

STEPTOE & JOHNSON LLP

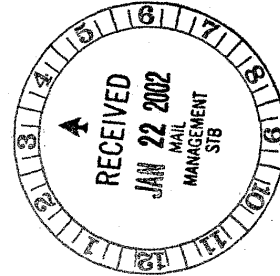
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DAVID H. COBURN
(202) 429-8063
dcoburn@steptoe.com

1330 Connecticut Avenue, NW
Washington, DC 20036-1795

Telephone 202.429.3000
Facsimile 202.429.3902
www.steptoel.com



January 22, 2002

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W., Room 711
Washington, DC 20423-0001

Re: Section 5a Application No. 118 (Sub-No. 2), et al.; EC-MAC Motor
Carriers Service Association, Inc., et al. 204498

Reply of Rate Bureaus to Petitions for Reconsideration

Dear Secretary Williams:

Enclosed for filing please find an original and 10 copies of the Reply of EC-MAC
Motor Carriers Service Association, Inc., et al. to the petitions for reconsideration filed in the
above proceeding.

Respectfully,

David H. Coburn
David H. Coburn
Attorney for Rate Bureaus

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Office of the Secretary

JAN 23 2002

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Enclosure

cc: All parties of Record

WASHINGTON

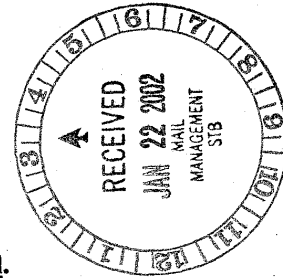
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**BEFORE THE
SURFACE TRANSPORTATION BOARD**



SECTION 5a APPLICATION NO. 118 (Sub-No. 2), et al.

EC-MAC Motor Carriers Service Association, Inc., et al.

**REPLY OF RATE BUREAUS
TO PETITIONS FOR RECONSIDERATION ***

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David H. Coburn
STEPTOE AND JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 429-8063

Attorney for Rate Bureaus

January 22, 2002

* This reply is filed on behalf of EC-MAC Motor Carriers Service Association, Inc. (Section 5a Application No. 118); Niagara Frontier Tariff Bureau, Inc. (Section 5a Application No. 45); and Rocky Mountain Tariff Bureau, Inc. (Section 5a Application No. 60).

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

SECTION 5a APPLICATION NO. 118 (Sub-No. 2), et al.

EC-MAC Motor Carriers Service Association, Inc., et al.

**REPLY OF RATE BUREAUS
TO PETITIONS FOR RECONSIDERATION ***

The petitions for reconsideration filed in this proceeding by several rate bureaus and by one shipper group share a common theme: the truth-in-rates notice requirement imposed by the Board's November 20, 2001 Decision does not fully or appropriately address the concern that underpins the Board's decision to condition rate bureau immunity.¹ That underlying concern is that some shippers may be charged undiscounted class rates and that those rates may be unreasonably high. The truth-in-rates notice was apparently designed to alert shippers to the fact that a certain range of discounts from class rates may be available.

* This reply is filed on behalf of EC-MAC Motor Carriers Service Association, Inc. (Section 5a Application No. 118); Niagara Frontier Tariff Bureau, Inc. (Section 5a Application No. 45); and Rocky Mountain Tariff Bureau, Inc. (Section 5a Application No. 60).

¹ In addition to Bureaus' filing, petitions for reconsideration were filed by the National Small Shipments Traffic Conference ("NASSTRAC"); Southern Motor Carriers Rate Conference, Inc. ("SMC"); and jointly by Midwest Motor Freight Bureau, Inc. and Pacific Inland Tariff Bureau, Inc. ("Midwest/PITB"). Western Motor Tariff Bureau, Inc. also filed a petition for reconsideration arguing that the truth-in-rates and loss-of-discount provisions not apply to it.

Bureaus dispute that there is a problem that warrants the imposition of new conditions on rate bureau immunity. Further, because the notice requirement would not apply to non-bureau carriers, who also quote discounts on the basis of collectively-made class rates (through publications such as CZAR-LITE), and because it would require the disclosure of a very broad discount range that would mislead any particular shipper with respect to discounts that may be available on the shipper's traffic, the notice requirement (among other reasons) is defective. The truth-in-rates notice would confuse, rather than enlighten, and it would serve no genuine remedial purpose.

The better answer to the Board's concern is already in place – a set of automatic discounts established by bureau carriers. These discounts apply for the benefit of shippers that do not otherwise have a negotiated discount. The bureaus and NASSTRAC appear to be in agreement that these automatic discounts provide the most effective response to the concerns underlying the Board's decision. Bureaus thus submit that any consideration of new conditions be deferred pending completion of the statutory five-year review of rate bureau immunity.

A. Reply to NASSTRAC

NASSTRAC notes at page 5 of its Petition that in view of the Board's prior statements and the comments filed by the various parties to this proceeding, it was "somewhat surprised" by the November 20 Decision requiring a truth-in-rates notice. While NASSTRAC does not argue (as do Bureaus) that the truth-in-rates rule was improperly adopted without prior notice or opportunity for comment, NASSTRAC's surprise at the truth-in-rates rule echoes the point Bureaus have made: the rule should have been considered in the context of a notice-and-comment rulemaking before its adoption, and cannot be characterized as a logical outgrowth of the Board's decision initiating this proceeding.

It is clear from its filing that the truth-in-rates notice is not viewed by NASSTRAC as a satisfactory response to the concerns underlying this proceeding. Rather, NASSTRAC argues that the feature of collective ratemaking that "does reduce, if not eliminate, the collection of rates exceeding competitive levels is the rate bureaus provision for automatic discounts for shippers that do not have other discount programs in effect." NASSTRAC at 3. While Bureaus may differ with NASSTRAC on the extent to which supra-competitive rates are a problem, they concur entirely with NASSTRAC's analysis of the proper "solution," *i.e.*, the existing automatic discount programs. By asserting that the automatic discounts "reduce, if not eliminate" the cause for the concern underlying this proceeding, NASSTRAC's Petition underscores that no further action on the part of the Board is needed. Should any evidence develop to suggest that shippers are paying supra-competitive rates as a consequence of collective ratemaking, and that the automatic discounts are not remedying the problem, the Board could address potential further steps at that time. At a minimum, the Board should await completion of the five-year review of rate bureaus required by 49 U.S.C. § 13703(c)(2) before further considering, after adequate opportunity for public comment, a truth-in-rates rule or any other conditions.

NASSTRAC argues at page 7 of its Petition that the Board has authority to require the bureaus to prescribe minimum discounts now in place. Bureaus submit that the Board should not intervene in the market by prescribing any discounts. Shippers and carriers should retain the right to negotiate a level of discount that reflects, for example, special service requirements that the shipper may need or unique costs that may be associated with serving the shipper's traffic. As the Board recognized in its November 20 Decision, requiring particular minimum discounts would amount to the prescription of rates and "our objective has not been to

prescribe rates.”² Rate prescription would be grossly inconsistent with the deregulatory purpose of ICCTA, and would involve the government in ratemaking to an extent clearly not envisioned by that statute’s drafters.

While prescription of discounts should be avoided, the Board should take account of the fact that automatic discounts have been, and continue to be, offered by rate bureaus in assessing whether any special new conditions on rate bureau immunity are required. The Board should also be aware that there are no efforts underway to modify the automatic discounts, and that carriers understand that doing so would likely draw vigorous shipper opposition. Bureaus would of course provide advance notice of any proposal to modify these discounts so that shippers would have an opportunity to voice opposition and pursue any appropriate remedies they may have, and the Board would have adequate time to respond. The critical point, however, is that as long as the automatic discounts remain in place, the truth-in-rates notice is unneeded, and would for the reasons articulated in Bureaus’ Petition for Reconsideration be counterproductive.³

² NASSTRAC appears to have abandoned its previous proposal for mandatory minimum discounts pegged to average discount level. The Board properly determined that such mandatory minimum discounts would provide some shippers with a windfall far in excess of what they might achieve in the competitive market. Further, NASSTRAC still may be of the view that the automatic discounts should be “true” minimum discounts, and that lower discounts accordingly should not be permitted. NASSTRAC at 3-4. While NASSTRAC clearly argued that the automatic discounts should establish the discount floor in earlier filings in this proceeding, its current position on this question is not as clear. Bureaus remain opposed to any such prescription and maintain that shipper/carrier negotiations should not be fettered by the Board.

³ NASSTRAC takes issue with the Board’s suggestion that shippers can protect themselves against paying undiscounted class rates in the customer return or vendor shipment setting by choosing the carrier for the shipment. NASSTRAC at 6. Bureaus agree that shippers can often have a say in which carrier is used. Beyond that protection is the fact, acknowledged by NASSTRAC, that the motor carrier market is a competitive one and that a carrier not offering competitive rates will not long retain its business. It bears further note that the automatic

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In short, issues pertaining to the prescription of discounts need not be considered here since no proposals have been made to modify the discounts. Carriers well understand that any effort to modify those discounts would engender strong shipper opposition and that automatic discounts are a reasonable response to the Board's stated concerns. Thus, the issue of prescription is at best a hypothetical response to a problem that does not (because of the automatic discounts) exist. As long as the discounts remain in place so as to "reduce, if not eliminate" the perceived problem, there is no need for any Board action, such as the truth-in-rates rule.

NASSTRAC maintains that the truth-in-rates rule would only be effective if coupled with a requirement that Bureaus maintain the automatic discounts now in place. But notably absent from the NASSTRAC Petition is any explanation of what the truth-in-rates notice adds to the automatic discounts as a "solution" to the perceived threat of supra-competitive rates. Not only does NASSTRAC fail to identify any specific benefit that shippers might derive from the truth-in-rates rule, as opposed to the automatic discount provisions, but it appears to acknowledge that shippers have little to gain – and could be misled – by a notice advising them that discounts range “from 0% to 70%.” NASSTRAC at 5. The best NASSTRAC can say about the truth-in-rates notice is that it appears “less objectionable” if the disclosed range of discounts were required to embrace the automatic discounts so that the low end of the range would be 20% or 35%. NASSTRAC at 6. However, NASSTRAC leaves unexplained how a shipper would benefit from being told that discounts range from 20% to 70% any more than they would benefit from learning that discounts range from 0% to 70%. Under either scenario, the

discounts would apply in this setting, while the truth-in-rates notice would not address the concern NASSTRAC has raised regarding such shipments.

range is so broad that the information is clearly useless, and potentially misleading -- particularly to the class of smaller shippers sought to be protected.⁴

NASSTRAC suggests that disclosure of bureau carrier minimum discounts might temper class rate "excesses" industry-wide, *i.e.*, among non-bureau members. NASSTRAC at 9. Bureaus submit that the current market structure in which member and non-member carriers actively compete for business by offering negotiated discounts serves to temper any such theoretical excesses, and that a notice requirement (which only bureau carriers would be required to meet) will not enhance this competition in any respect. Further, NASSTRAC does not address the fact that non-bureau carriers can be expected to quote rates based on collectively made class rates when they rely on publications, such as CZAR-LITE, that are no more than compilations of collectively made rates formulated through several different bureaus. The truth-in rates rule apparently would not apply to such rate quotations by non-member carriers. This anomaly would add to the likelihood that shippers may be misled into believing that the rates being quoted to them by non-members are not derived from the collective process, and result in an unreasonable competitive detriment to bureau carriers.

NASSTRAC tellingly observes on page 8 of its Petition that the marketplace for carrier services is competitive and efficient "for all but a few shippers and shipments." While proof of the existence of these few shippers and shipments remains a mystery to bureaus, NASSTRAC is certainly on target in arguing that competition and efficiency are hallmarks of the motor carrier industry and that "class rates as baselines for discounting may even contribute to that efficiency, where competition works." NASSTRAC at 8. Indeed, NASSTRAC's

⁴ Moreover, a "truth-in-rates" notice that identifies the lower end discounts at the automatic discount level in a setting where there are in fact discounts of less than 20% or 35%,
(Continued ...)

acknowledgment that the market for motor carrier services is competitive underscores the point that government interference would be inappropriate. Any shipper, regardless of its size, is able to benefit from this competition and from the discounts made available broadly to all shippers.

NASSTRAC's claim that there are some shippers disserved by collective ratemaking is not only unsupported by any evidence, but unsustainable given that the automatic discounts protect the smaller and inexperienced shippers about which it voices concern. NASSTRAC does not demonstrate how the existing discounts fail to protect shippers, regardless of the shipper's size, or how the truth-in-rates notice would offer the desired protection. In fact, NASSTRAC is plainly concerned that a truth-in-rates notice would add nothing to the protection offered to these shippers, as evidenced by its comment on page 9 that the Board has "gone too far" in trusting disclosure, and disclosure alone, to address the problem it perceives.

Near the end of its petition, NASSTRAC argues that, as an alternative to prescribing discounts, the truth-in-rates notice might be modified to require the disclosure of the "distribution of discounts." NASSTRAC at 9. The quoted term is left undefined, and the point is not explained. If NASSTRAC means, however, that the Board might consider requiring the disclosure, in a truth-in-rates type notice, of the specific discounts offered to particular types of traffic, that would be a virtually impossible task given the broad variability of traffic pricing factors. As Bureaus have previously explained in their Petition, and as the Board and its predecessor have acknowledged, pricing on any particular traffic is a function of numerous elements, including volume, location, nature of the traffic, level of competition, etc. Thus, while one might be able to determine in a *Georgia-Pacific*-style litigation whether a specific rate or discount is reasonable based on comparative rate analysis -- that kind of detailed analysis could as the case may be, would be a patently untrue notice.

not be feasibly undertaken in the fast-paced, competitive marketplace setting in which carriers quote rates on specific traffic day in and day out. In short, there is no feasible way that a truth-in-rates notice could be tailored so that it would disclose a specific range of discounts that might be offered by bureau carriers on the particular traffic at issue.

Further, the very notion that such particularized, competitively-sensitive discount data, not currently compiled or available, might be gathered and disseminated by the bureaus gives rise to even greater antitrust concerns than are already implicated by the range of discount data required to be compiled in connection with the notice prescribed in the November 20 Decision. Thus, even if the discount data on a vast array of different categories of traffic could be obtained in some way, it would not advance pro-competitive goals for each carrier to learn what its competitors were offering on particular types of traffic, and could lead to claims of collusion in settings where carriers choose to match each other's discounts.⁵

B. Reply to Other Petitions

The petitions for reconsideration filed by the other rate bureaus agree with Bureaus that the notices were improperly adopted, would impart misleading information to shippers, and would unduly interfere with shipper/carrier negotiations. These rate bureaus thus argue that the truth-in-rates notice should be eliminated or, at least, modified. In that connection, all of the bureaus urge that the range of discount data be eliminated from the notice. There is a unanimity of view that such discount data can only mislead shippers. Further, the notice

⁵ Further, the dissemination of information about particular discounts raises issues under 49 U.S.C. § 14908, which prohibits the unlawful disclosure by a carrier of information about a shipper's traffic where such information may be used to the competitive detriment of the shipper. Shippers surely view the discounts that they have negotiated with carriers to be confidential competitive information.

requirement is likely to lead to carrier/shipper disputes, and unduly disrupt with the negotiating process.

Assuming that a notice requirement is imposed, SMC suggests that any required notice be provided in the SMC class rate tariff and to any shipper customer of a bureau carrier on a one-time basis. Midwest/PITB urge that any notice be provided only when an undiscounted class rate is quoted. Bureaus -- which have suggested that the notice be provided to new customers and in any publication (such as a tariff) that contains or references undiscounted collectively made class rates -- concur in the alternative options presented by the other rate bureau petitioners. The goal of each of these proposals is that if any notice may be required, such a notice should be provided in those circumstances when doing so might serve some legitimate purpose. For example, no purpose would be served by providing a notice each and every time a new rate is quoted to, or negotiated with, a long-standing customer who already receives a significant discount. Indeed, any such broad requirement would impose an undue, and pointless, burden on carriers.⁶

The other petitioner bureaus also agree that the loss-of-discount rule should be eliminated or modified. Bureaus concur in their arguments on this issue as well. Bureaus also concur in the proposal of SMC, consistent with their own proposal, that if a loss-of-discount rule is adopted, it be implemented through a broadly applicable rule set forth in the bureau's tariff,

⁶ There is certainly no basis on which the Board might apply a different condition on one bureau's immunity as opposed to another. Each bureau engages in collective ratemaking in essentially the same manner as each other bureau, and each publishes class rates. Further, the automatic discounts maintained by each bureau are not different in any meaningful respect. In this connection, it bears note (in contrast to the description of these discounts provided at footnote 13 of the November 20 Decision) that by its own terms the SMC automatic discount, like that of the Bureaus, does not apply if the shipper's traffic is already subject to negotiated

(Continued ...)

rather than by the more cumbersome means of individual carrier certifications. Publication of a tariff rule concerning loss-of-discount penalties, in fact, is more likely to provide notification to shippers of any restriction on such penalties that might become effective.

CONCLUSION

For all of the reasons offered in the petitions for reconsideration and in this reply, Bureaus submit that the Board should defer any imposition of a truth-in-rates rule and find that the existing automatic discount programs serve the remedial purpose sought to be achieved. The Board should also reconsider the loss-of-discount condition for the reasons articulated.

Respectfully submitted,



David H. Coburn
STEPTOE AND JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 429-8063

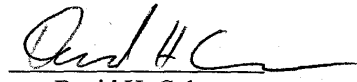
Attorney for Rate Bureaus

January 22, 2002

discount provisions. In other words, the SMC discount provision is no different than the automatic discount published by each of the Bureaus.

CERTIFICATE OF SERVICE

I hereby certify that I have this 22nd day of January 2002 served a copy of the foregoing
Reply Of Rate Bureaus To Petitions For Reconsideration upon all parties to this proceeding by
first class mail.


David H. Coburn

SERVICE LIST

Scott N. Stone
Patton Boggs, LLP
2550 M Street, N.W.
Washington, DC 20037

Nicholas J. DiMichael
Karyn A. Booth
Scott A. Harvey
Thompson Hine & Flory LLP
1900 N Street, N.W., Suite 800
Washington, DC 20036

George Carl Pezold
Augello, Pezold & Hirschmann, P.C.
120 Main Street
Huntington, NY 11743

Gordon P. MacDougall
1025 Connecticut Avenue, N.W.
Washington, DC 20036

Brian L. Troiano
Rea, Cross & Auchincloss
1707 L Street, N.W., Suite 570
Washington, DC 20036

John M. Cutler, Jr.
McCarthy, Sweeney & Harkaway, P.C.
2175 K Street, N.W., Suite 600
Washington, DC 20006

John R. Bagileo
Law Office of John R. Bagileo
1101 30th Street, N.W., Suite 300
Washington, DC 20007