

SERVICE DATE - JANUARY 29, 1997

SURFACE TRANSPORTATION BOARD<sup>1</sup>

DECISION

No. 40559

RAULAND-BORG CORPORATION  
--PETITION FOR DECLARATORY ORDER--  
CERTAIN RATES AND PRACTICES OF LIFSCHULTZ FAST FREIGHT, INC.

Decided: January 23, 1997

The Board directs petitioner Rauland-Borg Corporation (Rauland-Borg) to show cause why this proceeding should not be dismissed.

BACKGROUND

At issue is the attempt of Lifschultz Fast Freight, Inc. (Lifschultz) to collect "undercharges" from Rauland-Borg for certain shipments, i.e., the difference between (1) the applicable tariff rates on file with the ICC and (2) lower rates to which the parties allegedly agreed for the transportation.

On April 30, 1991, Rauland-Borg filed a petition for a declaratory order requesting the ICC to adjudicate the lawfulness of Lifschultz's attempt to collect undercharges. Evidence was submitted under then-existing law, and the record closed.

On December 3, 1993, after the record closed, the Negotiated Rates Act of 1993 (NRA) was signed into law. The NRA exempted small businesses from paying undercharges if they meet the statutory definition of a small business.<sup>2</sup>

On March 4, 1994, Rauland-Borg filed a petition requesting a finding that it is a small business under the small business exemption and therefore not subject to the claimed undercharges.

By order served April 28, 1995, the ICC denied Rauland-Borg's petition, holding that the ICC was not the proper forum to determine whether an entity was a small business under the NRA. The ICC's order, however, did not foreclose Rauland-Borg from pursuing the small business exemption. Rauland-Borg still has the option of invoking that provision by showing the court that it is a small business (or obtaining a finding to this effect

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<sup>1</sup> The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the Act), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the Act provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the Act. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 13709-13711.

<sup>2</sup> See former 49 U.S.C. 10701(f)(9), recodified as 49 U.S.C. 13709(h).

from the Small Business Administration) and then moving the court to dismiss the undercharge collection action under the NRA.

Board staff contacted Rauland-Borg's counsel by telephone and letter<sup>3</sup> in an attempt to determine whether Rauland-Borg was going to invoke the small business exemption before the court (and thereby eliminate the need for a decision on the merits in this proceeding), but as of this date no response has been received.

#### DISCUSSION AND CONCLUSIONS

Due to the possibility that Rauland-Borg may invoke the small business exemption (or may already have done so) and the possibility that the underlying court action for undercharges may have been dismissed for other reasons, it would be inappropriate to issue a decision based on the existing, pre-NRA record until the Board is advised of the status of this proceeding. Because the Board has been unable to obtain information concerning the status of this proceeding by informal communication with Rauland-Borg's counsel, the Board is issuing this order directing Rauland-Borg to show cause why this proceeding should not be dismissed. If Rauland-Borg desires a decision on the existing, pre-NRA record, the Board should be so informed. If Rauland-Borg is going to pursue a remedy under the small business exemption of the NRA or if there is any other reason why this Board should not issue a decision on the merits, the Board should be so informed. Failure to respond to this order within 30 days will result in the dismissal of Rauland-Borg's petition.

#### It is ordered:

1. Rauland-Borg is ordered to show cause within 30 days why this proceeding should not be dismissed.
2. This order is effective on its date of service.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams  
Secretary

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<sup>3</sup> A letter dated June 4, 1996 was sent to co-counsel Elizabeth D. Sharp and William N. Krucks.