

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-5031

IN THE MATTER OF: STEVE D. THOMPSON TRUCKING,
INC., Debtor.

BILLY R. VINING, Trustee,

Appellee,

versus

RESINALL MISSISSIPPI, INC.,

Appellant.

Appeal from the United States District Court for the
Western District of Louisiana
91 CV 1944

(August 11, 1993)

Before KING and JOLLY, Circuit Judges, and PARKER, District Judge.*

E. GRADY JOLLY:**

In the case before us, the trustee of a bankrupt common motor carrier brought suit against a shipper to collect undercharges for past shipments. The district court, based on the bankruptcy court's recommendation, granted summary judgment in favor of the

*Chief Judge of the Eastern District of Texas, sitting by designation.

**Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

common motor carrier's estate in bankruptcy. The district court held, among other things, that the reasonableness of the rate is not a defense in such an action. Because recent Fifth Circuit and Supreme Court cases subsequently have recognized this defense, we reverse and remand for further proceedings.

I

Steve D. Thompson Trucking, Inc. ("Thompson") was a common motor carrier operating under authority granted by the Interstate Commerce Commission ("ICC") with tariff rates it filed with the ICC. Resinall Mississippi, Inc. ("Resinall") is a manufacturer of resin-based products located in Hattiesburg, Mississippi. On seventeen different occasions in 1987 and 1988, Thompson shipped goods for Resinall at negotiated rates below those on file with the ICC.

In August of 1989, Thompson filed for protection from its creditors under Chapter 11 of the Bankruptcy Code. A few months later, the bankruptcy court converted the case to a liquidation proceeding under Chapter 7 of the Bankruptcy Code and appointed Billy R. Vining trustee for the debtor. Vining entered into an agreement with Carrier Service, Inc. to perform an audit of Thompson's freight bills. Charles E. Shinn, a Carrier Service employee, performed the audit. Shinn's audit revealed that, by agreement of the parties, Resinall had paid Thompson at rates below those filed with the ICC. Vining billed Resinall for the undercharges and Resinall refused to pay.

II

In June of 1991, Vining brought this adversarial proceeding in bankruptcy court against Resinall for the undercharges. Vining alleged that Resinall owed the estate in bankruptcy over \$18,000. In its answer, Resinall admitted that it received the shipping services from Thompson. Resinall, however, contended that it owed nothing because the filed tariff, which formed the basis of Vining's claim, was unreasonable, discriminatory, arbitrary and capricious.

Vining filed a motion for summary judgment accompanied by his affidavit and an affidavit from Shinn, the auditor at Carrier Service. Resinall opposed the motion for summary judgment with an affidavit from its freight analyst, Byron Falk. Resinall attached two of Thompson's tariffs to Falk's affidavit. Falk contended that the rates in the attached tariffs applied to Resinall instead of the rates that Shinn used to determine the underpayment. The bankruptcy court held a hearing in October of 1991. At the hearing, Resinall offered an affidavit from its traffic manager, John Johnson, which the bankruptcy court excluded. A few weeks later, the bankruptcy court issued a report and recommendation in favor of Vining.

In the district court, Resinall opposed the bankruptcy court's report and offered another affidavit from Johnson. The district court denied Resinall leave to file Johnson's affidavit, and in January of 1992, rendered judgment in favor of Vining. The

district court temporarily withdrew its summary judgment pending its review of Resinall's motion for reconsideration. Ultimately, the district court reinstated its summary judgment and denied Resinall's motion for reconsideration and its other post-judgment motions. Resinall then brought this appeal.

After Resinall filed its notice of appeal, the Supreme Court granted certiorari in Reiter v. Cooper, 61 L.W. 4232, 113 S.Ct. 1213 (1993). The Supreme Court decided Reiter on March 8, 1993, and we requested letter briefs from the parties on the effects of that decision on this case.

III

Resinall contends that the district court erred when it rejected Resinall's defense that Thompson's rates were unreasonable. The bankruptcy court found that "the issue of rate unreasonableness does not constitute a defense to an action to collect freight charges." The bankruptcy court further found that "Resinall failed to present any relevant evidence concerning the unreasonableness of the rates sought to be collected." We review the district court's decision to grant summary judgment de novo, applying the same standards of law as the district court. Advance United Expressways, Inc. v. Eastman Kodak Co., 965 F.2d 1347, 1350 (5th Cir. 1992). To sustain the district court's summary judgment, we must find 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.R.Civ.P. 56(c).

A

At the time the bankruptcy court made its recommendation, we did not recognize rate unreasonableness as a defense in an action to collect freight charges. In re Caravan Refrigerated Cargo, Inc., 864 F.2d 388 (5th Cir. 1989). Since then, however, we have held that the Supreme Court's decision in Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 110 S.Ct. 2759 (1990), required us to recognize this defense. United Expressways, 965 F.2d at 1352. In Reiter, 61 L.W. at 4232, the Supreme Court confirmed that, generally speaking, we reached the correct result in United Expressways. In Reiter, the Supreme Court held that a shipper could raise the reasonableness of the rate as a counterclaim. The Court further held that, as a matter of pleading, it was sufficient to raise this issue as a defense and that the shipper did not have to pay the rate in advance to raise it.

B

Since Resinall was entitled to raise the reasonableness of Thompson's rate, we must determine whether Resinall offered sufficient evidence to withstand summary judgment on this issue. The following criteria, among others, are relevant in determining whether a rate is reasonable: comparisons with other relevant rates, a carrier's proffer of a particular rate, whether the rate would have moved the traffic, the class rates for like traffic, and

tariff analysis. Petitions for Issuance of Rate Reasonableness and Unreasonable Practices Policy Statement, 8 I.C.C.2d 61 (1991).

We find that Resinall offered sufficient evidence to call into question the reasonableness of the rates that Vining was attempting to collect. Before the bankruptcy court, Resinall offered an affidavit from its expert Falk and an affidavit from its traffic manager Johnson, which the bankruptcy court excluded. Falk alleged, inter alia, that Thompson had a published tariff that applied to only Exxon, which granted Exxon a 40% discount. Falk stated that Resinall and Exxon shipped under substantially similar circumstances. This evidence clearly calls into question the reasonableness of Thompson's rates. See United States v. Northern Pacific Railway, 288 U.S. 490, 53 S.Ct. 406 (1933) (recognizing as a "settled" principle that comparing rates is one method of determining the reasonableness of the rate).¹ Thus, even without the rejected Johnson affidavits, Resinall has raised an issue of material fact concerning the reasonableness of Thompson's rates.²

C

Finally, we must consider the proper disposition of this appeal. The reasonableness of a rate is ordinarily within the

¹Falk makes similar allegations about several of Thompson's other filed tariffs. According to Falk, Thompson had several other filed rates that could have applied to Resinall's shipments, and they all would have resulted in lower shipping bills for Resinall.

²We note that both the bankruptcy court and the district court barred Johnson's affidavits for procedural reasons that are not likely to apply on remand.

ICC's primary jurisdiction. United Expressways, 965 F.2d at 1353. The district court, however, may determine the reasonableness of Thompson's rates if it can resolve this issue "using the plain language of the tariffs and the ordinary rules of construction." Id.; see also Matter of Steve D. Thompson, Inc., 989 F.2d 1424, 1433 (5th Cir. 1993) ("if the district court determines that it can resolve the issues of reasonableness without the need for ICC expertise, then it is permitted to decide this issue"). If the district court refers the matter to the ICC, it may either 1) stay its proceeding pending the ICC's decision on rate reasonableness or 2) rule on the claim for undercharges and if it finds for Vining, enter a separate judgment in his favor without addressing Resinall's counterclaim. If the district court enters such a separate judgment against Resinall, however, Resinall shall deposit the amount of the judgment in the registry of the court pending the ICC's decision on the reasonableness of the rate. Reiter, 113 S.Ct at 1221; Matter of Steve D. Thompson, 989 F.2d at 1433 n.19.

IV

For all of the foregoing reasons, we REVERSE the district court's decision and REMAND for further proceedings not inconsistent with this opinion.

REVERSED and REMANDED.