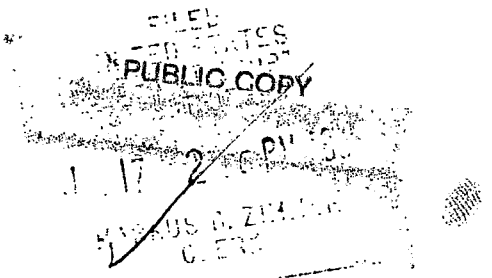

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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

In re:

IML FREIGHT, INC., a Utah corporation; INTERSTATE RENTAL OF UTAH, INC., a Utah corporation; IML PROPERTIES, INC., a Utah corporation,

Debtors.

VOLVO WHITE TRUCK CORP.,

Appellant,

-vs-

TRADEX, INC., et al.,

Respondents.

ORDER REVERSING JUDGMENT OF BANKRUPTCY COURT DATED DECEMBER 1, 1988

Bankruptcy Nos:

83C-01950
83C-01951
83C-01952

(Bankruptcy Adv. Pro. No. 84PC-0844)

Civil No: 89-C-113W

On December 1, 1988, the Honorable Glen E. Clark, United States Bankruptcy Judge for the District of Utah awarded Tradex, Inc., agent and attorney-in-fact for IML Freight, Inc., later succeeded by Pete Marwick, Main & Company in its capacity as the trustee of IML Freight, Inc., ("plaintiff"), a judgment against defendant, Volvo White Truck Corporation ("defendant") in the amount of $10,774.51 plus interest and costs. Defendant filed a timely notice of appeal to this court from that judgment. Thereafter, the defendant filed its brief in support of its

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appeal, plaintiff filed its response thereto and plaintiff filed a reply brief. The matter came on for oral argument before this court on July 14, 1989. Plaintiff was represented by Robert D. Merrill and defendant was represented by Bryce D. Panzer. Prior to the hearing the court had read the briefs of counsel, the record before the bankruptcy court and a number of the authorities relating to the issue on appeal. Following oral argument and after taking the matter under advisement, the court has further considered the law and the facts relating to this appeal. Being now fully advised and good cause appearing

IT IS HEREBY ORDERED that the judgment of the bankruptcy court entered on December 1, 1988 is reversed and defendant is granted judgment against plaintiff of no cause of action on plaintiff's complaint for turnover in Adversary No: 84 PC-0844, and defendant is awarded its costs.

Plaintiff filed its complaint against the defendant seeking recovery of freight charges for freight carried by IML Freight, Inc. preceding the filing of that company's Chapter 11 petition in bankruptcy. In its complaint, plaintiff asserted that, pursuant to 11 U.S.C. § 542, defendant was required to pay outstanding freight bills in the sum of $10,714.51. At the trial before the bankruptcy court it was stipulated (1) that plaintiff held valid claims against defendant for freight charges incurred prior to the filing of IML's bankruptcy petition which claims

totaled $10,441.98; (2) that IML charged defendant the same freight rates it regularly charged for such services; and (3) that defendant held valid pre-petition claims against IML for goods sold on an open account, which claims exceeded $10,441.98.

The bankruptcy court reached its conclusion that defendant's setoff against plaintiff was not valid because of 49 U.S.C. § 10761(a), a provision of the Interstate Commerce Act which prohibits discrimination. By reason of that Act, the plaintiff claims that the only defenses which may be raised to a carrier suit for freight charges are (1) that the services have been paid for, (2) that the services were not rendered, (3) that the services were charged under an inapplicable tariff schedule, or (4) that the rates were unreasonable. Since none of those defenses has been raised by the defendant, the plaintiff claims that defendant is precluded from using its offset in the adversary proceedings and must assert that claim, if at all, by filing a proof of claim in plaintiff's bankruptcy. In support of this position, the plaintiff primarily relies on the following cases: In re Penn Central Transportation Company, 477 F.2d 841, 844 (3rd Cir.) aff'd mem. sub nom., United States Steel Corp. v. Trustees of Penn Central Transportation Co., 414 U.S. 885 (1973); see also In re Williams, 422 F.Supp. 342, 344 (N.D. Ga. 1976); and P Baker v. Crown Coal & Coke Co., 377 F. Supp. 190, 191 (W.D. Pa. 1974).

In entering its judgment in favor of the plaintiff and against the defendant, the bankruptcy court agreed with the position of the plaintiff's.

On the contrary, the defendant argues as follows: Although 11 U.S.C. § 542(b), permits a trustee to recover a debt that is property of the bankruptcy estate, that section goes on to provide that recovery is limited "to the extent that such debt may be offset under § 553 of this title against a claim against the debtor." 11 U.S.C. § 553 provides that the bankruptcy code "does not effect any right of a creditor to offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the case under this title against the claim of such creditor against the debtor that arose before the commencement of the case . . ." (There are certain exceptions which are inapplicable to the present case.) The argument of defendant continues that defendant's pre-petition open account claim against plaintiff should be able to be offset against plaintiff's pre-petition claim against the defendant since the debts are mutual and pre-petition and this is all that is required for an offset. Further, defendant argues that the provisions of 49 U.S.C. § 10761(a) of the Interstate Commerce Act do not change this result.

This court agrees with the defendant's position and believes that § 553 was intended to preserve, with some changes,

the right of setoff in bankruptcy cases which had been found in its predecessor statute, § 68(a) of the Bankruptcy Act of 1898. The earlier section, 68(a), not only allowed setoff, it mandated that "mutual" debts and credits be stated as one account.

In this case the defendant is asserting, in the context of a lawsuit, the right to setoff its admittedly valid, pre-petition, claim against the plaintiff. Because the clear wording of 11 U.S.C. § 542(b) precludes a turnover of debts to the extent they are subject to setoff, it is the opinion of this court that the defendant's offset claims may be asserted to defeat plaintiff's claim in this turnover proceedings. This court does not agree that the Interstate Commerce Act or the authorities cited by plaintiff change that result. Rather, this court believes that the decision in Chicago and N.W. Ry. Co. v. Lindell, 281 U.S. 14 (1930), is more applicable to the case at bar than the cases cited by the plaintiff.

Accordingly, it is the opinion of this court that the bankruptcy court erred in entering the judgment in favor of the plaintiff and against the defendant, inasmuch as the freight bill sued upon was subject to setoff. Consequently, the judgment of the bankruptcy court must be reversed.

Dated this 17 day of July, 1989.

David K. Winder
United States District Judge