

21588
SEC

SERVICE DATE - FEBRUARY 18, 1997

SURFACE TRANSPORTATION BOARD¹

DECISION

No. 41559

SOLAR GROUP, A DIVISION OF ENAMEL PRODUCTS AND PLATING COMPANY--
PETITION FOR DECLARATORY ORDER--CERTAIN RATES
AND PRACTICES OF TRANS-ALLIED AUDIT COMPANY, INC.
AND MERCHANTS TRUCK LINE, INC.

Decided: February 12, 1997

Solar Group, a division of Enamel Products and Plating Company (Solar or petitioner) filed a petition with the ICC dated March 27, 1995. By decision served April 14, 1995, a procedural schedule was established.

The April 14 decision specifically directed Merchants Truck Line, Inc., Trans-Allied Audit Company, Inc. (respondent) to furnish petitioner with the material called for in Vertex Corp. Pet. Declar. Order Rates and Practices, 9 I.C.C.2d 688, 697-98 (1993) (Vertex II).

On May 5, 1995, respondent filed an unopposed motion requesting partial relief from the requirement of providing petitioner with all the information called for in the April 14 decision. Respondent also requested a new procedural schedule. Respondent further stated that petitioner informed respondent's counsel on April 25, 1995, that it did not oppose the motion. The motion was granted.

Also on May 5, 1995, respondent filed a petition to allow discovery regarding certain questions "if the Commission chooses to address issues of misrouting," arguing that the questions could best be answered by petitioner through the taking of oral testimony, by deposition of petitioner. On May 15, 1995, petitioner filed a reply objecting to the request for deposition testimony until such testimony is determined necessary. Respondent's request for depositions was denied.

By decision served October 3, 1995, the ICC established a new procedural schedule in this proceeding. On November 6, 1995, petitioner filed for sanctions for failure of respondent to comply with the ICC's discovery order of October 3, 1995. Respondent failed to respond. The April 14 decision stated that Vertex II information is needed to enable the ICC to determine whether the rates on which respondent has based its undercharge claim are applicable to the disputed movements. Respondent was directed in the October 3 decision to provide the Vertex II material to the petitioner by October 23, 1995.

The Vertex II materials is needed to determine accurately the specifics of the transportation provided. Without the material, the Board would not be able to determine the

¹ On December 29, 1995, the President signed the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICC Termination Act or the Act). Effective January 1, 1996, the Act abolished the Interstate Commerce Commission (ICC or Commission) and transferred various ICC functions to a newly created Surface Transportation Board (Board), including the resolution of issues in motor carrier undercharge proceedings, 49 U.S.C. 13709-13711.

applicability of the assessed rates. The April 14 decision stated that if the ICC did not dispose of the proceeding on grounds other than rate reasonableness, the ICC would address the rate reasonableness issues using the market based approach set forth in Georgia-Pacific Corp.--Pet. for Declar. Order, 9 I.C.C.2d 103 (1992), aff'd and clarified, 9 I.C.C.2d 796 (1993).

A review of the record indicates that respondent has failed to supply the necessary, requested Vertex II materials or to respond in any manner to the ICC's directives in this regard.

This proceeding will be dismissed. Without the Vertex II information called for in the April 14 and October 3 decisions, the Board cannot determine whether the sought rates are applicable to the disputed movements. Moreover, without an applicability finding, it would be mere hypothetical exercise for the Board to rule on the reasonableness of the allegedly applicable rates. Respondent is hereby advised that this order of dismissal is the result of respondent's failure to submit the evidence necessary to support its undercharge claim and that, as a consequence of its failure, undercharges should not be awarded against the petitioner. In Vertex II, supra, at 691, the ICC cited Carriers Traffic Serv. v. Toastmaster, 707 F. Supp. 1498, 1505-06 (N.D. Ill. 1988), in explaining that a carrier must "live with the record it has made (or failed to make)" before the ICC (now the Board) when pursuing its undercharge proceeding.

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 dismissed.
2. This decision is effective on the service date.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams
Secretary