

UNITED STATES BANKRUPTCY COURT WESTERN DISTRICT OF WISCONSIN

IN RE: IN BANKRUPTCY NO.:

GROSS COMMON CARRIER, INC., 91-52860-11

Debtor. IN ADVERSARY PROCEEDING NO.:

GROSS COMMON CARRIER, INC., 93-5362-11

Plaintiff,

v.

BRIDGESTONE FIRESTONE, INC.
d/b/a/ Firestone Tires,

Defendant.

FILED

MAY 24 1994

CLERK, U.S.
BANKRUPTCY COURT
CASE NO.

MEMORANDUM DECISION:

I adopt the Proposed Findings of Fact submitted by the Defendant in this adversary proceeding with the exception of paragraph 11 which is a legal conclusion. A copy is attached to this Memorandum as Exhibit A.

For the reasons stated in Gross Common Carrier, Inc v Baxter Healthcare Corp, 1994 WL 159840 (ND Ill), which case appears to be factually identical to this case except for immaterial specifics, I grant the Defendant's motion for summary judgment.

As reasons in addition to those set forth in Gross Common Carrier v Baxter, I find that in the present case, Gross never used subcontract carriers outside the area for which Gross had permit authority and that therefore, the subcontracting of transportation by Gross does not have the characteristics which make "interlining" objectionable. There seems to be no official definition of "interlining." Because the offending characteristic present in cases which seem to describe and prohibit interlining (that being

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the ability to extend permit authority beyond the geographical area for which a carrier has contract carrier permits) is absent in this case, Gross' practice of subcontracting is not prohibited and does not constitute "interlining" so as to give rise to the application of common carrier tariffs for the transportation provided.

Dated May 24, 1994.



ROBERT D. MARTIN
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WISCONSIN
FILED

In the Matter of:

10/20/91 10 07

GROSS COMMON CARRIER, INC. Bankruptcy No.
a Wisconsin corporation, 91-52860-11
Debtor.

GROSS COMMON CARRIER, INC.

Plaintiff,

v.

Adversary Proceeding
No. A93-5362-11

BRIDGESTONE FIRESTONE, INC.
d/b/a FIRESTONE TIRES,
a corporation,

Defendant.

**DEFENDANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS
OF LAW WITH RESPECT TO MOTION FOR SUMMARY JUDGMENT**

The Defendant, Bridgestone Firestone, Inc. ("Bridgestone/
Firestone"), submits the following Findings of Fact in support of
its Motion for Summary Judgment.

FINDINGS OF FACT

Background - The Parties and Claims

1. Gross Common Carrier, Inc. ("Gross") filed a petition for
relief under Chapter 11 of the Bankruptcy Code on August 20, 1991
(the "Petition Date"). (Stipulation of Facts, ¶ 1; hereinafter
"Stipulation").

2. Gross brought this action against Bridgestone/Firestone
seeking recovery of undercharges in connection with transportation
services provided by Gross to Bridgestone/Firestone during the

period December 12, 1988 through July 10, 1991. (Stipulation, ¶ 2).

3. Gross is a motor carrier performing service in interstate commerce under operating authorities issued by the Interstate Commerce Commission ("ICC") pursuant to 49 U.S.C. § 10101, et seq., of the Interstate Commerce Act ("ICA"). (Stipulation, ¶ 3).

4. Bridgestone/Firestone manufactures tires, tubes, and other automotive products (the "Products") for sale throughout the United States in retail locations and otherwise. In order to conduct its business, Bridgestone/Firestone operates a number of manufacturing facilities and distribution and warehouse centers. It manufactures and sells millions of Products annually. In order to transport the Products from manufacturing plants to distribution and warehouse centers and to its store facilities and dealers (collectively "Bridgestone/Firestone Facilities"), Bridgestone/Firestone utilizes transportation services provided by motor carriers such as Gross. (Castner Aff., ¶ 3).

5. Bridgestone/Firestone's transportation needs involve both Less-Than-Truckload ("LTL") shipments as well as full truckload, i.e. "Volume" shipments. (Castner Aff., ¶ 4).

6. During the period March 1, 1989 through at least July 10, 1991 (the "Relevant Period"), Gross held interstate industry-wide motor contract carrier authority pursuant to Permit No. MC 1494 Sub 35 (the "Permit"), issued by the ICC, enabling it to provide contract carrier transportation services throughout the 48

contiguous United States. (Stipulation, ¶ 4; Germinaro Aff., ¶ 4; Wittenberg Aff., ¶ 4; Sisel Aff., ¶ 4; Ex. 1).

7. Under the Permit, Gross was authorized to enter into a contract with any commercial shipper, including Bridgestone/Firestone, for transportation in interstate or foreign commerce to be performed on and after January 11, 1985 anywhere within the 48 contiguous United States. (Stipulation, ¶ 5; Ex. 1).

8. During the Relevant Period, Gross also held common carrier authority as granted by the ICC. (Stipulation, ¶ 6).

9. One of the significant differences between contract carriage and common carriage is that common carriers are required to charge for transportation services at rates described in tariffs filed with the ICC pursuant to the Interstate Commerce Act ("ICA"). Contract carriers on the other hand, are free to negotiate specific rates with shippers different from, and generally less than, filed tariffs. Carriers providing transportation services as common carriage are not allowed to deviate from charging the filed tariffs under what is commonly referred to as the "filed rate doctrine." (Castner Aff., ¶ 5).

10. Gross seeks recovery of undercharges totalling \$89,458.37 together with interest, pursuant to the "filed rate doctrine" on the basis that the amounts charged were less than filed tariffs applicable to common carriage. Of this amount, \$89,395.52, relates to the Relevant Period. (Stipulation, ¶ 7; Castner Aff., ¶ 6; Ex. 8).

~~11. It is Bridgestone/Firestone's position that the "filed rate doctrine" is not applicable and Gross is not entitled to undercharges at least as to shipments by Gross for Bridgestone/Firestone totalling \$89,395.52 during the Relevant Period because those shipments were made pursuant to Gross' contract carrier authority and in accordance with written contract carriage agreements which are described below. (Technically, one shipment which occurred on December 12, 1988 is not covered by the contracts. The undercharge claimed for that shipment is \$62.85.)~~

~~(Castner Aff., ¶ 6).~~

The 1989/1990 LTL Programs

12. For a number of years prior to the Relevant Period, Bridgestone/Firestone had instituted "Less-Than-Truckload" (LTL) Programs, which as the name implies, involved shipment of the Product between Bridgestone/Firestone Facilities in quantities that did not amount to a truckload. The shipments made during the Relevant Period were part of the 1989 and 1990 LTL Programs. The LTL Programs were nationwide and involved selection of carriers to provide transportation services as contract carriers rather than as common carriers. Bridgestone/Firestone determined that contract carriage allowed it to deal with a select, or "core," group of carriers which would maximize efficiency, reduce expense, secure competitive rates which would be guaranteed for at least a year, and ensure reliability, accessibility, responsiveness and quality performance on the part of the chosen carriers. Bridgestone/Firestone wanted to establish a working relationship with carriers

by which it could select transport services meeting its operating units' specific needs and which would work to the mutual benefit of Bridgestone/Firestone and the carriers. The carriers would be selected to provide services within specific geographical areas. (Castner Aff., ¶ 7; Stipulation, ¶ 17; Ex. 6).

13. Bridgestone/Firestone needed to move over four and one-half million Interstate LTL shipments per year to or from over approximately 20 shipper locations on a corporate-wide basis and in the most efficient manner. Bridgestone/Firestone met this requirement through a computerized rating, routing, and billing system that needed to be uniform for all contract carriers in Bridgestone/Firestone's corporate transportation program. (Castner Aff., ¶ 8).

14. Bridgestone/Firestone was able to satisfy its need to control costs by locking in rates for extended periods of time. By locking in rates, Bridgestone/Firestone avoided the risk of short notice unilateral changes applicable to common carriage. Bridgestone/Firestone was also able to eliminate many hidden charges that often accrue under common carriage, but which are not evidenced until they appear on a freight bill. Contract carriage also reduced Bridgestone/Firestone's administrative burden significantly over common carriage. (Castner Aff., ¶ 9).

15. The LTL Programs, including the 1989 and 1990 LTL Programs, entailed a competitive bidding process in which Bridgestone/Firestone requested bids from various motor carriers, usually those whose services it was already using. Bridgestone/

Firestone gave those carriers the opportunity to provide contract carrier transportation services that met the specific needs and requirements of Bridgestone/Firestone. (Castner Aff., ¶ 10).

16. Cost and service were the primary basis for awarding bids for all of the LTL Programs, with financial stability and response to Bridgestone/Firestone's operational demands as other contributing factors. The LTL Program bid process provided Bridgestone/Firestone with a means of prescreening carriers to ensure that they could provide the quality of service Bridgestone/Firestone required. Carriers were required to bid under contract carrier authority and not under common carrier authority. As the LTL Programs were for contract carriage only, Bridgestone/Firestone would not award its LTL Program bids to carriers on other than a contract carriage basis. (Stipulation, ¶ 14; Castner Aff., ¶ 11; Ex. 4).

17. Bridgestone/Firestone relied on those carriers it selected for the LTL Programs to lawfully ship Bridgestone/Firestone's Product pursuant to the carrier's contract carrier authority within the designated geographical area covered by the LTL Program contracts. (Castner Aff., ¶ 12).

The 1989/1990 LTL Program Bid Process

18. The bid process for the 1989 and 1990 LTL Programs was conducted in the same fashion as was the bid process for the LTL Programs in prior years. The bid process in connection with the 1989 LTL Program was handled by Mr. Vic DiCola, then Section

Manager, Transportation Pricing for Bridgestone/Firestone. Mr. DiCola left the company in February, 1992. (Castner Aff., ¶ 13).

19. John Castner, then Senior Analyst, Transportation Pricing, handled the bid process and negotiations with respect to the 1990 LTL Program for Bridgestone/Firestone. His responsibilities included sending bid requests to carriers, including Gross, and completing written agreements with carriers which provided for a contract carrier rather than a common carrier relationship. Vic DiCola had similar responsibilities with respect to the 1989 LTL Program. (Castner Aff., ¶ 14; Ex. 4).

20. In connection with the 1990 LTL Program bid process, Castner wrote Mr. Ron Erlichman, Manager, National Accounts at Gross, on June 22, 1990, advising that Bridgestone/Firestone was accepting bids for the 1990 LTL Program. Similar letters were sent to other carriers. (Stipulation, ¶ 11; Castner Aff., ¶ 15; Ex. 4).

21. The 1990 LTL Program Bid Request was typical of requests sent to carriers requesting bids for each annual LTL Program. A 1989 LTL Program bid request letter similar to Exhibit 4 was sent by Vic DiCola or someone else at his direction to Gross detailing Bridgestone/Firestone's requirements for its 1989 LTL Program. (Castner Aff., ¶ 16; Germinaro Aff., ¶ 3; Sisel Aff., ¶ 3).

22. The 1990 LTL Program Bid Request advised that, if accepted, the parties would enter into a written contract with rates held at a discounted level for at least 12 months. (Stipulation, ¶ 12).

23. Gross responded to the Bid Requests for both the 1989 and 1990 LTL Programs by submitting detailed proposals which were tailored to Bridgestone/Firestone's specific needs. (Stipulation, ¶ 15; Castner Aff., ¶ 17; Exs. 5, 7; Germinaro Aff., ¶ 3; Wittenberg Aff., ¶ 3; Sisel Aff., ¶ 3).

24. The 1989 LTL Program required that "Roadway Tariff 500-F" serve as the base tariff upon which discounts must be applied and the 1990 LTL Program required that "Roadway Tariff 500-G" serve as the base tariff upon which discounts must be applied. Those requirements were fulfilled by Gross in each of its bid proposals, which in turn were incorporated into contracts entered into as described below. (Castner Aff., ¶ 18).

25. Gross understood that Bridgestone/Firestone required that the parties enter into a contract carrier relationship for the 1989 and 1990 LTL Programs. Accordingly, Gross bid under its contract carrier authority pursuant to the Permit, and not under its common carrier authority. (Germinaro Aff., ¶ 4; Wittenberg Aff., ¶ 4; Sisel Aff., ¶ 4).

26. The 1990 LTL Program Bid Request, as a standard form sent to all potential bidders, advised that the carrier would be responsible for loading and unloading; and that it: "must protect all discounts on interlined traffic. (Please indicate the zip codes where interline is required by noting them in your cover letter.)." (Stipulation, ¶ 13; Ex. 4).

27. "Interlined traffic" involved the utilization by Gross of other carriers to complete shipments for Bridgestone/Firestone

beyond the geographic area in which Gross was authorized to move Bridgestone/Firestone Products under its contract carrier Permit issued by the ICC, if so restricted. Bridgestone/Firestone had no objection to Gross subcontracting with other carriers to complete shipments within the geographic area covered by its contract carrier Permit issued by the ICC and within the geographic territory covered by the contracts issued in connection with the 1989 and 1990 LTL Programs. Castner's October 5, 1990 bid acceptance letter to Gross reaffirmed that discounts must also apply to interlined traffic. (Castner Aff., ¶ 20; Ex. 6).

28. Bridgestone/Firestone did not know whether Gross would need to utilize any other carrier through interlining or otherwise. It was, however, Bridgestone/Firestone's requirement that in the event Gross utilized other carriers by subcontracting with them in an interline or other relationship, the rates to be billed to and paid by Bridgestone/Firestone would be those as contractually agreed. Bridgestone/Firestone in no way controlled or dictated how Gross would complete the shipments, other than that they would be in accordance with written contracts. Bridgestone/Firestone had no objection to Gross engaging its own agents through subcontracts to complete the shipments, and the contracts between Bridgestone/Firestone and Gross described below, provided for an indemnification of Bridgestone/Firestone by Gross as to actions of any of Gross' agents. (Castner Aff., ¶ 20).

29. Gross' use of other carriers was solely for its convenience and without the specific knowledge or consent of

Bridgestone/Firestone. (Germinaro Aff., ¶ 11; Wittenberg Aff., ¶ 11; Sisel Aff., ¶ 11; Castner Aff., ¶ 20).

30. Once bids were received, it was Bridgestone/Firestone's practice to evaluate them for competitiveness and the ability to meet Bridgestone/Firestone's requirements. From the various proposals, Bridgestone/Firestone selected a core group of carriers, including Gross. The core carriers were limited in order to minimize the number of carriers Bridgestone/Firestone had to deal with and to ensure that its contract carriers received sufficiently substantial volumes of shipments to preserve their economies of scope and scale. (Stipulation, ¶ 17; Castner Aff., ¶ 21).

31. It was always the intent of Gross to perform as a contract carrier in specified areas and at specified rates when it entered into written contractual agreements. When Gross did so, its experience was that it obtained substantial traffic from contract shippers, including Bridgestone/Firestone. (Germinaro Aff., ¶ 13; Wittenberg Aff., ¶ 13; Sisel Aff., ¶ 13).

32. Gross conducted contract carriage operations, in addition to traditional common carriage operations, as a result of a deliberate, intentional and knowing decision on the part of Gross' management. The contract carrier agreements which comprise Contract 3019 were extremely valuable to Gross and the Company put forth serious efforts in securing and servicing those contracts. Bridgestone/Firestone's business was voluminous and provided Gross with a constant and significant stream of operating revenue. (Germinaro Aff., ¶ 14; Wittenberg Aff., ¶ 14; Sisel Aff., ¶ 14).

33. On October 5, 1990, Castner wrote Mr. Robert Germinaro, National Account Executive for Gross, advising that Bridgestone/Firestone had selected Gross as one of a limited number of carriers to participate in the 1990 LTL Program and was the primary carrier to all points listed. It was Bridgestone/Firestone's intent to tender 100% of the freight in those areas to Gross as long as it was able to meet the transit times stated in its bid, and provided the necessary equipment at origins, and was on time. (Stipulation, ¶¶ 16, 17; Castner Aff., ¶ 19; Ex. 6).

The Parties Enter Into Contract 3019 For Contract Carriage

34. In connection with the 1989 and 1990 LTL Programs, Gross and Bridgestone/Firestone entered into two written agreements relating to the transportation services to be provided by Gross to Bridgestone/Firestone during the Relevant Period. The agreements are identified as "Motor Transportation Agreement - Contract 3019" effective March 1, 1989 (the "3/1/89 Contract 3019"), and "Bridgestone/Firestone, Inc. Motor Carrier LTL Transportation Contract with Gross Common Carrier, Inc., Contract No. 3019," effective October 25, 1990 (the "10/25/90 Contract 3019"). The two contracts are collectively referred to as "Contract 3019." (Stipulation, ¶ 8; Castner Aff., ¶ 22; Germinaro Aff., ¶ 5; Wittenberg Aff., ¶ 5; Sisel Aff., ¶ 5; Exs. 2, 3).

35. The 3/1/89 Contract 3019 and 10/25/90 Contract 3019 were each negotiated pursuant to Bridgestone/Firestone's well-established bid procedures in connection with the 1989 and 1990 LTL

Programs. (Stipulation, ¶ 10; Castner Aff., ¶¶ 13-24; Exs. 4, 5, 6, 7).

36. Under Contract 3019, Gross agreed to provide contract carriage transportation services for shipment of Products pursuant to its contract carrier Permit. (Castner Aff., ¶ 22).

37. The 3/1/89 Contract 3019 was extended by agreement of the parties through the commencement of the 10/25/90 Contract 3019 such that during the Relevant Period, the contract carriage transportation services provided by Gross to Bridgestone/Firestone were pursuant to Contract 3019, as a whole. (Castner Aff., ¶ 27; Germinaro Aff., ¶¶ 8, 9; Wittenberg Aff., ¶¶ 8, 9; Sisel Aff., ¶¶ 8, 9; Ex. 2).

38. The geographic area awarded to Gross under Contract 3019 included the States of Illinois, Indiana, Iowa, Michigan, Minnesota, Ohio, and Wisconsin, all of which were within the territory in which Gross was authorized to operate under its Permit. (Stipulation, ¶ 5; Castner Aff., ¶ 23; Germinaro Aff., ¶ 6; Wittenberg Aff., ¶ 6; Sisel Aff., ¶ 6; Exs. 2, 3).

39. Bridgestone/Firestone would not have awarded the bids for the 1989 and 1990 LTL Programs to Gross, other than on the basis that transportation services would be provided as contract carriage, rather than as common carriage. Bridgestone/Firestone then relied upon Gross to lawfully ship Bridgestone/Firestone's product as a contract carrier pursuant to its Permit within the geographic territory covered by Contract 3019. (Castner Aff., ¶ 24).

40. Although the 10/25/90 Contract 3019 has terms in addition to those contained in the 3/1/89 Contract 3019, Bridgestone/Firestone interpreted Contract 3019 in its entirety, either explicitly or implicitly as obligating it to the following: (Stipulation, ¶ 18; Castner Aff., ¶ 25; Exs. 2, 3, 4, 6).

(a) to pay the rates contained in each agreement for services provided by Gross; with payment to be made within the time periods specified;

(b) to tender 100% of Bridgestone/Firestone's freight in the areas covered by Contract 3019 to Gross within the area of Gross' operating authority, so long as it was able to: meet the transit times stated in Gross' bids, provide the necessary equipment at origins, and be on time;

(c) to integrate Gross into Bridgestone/Firestone's LTL Programs which both parties understood would result in Bridgestone/Firestone tendering a series of shipments to Gross;

(d) not to change base prices prior to the expiration of Contract 3019;

(e) where claims for loss, damage, injury, or delay to cargo result from shipments which are within the jurisdiction of the ICC, to settle such claims in compliance with regulations prescribed by the ICC;

(f) to treat information concerning Gross' business with confidence and not to divulge such information to

third parties, except where required to perform delivery or to comply with applicable laws; and

(g) to perform all obligations arising under Contract 3019 in good faith.

41. Bridgestone/Firestone interpreted Contract 3019 in its entirety as obligating Gross implicitly or explicitly to the following: (Castner Aff., ¶ 26; Exs. 2, 3, 4, 6).

(a) to provide all services under the Permit;

(b) to transport all freight tendered at the prices and discounts stated in Contract 3019;

(c) not to change discounts prior to the expiration of Contract 3019;

(d) to operate as an independent contractor, retaining the right to subcontract with another carrier to complete shipments;

(e) to apply the rates and discounts contained in Contract 3019, even when Gross subcontracts with another carrier to complete shipments within the area of its operating authority;

(f) to warrant Gross' quality of service;

(g) to render itemized bills for services;

(h) to fully indemnify Bridgestone/Firestone against loss of all Products which Gross receives;

(i) to carry and keep in force liability, property damage, and workers compensation, in an amount equal to or in excess of that required by the state or federal

regulatory agency with jurisdiction over insurance standards; to assume full responsibility for selecting, engaging, and discharging its employees, agents, or servants and for otherwise directing and controlling their services; and to act as an independent contractor responsible for complying with all applicable laws and regulations for the benefit of its employees; and finally, to hold Bridgestone/Firestone fully indemnified for any liability, damage, cost, or expense which Bridgestone/Firestone may suffer as result of Gross' failure to assume or fulfill the foregoing obligations;

(j) to treat information concerning Bridgestone/Firestone's business with confidence and not to divulge the information to third parties, except where required to perform delivery or to comply with applicable laws;

(k) to warrant that the services, rates and charges set forth in the agreement conformed to the rules, regulations and requirements of any regulatory agency having jurisdiction over Gross' activities, and that it has complied and will comply with applicable laws, codes, regulations, rules and orders;

(l) to move shipments under a uniform Bill of Lading or such other document as the parties agreed to use;

(m) to furnish, operate, and maintain in good working condition and suitable appearance all motor

vehicles and allied equipment necessary to perform services required, and to provide, supervise and control all necessary drivers and dispatches, procure necessary licenses, provide appropriate maintenance and furnish all supplies necessary for the proper operation of the equipment so furnished;

(n) to observe the transit time service standard for each traffic lane specified in the contract;

(o) to be responsible for loading and unloading trailers and any cost of incidental labor which may be employed to assist therewith; and

(p) to perform all obligations arising under Contract 3019 in good faith.

42. It was Bridgestone/Firestone's and Gross' intent, both with respect to the 3/1/89 Contract 3019 and the 10/25/90 Contract 3019, to form a contract carrier relationship and the terms of the contracts were designed to fulfill that intent. It was further the intent of Bridgestone/Firestone as well as Gross that all shipments move under contract carrier Permit MC 1494 Sub 35 issued by the ICC to Gross. (Stipulation, ¶¶ 19, 20, 24; Castner Aff., ¶ 28; Germinaro Aff., ¶¶ 7, 8; Wittenberg Aff., ¶¶ 7, 8; Sisel Aff., ¶¶ 7, 8).

43. Pursuant to Contract 3019, Gross agreed to provide service within the scope of service authorized by its contract carrier permit issued by the ICC. (Stipulation, ¶ 21).

The Parties Perform Under Contract 3019

44. During the Relevant Period, Gross transported at least 326 shipments under Contract 3019, assessed charges that were based on the contract rates and discounts specified in Contract 3019, and received payment from Bridgestone/Firestone based on those rates and discounts. (Castner Aff., ¶ 29; Germinaro Aff., ¶¶ 9, 12; Wittenberg Aff., ¶¶ 9, 12; Sisel Aff., ¶¶ 9, 12; Ex. 8).

45. The discounts applicable to each shipment were reflected on the freight billings issued by Gross. The rates and discounts shown on the freight billings are equivalent to the levels of rates and discounts which are provided under Contract 3019. (Stipulation, ¶ 25; Castner Aff., ¶ 30; Ex. 9).

46. Bridgestone/Firestone and Gross each rendered substantial performance in accordance with the terms of Contract 3019 and all of the shipments moved under Contract 3019. Both parties received substantial benefits under Contract 3019. (Stipulation, ¶¶ 22, 23; Castner Aff., ¶ 31; Germinaro Aff., ¶ 12; Wittenberg Aff., ¶ 12; Sisel Aff., ¶ 12).

47. Gross billed Bridgestone/Firestone for all shipments during the Relevant Period based on the discounts applicable under Contract 3019 and Bridgestone/Firestone paid accordingly. Gross did not believe that any tariffs required to be filed with the ICC were applicable since the relationship was that of contract carriage and not common carriage. (Stipulation, ¶ 31; Germinaro Aff., ¶ 10; Wittenberg Aff., ¶ 10; Sisel Aff., ¶ 10).

The Parties Intended a Contract Carrier Relationship

48. In entering into Contract 3019, Gross understood and intended that the discounts agreed to under Contract 3019 would be applicable even if Gross utilized the services of other carriers to complete shipments. At all times during the Relevant Period, Gross believed that it had full authority to subcontract with other carriers without any consent or involvement of Bridgestone/Firestone in order to complete shipments under Contract 3019. Gross entered into subcontracts with other carriers to complete shipments as evidenced by letter agreements with the other carriers. Those other carriers acted as agents of Gross. At no time did Gross subcontract with other carriers to complete shipments for Bridgestone/Firestone which were beyond the service area in which Gross was authorized to conduct its business under the Permit, namely the 48 contiguous United States. The use of other carriers was indicated on freight bills. At no time did Gross consider itself to be interlining shipments with the other carriers in violation of any statute, rule, or regulation. (Stipulation, ¶¶ 28, 29, 30; Germinaro Aff., ¶¶ 11, 16; Wittenberg Aff., ¶¶ 11, 16; Sisel Aff., ¶¶ 11, 16).

49. Gross and Bridgestone/Firestone intended that Contract 3019 was a continuing agreement. (Stipulation, ¶ 26).

50. The services which Gross provided to Bridgestone/Firestone during the Relevant Period were designed to meet Bridgestone/Firestone's distinct needs, including special requirements of Bridgestone/Firestone, the price Bridgestone/

Firestone was willing to pay, and the select nature of the delivery service that Bridgestone/Firestone needed. (Stipulation, ¶ 27).

There Was No Pre-Petition Challenge
To The Contract Carrier Relationship

51. Subsequent to the Petition Date, rate undercharge auditors (the "Rate Auditors"), retained with Bankruptcy Court approval, performed a review of Gross billings to Bridgestone/Firestone for the Relevant Period. (Stipulation, ¶ 33).

52. The Rate Auditors determined that the amounts charged by Gross to Bridgestone/Firestone pursuant to Contract 3019 were less than the amounts provided by the tariffs that would otherwise be applicable to the shipments had they been made pursuant to Gross' common carrier authority, the difference being the amount of \$89,458.37. (Stipulation, ¶ 34).

53. At no time prior to the Petition Date did Gross ever challenge the validity, nature, or enforceability of the contract carrier relationship between the parties under Contract 3019. Gross fully believed there was a contract carrier relationship rather than one of common carriage. Gross provided contract carrier services in accordance with the provisions of Contract 3019 and within the scope of its authority granted under its Permit at all times during the Relevant Period. (Stipulation ¶¶ 21, 32; Germinaro Aff., ¶ 15; Wittenberg Aff., ¶ 15; Sisel Aff., ¶ 15).

CONCLUSIONS OF LAW

1. At all times during the Relevant Period, Gross provided transportation services to Bridgestone/Firestone pursuant to a contract carrier relationship.

UNITED STATES BANKRUPTCY COURT

WESTERN DISTRICT OF WISCONSIN

IN RE:

IN BANKRUPTCY NO.:

GROSS COMMON CARRIER, INC.,

91-52860-11

Debtor.

IN ADVERSARY PROCEEDING NO.:

GROSS COMMON CARRIER, INC.,

93-5362-11

Plaintiff,

v.

ORDER:

BRIDGESTONE FIRESTONE, INC.
d/b/a/ Firestone Tires,

Defendant.

FILED
MAY 24 1994
CLERK, U.S.
BANKRUPTCY COURT
CASE NO. _____

The court having this day entered its Memorandum Decision in the above-entitled matter;

IT IS HEREBY ORDERED that the defendant's motion for summary judgement is granted; and

IT IS FURTHER ORDERED that the plaintiff's motion for summary judgement is denied.

Dated May 24, 1994.



ROBERT D. MARTIN
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT

WESTERN DISTRICT OF WISCONSIN

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Plaintiff,

v.

SERVICE LIST:

BRIDGESTONE FIRESTONE, INC.
d/b/a/ Firestone Tires,

Defendant.

Copies of this Memorandum Decision and Order were mailed to the following parties on May 24, 1994:

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