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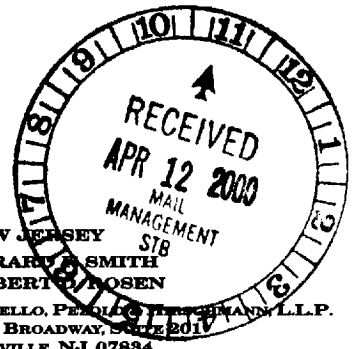
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April 11, 2000

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Surface Transportation Board
Office of the Secretary
Case Control Unit
1925 K Street, N.W.
Washington, DC 20423-0001

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Office of the Secretary

APR 12 2000

Part of
Public Record

Re: *Section 5a Application No. 61 (Sub-No. 6)*
National Classification Committee – Agreement

Section 5a Application No. 118 (Amendment No. 1), et al.
198067 → *EC-MAC Motor Carriers Service Association, Inc., et al.*

Dear Secretary:

This office represents The Transportation Consumer Protection Council, Inc. ("TCPC").

Enclosed herewith for filing in the above-referenced matters are the originals and ten copies of TCPC's Comments for each proceeding

Should you have any questions, please do not hesitate to contact this office.

Very truly yours,

George Carl Pezold

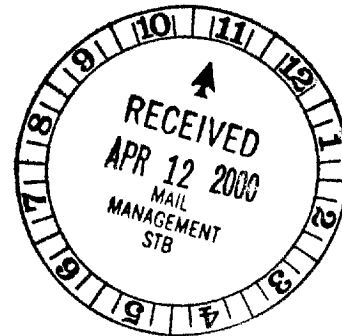
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BEFORE THE
SURFACE TRANSPORTATION BOARD



Section 5a Application No. 118 (Amendment No. 1), et al.

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

COMMENTS OF
THE TRANSPORTATION CONSUMER PROTECTION COUNCIL, INC.
REGARDING

RATE BUREAUS' ESTABLISHMENT OF COLLECTIVE RATES AT MARKET BASED
LEVELS

THE TRANSPORTATION CONSUMER
PROTECTION COUNCIL, INC.

by George Carl Pezold, General Counsel
William J. Augello, Executive Director

April 11, 2000

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The Transportation Consumer Protection Council, Inc. ("Council") respectfully submits its Comments in response to the Surface Transportation Board's request for comments regarding the Rate Bureaus' establishment of collective rates at market based levels.

The Council believes that the continued immunity granted to the Rate Bureaus must be conditioned on a reduction in class rates to prevailing levels of market based rates. Outlined below are the reasons this position and a suggested methodology to accomplish this goal.

WHY CLASS RATES SHOULD BE REDUCED TO MARKET BASED LEVELS

1. The Class Rates Are Unrealistically High

It is patently absurd to suggest that the full class rate levels maintained by the Rate Bureaus bear any relationship to reality. It is equally absurd to suggest that the STB (or its predecessor the ICC) does not know what is going on in the trucking industry.

As attorney David Coburn stated seven years ago, at page 6 of his "Comments of Georgia-Pacific Corporation in Response to March 31, 1993 Decision", (Docket No. 40265, Georgia-Pacific Corporation -- Petition for Declaratory Order -- Certain Rates and Practices of Oneida Motor Freight, Inc.):

. . . As the Commission has consistently recognized in recent years, class rates (collectively made or otherwise) have become merely a measure from which carriers peg their independently formulated discounts, and therefore do not normally reflect marketplace reality or define the upper limit of the zone or reasonableness. See Ex Parte No. MC-177 (Sub No. 2), Petitions for Issuance of Rate Reasonableness and Unreasonable Practices Policy Statement, 8 I.C.C.2d 61, 76 (1991) ("Rate Reasonableness") ("class rates of motor carriers . . . have lost their role as a standard of reasonableness"); Rules Governing Publication of Exceptions Ratings, 1 I.C.C. 2d 4 (1984). The size of price discounts -- which the Commission has found are as deep as 78% below class rates -- underscores the vast gulf that exists between carrier "list" prices (often the filed class rate sought to be collected in undercharge cases) and the rates that the free market has established (the negotiated rate in undercharge cases). E.g., Rate Investigation, 7 I.C.C.2d at 413 ("There can be no question that deep discounting is widespread in the LTL sector of the motor

carrier freight transportation industry."

The practice of discounting from inflated rate levels, which evolved after the Motor Carrier Act of 1980, is the root cause of the undercharge litigation, which has plagued the nation's shippers for the last fifteen years.

The Commission became directly involved in the undercharge crisis in the mid-1980's when thousands of shippers were sued for "undercharges" based on the filed class rate tariffs. During the years that followed, evidence of the discrepancy between the negotiated discount rates and the full bureau class rates was submitted in hundreds of undercharge cases and proceedings before the ICC.

For example, by 1991 (using 1980 as a base year), the Southern Motor Freight Tariff Association nominal LTL class rates had increased one hundred seventy percent (170%); yet in the same time period both the Producer Price Index and carrier revenues increased approximately thirty-eight percent (38%). (Source: Affidavit of Bruce Hocum in the case of Steve D. Thompson Trucking, Inc. v. Sweetheart Cup Corporation, February 2, 1991).

A more recent analysis by Athern Transportation Consultants shows that between 1980 and 1996, the class rate level for small LTL shipments had increased by some two hundred fifty (250%) percent, while the Producer Price Index increased only fifty (50%) percent.

When it became obvious that the filed rates did not reflect the actual rates negotiated in the market place, the ICC established its negotiated rates policy, NITL -- Petition to Institute Rule on Negotiated Motor Car., 3 I.C.C.2d 99 (1986). Following the infamous decision in Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116 (1990), the ICC redefined the criteria for challenging the reasonableness of the full class rates in undercharge cases, recognizing a "market based cluster of rates" as the test of a reasonable rate level, Georgia Pacific Corporation --

Petition for Declaratory Order -- Certain Rates and Practices of Oneida Motor Freight, Inc., 9 I.C.C.2d 103 (1992).

Congress, too, was well aware of the problem. Following a four-year effort by shippers to obtain relief, the Negotiated Rates Act of 1993 was passed, see Doing Business Under the New Transportation Law: The Negotiated Rates Act of 1993, by William J. Augello (TCPC 1994). Unfortunately, this legislation only attempted to provide relief for the symptoms, and failed to address the cause.

Subsequent legislation, the Trucking Industry Regulatory Reform Act of 1994 ("TIRRA"), Pub. L. No. 103-311 (Aug. 26, 1994) and the ICC Termination Act of 1995 ("ICCTA"), Pub. L. No. 104-88 (Dec. 29, 1995) attempted to eliminate the vestiges of the "filed rate doctrine", in the belief that this would preclude future undercharge claims and litigation.

Of course, neither the NRA, TIRRA nor ICCTA completely eliminated the undercharge problem. The latest variety of undercharge lawsuits and claims (e.g., Humboldt Express, FMEC Accounts Liquidation/Fredrickson Motor Express, Atlanta Motor Lines, Inc., Goggin Truck Line Co., Inc., and Nu-Trans Companies, Inc.) involve the loss of discounts as a penalty for alleged late payment of freight bills. This vicious practice shows no signs of abetting.

But for the practice of charging one rate, and maintaining a fictitious and inflated "list price" in the class rate tariffs, none of this undercharge litigation would have taken place. The undercharge fiasco will finally end if rates are returned to a market driven level. The Board should prescribe a cost based maximum penalty of 1 ½ % per month in lieu of the "loss-of-discount" penalty found in many carrier's tariffs today.

2. Who Is Hurt By The Practice Of Maintaining Unreasonably High Class Rate Levels?

The Board focused on protecting "vulnerable" shippers, the implication being that small, unsophisticated shippers are the most likely to pay undiscounted class rates. While it is most certainly true that small or occasional shippers are the ones who usually are hit with full class rates, even large companies with traffic departments can have undiscounted bills that slip through. This can be due to inadvertence or clerical error, a consignee's return of a shipment via a carrier with whom the shipper has no discount agreement, discounts which have expired, entry of the wrong carrier code, interlining with a carrier with whom the shipper does not have a discount, etc. Exhibits returned from conventions and trade shows are often charged at full class rates when the trade show agents ignore routing instructions and make arrangements with carriers that pay them "commissions".

Diane Hathaway of Industrial Traffic Consultants, Inc. recently found from ITC's pre-audit of bills that an average of 9.54% of all bills were "undiscounted", i.e., where clients paid full class rates for freight movements. The study found that the numbers varied widely: some clients, even large companies, had large segments of undiscounted bills, while sometimes the smaller-volume shippers were more in control and rarely paid undiscounted freight pricing.

Whether shippers are large or small, the maintenance of the present level of class rates can only be called "a trap for the unwary". Maintaining the present class rates, which are no more than inflated "list prices" is like the rug merchant who marks up his inventory before the big sale. It is inherently unethical, if not fraudulent.

There is another good reason for reducing the "benchmark" rates to market levels. The application of general rate increases over the years, because of the compounding effect,

magnifies errors in the classification of articles. Small distortions become big dollars on the freight bill.

Perhaps the most widespread situation wherein shippers face paying undiscounted class rates results from carriers' use of loss of discount tariff provisions as mentioned above. Carriers are allowed to impose a loss of discount provisions in their tariffs pursuant to 49 C.F.R 377. Because class rates are so unrealistically high, they result in discounts commonly exceeding 50%. If this deep discount is lost when a freight bill is not timely paid, the resulting additional charge will more than double the freight charges. When the class rates are reduced to market based levels, the resulting loss of discount tariff penalties would not be so egregious.

SUGGESTED METHODOLOGY

When pressed to devise a test of rate reasonableness during the height of the undercharge fiasco, the Commission looked to the "market based cluster of rates" as the test of a reasonable rate level, Georgia Pacific Corporation -- Petition for Declaratory Order -- Certain Rates and Practices of Oneida Motor Freight, Inc., 9 I.C.C.2d 103 (1992). The Council suggests that this same methodology be applied to the existing rates to determine what a reasonable "market based" class rate would be.

This should not be difficult to accomplish. A statistical analysis of the market based cluster of rates for various traffic lanes could be conducted to determine a correction factor that could then be applied to the existing class rates to reduce them to the market level. Then, periodically thereafter the process should be conducted again to review the class rates and revise them as necessary to keep them at the then market based level. Insofar as the Rate Bureaus have no problem

applying “general rate increases” to the class rates, they should have no problem applying a general rate reduction to the class rates in order to reduce them to market based levels.

RESPONSE TO RATE BUREAU OBJECTIONS

It should be noted that there is no affirmative reason that class rates need to be maintained at the current unrealistically high levels. The reasons against reducing the class rates as outlined by attorney David H. Coburn in his December 15, 1999 letter to the Board on behalf of the Rate Bureaus are all negative. On page 5 of this letter Mr. Coburn raises the specter of the “innumerable number of negotiated rate agreements pegged to a given class rate level [that] would have to be re-drawn were benchmark rates required to be rolled back, at a huge cost in resources and confusion to the transportation community, shippers and carriers alike.” While there are numerous rate agreements pegged to class rate levels, they would not have to be re-drawn when class rates were revised; rather the parties could, and should, make the revisions upon the renewal anniversary of the agreement when the terms of the agreement would normally be revisited anyway.

Additionally, it appears disingenuous to argue that a general rate reduction would cause such a calamitous disruption to shippers and carriers when the Rate Bureaus have no problem implementing “general rate increases” on a regular basis. Why should it be any more difficult to reduce class rates than to increase them?

The other objection to the Board’s proposals Mr. Coburn raises on page 5 of his letter is that “any proceeding instituted for the purpose of rolling back class rate levels would inevitably prove controversial and absorb a substantial amount of regulatory resources.” This is a red-herring as it is the maintenance of these artificially high class rates that has, and continues to, absorb

resources. The huge public and private cost of the undercharge debacle is a direct result of the practice of extensive discounting from these artificially high class rates created and maintained by the Rate Bureaus. If there is no affirmative reason to maintain class rates at these levels, there should be no controversy in reducing them to market based levels.

Finally, Mr. Coburn's suggestion that there is no longer any reason to reduce class rates to market based levels because the Rate Bureaus have implemented across-the board 35% discounts for all shippers that do not otherwise have another discount in place for their traffic begs the question. First, this action by the Rate Bureaus only goes to show that the Rate Bureaus know that the class rates are at least 35% too high. Second, providing an across-the-board 35% discount does not resolve the most egregious problems associated with the maintenance of unrealistically high class rates, such as the absurd results when carriers' loss of discount tariff provisions are applied to payments made beyond the prescribed credit period

CONCLUSION

In conclusion, the Council believes that the cornerstone of American business is honesty and fairness. A system that invites misrepresentation and takes advantage of unsophisticated shippers should be corrected. There simply is no reason to justify the maintenance of these arbitrarily high class rates while their continued use can only lead to harm. It should be understood that immunity to antitrust laws is conditioned upon the public interest and public benefit. Maintaining class rates at unrealistically high levels is simply not in the public interest, and rather than provide a public benefit, it causes harm.

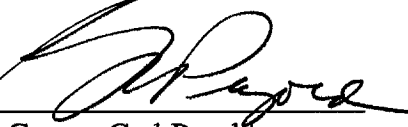
A statistical analysis of the market based cluster of rates for various traffic lanes could be conducted to determine a correction factor that could then be applied to the existing class rates to reduce them to the market level. It should be observed that equalizing the "benchmark" rates with the actual rate levels prevailing in the market would not prejudice carriers. Carriers would still be free to give reasonable cost-based discounts related to volume, or allowances related to services actually provided by shippers. Carriers would still be free to charge for accessorial services when extra services are requested, or to charge arbitraries on shipments that are more difficult or expensive to serve.

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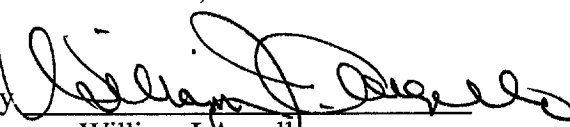
Respectfully submitted:

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