an unregulated freight forwarder whose charges are not subject to the filed rate doctrine, rather than as a motor carrier whose charges are subject to that doctrine (the status defense); (2) that, even if it were a motor carrier, SFF had no effective tariff on file because it had failed to adopt the tariff of its predecessor as its own (the adoption defense); and (3) that, in any event, the rates contained in the tariff are unreasonably high and the attempt to collect them is an unreasonable practice (the lawfulness defense).

The Bankruptcy Court designated the Infinity proceeding as the lead case for the purpose of resolving these threshold

¹ The ICC was abolished by the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the ICCTA), which transferred certain functions, including those relating to undercharge claims by motor carriers, to the Surface Transportation Board (Board).

issues. By decision entered July 11, and order entered August 8, 1996, the court granted Infinity's motion for stay to enable referral of these issues to us, based on our primary jurisdiction and the need for agency expertise and uniformity of decision-making.

B. Proceedings before the Board.

Infinity, along with several "joining parties," i.e., similarly situated shipper-defendants in the bankruptcy case, filed its petition for declaratory order. After we established a procedural schedule for the initial phase of this proceeding, which was to encompass the status and adoption defenses, SFF filed a motion to rescind the scheduling order and a request for a status hearing. It contended that, for efficiency's sake, the initial phase of the proceeding should encompass only the adoption defense and, if it were not so limited, that SFF should be allowed to conduct discovery of all shippers to elicit evidence concerning the status defense. Infinity replied. We denied SFF's motion in its entirety, holding that the status defense would be evaluated not as to each shipper, but on the basis of SFF's business relationship with Infinity, as contemplated by the Bankruptcy Court when it adopted the lead case approach. Infinity filed its opening statement on January 28, 1997; SFF filed its opening statement on March 6, 1997; and Infinity filed its rebuttal on March 31, 1997.

C. Resolution of SFF's motion to strike certain testimony.

Throughout the record-building phase of this proceeding, the parties have sparred over the testimony of Ken Bertrand, a former national accounts representative for SFF, who submitted a declaration in support of Infinity's opening statement. SFF filed a motion to compel his deposition, claiming that cross-examination of Mr. Bertrand was necessary to resolve an alleged conflict between his testimony and statements contained in copies of letters submitted by SFF. However, on March 12, 1997, that request was withdrawn. Thereafter, SFF moved to strike portions of Mr. Bertrand's reply declaration, filed with Infinity's rebuttal statement, or, alternatively, for an order compelling his deposition. Infinity replied.

SFF claims that the challenged portions of Mr. Bertrand's reply declaration are not responsive to SFF's opening statement because he was aware of the facts asserted at the time of his original statement and because, unlike Mr. Bertrand's original statement, they relate directly to SFF's relationship with Infinity. Thus, in SFF's view, they are not "confined to issues raised in the reply statements to which they are directed." 49 CFR 1112.6.

We will deny SFF's motion to strike and its request to depose Mr. Bertrand. The first challenged portion of Mr. Bertrand's testimony responds to written evidence submitted by SFF putting into the record what SFF characterizes as its offers to provide "direct" service, or "complete" service to shippers. Mr. Bertrand's reply declaration explains that the terminology used in the correspondence was intended to describe service

provided by the entire Superior Transportation Group, and that SFF management and sales personnel were well aware of the distinction between motor carrier and freight forwarder services. This testimony clearly is responsive to SFF's evidence, which was not of record at the time Mr. Bertrand presented his original statement.

The second category of statements challenged by SFF relate (1) to a picture of an SFF vehicle that appeared on the cover of a road atlas and (2) to a meeting Mr. Bertrand states that he attended with Infinity personnel, in which he claims he identified SFF as a freight forwarder. As explained below, we find (1) that the picture is irrelevant to whether SFF provided services to Infinity as a freight forwarder, and (2) that SFF submitted no evidence to support its contention that SFF acted as a motor carrier in transporting Infinity shipments, rendering the reply testimony of Mr. Bertrand on that point superfluous. Therefore, SFF is not harmed by our denial of its motions as to the second category of statements.²

FACTS

The parties are in general agreement as to the corporate history and identity of SFF and related companies. However, they differ sharply over whether SFF acted as a motor carrier subject to the filed rate doctrine and whether SFF maintained a tariff governing the shipments involved here by properly adopting the tariffs of its predecessor.

A. Corporate identity.

SFF began conducting freight forwarder operations in California in 1939. Shortly thereafter, when Congress brought freight forwarders under federal regulatory jurisdiction,³ SFF obtained a permit to provide freight forwarder services from the ICC, under Docket No. ICC FF-56. From that time until at least 1986, when Congress eliminated regulatory oversight as to most freight forwarders,⁴ SFF held itself out to the public to operate, and in fact operated, as a freight forwarder.

From 1955 until 1986, the principals of SFF also owned Superior Fast Drayage (Drayage), a corporation that operated as a motor carrier called "Superior Fast Drayage dba Superior Express" (Superior Express). Superior Express held a certificate of

² Infinity contends that SFF should have been required to produce its unfiled, in-house tariffs in our original scheduling order. Under the circumstances of this case, where we find that SFF cannot lawfully collect the undercharges it seeks, Infinity is not harmed by the failure of SFF to produce these tariffs. However, should such tariffs be required to allow shippers to prepare their defense in future cases, we will require their production.

³ Act of May 16, 1942.

⁴ Surface Freight Forwarder Deregulation Act of 1986, Pub. L. No. 99-521.

public convenience and necessity and a permit from the ICC (Docket No. MC-121336) authorizing it to provide service as a common and contract motor carrier.

In 1986, SFF was merged into Drayage, and the next year Drayage changed its name to SFF. As a result of this merger, SFF had authority to operate as either a freight forwarder or a motor common and contract carrier. In 1989, SFF filed a statement with the Los Angeles County Clerk registering "Superior Express" as the proprietary name for SFF. (*Id.*)

SFF states that it stopped holding itself out to the public to provide freight forwarder operations in 1986, and did not after that time provide such services. However, it did continue to participate in the series of National Motor Freight Classifications (NMFC)⁵ filed at the ICC, and to identify itself therein as a freight forwarder, with alpha code "SUFF." During that same time, SFF also participated in the NMFC under the proprietary name "Superior Express," identifying itself as a motor carrier, with alpha code "SULA."

In subsequent years, additional companies (Super Cal Express, Superior Hawaiian Express, and Surway, Inc.) were added to what SFF began to refer to as the "Superior Transportation Group."

B. The evidence.

1. The status issue.

In support of its contention that SFF acted as a freight forwarder, Infinity tendered a copy of the petition in bankruptcy filed by SFF, in which its president, Richard R. Castro, identifies the businesses of SFF as "freight forwarding and trucking," and a copy of a declaration filed in bankruptcy court by Robin Castro, vice-president of administration and secretary/treasurer of SFF, who states that "SFF is composed of two divisions. Superior Fast Freight is engaged in freight forwarding . . . Superior Express is engaged in freight pickup and distribution. . . ." Infinity Opening Statement, Exhibits 1 and 2.

Infinity also submitted a verified statement of Vince Prater, Director of Distribution for Harman International Industries, Inc., Infinity's parent company. Attached to that statement is a letter from Sandra L. Nava, SFF's Director of Pricing, transmitting to Infinity's freight bill payment agent a copy of Item S5555, SFF Discount Tariff No. ICC SUFF 617-B, the

⁵ NMFC is the principal classification tariff used by carriers to establish class rates. *National Classification Committee v. United States*, 22 F.3d 1174, 1175 (D.C. Cir. 1994). Carriers participate in it in order to simplify the process of establishing the final price for transportation services.

unfiled SFF freight forwarder discount tariffs on which SFF based its original bills to Infinity.⁶

Infinity also tendered into evidence copies of original freight bills, "corrected" to show the amounts now sought by SFF, which SFF had sent to Infinity with its demand for undercharges. Many of the "original copies" of those bills included the identifier "I.C.C. F.F. No. 56," SFF's freight forwarder docket number, although in other copies that identifier appears to have been deleted. The freight bills also contain the following phrase: "FIFTY YEARS OF SUPERIOR SERVICE."

Infinity also submitted declarations of several former SFF employees, including, as indicated earlier, Ken Bertrand and Sandra L. Nava. Significantly, Mr. Bertrand testified that:

[SFF's] operations consisted of assembling and consolidating less-than-truckload . . . shipments of cargo on behalf of various shipping companies. . . . The consolidated shipments were then transported by other motor carriers. . . . All equipment was placarded in the name of those carriers. I am not aware of any occasion in which [SFF] either performed any line-haul transportation services or placarded the equipment with [SFF's] name.

[SFF] contracted for delivery services at destination. Delivery services were performed by a local drayage company. . . .

Infinity Opening Statement, Exhibit 19, Bertrand Declaration at 1-2.

⁶ Infinity also submitted evidence concerning the business relationship between SFF and other shippers. For example, it submitted unfiled tariffs published and maintained by SFF containing rates for freight forwarder service to other shippers, and correspondence and affidavits from SFF officials asserting the legality of the unfiled freight forwarder rates in the tariffs. This correspondence indicated that SFF began using the name "Superior Transportation Group" to market its services in conjunction with affiliated companies. In other correspondence, apparently in response to customer concerns about the absence of filed tariffs that would document rates offered to them by SFF or the Group, SFF officials pointed to SFF's exempt status as a freight forwarder. Other shippers entered into freight forwarder agreements with SFF to ensure that they were protected from later claims that a filed tariff rate, rather than the agreed rate, applied to the shippers' transportation. This evidence, while not germane to the business relation between Infinity and SFF, does serve to refute SFF's claim that it ceased acting as a freight forwarder in 1986. Infinity also submitted documents showing that SFF, in the role of shipper, contracted with motor carriers to haul traffic on its behalf - the normal relation of a freight forwarder to a motor carrier.

In her declaration, Ms. Nava testified that, during her 11 years of employment in pricing for SFF, the company "operated as a freight forwarder only and not any other carrier, such as an ICC-licensed motor carrier." *Id.* Nava Statement at 2. She also testified that, under instruction from Richard Castro, SFF's President, she explained to each new sales person that SFF "was a freight forwarder only, and therefore exempt from any ICC-tariff filing requirements." *Id.* In order "to assure our shippers that the tariffs are completely legal," also under instruction from Richard Castro, she "furnished shippers with a form of Certification . . . setting forth SFF's status as a freight forwarder." *Id.*

Ms. Nava also testified that she was not aware of any occasion when SFF "either performed any line-haul transportation services or placarded the equipment with [SFF's] name." *Id.* at 4. She explained that Drayage performed local pickup and delivery service for SFF, as an agent for SFF. *Id.* at 4-5.

SFF submitted a declaration in which Robin Castro testified that when she stated in SFF's petition in bankruptcy that SFF was a freight forwarder, she was "not familiar with [certain] documents" that Infinity introduced here concerning SFF's legal status and "the significance to legal status of Superior as a carrier." SFF Statement, Castro Declaration, at 1. She states that now she has been "advised that certain documents . . . placed Superior's legal status, from 1987 on, as one of a motor common and contract carrier and not a freight forwarder." *Id.*

SFF also relies on an affidavit of Rodney A. Johnson, President of Trans-Allied Audit Co., Inc., the company appointed by the bankruptcy court to audit and collect SFF's accounts receivable. *Id.*, Johnson Affidavit. He testified that the only legal entity his company could locate was Drayage and that Drayage's name had been changed on the ICC certificate to SFF. He claims that SFF participated in some tariffs filed with the ICC, including the one on which SFF relies for its undercharge claims, although the only Superior company participant listed in the 1994 tariff he submitted into evidence is Drayage dba Superior Express. *Id.*, Exh. C. Mr. Johnson also asserts that, because tariff ICC SUFF 617-B, on which the original billings were based, could not be found on file at the ICC, it has no application. Finally, he asserts that "[n]o where does any of the correspondence between Superior and its customers proclaim and/or promote Superior as a freight forwarder." *Id.* at second unnumbered page.

SFF also submitted voluminous documentation consisting of correspondence, both internal and external, corporate profiles, and related evidence, most of which does not relate to SFF's relationship with Infinity. Some of this evidence facially supports SFF's claim to motor carrier status. For example, there are references to SFF's holding out to transport truckload traffic. SFF suggests that, as to some shippers, it did not consolidate shipments, one of the hallmarks of freight forwarder service. Moreover, SFF (or some company in the Superior group) apparently owned and operated hundreds of motor vehicles, some of

which may have been over-the-road vehicles. We note that the only set of documents SFF submitted relating to Infinity is a series of bills of lading for Infinity shipments with the words "Superior" and "LTL Truck" entered on the form under the word "route."

Finally, SFF contends that the reference to SFF's freight forwarder permit number on the original freight bills it sent to Infinity is only a matter of SFF using up old forms.

2. The Adoption Issue.

Concerning the adoption defense, Infinity submitted declarations of Michael Bange and John H. Kirkemo. Both of these declarations (with attached documentary evidence) confirm that the only Superior company that participated in the motor carrier tariff published by the Rocky Mountain Motor Tariff Bureau (RMB 583) on which SFF relies for the undercharge claims was Superior Drayage, Inc., dba Superior Express.

SFF submitted no evidence to dispute the facts contained in the Bange and Kirkemo declarations. Instead, it argues that, as a matter of law, SFF's failure to adopt the tariffs is a minor or technical deficiency that should not prevent it from collecting the undercharges based on the filed rate.

DISCUSSION AND CONCLUSIONS

A. The status issue.

During the relevant time period, the "filed rate doctrine" required motor carriers to file with the ICC tariffs containing their rates and to abide by those rates. 49 U.S.C. 10761-62 (1992); Maislin Industries, U.S. v. Primary Steel, 497 U.S. 116 (1990). Freight forwarders, on the other hand, were not required to file their rates and adhere to them, because they had been deregulated in the Freight Forwarder Deregulation Act of 1986. See n. 4, *supra*. SFF claims that it was a motor carrier required to charge its tariff rates, while the shippers claim that it was a freight forwarder.

A freight forwarder is defined in 49 U.S.C. 13102(8) as:
a person holding itself out to the general public
(other than as a pipeline, rail, motor, or water
carrier) to provide transportation of property for
compensation and in the ordinary course of its
business—

(A) assembles and consolidates, or provides for
assembling and consolidating, shipments and performs or
provides for break-bulk and distribution operations of
the shipments;

(B) assumes responsibility for the transportation from the place of receipt to the place of destination; and

(C) uses for any part of the transportation a carrier subject to jurisdiction under this subtitle.

A motor carrier, by contrast, is defined as "a person providing motor vehicle transportation for compensation." 49 U.S.C. 13102(12).

1. Who performed the line-haul?

As the ICC made clear:

The principal characteristic distinguishing freight forwarders from other common carriers is that they themselves may not perform the actual line-haul movement of the goods. Rather, they must rely upon common carriers by rail, motor, and water . . . to perform the underlying transportation service.

Investigation into Status of Freight Forwarders, 339 I.C.C. 711, 714 (1971) (*Status of Freight Forwarders*).

Thus, the best evidence of whether SFF acted as a freight forwarder or a motor carrier as to Infinity would involve a showing of who performed the actual line-haul movement of the goods. Unfortunately, neither party submitted evidence concerning this question. The record does not contain dispatch sheets indicating that a SFF vehicle was used for the movements, or a lease indicating that SFF leased a vehicle from another company, or any other evidence as to the identity and ownership of the motor vehicles that transported the Infinity (or any other) shipments.

We would not expect Infinity to be in possession of such documentation, but SFF should have evidence of the equipment used. Because SFF failed to present any evidence establishing that it acted as a motor carrier, we cannot find that it engaged in motor carrier operations as to Infinity. *Status of Freight Forwarders; Universal Carloading & Distribution Co. - Common Carrier Application*, 22 M.C.C. 491, 495 (1940) (absent evidence of a "lease or other arrangement" giving company "dominant control over the business" of the company providing the over-the-road transportation, the company is not a motor carrier).

2. What did SFF hold out to the public?

Another way of determining SFF's status, which has been urged by the parties, is by reviewing the nature of SFF's holding out to the public, that is, whether SFF, in offering its services, held itself out as a motor common carrier or a freight forwarder. Upon reviewing SFF's holding out, we find that SFF held itself out as a freight forwarder, rather than a motor common carrier, and that, as a result, the filed rate doctrine did not apply.

The only documentary evidence submitted by SFF that remotely bears on SFF's holding out to Infinity are bills of lading on which the name "SFF" is inserted in a box purporting to identify the "carrier" for each shipment. But as indicated in *Status of Freight Forwarders*, a freight forwarder is one of several types of common carriers. It is responsible to the shipper for the entire movement. *Status of Freight Forwarders*, 339 I.C.C. at 713 ("forwarders hold themselves out to provide, in their own name and under their own responsibility, a through transportation service from the point of receipt of a shipment to final destination."). Therefore, the fact that SFF is indicated as the carrier responsible for the shipments involved does not indicate that it was a motor common carrier, rather than a freight forwarder, as to those shipments.

On the other hand, the record contains abundant evidence that SFF acted as a freight forwarder as to the involved shipments. The freight bills issued by SFF referenced its freight forwarder permit number and boasted of "FIFTY YEARS OF SUPERIOR SERVICE," a claim that could not relate to motor carrier services that the SFF affiliate Drayage did not begin until 1955. In a similar vein, Sandra L. Nava, SFF's Director of Pricing, represented to Infinity's freight bill payment agent that SFF was acting under its unfiled freight forwarder discount tariffs in providing transportation for Infinity.

SFF contends that, in issuing freight bills referencing its freight forwarder permit number, it was merely using up old stationery. However, the freight bills in issue were dated in 1993, some seven years after SFF claims to have left the freight forwarding business. Particularly given the significance of the filed rate doctrine, on which SFF's entire case turns, and which was well known in transportation circles in 1993, SFF's explanation that it was casually issuing freight bills that described it as an unregulated freight forwarder rather than a regulated motor common carrier simply cannot be believed.

Indeed, the unrefuted testimony of former employees of SFF confirm that its operations were in the nature of freight forwarding. Ken Bertrand testified that SFF's operations during the time he was a national accounts representative consisted of assembling and consolidating shipments for transportation by motor carriers. Sandra Nava provided similar testimony. She indicated that, in accordance with direction from SFF's president, she informed each new sales person that SFF was a freight forwarder, and so certified to shippers. Drayage, she explained, performed local pickup and delivery for SFF.

SFF has produced nothing to refute this evidence. It has brought forward no witnesses who were in a position to be aware of SFF's mode of operations to challenge this testimony. Nor did it produce testimony to refute Ms. Nava's statement regarding her instructions from SFF's president.⁷ Instead, SFF relies

⁷ SFF relies on the fact that Robin Castro now testifies that she has been advised (by unknown persons) that certain

primarily on solicitation letters in which it held out to provide complete transportation service to shippers other than Infinity. But, as noted, just like motor carriers, freight forwarders take responsibility for shipments from origin to destination. Although we are not in a position to review every detail of every SFF shipment for every shipper to determine whether each constituted motor carrier transportation, we can say that, insofar as its relations with Infinity are concerned, the evidence is overwhelming that SFF was acting as a freight forwarder.

Rodney A. Johnson's claim that Drayage was the only legal entity that could have provided the transportation is totally baseless. Mr. Johnson apparently concludes that, because Drayage was the only company in the Superior group that had an ICC license during the relevant time period, it was the only company that could have lawfully provided the transportation. But the fact that SFF had no active ICC freight forwarder permit during the relevant period is not inconsistent with our finding that SFF was a freight forwarder. As a freight forwarder, it required no ICC permit. In any event, the best evidence of the identity of the legal entity was in the very documents SFF filed in the bankruptcy court, which identify the company as SFF, not Drayage.⁸

3. Conclusion as to status.

We recognize that the correspondence, corporate profiles, and related evidence that SFF submitted regarding its holding out to shippers other than Infinity may reflect some confusion (intentional or not) of responsibilities among the several Superior companies. However, even if it were true that SFF, or the Superior Transportation Group, marketed itself as a motor carrier to some shippers, at least as to Infinity, SFF did not provide, or hold itself out to provide, the underlying transportation. Therefore, we conclude that SFF was acting as a freight forwarder on the Infinity shipments. Because at the time of the shipments freight forwarders were neither required nor permitted to file rates with the ICC, those shipments are not subject to the filed rate doctrine, and SFF may not collect undercharges.

B. The adoption issue.

Finally, even if we were to conclude that it did provide motor carrier rather than freight forwarder service, SFF did not

documents make SFF's legal status that of a motor carrier. However, that does not undermine her original sworn statement that SFF was composed of two divisions, one of which was engaged in freight forwarding. It only indicates that someone gave her legal advice in the context of this litigation.

⁸ In fact, the evidence available to Mr. Johnson suggests that Drayage could not have provided the transportation during the relevant period because it had no tariff on file with the ICC demonstrating that it was an active motor carrier.

have an effective tariff on file for the shipments at issue here. When a "carrier's name is lawfully changed," it must file a tariff adoption notice "to reflect the new ownership or control." 49 CFR 1312.20(b). The notices must be filed "promptly," but "in no case later than 60 days" after consummation. 49 CFR 1312.20(h).

On November 23, 1987, Superior Fast Drayage d/b/a Superior Express, the motor carrier holding certificate number MC-121336, changed its legal name to Superior Fast Freight, Inc. d/b/a Superior Express. Although its trade name remained the same (Superior Express), the carrier was required promptly to formally adopt the tariffs of its predecessor or to file new tariffs to reflect the new name. 49 CFR 1312.20. However, SFF never filed a notice adopting the tariffs of Superior Fast Drayage d/b/a Superior Express. Therefore, it appears that no applicable tariffs were ever filed with the ICC for any motor carrier traffic that could have been transported by SFF. *MacLeod v. ICC*, 54 F.3d 888, 890 (D.C. Cir. 1995); *Rushton v. American Pacific Wood Products*, 192 B.R. 763 (D. Utah 1996).

SFF argues that 49 CFR 1312.20(b) does not require an adoption notice where there was a name change without a change of corporate identity, citing *Norwest Transportation v. Horn's Poultry*, 23 F.3d 1994 (7th Cir. 1994), *cert. denied*, 115 S.Ct. 1314 (1995). However, here there was a change of corporate identity – SFF was merged into Drayage, which had previously been a separate corporation, and Drayage subsequently changed its name to SFF. This is a change in corporate identity, not merely a change of name by a single corporation.

Moreover, even if the change were considered merely a change of name, we would find that SFF's failure to adopt Drayage's tariffs deprives it of the right to enforce those tariffs. *Security Services v. Kmart Corp.*, 511 U.S. 431 (1994) (*K Mart*). Just as in *MacLeod*, the shippers involved here "could not rely upon a tariff that the new . . . carrier had never adopted." 54 F.3d at 890.

Contrary to SFF's position, we do not believe that the failure to adopt is a mere technical defect. There simply was no SFF tariff on file with the ICC setting forth charges for motor carrier services. Thus, the failure to adopt does not result in "a complete tariff subject to some blemish independently remediable," but rather the total absence of a tariff whereby "a reliable calculation of charges" can be made. *K Mart*, 511 U.S. at 443.

Therefore, even if SFF had provided motor common carrier service for Infinity, no additional charges would be collectible.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The petition for declaratory order is granted, and we advise the Court that Superior Fast Freight has not demonstrated a basis for collecting undercharges.

2. This proceeding is discontinued.

3. This decision is effective on July 2, 1997.

4. A copy of this decision will be mailed to the referring court at this address:

The Honorable Ernest M. Robles, Judge
United States Bankruptcy Court
Suite 1560, 15th Floor
255 East Temple Street
Los Angeles, CA 90012-3300

Re: Chapter 11 Case No. LA 93-54051 ER
Adversary Proceeding No. AD 95-05854 ER

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary