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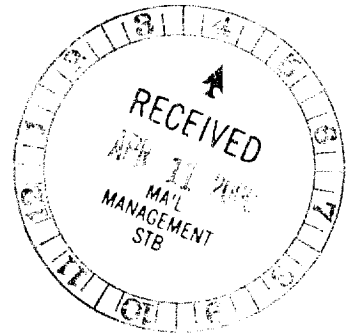
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April 11, 2000



VIA HAND DELIVERY

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

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

Comments of EC-MAC Motor Carriers Service Association, Inc.; Niagara
Frontier Tariff Bureau, Inc.; and Rocky Mountain Tariff Bureau, Inc.

Dear Secretary Williams:

Enclosed for filing in the above referenced docket please find the original and ten copies
of the Comments of the rate bureaus identified above. Also enclosed please find a disk
containing a copy of the Comments in Word Perfect format.

Any questions concerning these Comments should be directed to the undersigned.

Sincerely,

A handwritten signature in cursive script, appearing to read "David H. Coburn".

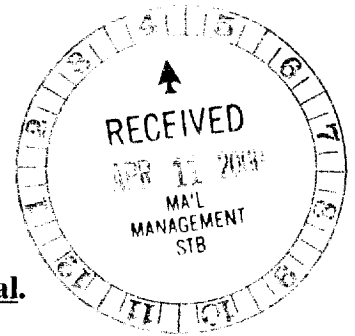
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Attorney for EC-MAC Motor Carriers
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Tariff Bureau, Inc.

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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.

COMMENTS OF RATE BUREAUS¹

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April 11, 2000

¹ These comments are filed on behalf of the following rate bureaus: 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.

COMMENTS OF RATE BUREAUS¹

The three motor carrier rate bureaus listed in the margin (“Bureaus”) hereby submit these initial comments in response to the Board’s February 11, 2000 decision requesting comments on “suggested methodologies that the motor carrier rate bureaus that have applied for renewal of their operating authority can use to adjust collective rates established by their bureaus to prevailing levels of market based rates,” as required by prior Board decisions issued on December 18, 1998 and February 11, 2000 in *EC-MAC Motor Carriers Service Association, Inc. et al., Section 5a Application No. 118 (Amendment No. 1) et al. (“EC-MAC I”)*.

¹ These comments are filed on behalf of the following rate bureaus: 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).

A. INTRODUCTION AND SUMMARY OF POSITION

The *EC-MAC I* proceeding was instituted in 1997 in anticipation that, based on the terms of section 13703(c) as the statute then provided, the Board would act by the end of 1998 on applications for renewal of collective ratemaking agreements, prior to the expiration of the approval of those agreements under the three year term set by the former terms of section 13703. In its December 1998 decision in *EC-MAC I*, the Board concluded, subject to the expression of Congressional views, that it would approve ratemaking agreements “only if all existing class rates are amended to reflect market-based rates.” December 1998 Decision at 8. The Board based its decision on a generalized concern that there may be some relatively unsophisticated shippers, none of whom participated in the proceeding or were identified, who are paying benchmark bureau-published class rate levels, which the Board concluded (without any specific evidence or rate analysis) may be above market rate levels. The Board offered no specific means of accomplishing the goal of a reduction in the benchmark rates, opting instead to delay further consideration of the issue pending possible Congressional action on these matters. *Id.*

Since that time, there have been two important developments. First, since the December 1998 Decision in *EC-MAC I*, each of the Bureaus (and at least three other major rate bureaus) has adopted a broadly applicable 35% discount to its class rates. These broadly applicable discounts, which the Bureaus initially established in November 1999, apply for the benefit of shippers that have no other discount from bureau published tariffs. They constitute a full and appropriate response to the Board’s concern about the level of collectively made class rates, obviating any need for the Board to go forward

here, even if there were a legitimate basis for concern about the level of undiscounted benchmark rates.

Second, Congress adopted the Motor Carrier Safety Improvement Act of 1999 (“Safety Act”).² As relevant here, section 227 of that statute repealed the rate bureau agreement expiration/renewal provision of section 13703(c) on which the *EC-MAC I* proceeding was based. As revised, the statute now provides that the Board shall review bureau agreements every five years, beginning during the five year period measured from the date of enactment of the Safety Act, *i.e.*, December 9, 1999. *See* 49 U.S.C. § 13703(c)(2), as revised by section 227(a)(2) of the Safety Act. The Safety Act underscores that it would be inappropriate for the Board to move forward with this proceeding at this time, rather than await the outcome of the five year review that the statute requires to determine if any action may be warranted. Moreover, Bureaus submit that the Board lacks regulatory authority to require a broad adjustment of motor carrier rates of the type that some groups of major shippers may urge it to adopt in this proceeding.

The Bureaus submit, as they have throughout the course of *EC-MAC I*, that the class rates maintained by the Bureaus are subject to market forces and fall within the same cluster of market-based class rates maintained by major non-bureau carriers, obviating any need to develop a methodology of the type on which comments are sought in this proceeding. Accordingly, before addressing the general discounts and the Board’s proper role here, the Bureaus will demonstrate that the predicate on which this proceeding is based – the generalized notion that collective ratemaking produces rates

² Public Law No. 106-159 (Dec. 9, 1999).

that are above market levels – has no basis in fact and therefore that no Board effort to adjust the level of collectively made rates is warranted.

B. THE EXISTING LEVEL OF BUREAU CLASS RATES IS MARKET RESPONSIVE

1. There is No Single “Going Rate Level”

The Board’s February 2000 Decision in *EC-MAC I* states that the Board is not foreclosing any bureau “from demonstrating that the undiscounted bureau rates do in fact reflect the going rate levels in a competitive market.” February 2000 Decision at 7. The Board does not define the term “going rate level.” Nor does the Board define the presumably similar term “prevailing levels of market based rates” used in its order instituting this proceeding.

In the context of a market in which there is a broad range of competitive rates paid by shippers of all types and sizes, and a wide range of price/service options, the terms “going rate level” and “prevailing levels of market rates” cannot be defined in terms of any single rate or rate level. Rather, rates for any particular shipment of any specific commodity can vary substantially based on a variety of factors, such as whether either or both the origin or destination are remote points; whether the shipment is a one-time event versus part of a repetitive volume movement; whether the shipper is located in a congested urban area; whether the shipment requires special handling or other services; whether it is a single shipment tender or it is tendered along with one or more other shipments; whether the shipper or consignee have sub-par, adequate, or excellent dock facilities; whether the shipment requires manual versus mechanical handling (palletized versus loose pieces); whether there is intermodal competition for the shipment; the extent to which other carriers, including major carriers like UPS or Federal Express that have

increasingly penetrated the LTL market, are interested in the shipment; etc. It is these and similar shipment characteristics, and the resulting degree to which the traffic attracts more or less competition, that in part determine the level of rates (discounts) that any particular carrier -- bureau member or otherwise -- is prepared to offer.

The other part of the equation is the size of the shipper and its marketplace power in negotiating transportation rates. To state the obvious, General Motors and other volume shippers do not pay the same per hundred weight rate for transporting hundreds of tons of widgets on a daily or regular basis as does an occasional shipper of small quantities of those same widgets, just as Wal-Mart does not pay the same price for commodities that it buys in large volumes as does a local retailer with a single store.

It is the wide variability of all of these factors and others that results in the broad range of possible rates that might apply on any particular traffic. The Board nonetheless appears to take issue with the proposition that rates will vary based on the characteristics of the traffic, contending in its February 2000 Decision in *EC-MAC I* that the classification system is designed to account for differences in transportation characteristics. The Board posits that if two articles have the same class rates they “ought to have the same transportation characteristics, and a decision to discount one but not the other would have to be based on something other than transportation characteristics.”³

The classification system accounts for inherent freight characteristics and groups commodities based on those characteristics, *i.e.*, value, density, packaging and in some cases special handling characteristics (flag poles as opposed to boxes). Where commodities have like characteristics, they are assigned similar classes. By contrast,

³ See February 2000 Decision at 6, fn. 11.

rates come into play when carriers estimate their costs, the impact of competition and a variety of other factors such as those identified above that the classification process does not take into account, including the volume nature of the shipment(s); quality of loading dock facilities; balance of traffic in the particular traffic lane; and the like. Thus, what classification does not do (and what ratemaking does) is determine whether any particular shipment is compensatory to the carrier (or not) based on competition-related and other factors such as those identified above.

The Interstate Commerce Commission correctly recognized that rates will vary within a range depending on a variety of external factors, unrelated to the classification of the particular commodity. *See Georgia-Pacific Corp. – Petition for Declaratory Order – Certain Rates and Practices of Oneida Motor Freight, Inc.* 9 I.C.C.2d 103, aff’d 9 I.C.C.2d 796 (1993) (“*Georgia-Pacific*”). In that case, the ICC listed a variety of factors that will influence what a carrier will charge and a shipper will pay for transportation services. For carriers, these factors include the perception of inter- or intramodal competition for the move; level of competitive pressure; availability of capacity; timing; expectations with regard to longevity of the relationship with the shipper; need for special equipment; and express versus standard service. 9 I.C.C.2d at 159. For the shipper, these factors include expected volume; delivery deadlines; regularity of delivery; frequency of service; provision of loading and unloading services; the available pool of competing carriers and advertising. *Id.* The ICC recognized that “shippers with similar movement requirements may frequently and willingly pay different rates” and that “for specific movements, there will likely not be a single ‘market

rate,’ but a cluster of prices and associated services that might have been chosen for that movement.” 9 I.C.C.2d at 159-160.

The factors that the ICC identified in *Georgia-Pacific* and other factors that influence the competitiveness of any particular traffic account for the variability of rates available on any specific set of shipments, including those within the same class. In other words, these factors account for the fact that some traffic will benefit from much larger discounts than other traffic. Accordingly, the proposition that all similarly-classed commodities should or do move at the same rate level does not account for the influence of those market forces that have caused there to be a range of possible rates and discounts for any particular traffic. *See also Investigation of Motor Carrier Collective Practices*, 7 I.C.C.2d 388, 420-422 (1991) (discussing substantial discounting that characterizes the less-than-truckload sector of the trucking market).

2. The Bureau Class Rates Fall Within the Range of Market Rates

In the context of this proceeding, the relevant inquiry is whether the class rates maintained by the rate bureaus fall within the “going” or “prevailing” range or cluster of rates charged and paid in the marketplace. Central to this inquiry is the fact that Bureau carriers maintain collectively made class rates that are generally similar to those maintained by individual carriers that publish their own benchmark rates, including major carriers that operate nationwide. The carriers that participate in collective ratemaking daily compete with these other carriers and thus their rates, including the benchmark rates that are used as a basis for discounting, must of necessity be at levels that are dictated by the market. By that measure, the Bureau benchmark rates are set at the “going” or “prevailing” market level to no different degree than the individual (non collectively

made) carrier benchmark rates. *See also* January 22, 1999 Verified Statement of Dr. Irwin H. Silberman, submitted with January 27, 1999 Petition for Reconsideration of Rate Bureaus in *EC-MAC I* ("Silberman Statement") at 3-4.

In short, Bureau carriers, and the collective ratemaking process, are not insulated from the market, but of necessity very much responsive to it. Whatever the false perception that some might have that carriers conspire through rate bureaus to raise rates so that they can extract unusual profits from shippers, the reality is that bureau carriers in the current deregulated market actively compete with the much larger and more economically powerful carriers that form the majority of the universe of LTL carriers and that publish their own class rates. It follows that bureau carriers would maintain comparable class rates and comparable discounts as a matter of rational competitive business judgment. *See* Silberman Statement at 5-6. The smaller carriers that continue to participate in collective ratemaking do so not to raise rates to above-market levels -- such a strategy would quickly ensure their demise -- but primarily to attain the benefits of a common set of joint rates that they need to compete with larger, non-bureau carriers that are less reliant on joint rates. Far from insulating carriers from the free market or producing above-market rates, the antitrust immunity allows bureau carriers an opportunity to efficiently participate in the free market and thereby enhances the competitive options available to shippers.⁴

⁴ The suggestion that carriers are incentivized to participate in collective ratemaking so that they can impose undiscounted class rates on unsuspecting shippers is far off the mark for many reasons, but wholly disproved by the fact that carriers that publish their own class rates outside of the bureau process maintain similar and in some cases higher class rates.

Moreover, the dominant, largely non-bureau carriers that exert price leadership in the LTL market have responded to the marketplace demand that they maintain the same basic pricing structure that has characterized the trucking industry since the advent of deregulation. It is because of market demand -- not collective ratemaking -- that both bureau and non-bureau carriers continue to maintain a generally similar level of base or benchmark class rates from which discounts are negotiated. The proposition that some shippers must be protected from these benchmark rates by Board action directed solely at the smaller segment of bureau carriers is thus faulty not only because pre-discounted bureau carrier benchmark rates are no higher than carrier-published benchmark rates, but also because the very pricing structure that utilizes a combination of benchmark rates and discounts from those rates pervades the entire LTL carrier market, not just the segment composed of bureau carriers.⁵

In assessing whether the class rates established by rate bureaus are at market levels or not, the Board should not only consider the general similarity in class rate levels and pricing systems maintained by Bureaus and by major carriers operating outside of rate bureaus, but also whether those benchmark class rates (or the similar carrier-published class rates) actually move any traffic. As to that latter question, the Board has already determined that such rates do move traffic, having already concluded in

⁵ The use of a benchmark or list price in the pricing of LTL services is not essentially different from similar pricing mechanisms in other sectors of the economy, such as jewelry and airline seats, both of which usually carry a base price that relatively few consumers pay due to pervasive heavy discounting. When a consumer does pay the full price, however, it is generally because of the special circumstances, a situation that is no different in trucking. Since competition dictates that trucking benchmark prices are unlikely to be very different as between bureau carriers and carriers that publish their own class rates, there is no special reason for Board concern here.

EC-MAC I that traffic does move at the undiscounted class rate levels. *See* December 1998 Decision at 6-7; February 2000 Decision at 6.

While the record in *EC-MAC I* is notably devoid of any evidence concerning the movement of traffic at undiscounted Bureau class rates, to the extent any traffic moves at those undiscounted levels -- and of course such levels are now subject to a 35% discount -- it follows that such rate levels are, for that traffic, the appropriate “prevailing” rates set by the market.⁶ This of course is not to suggest that such rate levels would be market-based for every shipper or set of shipments. As shown above, much traffic moves under substantial discounts, while other traffic moves at lesser discounts. For an occasional shipper whose traffic is relatively non-competitive for any number of reasons, undiscounted or lightly discounted class rates may be the rates that the market dictates – regardless of whether the carrier applies a bureau-published or non-bureau rate. (Of course, such a shipper could now receive a 35% discount from a bureau carrier to the extent that it had none before.)

Further, the Board should not overlook the fact that shipper access to information on motor carrier rates has been greatly enhanced by the Internet, and specifically by the quickly increasing number of new Web sites that establish a virtual business-to-business marketplace for motor carrier services. *See, e.g.*, Gocargo.com; NTE.net; e-Center.com; Freightquote.com and Transplace.com.⁷ In addition to these and like Web sites, the

⁶ There is no record evidence in *EC-MAC I* as to how much traffic moves at undiscounted class rates, but not even the shipper groups that have sought this proceeding have argued that either their members (who are, ironically, the larger shippers getting the largest discounts) or other shippers regularly pay undiscounted rates or that any significant volumes of traffic regularly move at such levels.

⁷ For a discussion of the development and growth of on-line transportation exchanges, see Transport Topics, April 3, 2000 at 15-16.

proliferation of freight brokers and other third party intermediaries virtually ensures that even the smallest shipper can readily attain market information. The broad availability of rate information on the Internet and through third parties and other means should put to rest the contention that government action is needed to protect shippers who might not have sufficient information to make informed decisions about the competitive marketplace for truck services.

For all of these reasons, any concern about the potential application of a class rate that the Board has described as “governmentally-sanctioned” merits revisiting.⁸ Since the bureau class rates are no less tempered by market forces than are the similar (or even higher) rates of carriers that publish their own class rates, the need for the Board to “protect” any class of shippers is ameliorated. In this regard, there is no evidence that shippers that deal with small, bureau-member carriers are any more likely to pay benchmark class rates than are shippers that deal with much larger non-bureau carriers – and in fact shippers that deal with Bureau carriers can benefit from the general discount that has been put in place. Therefore, if “prevailing” rates are identified with reference to the range of available rates that the market has designed, then the bureau class rates are well within that range. And any traffic which may pay such rates would do so only because that is what the market (as evidenced by the similar non-bureau class rates) has dictated for that traffic. As shown next, Bureaus have taken steps in any event to establish a discount for even the most non-competitive traffic moving at collectively made rates published by Bureaus.

⁸ The Board of course does not approve any specific collectively made rate; it is the market which influences those rates.

B. The General Discounts Address the Board's Concerns

That the current level of bureau class rates is no higher than the market level of benchmark rates established outside the collective ratemaking system should be the end of the Board's inquiry. Bureaus recognize, however, that the Board has expressed concern about collectively made class rate levels, and accordingly the Bureaus have responded, as discussed below.

Whereas in the non-collectively made sector carriers charge undiscounted class rates because of the characteristics of the traffic, in the rate bureau environment the Bureaus have established a general discount of 35% for the benefit of shippers that have not negotiated their own discounts from the class rates published by each Bureau or who otherwise do not benefit from any special rates. Unless a shipper has negotiated a different discount level with a particular carrier (and there is no dispute from any quarter that virtually all traffic moves at negotiated discounts), bureau rates will be discounted 35% on the traffic of any shipper. This 35% discount is, Bureaus submit, a full and adequate response to the concern that has been expressed about shippers paying undiscounted rates forged through the collective process (even though Bureaus have shown that these are at the same levels as carrier rates established independently).

The Board acknowledges in its February 2000 Decision that an automatic discount to a market level of rates "might be one way to address the concerns" it has raised about undiscounted class rate levels. February 2000 Decision at 7. It also acknowledges that such discounts "would minimize the disruptions" that Bureaus explained in *EC-MAC-I* would result from a general rollback in rates. February 2000 Decision at n. 16. At the same time, the Board has raised three questions about the

Bureaus' 35% and similar general discounts established by several other rate bureaus.

These are addressed next.

**1. The General Discounts Do Not
Override Negotiated Discounts**

First, the Board appears to express some concern that the general discounts would not apply on traffic that is subject to some other discount or special rate program.

Bureaus submit that this is not a problem warranting Board concern or intervention. To the extent that a shipper benefits from some discount other than 35%, the precise level of that discount in all cases reflects a free market negotiation between the shipper and carrier undertaken in the context of the factors that determine the attractiveness and competitiveness of traffic. To the extent that the shipper might have agreed to a discount less than the 35% level, the shipper's traffic is likely to have characteristics that require special carrier handling or that result in greater cost for the carrier than other traffic.

Also, in some circumstances carriers and shippers agree that the carrier will provide special services (such as just-on-time scheduling, nighttime delivery services, lift-gate services) for the shipper at a price that is measured in a discount lower than that which might otherwise apply but for those special services. For the Board to determine that shippers that are paying agreed discounted rates have not obtained a sufficient discount -- and should instead get a discount at some different level fixed by regulators -- is entirely beyond the bounds of both sound policy and the Board's authority.

The trucking market is not one in which carriers are able to dictate rate levels to shippers -- and no party to the *EC-MAC I* proceeding has suggested or demonstrated otherwise. While some shippers have more market clout than others, there is no question that virtually all shippers have the ability to choose among competing carriers. In these

circumstances, once the Board is satisfied that the shippers it is attempting to protect (*i.e.*, those shippers that might not have access to good marketplace information or be aware of competitive options) will be “protected” against the payment of bureau-made benchmark class rates by the general discount, its role should be at an end. For the Board to go further and mandate an automatic minimum discount on all traffic would serve only to provide those shippers whose traffic would not be compensatory at a larger discount with a windfall.⁹

Such a result would not only work an unwarranted economic advantage for shippers of relatively unattractive freight, but would conversely cause economic problems and uncertainty for the primarily smaller carriers that participate in bureaus. Such carriers reasonably assumed that they would continue to achieve compensatory revenues based on the deals that they have negotiated. Were it to override those deals, the Board would effectively deprive those carriers of the benefit of their bargains and require these carriers to accept less revenue than the market has dictated. The likely result is that carriers would choose not to handle less attractive traffic at all, rather than transport it at a loss. Shippers would lose service, carriers would lose revenues and the public will have gained nothing.

Moreover, the Board lacks authority to mandate that carriers adopt any particular rate level or offer any particular discount, as discussed further below. Thus, the Board would far exceed its very limited rate regulatory role were it to substitute its judgment for

⁹ Moreover, there is no evidence in the record of *EC-MAC I* that there are shippers that need Board protection, and all of the available facts regarding the competitiveness of the market suggest otherwise.

that of the marketplace and effectively prescribe a minimum discount level for any traffic.¹⁰

2. The 35% Discount Level is Appropriate

The Board also raises a question as to the sufficiency of the 35% discount, inquiring as to whether this level of discount will bring rates down to a market level. February 2000 Decision at 7, fn. 18. As shown above, (a) there is no single market level and (b) the undiscounted Bureau rates fall in the same general range as the benchmark rates of non-bureau carriers. Clearly then, a 35% discount from those non-collectively and collectively determined benchmark rates will yield rate levels that are roughly equivalent and net rates that are within the range of rates found in the marketplace.

While 35% is not the largest discount offered, it is not the smallest either. Instead, it is a level of discount well within the range of the discounts commonly offered in the marketplace today, and a significant volume of traffic today carries a 35% discount. Under the rate reasonableness standards set forth in *Georgia-Pacific*, rates that are discounted 35% from current bureau rates are thus reasonable because such rates “are indicative of levels at which a shipper was willing to ship and a carrier was willing to transport” a significant volume of traffic. *Georgia-Pacific*, 9 I.C.C.2d at 156.

Importantly, the National Small Shipments Traffic Conference, Inc. (“NASSTRAC”) and The Health and Personal Care Distribution Conference, Inc., (“HPCDC”) which had jointly protested the initial General Rate Increases published by

¹⁰ Such an intrusion into the market would also be inconsistent with the National Transportation Policy goals of promoting a variety of price/service options, enabling well-managed carriers to earn adequate profits, and encouraging fair competition. See 49 U.S.C. § 13101(a)(2)(A), (D) and (F).

each of the Bureaus, opted not to protest an October 1999 general rate increase proposed by the Pacific Inland Tariff Bureau when, in the exercise of the business judgment of its carriers, that bureau established a 35% discount from its class rates. Nor did those Conferences choose to protest a general rate increase proposed by the Southern Motor Carriers Rate Conference which was coupled with a similar 20% general discount. Those same shipper Conferences also did not protest the re-established GRI's of the Bureaus after each of the Bureaus also established a 35% general discount following the suspension of their initial GRI's.¹¹

3. The General Discount Approach Does Not Enhance the Risk of Undercharge Claims

The Board also expresses concern that the 35% and like discounts could be revoked "if a carrier or a bankrupt carrier's estate considered payment to be untimely." February 2000 Decision at 7, fn. 17. Bureaus, however, do not maintain late payment penalties in any of their collectively made tariffs. While some carriers may do so in their own tariffs, this is not a matter over which the Board can exercise effective remedial authority through this or any other proceeding. For example, any action that the Board might take to adjust collectively made rates would not impair the ability of any individual carrier, bureau member or otherwise, from maintaining a late payment penalty provision that contemplates the imposition of any past or current collectively made or individually made class rate in the event of late payment, including a rate that reflects no discount of any kind. Moreover, a shipper faced with a late payment penalty may, whether that

¹¹ See October 8, 1999 Letter submitted by Bureaus in I & S M-35006, advising the Board that the protesting Conferences did not intend to protest the re-filed GRI's, provided that the Bureaus also published general discounts, and without prejudice to any further views of the Conferences on these matters.

penalty is based on a bureau or non-bureau rate, always challenge the reasonableness of the rate sought to be collected, among other defenses that may be available in the circumstances. *See* 49 U.S.C. §§ 13701 (imposing a reasonableness requirement for collectively made rates); 13710(a)(2) (authorizing Board to adjudicate reasonableness complaints); 14701(a) (allowing complaints to be filed).

In short, the late payment issue is not a collective ratemaking issue. To the extent that late payment penalties are a concern to shippers, that concern is best addressed in a different proceeding in which the appropriate regulatory body might consider the reasonableness of loss of discount penalties established by motor carriers in their own tariffs/terms and conditions of transportation.¹²

Further, the Board has offered the undercharge crisis as a basis for concern over the level of class rates, noting that the estates of bankrupt carriers “sought and collected millions of dollars on the basis of the class rate structure.” February 2000 Decision at 6. In fact, the vast majority of these undercharge cases involved efforts to collect non-bureau class rates, and collective ratemaking was in no way implicated in those cases.¹³

More importantly, however, Congress has already provided a complete defense to any undercharge claim based on collectively made rates. *See* 49 U.S.C. Section

¹² That regulatory body appears to be the Federal Motor Carrier Safety Administration, which now has jurisdiction over motor carrier credit rules and policies. *See* 49 CFR Part 377.

¹³ *See, e.g., Delta Traffic Service, Inc., Assignee of RTC Transportation, Inc. — Petition for Declaratory Order*, No. MC-C-30150, 1990 CCH ¶37,774 (Oct. 17, 1989); *Sewell Plastics, Inc. v. Highway Express, Inc.*, No. MC-C-30027, 1995 CCH ¶38, 183 (March 6, 1995); *General Mills, Inc. — Petition for Declaratory Order — Certain Rates and Practices of Tobler Transfer, Inc.* No. MC-C-30095, 1995 CCH ¶38,199 (Feb. 24, 1995) (each involving efforts to collect rates published by an individual carrier). Plainly, rate bureaus and bureau rates are not to blame for the now-abated undercharge crisis.

13703(f)(1), which provides that, “Nothing in this section [addressing rate bureaus] shall serve as a basis for any undercharge claim.” Thus, apart from the full range of negotiated rate defenses generally available to shippers under other provisions of the statute, shippers that use carriers that rely on bureau class rates have the additional and complete defense that such rates cannot be used as the basis for an undercharge claim. For this additional reason, the Board should conclude that the discounts that are now in place address the concerns it has raised.

C. The Board’s Jurisdiction Over Motor Carrier Rates is Very Limited

As the Board has acknowledged, “[f]or motor carriers in general, [Congress] did not confer on the Board any authority to determine, through rulemakings, adjudications, or otherwise, either the circumstances entitling a party to a discount or the propriety of particular practices [relating to motor carrier billing].”¹⁴ Far from vesting the Board with any broad rate regulatory authority, the only explicit rate regulatory power that Congress gave the Board in the collective ratemaking section of the statute (section 13703) is the power to “suspend and investigate the reasonableness of any rate, rule, classification or rate adjustment of general application made pursuant to an agreement under this section.” 49 U.S.C. § 13703(a)(5)(A). This authority is an adjunct to the statutory requirement, set forth in section 13701(a), that rates established through the collective ratemaking process be reasonable, and to the related and narrow authority vested in the Board to prescribe a

¹⁴ See Ex Parte No. MC-180 (Sub No. 3), *Regulations Implementing Section 7 of the Negotiated Rates Act of 1993* (served Feb. 25, 1997) at 6.

rate when necessary to stop a violation of the reasonableness requirement. See 49 U.S.C. § 13701(b).¹⁵

While there is no question that the Board can assess rate reasonableness by exercising its authority with respect to any particular rate that may be established through the collective ratemaking process, this is not tantamount to authority to broadly adjust or prescribe rate levels on thousands of existing rates, as some might request of the Board. The Board in fact explicitly did not determine in *EC-MAC I* -- and there is no basis on which it rationally could determine -- that all of the existing Bureau class rates are unreasonable, a necessary precondition for the exercise of its limited powers.¹⁶

The Board cannot rely on its more general authority to condition collective ratemaking agreements or to investigate actions not in the public interest as a basis for an order requiring that rates be reduced. See 49 U.S.C. §§ 13703(a)(3), (5)(B). To so apply these more general grants of authority would effectively re-write the statute so as to allow the Board much greater authority over rate levels than was contemplated by the statute's drafters. Whereas Congress required that collectively made rates be reasonable and gave the Board appropriate authority to enforce this requirement as to any particular rate, the Board cannot now impose an altogether different requirement that entire groups of class rates not exceed some "going" level even where such rates have not been found unreasonable. See *Burlington Northern Railroad Company v. Surface Transportation Board*, 78 F.3d 685, 693-696 (reversing ICC decision concerning railroad rate

¹⁵ The Board can also consider whether collectively made rates are reasonable on complaint or its own motion. See 49 U.S.C. § 14701(a).

¹⁶ In its December 1998 Decision in *EC-MAC I*, the Board expressly stated that it was "not here declaring any particular rate unreasonably high." *EC-MAC I* at 7, fn. 20.

requirement upon finding that ICC's authority was "extremely limited" and that ICC's action constituted "an end-run around the statutory scheme.") If the Board could adjust all collectively made rate levels merely on the basis of generalized concerns, why would Congress have limited the Board's rate authority to addressing rate reasonableness concerns through the suspension and investigation process? The plain answer is that the statute does not contemplate that the Board can utilize its authority over the collective ratemaking process as a basis to exercise broad authority over all the rates that are the product of that process. *See ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988) (agency may not exercise its authority "in a manner that is inconsistent with the administrative structure that Congress enacted into law.").

Not only does the Board lack broad rate regulation/prescription authority, but recent Congressional action strongly counsels against the imposition of any broad new collective ratemaking condition at this time. When the Board initiated the *EC-MAC I* proceeding in May 1997, it did so on the basis of then section 13703(c), which at the time contemplated that rate bureau agreements would expire (unless extended) as of December 31, 1998. Since that time, Congress enacted the Safety Act, section 227 of which repealed the agreement expiration/renewal provision, replacing it with a provision that requires that the Board review bureau agreements every five years beginning with the date of enactment of that statute. In enacting the five year review provision, Congress implicitly approved of the collective ratemaking *status quo*. It also plainly had in mind that more time should pass, at least five years, to allow the Board an opportunity to assess whether any major changes in bureau agreements should be required. While the same statute also contemplated that the statute would not affect pending cases (*EC-MAC I*),

harmonization of these two provisions of the Safety Act requires that while the Board may move forward with those aspects of the *EC-MAC I* proceeding that contemplate no major changes in bureau activity (such as the clarification of the scope of the immunity, discussed in the December 1998 Decision), any major changes to the *status quo* should await the outcome of the contemplated five year review process. Certainly, any order that the Board might adopt with respect to the level of bureau rates falls into the category of issues that should be deferred pending the five year review proceeding that the statute envisions.

This logical reading of the statute is confirmed in the February 3, 2000 letter sent to the Board's Chairman by Chairman Bud Shuster and Congressman Nick Rahall of the House Committee on Transportation and Infrastructure. These leading drafters of the Safety Act stated in relevant portion as follows:

By substituting the mandatory three-year renewal period of such agreements with a new five-year review requirement, we did not intend that the Board impose any significant new requirements on these agreements without a thorough review based on facts developed during a five-year review process. In effect, the status quo would be maintained until such time as any proceeding is initiated within the five-year process. Accordingly, the provision of section 227 regarding cases pending on the date of enactment H.R. 3419 should also be considered within that context.

It is no answer for the Board to state in response to this letter that the Board "will not require any specific changes until we complete the proceedings that we are now initiating." February 2000 Decision at 4, fn. 8. It goes without saying that the Board will not require any action in this proceeding until it completes this proceeding. It also gives too little credit to Chairman Shuster and Congressman Rahall, and to section 227 itself, to suggest that Congress' intent was that the Board could initiate a major change in collective ratemaking conditions before completing a five year review process in which

the Board can gather facts to determine if any major new conditions might be warranted. The Congressional directive here could hardly be more clear – Congress is content with the *status quo* and the Board should not act until it has completed such a five year review process that can begin no earlier than the 1999 enactment of section 227.

CONCLUSION

For all of the reasons stated above, the Board should find on the basis of the established general discounts that no further action on its part is required in this proceeding. It should therefore dismiss this proceeding or, failing that action, hold the proceeding in abeyance until such time as it completes a five year review of collective ratemaking.

Respectfully,



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