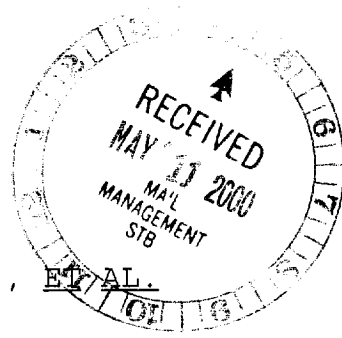


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BEFORE THE
SURFACE TRANSPORTATION BOARD



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Office of the Secretary

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Public Record

SECTION 5a APPLICATION NO. 118 (SUB-NO. 2), ET AL.
EC-MAC MOTOR CARRIERS SERVICE
ASSOCIATION, INC., ET AL.¹

SSM-34-10

198539

REPLY COMMENTS
OF
MIDDLEWEST MOTOR FREIGHT BUREAU, INC.

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DUE AND DATED: MAY 11, 2000

¹ This proceeding also embraces Middlewest Motor Freight Bureau, Inc. - Renewal of Agreement, Section 5a Application No. 34 (Sub-No. 10).

BEFORE THE
SURFACE TRANSPORTATION BOARD

SECTION 5a APPLICATION NO. 118 (SUB-NO. 2), ET AL.
EC-MAC MOTOR CARRIERS SERVICE
ASSOCIATION, INC., ET AL.¹

REPLY COMMENTS
OF
MIDDLEWEST MOTOR FREIGHT BUREAU, INC.

Middlewest Motor Freight Bureau, Inc. (MWB) submits these reply comments in the above proceeding.

MWB previously filed comments in this proceeding as did the Southern Motor Carriers Rate Conference, Inc. (SMC); Western Motor Tariff Bureau, Inc. (WMTB); Bohman Industrial Traffic Consultants, Inc. (Bohman); EC-MAC Motor Carriers Service Association, Inc. (EC-MAC); New England Motor Rate Bureau, Inc. (NEB); Niagara Frontier Tariff Bureau, Inc. (NFTB); Rocky Mountain Motor Tariff Bureau, Inc. (RMB); Pacific Inland Tariff Bureau, Inc. (PITB); Motor Carriers Traffic Association (MCTA); National Industrial Transportation League (NITL); Transportation Consumer Protection Council, Inc. (TCPC); Halogenated Solvents Industry Alliance, Inc. (HSIA); National Small Shipments Traffic

¹ This proceeding also embraces Middlewest Motor Freight Bureau, Inc. - Renewal of Agreement, Section 5a Application No. 34 (Sub-No. 10).

Conference, Inc. and The Health and Personal Care Distribution, Inc., jointly (NSSTRAC/HPCDC); and Professor Andrew F. Popper.

This Reply addresses arguments advanced by the shipper associations, viz., NITL, TCPC, HSIA, and NSSTRAC/HPCDC.

I. OVERVIEW OF THE ISSUES

When this proceeding commenced in May 1997,² its intent was to examine the continuation of immunized ratemaking agreements in the context of the public interest. However, it has been transformed into a de facto rate investigation focusing not on collective ratemaking agreements, but rather on rate levels moving traffic in today's markets. Even as a rate investigation, however, the proposals being advanced cannot pass muster. Bureau carriers are now confronted with an ultimatum to reduce existing rate levels if they want to retain their immunity, despite the fact that their rates have not been found to be unreasonable. This unprecedented action is assertedly necessary: (1) to protect a class of shippers who have not been shown to exist; or (2) to provide relief from the consequences of loss of discount rules which are authorized by law and in any event are not the product of collective action.

As explained in our previous comments, a mandatory rate reduction on the basis of this record carries with it serious legal issues. Equally as important, the record exposes the

² The initial proceeding was instituted by decision served May 20, 1997, in Section 5a Application No. 118 (Amendment No. 1), et al., EC-MAC Motor Carriers Service Association, Inc., et al.

practical difficulties in attempting to impose an across-the-board rate reduction without considering contemporary market conditions for every shipment in every traffic lane.

Against this background, consideration must be given to the changed circumstances since May 1997. First, the statute was amended to direct the Board to initiate a new proceeding to review approved agreements. See 49 U.S.C. § 13703(c)(2). That circumstance alone suggests that this proceeding be discontinued. Beyond that, however, MWB carriers, like their counterparts in other bureaus, have responded to the Board's concerns by adopting a general discount rule which ensures that no shipper will have to pay undiscounted bureau class rates. This action obviates the legal and practical dilemmas surrounding a prescribed rate level. As for those who argue that these general discounts do not go far enough, the statute affords adequate remedies to shippers who are actually injured or damaged by rates which violate the Act.

Faced with the loss of this rallying cry, the shipper associations turn to arguments which are either beyond the scope of this proceeding or beyond the reach of the Board's jurisdiction.

II. REPLY ARGUMENT

A. Summary of Shippers' Arguments

The various shipper associations advance similar arguments. They urge that bureau class rates without discounts are too high. (Comments of NSSTRAC/HPCDC, p. 14; NITL, p. 1; TCPC, p. 2). Acknowledging that widespread discounting in the

industry over the past two decades has resulted in virtually no shipper paying undiscounted class rates, the shipper groups nevertheless claim that a rate reduction is necessary: (1) to protect small, unsophisticated shippers from paying undiscounted rates (NSSTRAC/HPCDC, p. 14; NITL, p. 3; TCPC, p. 5); and (2) to protect all shippers from the consequences of loss of discount rules (TCPC, pp. 4-6; NITL, p. 8; NSSTRAC/HPCDC, p. 21). To achieve these goals, these groups advocate: (1) the establishment of an automatic minimum discount rule (NSSTRAC/HPCDC, p. 18; NITL, pp. 5-7; TCPC, p. 6); (2) a prohibition against or restriction on loss of discount rules (NITL p. 8; NSSTRAC/HPCDC, p. 24); and (3) sharp restrictions on the ability of rate bureaus to adopt general rate increases (GRIs) (NSSTRAC/HPCDC, pp. 19-20; NITL, p. 9; HSIA, p. 8).

We address these various contentions below.

B. The Shipper's Underlying Premises Are
Erroneous, Unfounded Or No Longer Present

1. Bureau Class Rates Are Not Unreasonable

Conspicuously absent from shipper comments is any reference to a formal determination that bureau rate levels are unreasonable, unlawful, or in any way in violation of the statute. While the associations condemn the rate levels as "unrealistically high", "inflated", and "swollen", they have not

submitted evidence addressing the essential facts necessary to support a determination of unreasonableness.³

The significance of this omission cannot be gainsaid. Such a determination is a prerequisite to a rate prescription, reduction, or mandatory discount. Moreover, the shippers' recent assertions of unreasonableness are puzzling. The class rate levels under attack did not materialize overnight. They have been established, maintained, and adjusted over the years under the watchful eyes of the ICC, the STB, and the shipping public, and subject to a variety of agency powers and shipper remedies. It hardly seems likely that the federal government would stand idly by for years while the bureaus openly constructed a level of rates if it believed them to be unreasonable, just as it is implausible that shippers decided to forego their right to protest GRIs or file a rate complaint.⁴

Notwithstanding this history of inaction, the shipper associations attach a conclusive presumption of unreasonableness

³ To support a rate complaint, the Board's regulations require certain essential information, viz., the commodities, rate applied, dates, time period, names, origins, destinations, or territorial or rate group involved. 49 C.F.R. § 1130.1, et seq. See 49 C.F.R. Parts 1132 and 1133, requiring the submission of facts.

⁴ NSSTRAC/HPCDC suggests that the bureaus presently control the rate structure of the entire motor carrier industry, thus necessitating tighter controls over the bureau rate structure. See pages 10-11. Given the makeup of the bureaus of small and medium carriers, bureau carriers find themselves following individual actions of the large carrier price leaders not the other way around. That this is so is confirmed by the general lack of shipper interest in the bureaus' rate actions prior to 1999.

to bureau rate levels. This is plainly wrong and reflects their confusion between statutory reasonableness and market-driven prices. A rate may be reasonable, but, for any number of reasons, higher than the going market rate. That does not make the rate unreasonable; a carrier's rate may cover its cost of service and allow a reasonable profit on particular traffic, but because of intense competition for that traffic, it may be too high to move the traffic. Yet, in another traffic lane, on an identical shipment, the same rate may also reflect the going rate moving the traffic as a result of competitive circumstances in that lane.

For these reasons, the reasonableness of a rate level cannot be considered in the abstract, but rather, must be measured against identifiable traffic. In this vein, the Board has recognized in reasonableness determinations that ". . . bureau tariffs offer a valid and valuable guide to the rate levels held out by the industry to transport traffic"

STB No. 40900, Ideal Forging Corp.--Petition--Rates and Practices of Legend Freight Systems, Inc., served January 25, 1999. Bureau rate levels are certainly not ipso facto unreasonable. The question of whether a rate is unreasonable is essentially one of fact to be determined on a case-by-case basis. Petitions for Issuance of Rate Reasonableness Policy Statement, 8 I.C.C.2d 61, 78 (1991). In short, there is no basis on this record to support a conclusion that existing class rate levels are unreasonable.

2. No Shipper Will Pay Undiscounted Class Rates By Default

The general discount rules adopted by the bureaus in 1999 essentially moot the primary argument advanced to support a reduction in the class rate level. Those rules grant a substantial discount to any shipper without a discount.⁵ Whether or not any such shipper in fact existed prior to the adoption of these rules, it is no longer an issue.⁶

The Board's February 11 Decision and some of the shipper groups argue that the general discount rules are not satisfactory because they do not establish a minimum discount, i.e., shippers with smaller discounts would not be entitled to the general discount. (See, e.g., NSSTRAC/HPCDC, pp. 17-18). In a related argument, the shipper groups urge that the general discount percentage is not high enough. (Id., pp. 18-19; NITL, p. 5; HSIA, p. 8).

These arguments ignore the statutory structure and also reflect a fundamental misunderstanding of the pricing mechanisms at play in the marketplace. That some shippers may have discount percentages lower than the general discount rule does not warrant government intervention for a number of reasons.

⁵ MWB's general discount is 35 percent, the same percentage adopted by PITB, EC-MAC, RMB and NFTB. SMC adopted a 20 percent discount.

⁶ The shipper associations typically argue that "small, unsophisticated shippers" are unable to secure discounts. See, e.g., NITL, p. 3, NSSTRAC/HPCDC, p. 14. This contention ignores the fact that shippers of all sizes are business people and undoubtedly more savvy than they are given credit for by the associations who purportedly speak on their behalf.

First and most importantly, the request for imposition of a uniform minimum discount overlooks the carriers' right of independent ratemaking authority which is guaranteed and absolute. 49 U.S.C. § 13703(a)(4). The ability of carriers to individually negotiate discounts at any level of their choosing may not be abridged. A mandated minimum discount would violate that right.

Shippers arguing for a mandatory minimum discount also lose sight of the different forms of discounts available from carriers. In Ex Parte No. MC-166, Pricing Practices of Motor Common Carriers of Property, 1983 Fed.Car. Cases Paragraph 37,064 (August 26, 1983), the ICC identified at least 9 different types of discount methods offered by carriers. Undoubtedly, there are others today. For example, some discounts combine a negotiated lower class rating than the article might otherwise take with a percentage discount from the applicable class rate smaller than the general discount percentage, while others apply an FAK rating with or without a percentage discount. For shippers with different forms of discounts in place, a mandatory minimum discount urged by the shipper associations would require carriers to attempt to determine on a shipment-by-shipment basis which of the different discounts applies so as to satisfy the mandatory minimum. Such "apples to oranges" comparisons would be an administrative nightmare, fraught with complexity, and an open invitation to billing disputes likely to lead to widespread undercharge and overcharge controversies.

Similarly, it is inappropriate for the Board (or a shipper association) to inject itself into the pricing process and mandate either a discount level or a reduced benchmark level without knowledge of the specifics of any given shipment. It is not for the Board to say that a shipper who ships light and bulky articles, infrequently, in a light density traffic lane is entitled to a different discount than the carrier and shipper have agreed upon. Similarly, a mandatory rollback of the class rate levels suggested by only two shipper groups (TCPC and HSIA) is objectionable for like reasons. Numerous carrier/shipper relationships based on contracts and other longstanding commitments are pegged to existing rate levels. Altering the benchmark would cause major disruptions in those relationships and have unanticipated consequences on both parties. Neither carriers nor shippers want such a result. (See Comments of NSSTRAC/HPCDC, p. 13).

Finally, a discount percentage higher than that adopted by the carriers in their general discount rule has no basis in the record. In fact, the shipper groups urging a minimum discount of 45-50 percent concede that they have no facts to support this level. (See NSSTRAC/HPCDC, p. 18; NITL, p. 5). Representations concerning a so-called "national average" are likewise insufficient to provide a valid basis for a mandatory discount level. Averages are just that. Actual discounts will be higher and lower than the average. Imposition of a so-called

average discount cannot possibly take into account the various market forces which drive discounts on actual traffic.

Because the general discount is intended to operate as a safety net, presumably for shippers of the least attractive freight, it should reflect the low end of the discount spectrum, not something in the middle. Notably, the shippers fail to offer any justification for their novel theory that the lowest discount should be set at the average level, the effect of which is to automatically raise all previously negotiated lower discounts to that level. No possible justification exists for such a result.

3. Loss of Discount Rules Are Not Relevant To This Proceeding

Since shippers without discounts are a nonissue, the shipper associations attempt to invent an issue out of carrier loss of discount rules. (NITL, p. 8; NSSTRAC/HPCDC, pp. 21-25; TCPC, p. 3). These rules require a delinquent shipper to forfeit his discount when he does not pay his freight bill within the carrier's applicable credit period. The associations complain that such rules are unfair, onerous, and should be prohibited.

As the Board is well aware, the loss of discount rules which apparently irk late-paying members of the shipper organizations are specifically authorized by federal regulations. 49 C.F.R. § 377.201, et seq. In cases of late payment, carriers are permitted "to require payment of the full nondiscounted rate instead of the discounted rate otherwise applicable. The difference between the discount and the full rate constitutes a carrier's liquidated damages for its collection effort." Id. at

377.203(g)(1)(ii). Consequently, the shippers' complaint is with the regulations, not the carriers' rules.

Second, the regulations are now maintained and enforced by the Federal Motor Carrier Safety Administration.⁷ Complaints about loss of discount rules therefore belong in another forum in another proceeding. For example, a shipper may challenge any rule it believes does not conform to or is not authorized by the credit regulations. 49 U.S.C. § 14701, 14702. A shipper may also defend against any asserted loss of discount on the basis of a carrier's noncompliance with the credit regulations or the applicability of the provision itself. See Humbolt Express, Inc. v. The Wise Company, 190 F.3d 624, 637 (4th Cir. 1999). And, of course, a shipper might even choose to timely pay his freight bill.

The most compelling response to the associations' argument, however, is that loss of discount rules are established and maintained by carriers individually. They are not the product of collective action and therefore are not relevant to the issue of immunized collective ratemaking. In fact, shipper objections to loss of discount rules are not even relevant to the class rate level. If a shipper forfeits his 50 percent discount because of late payment, his charges will double regardless of the level of class rates. In a similar vein, imposition of a

⁷ The statute, 49 U.S.C. § 13707, vests authority over credit regulations in the Secretary of Transportation. In turn, the administration and enforcement of the credit regulations has been delegated to the Administrator of the Federal Motor Carrier Safety Administration. 65 F.R. 200-221 (Jan. 4, 2000).

higher discount percentage as propounded by the shipper groups would likely inflame their objections to the loss of discount rules because their delinquency would result in forfeiture of a higher discount.

Neither collective ratemaking nor the class rate structure is the root cause of the shippers' problems. Late payment of their freight bills is the culprit and is a matter solely within their control. Reduction of the benchmark rate level will not negate forfeiture of their discount in the event of late payment.

4. General Rate Increases

The shipper associations urge that limitations be imposed on the bureaus' ability to adopt the general rate adjustments (GRIs) authorized in 49 U.S.C. § 13703(a)(1)(6). They propose that GRIs be limited to cost increases only and that certain procedures be imposed on bureaus with respect to notice of proposed rate actions as well as evidentiary requirements to support GRIs. (See NITL, p. 9; NSSTRAC/HPCDC, p. 20; HSIA, p. 8).

These contentions illustrate how far afield this proceeding has strayed. Substantive standards and procedures for GRIs not only go well beyond the subject of continued approval of collective ratemaking agreements, they go far beyond the issue noticed for comment, viz., suggested methodologies to reduce existing rate levels. See the Board's Feb. 11 Decision, and the Federal Register notice thereof. 65 F.R. 7099.

New procedures and standards for future GRIs are best left to a separate, properly noticed rulemaking proceeding.⁸ The arguments advocating new standards for approval of a GRI also demonstrate confusion between the effect of Section 13703 and the standard of reasonableness required by Section 13701. Section 13703 identifies the types of actions immunized by approval of a collective ratemaking agreement, including as pertinent, rate adjustments of general application. It does not, however, address the standard of reasonableness by which a GRI is measured.

Since the enactment of the ICC Termination Act (ICCTA), the Board has not addressed the ratemaking standards to be applied prospectively to GRIs. Prior to ICCTA, the so-called Rule of Ratemaking was statutory, set forth in former 49 U.S.C. § 10701(e). It enumerated a variety of factors considered to be integral to the collective ratemaking mix. Reasonableness was defined in terms of revenues sufficient to cover operating expense plus a reasonable profit and the ICC was directed to authorize revenue levels which would provide net income adequate to support prudent capital outlays, assure repayment of reasonable level of debt, permit the raising of needed equity capital, attract and retain capital, and take into account reasonable estimated or foreseeable future costs. Id. Congress

⁸ The MC-82 regulations, 49 C.F.R. § 1139.1, et seq., are still effective, although they are applicable only to filed tariffs. Those regulations would be affected by any new requirements adopted in such a proceeding, thus requiring a rulemaking proceeding.

and the ICC acknowledged that the Rule of Ratemaking was specifically designed for GRIs. See, e.g., House Report No. 96-1069, June 3, 1980, at page 26; Petition of Regular Common Carrier Conference - Minimum Rate Standard, 8 I.C.C.2d 340, 358-9 (1992) and Georgia Pacific I, 9 I.C.C.2d 103, 166 n.145 (1992).

Although this statutory language was removed without comment in ICCTA, the Board has not addressed ratemaking standards in the context of GRIs under the present statutory scheme. What is clear, however, is that the shipper organizations are urging a new rule which sharply departs from standards in general revenue cases. See, e.g., Fair Reward and Just Compensation, Common Carrier Service, Clyde B. Aitchison, 1954, Association of ICC Practitioners, pp. 57-75. We hasten to add that the National Transportation Policy continues to mandate oversight which promotes competitive and efficient transportation services to enable motor carriers to earn adequate profits, attract capital, and maintain fair wages and working conditions in order to encourage sound economic conditions and the establishment and maintenance of reasonable rates. 49 U.S.C. § 13101(a)(1) and (2). The shipper's standards for future GRIs not only depart from the past, but also ignore these provisions. Adoption of new standards for general revenue proceedings would constitute a major undertaking requiring, at the very least, a separate proceeding properly noticed and subject to comment. Cf. Minimum Rates Standard, supra.

To the extent that the shipper associations desire advance notice with respect to rate proposals, bureau meetings, and an opportunity to submit testimony, we only need point to the bureaus' approved agreements. MWB strictly adheres to the requirements of its agreement and conscientiously follows established procedures to ensure notice to members and subscribers. Rate meetings are open to the public and shippers may present testimony.

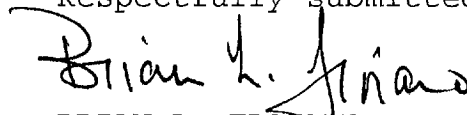
Suggestions that various documentation be made available in advance of any rate proposal are noticeably lacking in detail. The value of such a requirement is not readily apparent. The absence or availability of documentation is not likely to determine whether or not a shipper would protest a GRI. The impact of the increase, rather than underlying documentation will be determinative. If a shipper files a protest, a prudent bureau will undoubtedly present all available evidence to justify a GRI. Failure to do so would undoubtedly result in a suspension and/or investigation.⁹ In any event, this issue would be more appropriately considered in a proceeding to specifically address such a requirement.

⁹ In suspending the several bureaus' 1999 GRIs, the Board stated that they had not been shown to be justified -- not that the additional revenues were not needed. See No. ISM 35006, served September 30, 1999, p. 4.

CONCLUSION

The record in this proceeding clearly establishes that there is no need to address the levels of class rates maintained by the bureaus as a threshold matter to consideration of approval of existing collective ratemaking agreements. The Board should so find.

Respectfully submitted,



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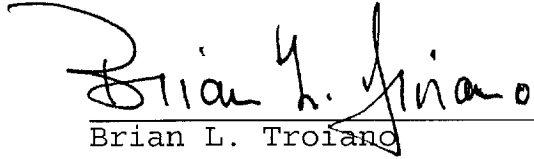
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DUE AND DATED: MAY 11, 2000

CERTIFICATE OF SERVICE

I hereby certify that I have this 11th day of May, 2000, served the foregoing Reply Comments of Middlewest Motor Freight Bureau, Inc. upon all parties of record in this proceeding by mailing a copy thereof, first class mail with postage prepaid.



Brian L. Troiano