

SERVICE DATE - OCTOBER 28, 1997

SURFACE TRANSPORTATION BOARD

DECISION

STB No. 42001

THE SHERWIN-WILLIAMS COMPANY AND UNITED COATINGS, INC.

v.

WILLIG FREIGHT LINES, INC.

Decided: October 22, 1997

The Sherwin-Williams Company and United Coatings, Inc. (complainants) filed a complaint with the Board against Willig Freight Lines, Inc. (Willig or defendant) pursuant to the order of the United States Bankruptcy Court for the Northern District of California, in Willig Freight Lines, Inc. v. The Sherwin-Williams Company and United Coatings, Inc., Case No. ND 95-33940-DM, Adv. No. 96-3369 and Adv. No. 97-3211. By decision served July 2, 1997 (July 2 decision), a procedural schedule was established in this proceeding.

The July 2 decision specifically directed defendant to furnish complainants with tariff and other documentation, listed in Appendix A to the decision, called for in Vertex Corp. Pet. Declar. Order Rates and Practices, 9 I.C.C.2d 688 (1993) (Vertex II), modified at 10 I.C.C.2d 367 (1994) (Vertex III) by July 22, 1997. Defendant failed to comply with the July 2 decision directive with respect to furnishing the requested Vertex II material and offered no explanation for its failure to do so.

By decision served September 26, 1997 (September 26 decision), the Board, pursuant to a motion to compel production of Vertex information filed by complainants, vacated the procedural schedule established in the July 2 decision and directed defendant to furnish complainants and the Board with the Vertex II information described in an attached appendix by October 16, 1997. Both the July 2 and September 26 decisions stated that should defendant fail to produce the requested information, it would become necessary for the Board to advise the court that defendant has not shown itself to be entitled to collect any undercharges.

The Vertex II material is needed to determine accurately the specifics of the transportation provided. Without the material, the Board would not be able to determine the applicability of the assessed rates. The July 2 decision stated that if the Board did not dispose of the proceeding on grounds other than reasonableness, the Board would address the rate reasonableness issue 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 defendant has failed to supply the necessary requested Vertex II materials, or to respond in any manner to the Board's directives in this regard.

This proceeding will be dismissed. Without the Vertex II information called for in the July 2 and September 26 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. The court is hereby advised that this order of dismissal is the result of defendant's failure to submit the evidence necessary to support its undercharge claims and that, as a consequence of its failure, undercharges could not be awarded against the complainants. In Vertex II, supra, at 691, the Interstate Commerce Commission (ICC), the Board's predecessor, cited Carriers Traffic Serv. v. Toastmaster, 707 F. Supp. 1498, 1505-06 (N.D. Ill. 1988), in explaining that a carrier on court referral must "live with the record it has made (or failed to make)" before the ICC (and now the Board) when pursuing its undercharge proceeding in the courts.

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 its service date.
3. A copy of this decision will be mailed to:

The Honorable Dennis Montali
United States Bankruptcy Court for
the Northern District of California
P. O. Box 7341
San Francisco, CA 94120

Re: Case No. ND 95-33940-DM,
Adv. No. 96-3369 and Adv. No. 97-3211

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams
Secretary