

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)	
)	
BEST REFRIGERATED EXPRESS, INC.,)	CASE NO. BK89-80169
)	
DEBTOR)	A91-8036
)	
THOMAS HOARTY, TRUSTEE,)	
)	CH. 11
Plaintiff)	
vs.)	
)	
AMERICAN DISTRIBUTION)	
MANAGEMENT INC.)	
)	
Defendant)	

MEMORANDUM

(I) Hearing was held on December 7, 1993, on a Motion to Dismiss filed by defendant. Appearing on behalf of trustee/plaintiff were John Siegler of Sims, Walker & Steinfeld, P.C., Washington, D.C. Also appearing on behalf of plaintiff was Norman Wright of Frazer, Stryker, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., Omaha, NE. Appearing on behalf of defendant was Robert J. Gallagher of Northhampton, MA. Also appearing on behalf of defendant was Thomas Saladino of Fitzgerald, Schorr, Barmettler, & Brennan of Omaha, NE.

(II) Hearing was held on March 18, 1994, on a Motion for Summary Judgment filed by defendant. Appearing on behalf of trustee\plaintiff were John Siegler and Norman Wright. Appearing on behalf of defendant was Robert J. Gallagher and Thomas Saladino.

This memorandum contains findings of fact and conclusions of law required by Fed. Bankr. R. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(A), (E) and (O).

Background

Best Refrigerated Express, Inc. (Best), filed a petition under Chapter 11 of the Bankruptcy Code on February 7, 1989. Best, a trucking firm, operated in interstate commerce as a motor contract carrier and a motor common carrier. Best ceased operating in February, 1989. Thomas F. Hoarty Jr. was appointed trustee of the estate on February 27, 1989.

The trustee engaged Trans-Allied Audit Company (Trans-Allied) to conduct an audit of Best's past freight bills to determine whether Best billed its customers according to the motor common carrier rates that Best had on file with the Interstate Commerce Commission (ICC) pursuant to 49 U.S.C. § 10761(a) or according to a negotiated rate. If there was a discrepancy between the amount Best billed for the transportation service and the rate that Best had on file with the ICC under its motor common carrier permit, Trans-Allied billed the shipper for the difference.

American Distribution Management, Inc. (ADMI) is a licensed broker of property who tendered shipments to Best to transport property on behalf of ADMI's customers. Trans-Allied audited Best's past accounts with ADMI and determined that ADMI owed Best \$4,955.54 in "undercharge claims." ADMI refused to pay Trans-Allied. The trustee filed this adversary proceeding to collect the undercharge claim plus pre-judgment and post-judgment interest against ADMI pursuant to 49 U.S.C. §§ 10741(a), 10761 and 10762 (1993) of the Interstate Commerce Act (ICA).

The parties raised the following issues before the Court:

- (1) Whether the lawful rates as published in Best's motor common carrier tariffs and filed with the ICC were applied to each shipment handled by Best for ADMI;
- (2) Whether ADMI tendered freight to Best for transportation in interstate commerce and Best accepted said freight and performed the transportation services;
- (3) Whether the rates sought to be collected by the trustee are reasonable rates;
- (4) Whether Best provided said transportation services as a common or contract carrier;
- (5) What amount, if any, remains due and owing to the trustee based upon ADMI's obligation to pay the lawful tariff rate on file with the ICC and in effect at the date of each shipment handled by Best for ADMI pursuant to 49 U.S.C. § 10761(a);
- (6) Whether ADMI tendered freight to Best as a consignor or consignee for transportation in interstate commerce and Best accepted said freight and performed the transportation services.

Preliminary Pretrial Statement, Filing no. 17, at 3.

On October 8, 1991, the adversary proceeding was stayed and several of the undercharge issues were referred to the ICC. Filing no. 18. ADMI petitioned the ICC to determine that it was not liable for the undercharge claims on the following grounds: (1) Since ADMI is a broker of property and not a shipper, it is not liable for the undercharge claims; (2) If common carrier rates do apply, the rates that Best had on file with the ICC are unreasonable rates and are uncollectible; (3) Because the transportation was provided by Best under its motor contract carrier authority, no filed common carrier tariff is applicable, and the contract rate originally billed was the correct rate.

The ICC ruled that ADMI and Best had entered into a motor contract carrier agreement on February 5, 1986 (the Agreement) under Best's motor contract carrier permit; therefore, the rates that were billed pursuant to the Agreement were the applicable rates, and the trustee was not entitled to an undercharge claim. Rates negotiated pursuant to a carriers motor contract authority are not required to be filed with the ICC, unlike common carrier rates which are filed with the ICC. Exemption of Motor Contract Carriers from Tariff Filing Requirements, 133 M.C.C. 150 (1983), aff'd sub nom Central & Southern Motor Freight Tariff Ass'n v. United States, 757 F.2d 301 (D.C. Cir. 1985), cert. denied, 474 U.S. 1019, 106 S. Ct. 568, 88 L. Ed. 2d 553 (1985).

The ICC concluded that its finding that Best acted pursuant to motor contract authority was dispositive of the entire case and, therefore, did not determine whether the filed rates were unreasonable or whether the goods shipped by Best were exempt from ICC regulation because ADMI is a broker. See American Distribution Management, Inc. -- Petition For Declaratory Order -- Certain Rates and Practices of Best Refrigerated Express, Inc., No. 40676 (I.C.C. Sept. 2, 1993) [hereinafter ADMI].

After the ICC decided ADMI, the parties returned to this Court where ADMI moved for dismissal of the adversary on September 2, 1993. Filing no. 20. The trustee resisted on the ground that the ICC erred by holding that the agreement between Robinson and Best was a motor contract agreement and not a common carrier agreement. Filing no. 23. Hearing was held on December 7, 1993. Filing no. 26. At the hearing, the Court ordered both parties to submit comments about the applicability of the new statute, the Negotiated Rates Act of 1993.

Congress passed and the President signed into law the Negotiated Rates Act of 1993 on December 3, 1993. Negotiated Rates Act of 1993, Pub. L. No. 103-180, §§ 1-9, 107 Stat. 2044 (codified as amended at 49 U.S.C. § 10701) (1994) [hereinafter the NRA]. The NRA has significantly changed the law by promulgating retroactive standards to determine whether a motor carrier or its representative is entitled to undercharge claims.

While the Motion to Dismiss was pending in this Court, ADMI filed a Motion for Summary Judgment. Filing no. 27. ADMI alleged that it is a "small-business concern" under 15 U.S.C. § 631 (the Small Business Act), and as such, ADMI is exempt from liability for undercharge claims under the NRA. §2(a)(f)(9)(A), codified at 49 U.S.C. § 10701(f)(9)(A).

A hearing was held on March 18, 1994. At the hearing, Best and ADMI stipulated that ADMI met the criteria of a "small-business concern" under 15 U.S.C. § 631. The trustee, in resistance to the motion, argued that the NRA is inapplicable for two reasons: (1) Section 9 of the NRA exempts bankrupt carriers from the NRA; and

(2) the NRA is unenforceable against a bankruptcy estate because the NRA violates Sections 541(c)(1), 363(1) and 362(a)(3) of the Bankruptcy Code.

After the hearing, the Motion for Summary Judgment was taken under advisement. This Memorandum will address both the Motion to Dismiss (I) and the Motion for Summary Judgment (II).

I. MOTION TO DISMISS

Discussion and Decision

Motions to dismiss are filed pursuant to Fed. Bankr. R. 7012. Rule 7012 states that Fed. R. Civ. P. 12(c) applies to this case. Rule 12(c) states the following:

After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

In this case, both parties have submitted information to the Court outside of the pleadings. Both parties briefed the motor contract carrier issue before the December 7, 1993, hearing. In addition, at the hearing, both parties were ordered to submit briefs on the applicability of the NRA on the issue of whether a motor contract carrier relationship existed. At the March 18, 1993, hearing, both the trustee and ADMI agreed that no additional time was necessary to submit further information to the Court.

Pursuant to Rule 7012, this Court will treat the Motion to Dismiss as a summary judgment motion under Fed. R. Civ. P. R. 56. A summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. Bankr. R. 7056(c); Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). The summary judgment procedure is appropriate in an action to review the record of an administrative agency because the reviewing court is generally limited to determining matters of law, i.e. sufficiency of record, statutory authority of agency, etc., and if there is no material issue of fact and only a question of law, summary judgment is

appropriate. 6-Pt. 2 **Moore's Federal Practice** ¶ 56.17[3], 56-362 - 56-364 (2d ed. 1993) (citing Milton v. Harris, 616 F.2d 968 (7th Cir. 1980) (holding that summary judgment is appropriate when no issue of material fact exists, and the court is reviewing administrative record for sufficiency of evidence)).

A. The Negotiated Rates Act of 1993

The NRA amended Title 49 of the U.S. Code by promulgating retroactive standards to determine whether or not a motor carrier or its representative is entitled to undercharge claims. The trustee argues that the NRA exempted carriers who were in bankruptcy and that the NRA violated § 541(c) of the Bankruptcy Code. ADMI's position is that the NRA is not relevant to the issues raised in the motion to dismiss because the ICC's decision in ADMI was filed before the NRA was passed.

It is the opinion of this Court that the passage of the NRA does not affect the ICC's decision in or this Court's review of ADMI. Because the ICC decision was filed in September, 1993, almost three months before the NRA was passed, this Court will review ADMI pursuant to the legal standards applicable before the NRA was passed. The ICC decision is based on an interpretation of regulations in effect when the shipments were made. Although those regulations were repealed, the NRA reinstates the law in effect at the time these undercharge claims arose and is not in conflict with the legal standards followed by the ICC in ADMI.

Motor contract carrier standards exist in Section 6 of the NRA. § 6, codified as amended at 49 U.S.C. § 10702. The NRA reinstates prior ICC regulations which were located at 49 C.F.R. § 1053.1 and were repealed in 1992. Since the ICC regulations that were repealed were in effect at the time the undercharge claims arose and followed by the ICC in ADMI, the NRA's amendment does not affect this Court's review of the issues raised by the motion to dismiss.

B. Standard of Review

When a court reviews an agency's action, the court must give the agency action a "presumption of regularity." Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415, 91 S. Ct. 814, 823, 28 L. Ed. 2d 136 (1971). A court may overturn the ICC's decision "only if it f[inds] that decision to be 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.'" First Nat'l Bank v. Smith, 508 F.2d 1371, 1373 (8th Cir. 1974) (quoting 5 U.S.C. § 706(2)(a) (1988)), cert. denied, 421 U.S. 930, 95 S. Ct. 1655, 44 L. Ed. 2d 86 (1975). Under the arbitrary and capricious standard, a court must defer to the ICC's decision if the decision has a rational basis. Missouri

Dep't of Social Servs. v. United States Dep't of Educ., 953 F.2d 372, 375 (8th Cir. 1992).

It is well established that "[r]egulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile changing economy." American Trucking Ass'n, Inc. v. Atchison, T. & S. F. R. Co., 387 U.S. 397, 416, 87 S. Ct. 1608, 1618, 18 L. Ed. 2d 847, reh'g denied, 389 U.S. 889, 88 S. Ct. 11, 19 L. Ed. 2d 197 (1967). It is expected that agencies such as the ICC require ample latitude to "adapt their rules and policies to the demands of changing circumstances." Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42, 103 S. Ct. 2856, 2866, 77 L. Ed. 2d 443 (1983) (quoting Permian Basin Area Rate Cases, 390 U.S. 747, 784, 88 S. Ct. 1344, 1369, 20 L. Ed. 2d 312, reh'g denied, Bass v. Fed. Power Com., 392 U.S. 917, 88 S. Ct. 2050, 20 L. Ed. 2d 1379 (1968)). This latitude gives the ICC the authority to change how it defines and interprets its regulations in order to be responsive to the realities of the market place.

A court reviewing an agency's decision may not balance policy considerations, or choose among competing interests when evaluating the reasonableness of an agency's action. Arkansas AFL - CIO v. F.C.C., 11 F.3d 1430, 1441 n. 10 and accompanying text (8th Cir. 1993) (stating that the reviewing court should not examine whether the agency's interpretation is the best interpretation of the statute, but should determine that the agency's interpretation does not conflict with the statute). Because of the degree of deference granted to a regulatory agency, a court should look narrowly at the decision of the ICC and not substitute its own judgment for that of the agency. Motor Vehicle Mfrs. Ass'n, 463 U.S. at 43, 103 S. Ct. at 2866.

C. Statutory Authority & Discussion

The Interstate Commerce Act defines "motor contract carrier" as:

"a person providing motor vehicle transportation of property for compensation under continuing agreements with one or more persons -- designed to meet the distinct needs of each such person.

49 U.S.C. § 10102(15)(B)(ii)(1993). The regulation that identified the elements of "continuous agreements" was 49 C.F.R. § 1053.1, which stated:

No contract carrier by motor vehicle, as defined in 49 U.S.C. § 10102(15), shall transport property for hire in interstate commerce except under special

and individual contracts or agreements which shall be in writing, shall provide for transportation for a particular shipper or shippers, shall be bilateral and impose specific obligations upon both carrier and shipper or shippers, shall cover a series of shipments during a stated period of time in contrast to contracts of carriage governing individual shipments, and copies of which contracts or agreements shall be preserved by the carriers parties thereto so long as such contracts or agreements are in force and for at least one year thereafter.

49 C.F.R. § 1053.1 was in effect at the time the parties entered into the written agreement; however, since that time, the ICC has eliminated the regulation because it has "outlived [its] usefulness and [caused] more harm than good." Ex Parte No. MC-198, 1991 MCC LEXIS 16 (I.C.C. February 20, 1991). But, the ICC followed Regulation 1053.1 in ADMI since the shipments occurred while the regulation was in effect and because the repeal of a regulation may not be applied retroactively unless the retroactive application is authorized by a statute. Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208, 109 S. Ct. 468, 471, 102 L. Ed. 2d 493 (1988).

The term "distinct needs" as used in 49 U.S.C. § 10102(15)(B)(ii)(1993) is defined as a need for more specialized services than a common carrier can provide. Don Barclay, Inc. v. Stewart & Stevenson Servs., Inc., 761 F. Supp. 194, 200 (D. Mass. 1991) (citing Global Van Lines, Inc. v. I.C.C., 804 F.2d 1293, 1301 (D.C. Cir. 1986); Global Transp. Servs., Inc. v. United Shipping Co. (In re United Shipping Co.), 134 B.R. 359 (Bankr. Minn. 1991); Transrisk Corporation, Inc. v. Matsushita Electric Corp., 1994 U.S. App. LEXIS 1262, 1994 WL 18596 (4th Cir. Jan. 26, 1994) ("Distinct needs", as interpreted by the federal courts, "is a need for a different or a more select or a more specialized service than common carriage provides." Global Van Lines, Inc. v. Interstate Commerce Commission, 256 U.S. App. D.C. 264, 804 F.2d 1293, 1301 (D.C. Cir. 1986)"). In a situation such as Best's in which the carrier has both a contract and common carrier permit, the test for whether the carrier meets a "distinctive need" is whether the carrier operates on a committed basis and over a continuing period of time. Barclay, 761 F. Supp. at 200 (quoting Interstate Van Lines, Inc., Extension -- Household Goods, 5 I.C.C.2d 168 (December 6, 1988); Global Transportation, 134 B.R. at 366.

The trustee argues that the ICC has recently broadened its definition of motor contract carrier beyond the bounds set by the ICC's original interpretation of Regulation 1053.1 and of the ICC's original interpretation of "distinct needs", and that the expansion of the definition is impermissible. The trustee cites three older negotiated rate cases where the ICC defined the distinction between

motor contract and motor common carriers by requiring motor contract carriers to strictly comply with ICC regulations before finding that the requirements for establishing motor contract agreement were met. See Conagra Poultry Company -- Petition For Declaratory Order, 1988 Fed. Carr. Cas. (CCH) ¶ 37,524 (1988); MCI Telecommunications Corp. v. E.L. Murphy Trucking Co., 1989 Fed. Carr. Cas. (CCH) ¶ 37,748 (1989); Diversey Wyandotte Corp. -- Petition For Declaratory Order, 1990 Fed. Carr. Cas. (CCH) ¶ 37,831 (ICC June 4, 1990).

The ICC has since changed its policy from requiring absolute compliance with its regulations to requiring substantial compliance with the requirements of Regulation 1053.1, and noted "it is not our policy to find a lack of contract carriage based on simply, technical oversights or omissions." General Mills, Inc. -- Petition for Declaratory Order -- Certain Rates and Practices of United Shipping Co., Inc., 8 I.C.C.2d 313 (1992) [hereinafter General Mills]. The ICC now examines the "totality of the circumstances" to determine whether the shipment was moved under a common carrier agreement or a contract agreement. Id. at 323; Contracts For Transportation of Property, 8 I.C.C.2d 520, 529 (1992) [hereinafter Contracts]; Ford Motor Co. v. Security Services f/k/a Riss Intl., 9 I.C.C.2d 892, 896-97 (1993) [hereinafter Ford v. Riss]. Under the totality of the circumstances test, the ICC distinguishes contract carriers from common carriers by focusing on the following factors:

It is the ongoing relationship, service commitment, and commercial link between a carrier and its shippers that render contract carriage inherently different from common carriage service alternatives. For example, the Commission may look at the circumstances surrounding the particular transportation service to determine whether the shipments at issue moved under a continuing agreement, and whether the transportation involved the use of dedicated equipment or a service tailored to meet the distinct needs of the shipper.

ADMI, at 4 (citing General Mills, 8 I.C.C.2d at 323; Contracts, 8 I.C.C.2d at 529).

The ICC has the authority to issue new policy statements that establish new formulas to determine how the parties will be regulated under the Interstate Commerce Act. Ryder Truck Lines, Inc. v. U.S., 716 F.2d 1369 (11th Cir. 1983), cert. denied, 466 U.S. 927, 104 S. Ct. 1707, 1708, 80 L. Ed. 181 (1984) (holding that the ICC's new policy which adopted a new formula to distinguish "for hire" carriers from "private" carriers was rational under the ICA). The rule in this Circuit is that an administrative agency has the discretion to alter its interpretation of a statute in light of changed circumstances. Arkansas AFL-CIO, 11 F.3d at 1441.

However, in a situation such as this one where the ICC has altered its interpretation of its regulations to the point where the new interpretation is in conflict with its prior interpretation, the reviewing court should adhere to the following principle stated by the Eighth Circuit:

We note that an agency interpretation of a statutory provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view. Watt v. Alaska, 451 U.S. 259, 273 (1981). However, we keep in mind the caution that:

[r]egulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy.

American Trucking Ass'n, Inc. v. Atchison Topeka & Santa Fe Ry. Co., 387 U.S. 397, 416 (1967))[sic].

Arkansas AFL-CIO, 11 F.3d at 1441 n. 11. Therefore, if the ICC's decision in ADMI is reasonable under the Interstate Commerce Act and is reasonable under the ICC's own regulations, this Court will defer to the "totality of the circumstances" test adhered to by the ICC.

D. Review of the ICC Decision

Upon review of the ICC's decision in ADMI, this Court finds that the decision is not arbitrary or capricious and has a rational basis in law. The trustee argues that the shift in the ICC's definition of contract carriers is a "complete evisceration" of the statute governing contract carriage at the ICC. Filing no. 23, at 23-24. The trustee believes that the shift from strict compliance to a focus on the intent of the parties is somehow invalid; however, the trustee submits no evidence or case law that states that it is impermissible for an administrative agency to alter its interpretation of its various rules and regulations. As discussed above, Congress granted the ICC the authority to revise its interpretation of regulations to reflect the reality of the marketplace. Arkansas AFL-CIO, 11 F.3d at 1441.

The ICC's decision in ADMI found that the agreement entered into between Best and ADMI was an agreement under Best's motor contract authority. Id. at 3. The ICC began its analysis by finding that Best was specifically authorized to serve ADMI as a motor contract carrier under its Sub-No. 40 permit, which was issued on March 27, 1986, and was authorized for a year prior to

the issuance of the Sub. 40 to serve brokers, such as ADMI, as a contract carrier. Id. at 4.

An official for ADMI testified at the ICC by affidavit that Best contacted ADMI and offered to handle ADMI's traffic. ADMI at 2. The official stated that Best offered rates which were competitive with other carriers. Id. After this exchange, the parties entered into the Agreement. Id. In the Agreement Best agreed to provide transportation pursuant to its motor contract permit and "in accordance with the rates, charges, rules, and regulations as are from time to time agreed to by the parties, and the same are made a part of this agreement." Id. at 5 (quoting the Agreement, at ¶ 3). The ICC found that once the parties establish that transportation is to be provided under motor contract authority, the shipper/broker "is entitled to rely on the carrier lawfully to transport such traffic under the permit...." Id.

The ICC concluded that all shipments transported by Best for ADMI moved under the Agreement and pursuant to the rates established under the Agreement. ADMI at 3. Best billed ADMI, and ADMI paid Best according to the rates established under the Agreement. Id. at 5. The ICC found that no shipments were ever intended to move under Best's common carrier authority. Id. at 3. In fact, Best submitted no evidence to the ICC to refute the ICC's finding that the parties intended the traffic to move under the Agreement and that all subsequent conduct by both parties supported the conclusion that Best and ADMI were operating pursuant to a motor contract relationship under 49 U.S.C. § 10102(15)(B). Id. at 5.

This Court finds that the ICC acted reasonably when it determined that the parties intended to enter into motor contract carriage, and the ICC's decision regarding the intent of the parties is entitled to deference from this Court. In examining the totality of the circumstances in this case, the ICC did not only address the intent and conduct of the parties, but also addressed technical compliance with the statute and regulations relating to motor contract carriage.

Under 49 C.F.R. § 1053.1, which was in effect during the time the shipments were made, the Agreement must meet the following to satisfy the "continuing agreements" requirement: the agreement must be in writing; it shall be a bilateral agreement and impose specific obligations on each party; it shall provide shipping for a particular shipper; it shall cover a series of shipments during a stated period of time; and the agreement shall be preserved by the parties for at least one year thereafter.

The ICC found that all of these requirements were met. See generally ADMI at 5. First, the ICC found that the Agreement was in writing. The ICC also found that the agreement was bilateral because specific obligations were imposed on both parties. The ICC

determined that Best constituted the specific shipper and that ADMI was the specific broker. ADMI was required to commit at least 40,000 pounds (a single truckload) each year, which the ICC found constituted a "series of shipments" under the regulation. In addition, the ICC noted that the conduct of the parties through out the term of the relationship indicated that the parties committed to a series of shipments under the Agreement, not multiple contracts covering individual shipments as in common carriage relationships. See also Transrisk Corp., 1994 U.S. App. LEXIS 1262, at *8 (citing Barclay, 761 F. Supp. at 202 ("continuing" refers to regularly reoccurring needs and repeated transactions, not isolated transactions.")). It is apparent that the parties have preserved the Agreement because the ICC was able to review it.

This Court will defer to the finding of the ICC that the Agreement was a continuing agreement. The trustee has argued that the ICC has repeatedly foregone requiring compliance with its own regulations and statutes in favor of its totality of the circumstances test. This Court finds that the trustee's argument is misplaced because the Agreement and the shipments carried out under it appear to technically as well as subjectively satisfy Regulation 1053.1. The trustee's main complaint is that the standards under which these requirements are evaluated have been altered. However, this Court finds it acceptable for the ICC to alter its own interpretations of its regulations and the statutes that Congress has designated the ICC to administer. The manner in which the ICC has chosen to interpret Regulation 1053.1 is consistent with the language of the regulation, and this Court defers to the ICC's reasonable and sufficient conclusion.

The ICC concluded that the Agreement satisfied the requirement that the contract carriage arrangement meet a distinct need. The ICC found that the Agreement was subject to a commitment by the parties that was stated in the Agreement and was reinforced by the conduct of the parties over time. ADMI at 3-5. Specifically, "Best agreed to refrain from contacting, soliciting, or handling traffic from ADMI accounts previously handled under the contract, and to assemble and provide certain information to ADMI on at least a monthly basis." Id. at 3.

This Court will defer to the ICC's conclusion that the contract carrier relationship satisfied a distinct need. As a broker, it would be crucial for ADMI to protect itself by entering into a contract with a carrier and have the shipper agree not to enter into future agreements directly with the broker's customers. The trustee did not submit any argument or evidence to the ICC that Best did not satisfy the needs enumerated by ADMI, or that ADMI's needs were non-existent. The ICC's interpretation of "distinct needs" is reasonable under 49 U.S.C. § 10102(15)(B)(ii).

When carrying out its decision-making authority, it is not only recognized that the ICC will resolve disputes, but also, the

ICC is entrusted to protect public policy. Chesapeake and Ohio Ry. Co. v. United States, 704 F.2d 373, 375-76 (7th Cir. 1983) (noting that preserving a competitive interest is implicit in Interstate Commerce Act); see generally 49 U.S.C. § 10101 (1993) (listing the transportation policies that the ICC must protect). The ICC's integration of traditional contract law by looking at the conduct and intentions of the parties with its previous rules under 49 U.S.C. § 10102(15)(B) to define motor contract carriers is rationally related to the promotion of the transportation policies enumerated in Section 10101, such as "encouraging sound economic conditions among carriers," 49 U.S.C. § 10101(1)(C); "promoting competitive and efficient transportation services in order to allow a variety of quality and price options to meet changing market demands and the diverse requirements of the shipping and traveling public." 49 U.S.C. § 10101(a)(2)(B).

ADMI has the right to rely on Best to conduct itself lawfully under the motor contract permit requirements since Best was issued its contract permit for the purpose to serve Robinson as a contract carrier. ADMI at 3. If there was confusion at Best regarding whether or not Best was operating under a contract or common carrier authority, Best should have applied to the ICC for a determination of its status under 49 U.S.C. § 10925(e) at the time the contract was entered into or executed. Id.

The trustee has focused at length on the broker's failure to comply with the law of contract carriers and the Supreme Court's finding in Maislin Indus., U.S., Inc. v. Primary Steel, Inc. that when a carrier fails to file the rates it negotiated in a common carrier case, it is no excuse for a shipper to plead ignorance of this fact in an undercharge proceeding. 497 U.S. 116, 110 S. Ct. 2759, 111 L. Ed. 2d 94 (1990) (holding that a defense to an undercharge claim in a negotiated rates case that is based upon the finding that the undercharge claim is an unreasonable practice is not valid). This Court cannot accept the trustee's position because a dispute over carrier status is distinguishable from Maislin, a negotiated rates case. Based upon the ICC's overwhelming conclusion that both Best and ADMI intended and conducted themselves as having entered into a motor contract agreement, the Maislin proposition that the shipper should have been aware of the filed rate doctrine is irrelevant because motor contract carriers do not file rates, so the doctrine would not have been a factor at the time the Agreement was effective.

Finally, the trustee alleges that it was ADMI who did not meet the definition of having entered into a motor contract carrier relationship, and therefore, the relationship could only be one of common carriage. However, there exists no statutory authority for the ICC to retroactively void this contract and treat the agreement as a motor common carriage relationship based upon any actual or asserted deficiencies or breaches of the contract or performance thereunder. Ford v. Riss, 9 I.C.C.2d at 895 (1993).

The Agreement satisfies the requirements for "motor contract carriage" that are located in 49 U.S.C. § 10102(15)(B)(ii). The ICC's decision in ADMI was a reasonable interpretation of the Interstate Commerce Act, and the ICC's exercise of authority in this case was within the bounds that Congress set in the Interstate Commerce Act.

The defendant's Motion to Dismiss is granted based upon review of the pleadings, the ADMI decision, and the accompanying briefs. This Court finds that the ICC was not acting arbitrarily or capriciously, but was acting reasonably and within its authority and therefore, the decision is entitled to deference by this Court.

II. DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
ON THE ISSUE OF NRA "SMALL BUSINESS CONCERN" EXEMPTION

Although the ruling on the motion to dismiss is dispositive, the Court will address the issues raised on the motion for summary judgment.

Motions for summary judgment are filed pursuant to Fed. Bankr. R. 7056, which incorporates Fed. R. Civ. P. R. 56. A summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. Bankr. R. 7056(c); Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Consideration of a summary judgment motion at this juncture is appropriate because there is no issue as to whether ADMI qualifies as a small business. The only issue for this Court is a question of law: Does Section 2(a)(f)(9)(A) of the NRA retroactively apply to eliminate the bankruptcy trustee's undercharge claim?

A. The NRA

Section 2 of the NRA is entitled "Procedures for Resolving Claims Involving Unfiled, Negotiated Transportation Rates." Section 2 amends Section 10701 of the ICA by adding a new subsection (f). The portion of Section 2(a)(f) which movant argued entitles it to summary judgment is the following:

(9) CLAIMS INVOLVING SMALL-BUSINESS CONCERNS, CHARITABLE ORGANIZATIONS, AND RECYCLABLE MATERIALS. -- Notwithstanding paragraphs (2), (3), and (4), a person from whom the additional legally applicable and effective tariff rate or charges are sought shall not be liable for the difference between the carrier's applicable and effective tariff rate and the rate originally billed and paid --

(A) if such person qualifies as a small-business concern under the Small Business Act (15 U.S.C. 631 et seq.).

§ 2(a)(f)(9)(A), codified at 49 U.S.C. § 10701(f)(9)(A).

The retroactive applicability of Section 2 to pending claims is set forth in Section 2(c) of the NRA but not codified in the U.S. Code. That section states: " The amendments made by subsections (a) and (b) of this section shall apply to all claims pending as of the date of the enactment of this Act...." § 2(c). In this Circuit, retroactive legislation that adjusts the burdens and benefits of economic life is presumed constitutional, and it would be the trustee's burden to show that the NRA is arbitrary and serves no rational legislative purpose. United States v. Northeastern Pharmaceutical & Chem. Co., Inc., 810 F.2d 726 (8th Cir. 1986) (citing Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15, 96 S. Ct. 2882, 2892, 49 L. Ed. 2d 752 (1976), to support retroactive application of CERCLA).

Although the trustee did not argue that the NRA is an unconstitutional use of Congress's authority, the trustee does argue that its property right, the cause of action for an undercharge claim, has been eliminated by the apparent retroactive application of the statute. In the District of Nebraska, bankruptcy courts are not permitted to issue final and binding orders on the constitutionality of statutes. Associated Grocers of Nebraska Coop., Inc. v. American Home Products Corp., 62 B.R. 439, 442 n. 3 (D. Neb. 1986). Therefore, this Court will not discuss whether the NRA constitutes a taking under the Fifth Amendment and will presume that the statute is constitutional because Congress has expressly stated that the NRA applies retroactively. United States v. Security Industrial Bank, 459 U.S. 70, 81, 103 S. Ct. 407, 413-14, 74 L. Ed. 2d 235 (1982) (acknowledging that Congress may pass a law which retroactively eliminates property rights if the statute explicitly states that the statute applies retroactively, but holding that where Congress had not explicitly commanded retroactive application in the legislation, the elimination of a state property right by Federal bankruptcy law constituted an impermissible taking under the Fifth Amendment of the Constitution).

It appears clear from a reading of Section 2(a)(f)(9)(A) of the NRA that movant is entitled to summary judgment since the parties have stipulated that movant is a "small-business concern," and Congress has specifically authorized that Section 2(a)(f)(9)(A) applies retroactively to pending claims. However, it is necessary to discuss Section 2(a)(f)(9)(A) in relation to other provisions of the NRA and in conjunction with the Bankruptcy Code before finally determining the rights of the parties.

Much of Section 2(a) of the NRA focuses on alternative measures to settle undercharge claims. Section 2(a)(f)(1) provides the general framework for settling undercharge claims:

When a claim is made by a motor carrier of property ..., or by a party representing such a carrier ... regarding the collection of rates or charges for such transportation in addition to those originally billed and collected by the carrier ... for such transportation, the person against whom the claim is made may elect to satisfy the claim under the provisions of paragraph (2), (3), or (4) of this subsection, upon showing that --

(A) the carrier ... is no longer transporting property or is transporting property for the purpose of avoiding the application of this subsection; and

(B) with respect to the claim --

- (i) the person was offered a transportation rate by the carrier ... other than that legally on file with the Commission for the transportation service;
- (ii) the person tendered freight to the carrier ... in reasonable reliance upon the offered transportation rate;
- (iii) the carrier ... did not properly or timely file with the Commission a tariff providing for such transportation rate or failed to enter into an agreement for contract carriage;
- (iv) such transportation rate was billed and collected by the carrier ...; and
- (v) the carrier ... demands additional payment of a higher rate filed in a tariff.

If there is a dispute as to the showing under subparagraph (A), such dispute shall be resolved by the court in which the claim is brought. If there is a dispute as to the showing under subparagraph (B), such dispute shall be resolved by the Commission.... Satisfaction under paragraph (2), (3), or (4) of this subsection shall be binding on the parties

§ 2(a)(f)(1), codified at 49 U.S.C. § 10701(f)(1). Paragraphs (2), (3), and (4) provide a party against whom the undercharge claims are made the opportunity to settle the claims by only paying a percentage of the claim based upon weight of the goods transported

or the party's status as a public warehouseman. § 2(a)(f)(2),(3) & (4), codified at 49 U.S.C. § 10701(f)(2),(3) & (4).

Finally, the last section of the NRA relevant to the summary judgment motion is Section 9. Section 9 which is not codified in the U.S. Code is entitled "Limitation on Statutory Construction," and states:

Nothing in this Act (including any amendment made by this Act) shall be construed as limiting or otherwise affecting application of title 11, United States Code, relating to bankruptcy; title 28, United States Code, relating to the jurisdiction of the courts of the United States (including bankruptcy courts); or the Employee Retirement Income Security Act of 1974.

The NRA, § 9.

B. The Trustee's Objections

1. Section 9 exempts all bankrupt carriers from the NRA

The trustee's first argument is that Section 9 of the NRA exempts all bankrupt carriers from the application of the NRA. The trustee explained the history of the NRA. According to the trustee, the Public Works and Transportation Committee of the House of Representatives, which oversees the ICA, had been trying to move an NRA-styled bill for several years that targeted bankruptcy, as the Senate's version of the bill did. In 1993, the NRA resurfaced, but the bill was stalled before reaching the floor of the House. Concerns were raised by the Chairman of the Judiciary Committee, Jack Brooks, that the NRA could not be submitted to the House for vote and had to be sequentially referred to his committee because the Judiciary Committee, which oversees the Bankruptcy Code, had not had the opportunity to review the NRA to determine how the bill would impact the Bankruptcy Code.

The Chairman of the Public Works and Transportation Committee, Norman Mineta, amended the bill by adding Section 9 of the NRA to avoid referral to the Judiciary Committee and delay. The trustee's position is that the Section 9 amendment was a last minute decision by the House to exclude all bankruptcy cases from the new requirements of the NRA.

2. The NRA violates 11 U.S.C. §§ 541(c)(1), 363(1)

The trustee's second objection is that the NRA violates 11 U.S.C. §§ 541(c)(1), 363(1). The trustee alleges that the NRA, through Section 2(a)(f)(9)(A), terminates the estate's interest in

Best's pre-bankruptcy right to bring a suit for undercharge claims against movant and that the termination is in violation of the Bankruptcy Code.

Section 541(c)(1) of the Bankruptcy Code states:

[A]n interest of the debtor in property becomes property of the estate notwithstanding any provision in an agreement, transfer instrument, or applicable nonbankruptcy law -- (B) that is conditioned on the insolvency or financial condition of the debtor, ...

11 U.S.C. § 541(c)(1). Section 363(1) states that "the trustee may use, sell, or lease property ... notwithstanding any provision in ... applicable law that is conditioned on the insolvency or financial condition of the debtor ..." 11 U.S.C. § 363(1).

The trustee's argument is broken into three segments. First, Best's right to collect undercharge claims from movant is property of the estate. Second, the NRA is an applicable nonbankruptcy law by virtue of Section 9 of the NRA. Third, Section 2(a)(f)(9) is conditioned on the financial condition of Best because the "no longer transporting property" clause in Section 2(a)(f)(1)(A) of the NRA is the equivalent of the phrase "financial condition" in 11 U.S.C. §§ 541(c)(1)(A), 363(1).

Analysis

A. Exemption of Bankrupt Carriers

The trustee's argument that Section 9 of the NRA operated to exclude bankrupt carriers is without merit. When the Senate Committee on Commerce, Science, and Transportation and the House Committee on Public Works and Transportation issued their reports on their respective negotiated rates bills, both reports overwhelmingly made clear that the NRA would apply to bankrupt carriers.

The Senate Report stated the purpose of the bill:

The bill, as reported, is intended to alleviate the freight motor carrier "undercharge" litigation crisis by establishing a statutory procedure for resolving disputes resulting from efforts by trustees for bankrupt motor carriers ... to collect additional amounts for past transportation provided, ...

S. Rep. No. 103-79, 103d Cong., 1st Sess. 1 (1993) [hereinafter S. Rep.].

The House Report, whose amended bill H.R. 2121 was substituted with the text of the Senate bill and amended, stated a similar purpose for enacting the NRA:

The purpose of H.R. 2121, as reported, is to provide a statutory process for resolving disputes for claims involving negotiated transportation rates brought about by trustees for non-operating motor carriers for past transportation services.

H.R. Rep. No. 103-359, 103d Cong., 1st Sess. 7 (1993) [hereinafter H.R. Rep.]

The trustee focused his argument on an exchange of letters between the Chairman of the Public Works and Transportation Committee, who oversees the ICA, and the Chairman of the Judiciary Committee, who oversees the Bankruptcy Code and court jurisdiction. See H.R. Rep. at 16. In the letter to Representative Mineta from Representative Brooks, Brooks' only concern with the House bill from the Judiciary Committee's standpoint appeared to be with the jurisdictional issues, not the effect of the NRA on general Bankruptcy Code provisions. Id. In fact, only Representative Mineta even used the word "bankruptcy code" in his letter. Id.

Further evidence that Section 9 of the NRA was intended only to clarify the jurisdiction of the courts and the ICC is contained in the Congressional Record. When explaining the Section 9 amendment to the House of Representatives, Representative Mineta stated:

[W]e are clarifying in section 9 of this bill that we do not intend in this legislation to affect either the bankruptcy code or the jurisdiction of the bankruptcy courts, matters over which our committee does not have jurisdiction. At present, when a carrier is in bankruptcy, and when in the course of the bankruptcy proceeding an issue arises over which the ICC has particular expertise, the court typically refers that issue to the ICC pursuant to the doctrine of primary jurisdiction. The ICC decides that particular issue, and the ICC's decision is then incorporated by the court into the overall adjudication of the bankruptcy case. Nothing in this legislation would alter the current statutory framework which established the

respective jurisdictions of the courts and the ICC.

139 **Cong. Rec.** H9603 (daily ed. Nov. 15, 1993) (statement of Rep. Mineta, Chairman of the Public Works and Transportation Committee).

Representative Brooks reinforced this interpretation that Section 9 of the NRA applied only to the jurisdiction of the courts by stating the following:

[T]he Committee on the Judiciary had earlier expressed concern that H.R. 2121, the Negotiated Rates Act of 1993, as ordered reported by the Committee on Public Works and Transportation, could have been construed to limit the jurisdiction of the Federal courts, including the bankruptcy courts. However, . . . , Mr. Mineta has offered an amendment to section 9 of H.R. 2121 clarifying that nothing in the proposed act shall be construed to limit or otherwise affect the jurisdiction of the Federal courts to make determinations in bankruptcy cases and proceedings.

139 **Cong. Rec.** H9603 (daily ed. Nov. 15, 1993) (statement of Rep. Brooks, Chairman of the Committee on the Judiciary).

Section 9 was inserted in the House's version of the bill to clarify the jurisdiction of the courts and the ICC. In Section 9, Congress intended that courts will retain their original jurisdiction and that referral to the ICC will not interfere with the original jurisdiction of the courts. For example, this Court would continue to have original jurisdiction of a bankruptcy case, but it would refer those matters designated for the expertise of the ICC under the NRA to the ICC. However, under Section 9 of the NRA, the referral would only be limited to that issue, and this Court would retain jurisdiction to determine all matters relating to the bankruptcy estate, including the enforcement of the ICC decision on the estate. There is nothing in any legislative history materials and, more importantly, in the language of the statute to suggest that Section 9 was added to exempt bankrupt carriers from the NRA, or that it was ever even suggested by any member of Congress that the NRA would not apply to bankrupt carriers.

B. The NRA and the Bankruptcy Code

1. The "small business concern" exemptions

This Court has previously held that a debtor's cause of action for undercharge claims constitutes property of the bankruptcy

estate under 11 U.S.C. § 541. In re Best Refrigerated Express, Inc., Neb. Bkr 91:244, 246, 1991 Fed. Carr. Cas. (CCH) ¶ 83,624 (Bankr. D. Neb. 1991). Therefore, on the date this bankruptcy case was filed, the right to pursue the undercharge claim did pass from Best to the bankruptcy estate.

Also, the NRA is "applicable nonbankruptcy law" under 11 U.S.C. § 541(c), or "applicable law" under 11 U.S.C. § 363(l). There is no doubt that the NRA is not bankruptcy law, but is a part of the ICA. Patterson v. Shumate, ___ U.S. ___, 112 S. Ct. 2242, 2246, 119 L. Ed. 2d 519 (1992) (holding that "applicable nonbankruptcy law" includes federal statutory law).

It is also indisputable that Section 2(a)(f)(9)(A) of the NRA would terminate the estate's property interest by extinguishing the trustee's right to pursue the undercharge claim it has pending against movant. Section 2(a)(f)(9)(A), codified at 49 U.S.C. § 10701(f)(9)(A), eliminates all undercharge claims currently pending against "small-business concerns." Therefore, because movant is a "small business concern," the trustee, under the NRA, no longer holds a claim for undercharges.

The trustee wants this Court to find that those subsections of the NRA which limit the rights of carriers no longer transporting property from bringing an undercharge claim to be construed as "financial condition" clauses which the Bankruptcy Code basically ignores. After so finding, the trustee wants the Court to find that such subsections are the basis for the exemption of claims against a small business concern. If the Court reaches that conclusion, the trustee desires a finding that the elimination of the trustee's claim against a small business concern directly violates the Bankruptcy Code.

This Court, after careful examination of the codified statute, finds that Section 2(a)(f)(9)(A) of the NRA, codified at 49 U.S.C. § 10701(f)(9)(A), is not conditioned upon the financial condition of the debtor. The trustee's argument that the "no longer transporting property" requirement of Section 2(a)(f)(1)(A) applies to Section 2(a)(f)(9) is incorrect because the statute clearly limits the "no longer transporting property" clause to paragraphs (2), (3), and (4), not to paragraph (9), the small business concern paragraph.

Section 2(a) of the NRA is codified at 49 U.S.C. § 10701(f). Section 10701(f)(1)(A) states that a party must show that a carrier is no longer transporting property, if that party wishes to satisfy his claim under paragraphs (2), (3) and (4). A reference to paragraph (9), the small business concern paragraph, is noticeably missing from Section 10701(f)(1). However, Section 10701(f)(7) states that "Except as authorized in paragraphs (2), (3), (4), and (9) of this subsection," nothing relieves a motor common carrier

from filing its rates, complying with the law, and complying with ICC rules. 49 U.S.C. § 10701(f)(7) (emphasis added).

It is apparent from a comparison of the two subsections discussed above that Congress does not intend for the courts to consider the "no longer transporting property" requirement under Section 10701(f)(1)(A), when evaluating a shipper/brokers "small-business concern" defense under Section 10701(f)(9). Had Congress intended the "no longer transporting property" clause of (f)(1)(A) to apply to (f)(9), the small business concern paragraph, it would have listed paragraph (9) with (2), (3) and (4) under Section 10107(f)(1), as it did under 10701(f)(7). A court should not read a paragraph into a statutory section when Congress left the paragraph out. Section 10701(f)(9) states that if movant qualifies as a "small-business concern," which it does, it is excused from being liable to Best or its representative for the undercharge claim. The "small business concern" exemption stands on its own, without reference to the operating or non-operating status of the carrier.

2. "Financial condition" is not equivalent of "no longer transporting property"

In the alternative, even if the trustee were correct and Section 10701(f)(1) did extend to Section 10701(f)(9), the "no longer transporting property" clause does not constitute the equivalent of a clause terminating the debtor's interest in property based upon the "financial condition" of the debtor. It is not the financial condition of the carrier that triggers the termination of the property interest, it is the retroactive application of the NRA that terminates the property interest. Congress has used Section 10701(f)(1) to redefine non-operating carriers' property rights (that is, the right to pursue undercharge claims) and apply that definition retroactively to alter already existing property rights without regard to a carrier's financial condition. This issue is not related to Sections 541(c)(1)(B) and 363(l) of the Bankruptcy Code, which provide that the debtor has certain property rights notwithstanding nonbankruptcy statutory language which purports to limit such rights based upon the financial condition of the debtor.

For example, if Best had ceased operating, but did not file bankruptcy, the "no longer transporting property" clause under 49 U.S.C. § 10701(f)(1) would still apply, and Best would be unable to pursue its undercharge claim. However, under such circumstances, the Bankruptcy Code would not apply to the nonbankrupt non-operating carrier. Therefore, the financial condition of Best is not a factor which causes Section 10701(f)(1) to apply.

Considering a different factual scenario, if Best filed a Chapter 11 case, but decided in good faith to continue operating, and was able to continue operating, it would not lose its

undercharge claim by virtue of Section 10701(f)(1). At least one court has held that when a motor carrier in Chapter 11 bankruptcy is still operating, and not continuing operation to avoid the applicability of Section 10701(f), the motor carrier debtor is not subject to the portions of the NRA qualified by the "no longer transporting property" clause. Gross Common Carrier, Inc. v. A.B. Dick Co., 1993 U.S. Dist. LEXIS 18667, *9 (N.D. Ill. December 21, 1993); see also Jones Trust Lines, Inc. v. Aladdin Synergetics, Inc., 1994 U.S. Dist. LEXIS 3191, *15 n. 9 (M.D. Tenn. February 11, 1994). Therefore, the financial condition of the bankrupt debtor does not terminate or modify the operating debtor's right to continue to pursue undercharge claims, and the debtor has the identical property rights under the NRA as a nonbankrupt motor carrier.

Since the two criteria, "financial condition" and "no longer transporting property," are not the same, the NRA does not violate 11 U.S.C. §§ 541(c)(1), 363(1).

Conclusion

The defendant is a "small business concern" exempt from undercharge claims. The motion for summary judgment is granted.

Separate judgment entry shall be filed.

DATED: April 22, 1994.

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

CC: Movant, Debtor(s) Atty. and all parties appearing at hearing
[] Chapter 13 Trustee [] Chapter 12 Trustee [] U.S.Trustee
Movant is responsible for giving notice of this journal entry to any parties in interest not listed above.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)	
)	
BEST REFRIGERATED EXPRESS, INC.,)	CASE NO. BK89-80169
)	
DEBTOR)	A91-8036
)	
THOMAS F. HOARTY, TRUSTEE,)	
)	CH. 11
Plaintiff)	
vs.)	
)	
AMERICAN DISTRIBUTION,)	
MANAGEMENT, INC.,)	
)	
Defendant)	

JUDGMENT

Motion to Dismiss is granted. Motion for Summary Judgment is granted. See memorandum this date.

DATED: April 22, 1994.

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

CC: Movant, Debtor(s) Atty. and all parties appearing at hearing
[] Chapter 13 Trustee [] Chapter 12 Trustee [] U.S.Trustee

Movant is responsible for giving notice of this journal entry to any parties in interest not listed above.