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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

In re: IML FREIGHT, INC., Debtor,	Bankruptcy No. 83C-01950 Chapter 7 Adversary Proceeding No. 85PC 0283 Defendant ID NO. 110 District Court No. C86-0484 J
MAIN HURDMAN, Trustee, Plaintiff, vs. TRAILER-TRAIN, INC., Defendant, Third-Party Plaintiff and Appellant, vs. CHICAGO & NORTHWESTERN TRANSPORTATION COMPANY, UNION PACIFIC RAILROAD COMPANY, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY CO., and SOUTHERN PACIFIC TRANSPORTATION COMPANY, Third-Party Defendants and Appellees.	MEMORANDUM OPINION AND ORDER

This is an appeal from a bankruptcy court order dismissing, for lack of subject matter jurisdiction, appellant Trailer-Train's third-party complaint against the appellees, four

different railroad companies (hereinafter collectively referred to as "Railroads"). Because this court holds that the record submitted for review is inadequate, the case is remanded for further proceedings.

The debtor in the bankruptcy underlying this action is IML Freight, Inc. (IML), a motor carrier. IML's business involved the transport of its truck trailers from the West Coast to Chicago, Illinois, via rail. Acting as a shipper's agent, appellant in this case, Trailer-Train, Inc. (Trailer-Train), would arrange for IML's trailers to be carried on the Railroads' trains. Thus, IML would pick up trailers and contents from its customers, haul them by truck to the Railroads' terminals, and the trailers would then be shipped by train. IML would pick up the trailers at the destination terminal and truck them to their final destination. Significantly, IML paid both the Railroads and Trailer-Train via checks made out to Trailer-Train. In other words, Trailer-Train would bill its customers for the full cost of the shipping services it had arranged. Motor carriers, such as IML, would then pay Trailer-Train for the services they received from the railroads as well as Trailer-Train's fees. Trailer-Train would pay each of the Railroads the shipping charges for all the trailers a particular railroad had shipped for Trailer-Train's customers.[1] It is a portion of the funds

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[1] For any particular shipment, the trailer shipped is identified by number on Trailer-Train's billing documents. Thus, although Trailer-Train would pay the railroads on behalf of several different shippers in one check, it is possible to identify the particular shippers, indeed the particular trailers, to which each payment was attributable. The effect of this arrangement on Trailer-Train's status is unclear. The question of whether Trailer-Train stood in the

paid by IML to Trailer-Train that is the subject of these adversary proceedings.

IML filed for chapter 11 bankruptcy on July 15, 1983. Later, the case was converted to a chapter 7 liquidation. In April 1985 IML's trustee, Main Hurdman, instituted this adversary proceeding in order to recover alleged preferential payments from Trailer-Train. The trustee alleged that $50,632 had been paid to Trailer-Train on account of debts incurred for Trailer-Train's services. Because these transfers occurred within ninety days of IML's filing of its petition, the trustee alleged that they constituted preferential payments. The trustee brought no action against the Railroads.

Along with its answer to the preference complaint, Trailer-Train filed a third-party complaint against the Chicago and Northwestern Transportation Co. and Union Pacific Railroad Co. (CNW/UP), two of the four railroads now involved. Somewhat over six months later, following CNW/UP's answer, Trailer-Train filed a second third-party complaint against the remaining railroads, the Atchison, Topeka and Santa Fe Railway Co. and Southern Pacific Transportation Co. (SF/SP). Both these third-party complaints were based on a theory that Trailer-Train merely forwarded the Railroads' fees, and the preference action to recover those fees should therefore include the Railroads.

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relation of a creditor of the shippers or merely acted as a conduit through which the shippers paid the railroads depends on a careful examination of the business in which Trailer-Train was engaged. That examination involves a factual inquiry for which the present record on appeal is inadequate. This is a question not only central to the issues before this court, but directly related to the merits of the preference action.

CNW/UP answered the third-party complaint against them, but SF/SP responded to the complaint against them by filing a motion to dismiss based on a lack of subject matter jurisdiction.

Supporting its motion to dismiss, SF/SP argued that the action against them was not a case "related to," "arising in" or "arising under" proceedings under title 11. Thus, they argued, the action was not within the bankruptcy court's jurisdictional boundaries as set out in 28 U.S.C. §§ 1334(b) & 157. Moreover, SF/SP argued, the Trustee alone is empowered to bring preference actions, and Main Hurdman had chosen to name only Trailer-Train in its preference complaint; Trailer-Train could not amend that choice. Trailer-Train, on the other hand, continued to argue that the third-party complaint was within the bankruptcy court's jurisdiction. As an alternative to this argument, Trailer-Train argued (for the first time) for the joinder of the Railroads under Bankruptcy Rule 7019. In reply, SF/SP asserted that the joinder issue was not properly before the court, but was not within the court's jurisdiction in any case.

The bankruptcy court granted SF/SP's motion to dismiss for lack of subject matter jurisdiction, and on CNW/UP's oral motion extended the order to include them as well. It is this order, dismissing <u>all</u> the railroads, that is the subject of this appeal.

As a preliminary argument against their inclusion as third-party defendants in this proceeding, SF/SP argue that the third-party complaint against them is deficient because Trailer-Train failed to ask leave to file the complaint as required by Rule 7014. Rule 14 of the Federal Rules of Civil

Procedure, applied to bankruptcy proceedings through Bankruptcy Rule 7014, requires a party seeking to file a third-party complaint later than ten days after filing an answer to obtain leave by motion after notice to all parties. In SF/SP's case, Trailer-Train filed a third-party complaint against SF/SP some six months after filing its answer.

SF/SP are correct in asserting that Trailer-Train should have filed a motion for leave to file a third-party complaint before filing its second third-party complaint. Bankr. Rule 7014; Fed. R. Civ. P. 14. SF/SP, however, were not parties to the proceeding at that time and would not have had the right to be heard at a hearing on such a motion. The applicable rule was not drafted for the benefit of potential impleader defendants, but for the court and those already parties to the action. Hensley v. United States, 45 F.R.D. 352 (D.Mont. 1968). No objection was made by those parties to the addition of SF/SP. This procedural defect was evidently not the basis for the order of dismissal, because the bankruptcy court also dismissed CNW/UP, who were proper third-party defendants.

Apart from this minor procedural defect, the main issues on appeal boil down to two basic questions. First, whether the bankruptcy court had subject matter jurisdiction over the third-party complaints brought by Trailer-Train, and second, whether the bankruptcy court had subject matter jurisdiction to join the Railroads as co-defendants. This court, however, cannot resolve either issue because of the insufficiency of the record on appeal.

No findings of fact or conclusions of law have been made a part of the record on appeal. The order appealed from purports to incorporate findings of fact and conclusions of law entered "on the record" and refers to those findings and conclusions three times. Record on appeal, at 400. None of the parties designated the portion of the record containing these findings and conclusions for inclusion in the record on appeal. Bankruptcy Rule 8006 places the burden of designating "the items to be included in the record on appeal" on the appellant. Among those items required to be included in the record are the "order, or decree appealed from, and any opinion, findings of fact, and conclusions of law of the [bankruptcy] court." Bankruptcy Rule 8006. Although Trailer-Train designated the order for the record, that order is incomplete without the bankruptcy court's statements that were incorporated by reference in the order. Trailer-Train failed to comply with Rule 8006 in designating the order and failing to "immediately . . . deliver to the reporter and file with the clerk of the bankruptcy court a written request for the transcript and make satisfactory arrangements for payment of its cost." Id. As a result the record on appeal is incomplete.

Without the findings of fact made below, this court cannot effectively review the bankruptcy court's decision. A reviewing court may not overturn the bankruptcy court's findings of fact unless clearly erroneous, Bankruptcy Rule 8013, and in this case it is unclear what those findings were. This court is unwilling to upset an order of the bankruptcy court without knowing the

substance of the decision below. The appropriate course, then, is to vacate the bankruptcy court's order dismissing the railroads and remand for entry of findings of fact and conclusions of law.

In addition to lacking accompanying factual findings, the bankruptcy court's order is ambiguous as to its rationale. The bare statement that the court lacked jurisdiction gives no indication as to the basis for that conclusion. Nothing in the record indicates that the bankruptcy court considered the issue of joinder.[2] Nowhere in the record is there an explanation for the lower court's refusal to exercise jurisdiction over the third-party claims.

Bankruptcy courts[3] obtain their jurisdiction by reference from the district courts. 28 U.S.C. §§ 157 & 1334; See Order Re Referral of Bankruptcy Matters to Bankruptcy Judges, July 10, 1984 (D. Utah). As units of the district court, they exercise

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2 The Railroads contend that Trailer-Train should have filed a motion for joinder as a mandatory precondition to presenting its arguments on that issue. Plainly, the absence of a motion for joinder does not preclude a court from considering the question. Federal Rule of Civil Procedure 21, and thus Bankruptcy Rule 7021, allow a court to order the joinder of parties on its own initiative. The bankruptcy court could properly consider the Rule 7019 arguments of Trailer-Train.

3 28 U.S.C. § 151 designates the bankruptcy judges in each judicial district as "judicial officer[s] of the district court" to function as "a unit of the district court." Formerly, §151 established bankruptcy courts as separate courts, adjuncts to the district court. 28 U.S.C. § 151 (1982). Cf. 28 U.S.C. § 151 (1982 & Supp. III 1985), which does not establish a bankruptcy court, but only provides that the bankruptcy judges in each district shall constitute a unit of the district court "to be known as the bankruptcy court for that district." When one speaks of "bankruptcy courts" one refers to bankruptcy judges functioning as units of the district court of that judicial district.

district court jurisdiction, although at times they are statutorily limited to entering only proposed findings of fact and conclusions of law. 28 U.S.C. § 157(c). Therefore, for purposes of initially determining subject matter jurisdiction, such as is involved here, the analysis must focus on the jurisdiction granted to the district court. In re John Peterson Motors, Inc.,56 Bankr. 588, 590 (Bankr. D. Minn. 1986); Firestone v. Dale Beggs & Associates (In re Northwest Cinema Corp.), 49 B.R. 479 (Bankr. D. Minn. 1985); The question for the bankruptcy court in this case was identical to the question of whether, if the proceeding were in district court, the district court's jurisdictional limits would encompass the claim in question.

On remand, the bankruptcy court should analyze the case in light of the limits on the district court's jurisdiction, which it exercises as the district court's adjunct. Normally, a proper third-party complaint would fall within the district court's ancillary jurisdiction.[4] The analysis required to be applied

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[4] The Railroads argue that the result of Trailer-Train's claim against them for contribution or indemnity will have no effect on the bankruptcy estate and therefore is unrelated to the IML bankruptcy. Without some quantitative effect on the bankruptcy estate, the Railroads argue, no jurisdiction exists over the third-party claims. This court rejects this analysis as the sole test for "related to" or ancillary jurisdiction.

Some courts perceive no difference between ancillary and "related to" jurisdiction. In re Bell & Beckwith, 54 Bankr. 303, 308 (Bankr. D.Ohio 1985). The problem with this view is that the tests developed for recognizing "related to" jurisdiction would confine their own utility if applied to limit ancillary jurisdiction. Specifically, some courts require a controversy to have some effect on the bankruptcy estate or its administration in order to be "related to" the title 11 case. National City Bank v. Coopers & Lybrand, 802 F.2d 990 (8th Cir. 1986); Pacor, Inc. v. Higgins, 743 F.2d 984 (3d Cir. 1984); Zweygardt v. Colorado National, 52 Bankr. 229 (Bankr. D.Colo. 1985); In re Haug, 19 Bankr. 223 (Bankr.

in recognizing ancillary jurisdiction is set out in Aldinger v. Howard, 427 U.S. 1 (1976).[5]

Or. 1982). This may well be an appropriate test for some situations, but it is too restrictive to delimit the outermost boundaries of bankruptcy jurisdiction in all cases. One reason is that the legislative history reflects precisely the opposite intent. H.R. 95-595 p. 445 reprinted in 1978 U.S. Code Cong. & Admin. News, 5787, 6401 ("The idea of possession or consent as the sole bases for jurisdiction is eliminated"). Moreover, such an approach would prevent the exercise of ancillary jurisdiction over cases purely between creditors and third parties, such as that involved here. The better reasoned authorities allow such proceedings in bankruptcy court, even if no apparent effect on the bankruptcy estate will result. In re John Peterson Motors, Inc., 56 Bankr. 588 (Bankr. D.Minn. 1986) (cited by SF/SP and Trailer-Train in this appeal) (recognizing ancillary jurisdiction of bankruptcy courts over properly brought third-party complaints, but declining to exercise ancillary jurisdiction); Helena Chemical Co. v. Manley, 47 Bankr. 72 (Bankr. N.D.Miss. 1985) (recognizing jurisdiction over creditor's suit against guarantor); Membres Valley Bank v. Greenman, 22 Bankr. 1 (Bankr. D.N.M. 1982) (recognizing jurisdiction over creditor's suit against guarantor); In re Herman Cantor Corp., 15 Bankr. 747 (Bankr. E.D. Va. 1981) (third-party complaint against surety allowed, rejecting previous dicta contra); In re Lucasa International, Inc., 6 Bankr. 717 (Bankr. S.D.N.Y. 1980). These cases suggest that the standard advanced in Pacor and other similar cases for recognizing "related to" jurisdiction is insufficient to be all-encompassing as it fails to also define ancillary jurisdiction.

This court is of the opinion that "related to" jurisdiction includes, but is not limited to, that jurisdiction traditionally termed ancillary. Depending on the context in which a purportedly "related to" claim arises, the tests developed for recognizing "related to" jurisdiction may be useful. In cases such as the one at bar, however, when the claim over which jurisdiction is disputed is presented as a third-party complaint accompanying a proceeding with independent subject matter jurisdiction, it is appropriate to use traditional analysis for ancillary jurisdiction. For example, in this case Trailer-Train's claim for indemnity or contribution from the Railroads comes before the court as a third-party complaint in a preference action. Were the claim to be asserted outside of that context, other tests for "related to" jurisdiction might be applicable and would probably exclude the claim from bankruptcy court. In the present case, on the other hand, it is sufficient to apply principles of ancillary jurisdiction to determine whether the court should have the discretion to adjudicate the third-party claim.

Exercise of ancillary jurisdiction, if it is found to exist, is a matter of trial court discretion. The record does not reflect whether the dismissal of the third-party claims was based on a perceived absence of authority to exert jurisdiction, or merely a refusal to exercise discretionary ancillary jurisdiction. Entry of proposed findings of fact and conclusions of law would clarify the basis for declining or exerting jurisdiction, in addition to explaining why the railroads should or should not be joined. In short, a detailed factual inquiry needs to be made regarding the propriety of joinder and, if necessary, the existence of ancillary subject-matter jurisdiction over the third-party claims and the propriety of allowing such ancillary claims. The record does not reflect such an inquiry.

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[5] Aldinger established a two-part test for determining the existence of ancillary jurisdiction. First, the nonfederal, in this case the non-bankruptcy, claim and the federal claim must "derive from a common nucleus of operative fact". Aldinger, 427 U.S. at 14, quoting United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966). Second, the court must satisfy itself that Congress "has not expressly or by implication negated" the existence of jurisdiction, Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365, 373 (1978), quoting Aldinger, 427 U.S. at 18. considering "the posture in which the nonfederal claim is asserted and . . . the specific statute that confers jurisdiction over the federal claim," Owen Equipment, 437 U.S. at 373.

Accordingly, the order of the bankruptcy court dismissing the third-party complaints against the railroads is vacated and the case REMANDED for further proceedings.

So ordered.

Dated this 26 day of Nov., 1986.

BY THE COURT

Bruce S. Jenkins, Chief Judge
United States District Court

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