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BEFORE THE
SURFACE TRANSPORTATION BOARD

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



COMMENTS OF
MIDDLEWEST MOTOR FREIGHT BUREAU, INC.

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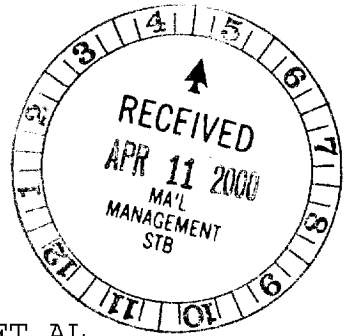
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DATED: APRIL 11, 2000

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

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COMMENTS OF
MIDDLEWEST MOTOR FREIGHT BUREAU, INC.

Pursuant to the Board's decision served in this proceeding on February 11, 2000, Middlewest Motor Freight Bureau, Inc. (MWB or the Bureau) submits these comments.

MWB is a motor carrier rate bureau operating pursuant to a collective ratemaking agreement approved under former Sections 5a and 10706(b) of the Interstate Commerce Act. Its agreement was reviewed and approved by the former ICC in Section 5a Application No. 34 (Amendment No. 6), Middlewest Motor Freight Bureau, Inc.-- Agreement, served June 9, 1987.² Having remained continuously in effect, MWB's Agreement was submitted to the Board for renewal on December 22, 1998, pursuant to the provisions of 49 U.S.C. § 13703(d) in effect at that time.

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

² Additional amendments necessary to effect MWB's merger with Central States Motor Freight Bureau, Inc. were approved by the ICC in Section 5a Application No. 34, Middlewest Motor Freight Bureau, Inc.-Merger Agreement, served July 9, 1993.

RELEVANT BACKGROUND

The instant proceeding is an outgrowth of the Board's 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., instituting a proceeding to examine, among other things, the continuation of motor carrier antitrust immunity. MWB, other bureaus, shipper groups, government agencies, and various individuals submitted comments in that proceeding. On December 18, 1998, the Board served a decision (hereinafter "1998 Decision"), announcing its intent to impose a new condition for approval of effective motor carrier collective ratemaking agreements. Specifically, it advised that bureau class rate levels would have to be reduced in order for carriers to retain the antitrust immunity conferred by an approved agreement. However, the Board took no action at that time in deference to Congressional expressions that possible relevant legislative amendments might occur in 1999. In view of the statutory expiration of their Agreements on December 31, 1998, MWB and other bureaus filed applications for renewal prior to the end of the year. Thereafter, several bureaus sought reconsideration of the 1998 Decision.

Congress enacted the Motor Carrier Safety Improvement Act of 1999, P.Law 106-159, December 9, 1999. As pertinent, Section 227 amended 49 U.S.C. § 13703 to replace the mandatory 3-year expiration and renewal period with a new 5-year review requirement. 49 U.S.C. § 13703(c)(2). The legislation also

prohibited the establishment of nationwide collective ratemaking authority. 49 U.S.C. § 13703(d).

On February 11, 2000, the Board issued a decision (hereinafter, the "Feb. 11 Decision") denying the bureaus' petition for reconsideration and reaffirmed the 1998 Decision to require reductions in bureau class rate levels as a condition of approval of their ratemaking agreements. The Board simultaneously served a decision instituting this proceeding seeking suggested methodologies to accomplish class rate reductions.

COMMENTS

I. Summary of Position

The Board's proposal to order a general rate reduction as a condition precedent to approval of collective ratemaking agreements is contrary to law and beyond its authority. Its authority over ratemaking agreements is separate and distinct from its regulatory authority over rates established pursuant to such agreements. The Board cannot intermingle these specific provisions to create a new super remedy not authorized by law.

Moreover, the Board's desire to adjust class rate levels to reflect "market-based rates" is misdirected. The rates presently moving traffic are, by definition, market-based rates. The Board's efforts constitute an unwarranted interference with the marketplace which would seriously disrupt carrier-shipper relations. In any event, recent bureau actions have addressed the concerns expressed in the 1998 Decision.

II. The Board Lacks Jurisdiction To Order
A Rate Reduction In This Proceeding

The Board's authority to require a general rate reduction as a condition precedent to approval of rate bureau agreements, if it exists, must be found in the statute. Congress has established a specific statutory structure governing collective ratemaking by motor carriers in 49 U.S.C. § 13703. In authorizing and reauthorizing collective ratemaking every time it has examined the issue, Congress has expressed its will that this form of motor carrier ratemaking furthers the National Transportation Policy and hence is in the public interest. It has, of course, expressly authorized and placed limitations on permissible carrier actions under agreements authorized by Section 13703. And, it vested in the Board, and previously the ICC, authority to initially approve and subsequently review carriers' agreements to ensure that they conformed to the provisions of law. Section 13703(a) and (c). In addition, the Board was granted authority to police carrier actions under approved agreements. Section 13703(a)(5)(B).

Under the same regulatory scheme, Congress also gave the Board, and before it the ICC, an entirely separate set of powers to oversee and police the rates established and maintained pursuant to approved collective ratemaking agreements to ensure that they comply with the statutory requirement of reasonableness set forth in 49 U.S.C. § 13701(a). The Board may suspend and investigate the reasonableness of any proposed rate, rule, classification, or rate adjustment of general application made

pursuant to a collective ratemaking agreement. 49 U.S.C. § 13703(a)(5)(A). It may also institute an investigation to determine whether existing rates violate the statute. 49 U.S.C. § 14701(a). Upon finding that a collectively made rate violates the reasonableness requirements of Section 13701(a), the Board is authorized to prescribe the rate, classification, rule, or practice to be applied. 49 U.S.C. § 13701(b).³

The Board's jurisdiction over rates established pursuant to bureau agreements is limited by the statute. Conspicuously, these provisions do not include the power to withhold approval of the collective ratemaking agreement pursuant to which the rates were established. Conversely, its authority to change the conditions or withhold approval of existing agreements does not include the power to cancel or prescribe rates. To read the statute as extending the Board's review and approval authority over ratemaking agreements to also include rate regulation authority would render superfluous the more specific rate reasonableness requirements and remedies of the Act. For this same reason, the Board's authority over carrier actions under their agreements, 49 U.S.C. § 13703(a)(5)(B), cannot furnish a proper basis for a mandated rate reduction. Such an interpretation would make superfluous both the Board's authority to prescribe rates and its authority to impose conditions on ratemaking agreements.

³ The Board also has authority to determine the reasonableness of rates on past shipments for purposes of reparations actions under Sections 14704, 14705.

Assuming arguendo that the Board could prescribe rates under its authority to review and approve ratemaking agreements, it clearly lacks jurisdiction to do so on the basis of the new "unrealistically high" standard announced in the 1998 Decision. The Board's remedial authority over collectively established rates is limited to rates found to violate the reasonableness requirement of 49 U.S.C. § 13701(a). Rates not found to be unreasonable do not violate the statute. Here, the Board has expressly disclaimed making such a finding (1998 Decision, p. 7, note 20) and, instead, has applied a new rate market-based standard not found in the statute. Regardless of how market considerations might fit within the statutory reasonableness framework, it is beyond doubt that the Board is without jurisdiction to order a rate reduction absent a finding that existing rate levels are unreasonable.

Nor can the statutory reasonableness standard be avoided by redefining it as the market-price. The Supreme Court invalidated just such an effort in FPC v. Texaco, 417 U.S. 380, 41 L.Ed.2d 141, 156 (1974), where it held that the Federal Power Commission lacked authority to use the prevailing price in the marketplace as the final measure of the just and reasonable rates mandated by the statute. (" . . . Congress could not have assumed that 'just and reasonable' rates could conclusively be determined by reference to market price." Id., 157) See also Farmers Union Cent. Exchange, Inc. v. F.E.R.C., 734 F.2d 1486, 1508-9 (D.C. Cir. 1984). Market prices may undoubtedly be considered in

making a reasonableness determination on a case-by-case basis. However, they cannot supplant the reasonableness standard imposed by statute.

The Act and the Board's regulations enumerate specific procedures for challenging the reasonableness of rates. 49 U.S.C. §§ 13703(b), 13703(a)(5)(A), 14701(a), and 49 C.F.R. §§ 1111, 1130 and 1132. Adherence to these procedures is necessary to carry out Congress' intent with respect to the substantive provisions of the statute. For example, the party challenging the lawfulness of an effective rate bears the burden of proof. Atchison, T. & S. F. R. Co. v. Bd. of Trade, 412 U.S. 800, 37 L.Ed.2d 350, 366 (1973). Here, the Board would wholly eliminate this requirement and place upon the carriers the burden of justifying existing rate levels. Such a procedure is plainly contrary to law.

Given the widespread discounts available to the shipping public coupled with the absence of shipper complaints concerning the levels of rates actually being charged, the Board's assertion of a "problem" is perplexing. But even assuming the existence of a problem, the Board's powers are constrained by the statute. As the Supreme Court recently stated in denying the Food and Drug Administration's assertion of authority to regulate tobacco:

Regardless of how serious the problem an administrative agency seeks to address, however, it may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law. [Internal quotes and

citation omitted.] Food and Drug Administration v. Brown & Williamson Tobacco Corp., ___ U.S. ___, 68 U.S.L.W. 4194, 4195 (March 21, 2000).

III. A Mandatory Adjustment to Class Rate Levels Is Misdirected

Apart from the jurisdictional issue, the Board's focus on some type of adjustment to the bureau class rate level to achieve a market price is equally misplaced. The collectively established rate level, like individually set class rate levels, serves primarily as a benchmark from which discounts are freely negotiated on a shipment-by-shipment basis. Unlike individual carrier class rates, bureau rate levels continue to be subject to STB jurisdiction and have been maintained and adjusted when necessary always under the possible intervention of the Board. As a result, they carry a presumption of reasonableness. The "benchmark less discount" form of pricing has been hailed by shippers and the Department of Justice as an indication of the competitive marketplace at work. Investigation of Motor Carrier Collective Practice, 7 I.C.C.2d 388, 421-2 (1991).

Motor carrier discounting practices have been addressed on numerous occasions since enactment of the Motor Carrier Act of 1980. See, e.g., Petition for Declaratory Order - Lawfulness of Volume Discount Rates, 365 I.C.C. 711 (1982); Ex Parte No. MC-166, Pricing Practices of Motor Common Carriers, 1983 Fed.Car.Cas. Para. 37,064 (1983); Ex Parte No. MC-195, Petition of Regular Common Carrier Conference for Establishment of Minimum Rate Standard, 1992 Fed.Car.Cas. Para. 37,959 (1992). Throughout

the past two decades individual discounting by carriers has been actively encouraged and promoted as furthering the pro-competitive goals of the National Transportation Policy. Indeed, the ICC steadfastly refused carrier requests to institute general proceedings to set uniform minimum standards governing discounts. For example, it stated in Lawfulness of Volume Discount Rates, supra, that it did not wish to interfere with the workings of the marketplace. 365 I.C.C. 712. It noted that the Act contains adequate remedies to address individual rates believed to violate the statute -- protest procedures to challenge proposed rates and complaint procedures for existing rates. Id., 716. As pointed out there, individual adjudication is legally the only satisfactory method of establishing a record for finding of unlawfulness. Id. Of course, what was said then continues to apply in the statute as it exists today.

In contrast, the Board now wants to inject itself into the marketplace and mandate a different, lower level of rates governing private negotiations. Given the nature, functions, and structure of class rates, achieving a marketprice class rate level is problematic. The class rate system is designed to provide rates for any commodity shipped in any quantity between any points. These rates are refined by the individually-established discount to reflect the market conditions for a particular shipment at a particular time. As the ICC explained

in Georgia-Pacific Corp.--Petition for Declaratory Order, 9

I.C.C.2d 103, 156-7 (1992):⁴

Motor carrier freight transportation today is a heterogeneous service. There are many qualitative service dimensions considered in establishing the rates for a particular shipment. They generally reflect supply and demand conditions in the market place at the time of shipment.

Market conditions affecting the rate a carrier will offer include perception of competition for the move, level of competitive pressure, availability of capacity, timing (peak or off-peak), current availability of front hauls and backhauls, length or expected length of relationship with shipper, special equipment needs, cash flow requirements, special service requirements, carrier's cost structure, shipment density, and the fit of the shipper's traffic with the carrier's existing operations. Id., 159. Factors which are important to the shipper include expected volume, delivery deadlines, frequency of movement, carrier reliability, equipment availability, proximity to carrier's terminal, condition of equipment, carrier treatment of claims, availability of competing service, customer relations, etc. Id., at 160.⁵

⁴ The Georgia-Pacific criteria were initially established to address the reasonableness of past rates challenged in undercharge cases. Those criteria have since been extended to the rates of operating carriers on past shipments. See, e.g., Marmon Holdings, Inc., Docket No. 41287, served July 31, 1998.

⁵ In a somewhat puzzling statement, the Board suggests that the only relevant distinction between shipments is the characteristics of the commodity transported. February 11 Decision, note 11. It reasons that the classification system is designed to ensure that articles having the same class rating

These factors will obviously vary from shipment to shipment. As the Commission said:

Because price and service packages are often customized, shippers with similar movement requirements may frequently and willingly pay different rates. Variations in the price and service packages between similar shippers are typically not a manifestation of unlawful price discrimination, but rather represent real differences in operational and market circumstances.

While motor carrier markets are, in general, effectively competitive, they are not perfectly competitive. That is, motor carriers are not all identical firms operating within some textbook model of perfect competition. This related variation in service offerings and among motor carriers themselves means 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. Rates within this cluster are all "market-based rates", i.e., rates that a willing buyer would pay a willing seller. Id. at 160.

Thus, for any given shipment, there will not be a single market-based rate, but rather, a cluster of rates representing the "going level". Rates moving the traffic at a wide-ranging scale of discounts (including zero) comprise the cluster and reflect the market conditions for that particular shipment. Trying to set a single, one-size-fits-all market-based

ought to have the same transportation characteristics. The Board has confused the transportation characteristics of commodities (i.e., density, liability, etc.) with the characteristics of traffic (volume, frequency, special service requirements, etc.), all of which are factors bearing on the ultimate discount level. Thus, depending on these other factors, two shipments of the identical commodity could very well have different rates.

rate level as the Board proposes is not feasible. A rate level established without specific consideration of the above factors could not result in a true market value.

In addition, a forced reduction in the bureau class rate level would also seriously disrupt the ongoing relationships between shippers and carriers. Existing bureau rate levels have been established and maintained on the basis of traditional ratemaking standards to ensure a reasonable rate level. For this reason, numerous carriers and shippers have chosen the bureau level as the preferred benchmark for discount purposes in their ongoing business relationships whether by tariff, contract, or simply for comparisons. By altering those rate levels, the Board's action will intrude on these relationships and transactions freely negotiated by the parties.

A mandated decrease in the bureau class rate level will also displace the competitive position of carriers. Bureau class rate levels are presently comparable to (and in many cases lower than) the class rate levels maintained individually by carriers. Bureau carriers will be at a competitive disadvantage if required to lower their base rate levels while non-bureau carriers are not subject to the same requirement. For example, an across-the-board 20 percent reduction in the base rate level will not likely produce a corresponding reduction in the discount level of a shipper accustomed to a 50 percent discount. He will undoubtedly continue to demand the same level discount he presently receives from competing non-bureau carriers. Since

existing benchmark levels are sufficiently comparable, shippers can readily make "apples-to-apples" comparisons. A mandatory reduction in one but not the other will destroy the utility of benchmarking.

Discounting practices presently followed by carriers and shippers reflect market conditions on a shipment-by-shipment basis. The Board cannot feasibly inject itself into the marketplace and order a rate level which reflects the wide variety of constantly changing factors that drive the marketprice. That function is served best by the actual participants in the market without the unnecessary intrusion of the government.

IV. There Is No Longer Any Justification For
Going Forward With a Mandatory Rate Reduction

The 1998 Decision was premised on a proceeding that was commenced in May 1997. Circumstances have changed since the development of the record in that proceeding. Most notable, of course, is the enactment of the Motor Carrier Safety Improvement Act of 1999 which, as pertinent here, eliminates the need for the Board to rush to judgment under the prior mandatory 3 year renewal period. Of particular significance is the February 3, 2000, letter from the leadership of the House Committee on Transportation and Infrastructure to the Board advising that Congress "did not intend that the Board impose any significant new requirement on these agreements without a thorough review based on facts developed during a five-year review process" in a proceeding "initiated within the five-year process". Congress

plainly intended that the Board develop a record based on current facts rather than relying on a record developed some 2 years ago. In that respect, the circumstances advanced in the 1998 Decision no longer exist.

According to the Feb. 11 Decision, the rate reduction was deemed necessary because: (1) "we cannot forget the undercharge crisis"; and (2) "some [shippers] pay undiscounted rates". (Decision, p. 6). Changed circumstances negate both considerations as a basis for the proposed action.

The Board's reliance on the so-called undercharge crisis is surprising. The undercharge controversy was legislatively addressed by the Negotiated Rates Act of 1993, and carried forward in the Trucking Regulatory Reform Act of 1994, and again in the ICC Termination Act of 1995. Shippers have specific statutory protections from undercharge claims. See 49 U.S.C. §§ 13709, 13710, and 13711. Federal regulations also shield them from the assessment of class rates as a penalty for late payment of freight bills.⁶ See, e.g., 49 C.F.R. § 377.201, et seq. Of course, shippers continue to have the right to challenge the reasonableness of collectively made rates on past shipments, either affirmatively or defensively. 49 U.S.C. § 13701, 14704, 14705. Finally, and as particularly pertinent, Section 13703(f) specifically provides that: "Nothing in this section shall serve as the basis for any undercharge claim". In

⁶ The so-called loss-of-discount for late payment rules are established individually not collectively.

view of this array of remedies, it cannot seriously be contended that the proposed radical new condition is necessary to address an undercharge crisis long since gone.

As for the assertion that some shippers are paying undiscounted class rates, the prior decisions never identified contemporaneous facts establishing the extent of or circumstances surrounding the claimed payment of undiscounted class rates.⁷ Nonetheless, it is a moot issue as a result of changed circumstances.

In the latter part of 1999, the various regional rate bureaus, including MWB, proposed general increases to become effective on or around October 1, 1999. After protest by the National Small Shipments Traffic Conference, Inc. and the Health and Personal Care Distribution Conference, Inc., (the Conferences), the Board suspended and set for investigation the proposed increases of MWB, EC-MAC Motor Carrier Service Association, Inc., North American Transportation Council, Inc. and Rocky Mountain Motor Tariff Bureau, Inc., STB Docket No. ISM 35006, Protests and Petitions for Suspension and Investigation, served September 30, 1999.⁸

⁷ It is, of course, our position that the undiscounted bureau class rate level is just and reasonable and properly achieves the goals of the National Transportation Policy.

⁸ General increases were also published by Pacific Inland Tariff Bureau and Southern Motor Carriers Rate Conference. As explained, *infra*, they were not protested by the Conferences or suspended by the Board.

Subsequently, the four bureaus cancelled the suspended increases and the Board discontinued the suspension and investigation proceeding by decision served October 15, 1999. The bureaus then published general rate increases simultaneously with a general rule applying a 35 percent discount to class rates for shippers without an applicable discount. (PITB and SMC previously published similar discount rules and therefore their general increases were not protested or suspended.) These increases were not opposed, suspended, or investigated and became effective on or about November 1, 1999.

In view of these actions by bureau carriers, there no longer are any shippers subject to undiscounted bureau class rates. While the Board's Feb. 11 Decision expresses some concern that the discount rules do not provide minimum discounts, the class of shippers assertedly sought to be protected in the 1998 Decision were those without any discounts. The general rule adopted by the bureaus addresses that concern and ensures that any shipper previously without any discount will receive the benefit of the 35 percent discount. The underlying premise for the 1998 Decision has therefore been eliminated.

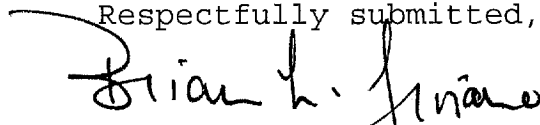
CONCLUSION

Since the Board announced its approach to the renewal of bureau agreements in December 1998, circumstances have changed dramatically. The statute was amended to eliminate the mandatory 3 year expiration and review provisions pursuant to which the 1998 Decision was issued. It was replaced with a new 5 year

review period which was intended to give the Board sufficient time to engage in a more deliberative process in reviewing these agreements. Contemporaneously with this legislative activity, the bureaus took rate actions which addressed the concerns expressed in the 1998 Decision.

Given these considerations, the Board should conclude that its proposed action is not warranted by the facts or the law.

Respectfully submitted,



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