

SURFACE TRANSPORTATION BOARD

DECISION

STB No. 41993

ILLINOIS TOOL WORKS, INC. d/b/a SIGNODE PACKAGING SYSTEMS  
a/k/a IMSA SIGNODE S.A.

v.

BE-MAC TRANSPORT, INC.

Decided: September 8, 1997

Illinois Tool Works, Inc. d/b/a Signode Packaging Systems a/k/a IMSA Signode S.A. (ITW or complainant) filed a complaint with the Board against Be-Mac Transport, Inc. (Be-Mac or defendant) pursuant to the order of the United States District Court for the Eastern District of Missouri, Eastern Division, in Be-Mac Transport, Inc. v. Illinois Tool Works, Inc., Case No. 4:95-CV-1301 (CEJ), dated January 28, 1997. By decision served April 3, 1997 (April 3 decision), a procedural schedule was established in this proceeding.

The April 3 decision specifically directed defendant to furnish complainant 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 April 23, 1997. Defendant failed to comply with the April 3 decision directive with respect to furnishing the requested Vertex II material and offered no explanation for its failure to do so.

By decision served July 21, 1997 (July 21 decision), the Board, pursuant to a motion for default or request for postponement of procedural deadlines filed by complainant, vacated the procedural schedule established in the April 3 decision and directed defendant to furnish complainant and the Board with the Vertex II information described in an attached appendix by August 11, 1997. Both the April 3 and July 21 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 April 3 decision stated that if the Board did not dispose of the proceeding on grounds other than reasonableness, the Board 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).

On August 14, 1997, complainant, asserting that defendant has failed to supply the requested Vertex II materials, filed a renewed motion for default. 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.<sup>1</sup>

This proceeding will be dismissed. Without the Vertex II information called for in the April 3 and July 21 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 claim and that, as a consequence of its failure, undercharges could not be awarded against the complainant. 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

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<sup>1</sup> This determination is based upon a review of Board records in addition to the assertions set forth in complainant's renewed motion for default.

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. The proceeding is dismissed.
2. This decision is effective on its service date.
3. A copy of this decision will be mailed to:

The Honorable Carol E. Jackson  
United States District Court for the  
Eastern District of Missouri, Eastern Division  
U. S. Court & Custom House  
1114 Market Street, Room 828  
St. Louis, MO 63101

Re: Case No. 4:95-CV-1301 (CEJ)

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams  
Secretary