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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.

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REPLY COMMENTS OF RATE BUREAUS¹

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¹ These reply 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).

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The three general commodity motor carrier rate bureaus listed in the margin (“Bureaus”) hereby reply to certain initial comments submitted in this proceeding. Specifically, Bureaus will reply to the joint comments submitted by the National Small Shipment Traffic Conference, Inc. and the Health and Personal Care Distribution Conference, Inc. (jointly, “Conferences”); the National Industrial Transportation League (“NITL”); the Halogenated Solvents Industry Alliance, Inc. (“HSIA”) and the Transportation Consumers Protection Council, Inc. (“TCPC”).

¹ These reply 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).

I. INTRODUCTION AND SUMMARY

This proceeding should be discontinued. In the Motor Carrier Safety Improvement Act of 1999 ("Safety Act"), Congress removed the three-year agreement expiration/renewal provision from 49 U.S.C. § 13703(c) (the provision under which the Board began its consideration of the level of class rates in *EC-MAC I*).² The expiration/renewal process was replaced with a provision directing the Board to undertake a review of bureau actions under the antitrust immunity every five years, such period beginning with the enactment of the Safety Act. *See* Safety Act, section 227, amending section 13703(c). As Chairman Shuster and Congressman Rahall advised the Board in very clear terms in their February 3, 2000 letter, the Board is not expected to impose any "significant new requirements" on bureaus "without a thorough review based on facts developed during a five-year review process." (emphasis supplied). The Congressmen were also very clear that, "the provision of section 227 regarding cases pending on the date of enactment of [the Safety Act] should also be considered" within the context of a five year review proceeding.

The Board should respect this explicit Congressional direction by taking no action in this proceeding at this time. Rather, the Board should use the review period fixed by the new statute to determine if there is a problem with respect to class rates that warrants its attention or not.

Moreover, it is clear from the record in this proceeding that no intrusive regulatory action is needed because (1) the motor carrier market remains highly competitive and (2) the rate bureaus have responded to the concerns that the Board has

² *EC-MAC Motor Carriers Service Association, Inc. et al., Section 5a Application No. 118 (Amendment No. 1) et al.*, (served December 18, 1998, *aff'd* February 11, 2000).

expressed by establishing a general discount from their class rates for traffic not otherwise discounted.

No party to this proceeding offers any basis on which to seriously dispute that the rates charged by motor carriers that are members of rate bureaus, just as the rates that are charged by carriers that are not members of rate bureaus, are market-determined. As the ICC found only a few years ago, “the motor carrier industry is a textbook example of a competitive industry”³ The precise level of rates or discounts for any given traffic is determined with reference to the competitive and other factors surrounding the shipment itself – factors such as the volume of the cargo, regularity of the traffic, need for special equipment or handling, presence of intermodal competition, whether any special services are required, etc.⁴ The mix of factors relevant to any particular freight may warrant a smaller discount from benchmark levels (e.g., traffic involving inefficient loading or unloading facilities or moving between points far from major routes), or the mix of factors may warrant a larger than average discount. As the Interstate Commerce Commission found in its thorough decision following a 1991 analysis of motor carrier pricing and collective ratemaking, “We recognize that shippers with higher volumes and more consistent traffic are likely to obtain lower rates than the occasional shipper of 500-pound lots. In today’s market that is understandable.” *See* Ex Parte No. 196,

Investigation of Motor Carrier Collective Ratemaking and Related Practices and Procedures, 7 I.C.C.2d 388, 463 (1991) (“*Investigation*”); *Georgia-Pacific*, 9 I.C.C.2d at 160 (“Variations in the price and service packages between similar shippers are typically

³ *See* *Petition of Regular Common Carrier Conference for Establishment of Minimum Rate Standard and Other Relief*, 8 I.C.C.2d 340, 353 (1992) (“*Petition*”).

⁴ *See* *Georgia-Pacific Corp. – Petition for Declaratory Order, Certain Rates and Practices of Oneida Motor Freight, Inc.*, 9 I.C.C.2d 103, 159 (1992) (“*Georgia-Pacific*”).

not a manifestation of unlawful price discrimination, but rather represent real differences in operational and market circumstances).

The ICC further determined in *Investigation* that the variability of rates from shipper to shipper does not mean that the small or occasional shipper is likely to become, in the absence of strict regulation, a victim of “price gouging.” That would not happen, the ICC reasoned, because in the trucking industry “it is likely that there will be carriers with the space and opportunity to take a small, occasional load at a reasonable price” and that “reasonably priced services generally should be available to those that try to find them.” 7 I.C.C.2d at 463. As the ICC determined as recently as 1992, “The notion that shippers do not have adequate rate information if the I.C.C. does not provide it ignores the realities of today’s economy. There are numerous private sector sources of price and service information. Even the smallest shipper can obtain quotes by telephone or fax from a variety of carriers, from brokers, or from other middlemen.” Petition, 8 I.C.C.2d at 355. Of course, this conclusion fully holds today given the continued competitiveness of the industry and the broadened access of shippers to available rate information through the Internet and other electronic means.

Ultimately, most trucking prices are determined by free market negotiations between shippers and carriers and, in a substantial percentage of cases, the product of these negotiations is reflected in transportation contracts. Often, rate levels are stated as discounts measured from benchmark class rates established either by carriers acting independently or by carriers acting collectively through the rate bureau process. The level of these benchmark rates does not vary significantly as between bureau and non-

bureau carriers, and in fact several large carriers, who maintain their own class rates, are the price leaders in the market.

Although the motor carrier market is highly competitive and sensitive to the pricing demands of shippers, the Board has suggested that, in order to protect an hypothesized class of shippers that do not have access to discounts, the level of collectively made benchmark class rates should be adjusted to make those rates more market-based. While those benchmark rates have not been proven to be unreasonable, and while the notion that there are shippers without access to discounts appropriate for their traffic ignores the competitive market conditions that the ICC found in its prior consideration of these issues, the carriers that are members of the Bureaus have nonetheless taken action that responds to the Board's concerns. Specifically, they have adopted an across-the-board 35% discount from the collectively made benchmark rates for any traffic that is subject to bureau-published rates, but not subject to any other individually determined discount program. This "general" discount has been put into place to address the concerns that have been expressed about the level of undiscounted bureau-published class rates, notwithstanding that these benchmark rates are not significantly different from the class rates that individual carriers maintain.

Unfortunately, the shipper associations that have filed comments have chosen to treat this proceeding as a vehicle to secure greater discounts for their members, rather than seriously address the merits of the 35% discount that Bureaus have established. While four of the five shipper associations agree that the general discount approach is an appropriate means of addressing the Board's concern, none of the shipper groups have demonstrated, much less even contended, that a general 35% discount from bureau class

rates yields rate levels that are unreasonable. Nonetheless, the shipper groups propose that bureau benchmark rates be discounted by 45% or 50% for all traffic, while acknowledging that they lack a factual basis to support their proposal. *See* Conferences at 18-19 (suggesting 45% or 50%), NITL at 6-7 (suggesting at least 50%).

They further propose that such 45% or 50% discounts be made applicable not only to the same extent as the Bureau-published 35% discount (*i.e.*, traffic that has no other discount), but that their proposed discount trump any lesser discount negotiated between a carrier or shipper on specific traffic, and thereby become a minimum discount.⁵ They seek this extraordinary remedy, and the windfall that would flow from it, without any regard for the fact that in the free market shippers and carriers regularly exercise business judgment respecting the mix of relevant transportation and competition factors, such as those described in *Georgia-Pacific*, in reaching a negotiated discount that may be more or less than such a prescribed minimum discount. Instead, the shipper groups contend merely that motor carriers “routinely” offer discounts of 45% or 50%, ignoring the fact that much traffic just as routinely moves at lesser discounts.

The position of the shipper associations is as ill-conceived as it is patently opportunistic. The same associations that have long advocated that the free market alone should govern rates now seek the assistance of government to force carriers to effectively cut benchmark rates in half for all shippers and undo negotiated discounts so that larger discounts must be placed on traffic that is already competitively discounted. It is beyond question that any one of their members would find absurd (and vigorously oppose) such a proposal were it applied to their own businesses. Further, this Board has no regulatory

⁵ Of course, if a higher discount is in place, it would remain in place.

jurisdiction to override rate arrangements made between individual carriers and shippers, even where those arrangements are based on collectively made benchmark rates. For one simple reason shippers point to no statutory authority on which the Board could rely in overriding negotiated discounts – there is none.

Putting aside the absence of any statutory basis for their proposal to override negotiated discounts, these shipper groups might posit that such a drastic approach is needed because the trucking industry's antitrust immunity insulates carriers from the marketplace, allows them to raise rates to supra-market levels, and confers upon them the market clout to force shippers to pay such "inflated" rates. This, however, is not the way the world works under deregulation, as these shipper groups well know. The antitrust immunity offers bureau carriers no immunity from their need to compete with other carriers for shipper business. Bureau member carriers would quickly find themselves out of business if their discount levels did not match those of non-bureau carriers, who use similar (but non-collectively made) benchmark rates and pricing programs. The immunity, in short, does not justify regulatory action designed to override discounts that are the product of negotiation.⁶

⁶ This point cuts to the heart of why carriers participate in rate bureaus – they do not do so to charge higher rates and they could not possibly profit from such a strategy. Instead, the major reason carriers participate in collective ratemaking is to allow them to offer more competitive options to shippers, generally in the form of joint rates. Through a network of collectively made joint rates, smaller bureau carriers can offer a competitive option to larger carriers that can handle freight in single line service. If the immunity were lost, this competitive option would be sacrificed. Carriers and their customers would suffer.

II. THE SHIPPER ASSOCIATIONS DO NOT CHALLENGE CERTAIN FUNDAMENTAL POINTS CONCERNING MOTOR CARRIER RATES AND PRICING

Before turning to the specific comments of the shipper trade groups, it bears note that there are several points on which there is no disagreement between those groups and Bureaus (or between those shipper groups and other rate bureaus that have filed comments). First, no party has contended that the trucking market is other than highly competitive. The comments of the Conferences acknowledge this competitiveness. *See* Conferences at 5 (“Today’s trucking industry is characterized by intense competition, generally reasonable rates, generally excellent service, and a level of responsiveness to customers that is far in excess of what railroads and water carriers manage to provide.”)

Second, no party has contended that the class rates established through collective ratemaking are higher than, or essentially different from, those established by individual carriers. In this era of deregulation, many carriers, including those carriers generally acknowledged to be price leaders, have established their own class rates outside of the bureau process.

Third, with the exception of TCPC, each of the other shipper groups is prepared to accept the general discount approach as a means of addressing concerns about some shippers paying undiscounted class rates. Both the Conferences and NITL support this approach over a broad rollback in class rates. As the Conferences note, a rollback approach “could necessitate amendments to thousands of contracts to address pricing impacts that were unanticipated by one or both parties.” Conferences at 13.

Further, none of the shipper groups offer any evidence of any shipper being deprived of its opportunity to find competitive rates. The record in this proceeding and in

EC-MAC I thus remains bare of proof that the price gouging problem that the Board is endeavoring to address does in fact exist, or at least that there is a problem warranting intrusive regulatory action. In short, the ICC's specific determination in *Investigation* that such a problem does *not* exist in the competitive trucking industry has not been disproved.⁷

III. REPLY TO SPECIFIC COMMENTS

Bureaus will next respond specifically to the comments filed by the major shipper groups (Conferences and NITL) that have submitted comments in this proceeding.

Bureaus will also address the views of TCPC and HSIA.

1. Collectively Made Rates Are Subject to Competitive Constraints

At pages 1 through 9 of their joint filing, the Conferences offer an historical overview of the changes brought about by deregulation of the motor carrier industry over the last several decades. This overview leaves the impression that the entire trucking industry raises rates in lockstep because of the antitrust immunity held by the rate bureaus and that rate bureau benchmark rates somehow dominate the market. Conferences at 7-9. NITL offers this same impression. See NITL at 2 ("the League is mindful that providing discounts off the rate bureau rates has evolved into a standard operating procedure of the motor carrier industry.")

⁷ TCPC contends on the basis of a "pre-audit" of unidentified freight bills by "Diane Hathaway of Industrial Traffic Consultants" that 9.54% of "all bills" are undiscounted. If TCPC is contending that 10% of all traffic moves at undiscounted class rates, it has hardly proven that to be the case. No more specific facts are offered about this "pre-audit." For example, no disclosure is made as to how many bills were audited, as to the nature of the freight (common or contract carriage), whether the rates charged were collectively made or independently made or the basis on which the applicable charges were determined, etc.

The notion that bureaus dominate motor carrier pricing to the exclusion of independent pricing is far from accurate, as shippers in the marketplace well know. The reality today is that Bureau member carriers are generally smaller carriers that do not dominate any markets, and rate bureau class rates are among many sets of benchmark rates from which discounts are available. For the past several decades, price leadership has shifted from the bureaus to major national and regional carriers, as best demonstrated by the fact that the periodic general rate increases in the trucking market are always sponsored initially by non-bureau carriers acting independently of both one another and the rate bureaus. This fact was very clearly demonstrated in connection with the 1999 increases, which were initiated by announcements made by a series of non-bureau carriers to become effective in early September 1999. *See* Exhibit 1, listing increases announced by major carriers independent of, and often prior to, collectively made increases. These announcements were then followed by similar (and in some cases lower) rate bureau increases of between 4.9% and 5.5% scheduled to be made effective October 1, 1999. Clearly, the antitrust immunity was not the driving force behind the 1999 increases. The same, in fact, could be said of every increase taken for several decades. The market places a cap on rate increases, and the immunity is not determinative with respect to the level or timing of those increases.⁸

⁸ It is ironic that Conferences, which are comprised in part of large pharmaceutical firms (e.g., Bristol-Meyers Squibb; Pfizer and Johnson & Johnson) whose prices and pricing policies have been questioned widely by political leaders, antitrust regulators and others for several years, and who face little competition in marketing drugs over which they have patents, would complain about transportation charges imposed in a highly competitive environment by carriers that are a fraction of their size. One of the underlying truths that sometimes is overlooked by those who question carrier antitrust immunity is that many of the members of these shipper groups are huge corporations (such as Eastman-Kodak and International Paper) that, within their own markets, exert much more influence on prices than does any rate bureau member. Much as they try to

The Conferences also contend that the bureau class rates have been “swollen over the years by general rate increases.” Conferences at 14. At the same time, however, the Conferences acknowledge, quite correctly, that the bureau class rates are “constrained” by the need “to preserve some reasonable relationship to the class rates published by the major individual carriers.” Conferences at 14. The latter statement is absolutely correct, and underscores the fact that bureau class rates are little different from those of individual carriers.

As to the allegation that class rates are “swollen,” Conferences overlook the fact that the rates are subject to a reasonableness standard and to the right of shippers and others to protest their level. In any event, while no proof is offered by the Conferences that the class rates are unreasonable or that any shipper is forced to pay above-market rates, the 35% discount program that Bureaus have established moots the concern.⁹

perceive themselves as Davids fighting the Goliath of the rate bureaus, the reality is that many of the Conferences’ members, and those of NITL, include many Goliaths of American industry. Those mega-corporations, benefiting from highly competitive carrier pricing, are trying to squeeze a little more through this regulatory proceeding.

⁹ The Conferences contend that the Bureaus have taken the inconsistent positions that (1) there are essentially no shippers paying undiscounted class rates and (2) shippers who are paying such rates “deserve what they get, because they should have shopped harder or smarter for transportation services.” Conferences at 15. This is not an accurate characterization of the Bureaus position. Bureaus have consistently maintained that there is no evidence of any widespread payment of undiscounted class rates by shippers. Accordingly, there is no proof of a problem warranting intrusive regulatory action. Bureaus have also consistently maintained that to the extent that some shippers may have in the past paid undiscounted class rates, it was because their traffic was relatively more expensive to handle and thus less competitive, *e.g.*, because such traffic may require special handling. Such traffic can be expected, in a competitive market, pay more than other traffic.

There is no inconsistency here – there is no evidence of a problem warranting regulatory attention because if any shippers were not getting the benefit of discounts before the 35% discount was put into place, it was the market that made that determination. What is grossly inconsistent is the Conferences’ contention on the one

2. A General Discount Approach is the Most Appropriate Means of Addressing the Board's Concerns

As noted, Conferences agree that a rollback of class rates would be disruptive of the market, and they favor the general discount approach adopted by Bureaus (and several other rate bureaus). Conferences rationally conclude that discount arrangements "represent a reasonable solution" to the class rates issue. NITL reaches the similar conclusion that a system of discounts might provide a viable approach to the issue.

On the other hand, TCPC disagrees with these shipper associations and urges that class rates be rolled back. Specifically, TCPC suggests that the Board apply the *Georgia-Pacific* methodology (which was designed to assess the reasonableness of a particular rate charged to a particular shipper on a particular traffic lane) to roll back class rates by periodically using "a statistical analysis of the market-based cluster of rates for various traffic lanes" and then applying "a correction factor . . . to reduce them to the market level." TCPC at 6. In other words, TCPC is asking the Board to use its limited resources to determine what some undefined groups of carriers is charging on an unspecified number of traffic lanes (which presumably would measure at least in the hundreds if not many thousands) and then apply the results to reduce class rates published by numerous bureaus.

Apart from the fact that such a highly complex undertaking, even if it could be done at all, would tax the resources of all involved parties, TCPC's proposal reflects that it is not merely off-base, like some other commenters, but off the reservation entirely.

hand that the market is highly competitive and, on the other, that regulatory intervention is needed to improve the position of shippers by cutting rates by at least one-half, beyond a 35% discount level which they do not claim is unreasonable.

There is no data base of carrier rates from which to perform such a study and no viable means of creating such a data base or fashioning the kind of detailed traffic lane study in a way that would yield meaningful results relative to the level of benchmark class rates. Moreover, TCPC is in effect asking the Board to apply a heavy regulatory hand to engage, on some periodic basis, in a detailed rate setting venture for one sector of the motor carrier industry, leaving untouched class rates established by numerous carriers acting outside of the collective process. This proposed approach is plainly at odds with the Board's very limited role in motor carrier matters, and its acknowledged limited resources. 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 (acknowledging that "[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]"); *EC-MAC I*, December 18, 1998 Decision at 7, fn. 19 ("given the resources and the mission that Congress assigned us in the Termination Act, we are in no position to rule on the reasonableness of every individual motor carrier rate . . . or otherwise engage in the elaborate regulatory processes conducted by the ICC to review GRIs . . .").

TCPC unrealistically downplays the disruption a benchmark rate rollback would cause to thousands of rate contracts and to the market in general. TCPC claims that contracts could be revised at their anniversary dates without disruption. But it is hard to imagine that a carrier would agree (nor should it have to agree) to ignore the impact of a rollback for two or three or more years, until a contract's anniversary date, in order to

accept a revenue shortfall resulting from negotiated discounts which were pegged to a higher benchmark. Further, it is unrealistic to believe that carriers and shippers would not be forced by a rollback order to promptly re-design a myriad of pre-rollback rate arrangements, or that surcharges fashioned in an effort to maintain rate equilibrium with pre-rollback discounts would not promptly appear in the marketplace. Significant market disruption and substantial transaction costs would certainly result from a rate rollback, TCPC's assurances notwithstanding.

TCPC claims that GRIs do not disrupt the market and on that basis argues that a general reduction should not. But here TCPC overlooks that contracts and other rate arrangements are designed in contemplation of periodic general increases and the market readily adjusts to these. Likewise, the market regularly deals with rate reductions on specific shipments by means of discounts, the level of which are adjusted to meet competitive circumstances. By contrast, general rate reductions are unprecedented and would require that all existing discount and other arrangements be re-visited.

TCPC argues that the public and private cost of a rollback proceeding is justified because "the huge public and private cost of the undercharge debacle is the direct result of the practice of extensive discounting from these artificially high class rates created and maintained by the Rate Bureaus." TCPC at 8. TCPC appears to have overlooked the fact that the undercharge crisis is over. There is no flood of undercharge cases facing TCPC's members or any other shippers because of the remedial legislation that has been passed over the last several years (including of course the repeal of tariff filing obligations) and the good work of this Board and its predecessor to soundly address the unseemly efforts of bankruptcy trustees to collect more than what was bargained for.

Further, and dispositive of its concerns, the Interstate Commerce Act provides that no collective action taken under an approved agreement “shall serve as a basis for any undercharge claim.” 49 U.S.C. 13703(f). In addition, the rate bureaus were not, and are not, responsible for any undercharges. While bureau class rates were undoubtedly at issue in some undercharge cases, in the vast majority of cases it was individual carrier class rates that trustees were seeking to collect in the negotiated rates cases.¹⁰ Rolling bureau class rate back now, years after the crisis is over, would serve no remedial purpose.¹¹

In short, the views of the Bureaus, Conferences and NITL on the issue of discount versus rollback should prevail over those of TCPC. There are, however, important differences between the Bureaus and these shipper groups that favor the discount approach with respect to the level of the general discount and how it should be applied, and these differences are addressed next.

¹⁰ See, e.g., *Nice-Pak Products, Inc. v. Be-Mac Transport Company*, STB No. 41844 (May 8, 2000) (involving efforts by a carrier to collect undercharges for 1992 shipments on the basis of a tariff published by an individual carrier known as Middlewest Freightways, Inc.).

¹¹ TCPC takes issue generally with the very existence of class rates, calling them a “trap for the unwary.” However, a list price/discount pricing system has been the hallmark of motor carrier pricing for decades, and is a pricing model not dissimilar to that used in other businesses. TCPC offers no proof that the competitive market is not functioning freely or that, contrary to the ICC’s conclusion in *Petition*, shippers lack the information or tools to make informed decisions with respect to the prices they are prepared to pay for motor carrier services offered in the free market. TCPC does not even acknowledge that the market is competitive – a fact its own members would be quick to confirm. In any event, the Board lacks authority to decree the class rate system away, either for carriers that participate in collective ratemaking or others.

3. The Proposed 45%-50% General Discount is Unsupported and is Far Too High

The Conferences support discounts that are sufficient “to reflect the impact of competition on motor carrier rates.” Conferences at 18. NITL likewise supports a discount that would achieve “parity with market rates.” NITL at 6.

Putting aside the now mooted question of whether undiscounted class rates are at market levels or not, Bureaus submit that the 35% discount they have established precisely meets the stated goals of these shipper associations. A 35% discount level (1) was accepted by the Conferences as a basis for resolving their protest of the October 1999 general rate increase taken by Bureaus; (2) is identical to or greater than discounts of other rate bureaus whose increases were not protested by Conferences; (3) is indisputably within the range of discounts available to shippers in the marketplace; (4) is greater than some other discounts that are commonly available to traffic that is generally more expensive to handle and (5) is not grossly unfair to the carrier.

Further, neither Conferences nor NITL (nor any other party) contend that bureau rates are unreasonable or not at a market-level after being discounted by 35%. If the bureau rates, discounted by 35%, reflect a level of rates available in the market, that should be the end of the inquiry in this proceeding.¹²

Confessing that they lack data “to assess the appropriate minimum level for such discounts,” the Conferences nonetheless now argue that the ICC’s finding in *Investigation* that a 40% discount was the average discount level in 1991 suggests that a

¹² Of course, there are many different market levels of rates, as Bureaus have argued previously, including rates that are discounted somewhat more or somewhat less than 35%.

35% discount is now too small to apply to shippers who heretofore have not qualified for any market discount. On this thin basis, they urge that a discount of perhaps 45% or 50% is more appropriate. At the same time, they recognize the lack of data to support one level over another and acknowledge that it "would be interesting to learn what the range and distribution of discounts is among shippers with discount programs." NITL similarly acknowledges that it "does not have access to comprehensive, up-to-date data on the discounts actually charged" by bureau carriers and is "therefore not in a position to identify the precise discounts" that might be appropriate. Nonetheless, NITL proceeds to conclude that the discount should be 50%, citing the same ICC finding in 1991 relating to the average discount and the fact — which Bureaus have acknowledged -- that discounts of up to 50% and higher are offered on certain freight.

The Conferences and NITL admitted lack of a factual or reasoned basis to support their proposed 45% or 50% discount level argues persuasively that the Board should not credit these proposals. Bureaus do not dispute that there are discounts offered at those levels and that in some cases (involving the most attractive, high volume shipments) even higher discounts are offered. That fact alone, however, does not support the establishment of a general discount at the 45% or 50% levels, for it is equally true that substantial traffic moves at negotiated, market discounts that are lower than 45% or 50%. Therefore, to place the general discount at a level (such as 45% or 50%) that reflects a discount level higher than that applicable on a significant volume of traffic can serve only to result in an unwarranted windfall for shippers. It would mean, for example, that a one-time shipper of cargo that is difficult to handle and being transported to or from a remote or congested location would be entitled as a matter of right to a half-off discount, whereas

today that shipment might receive a smaller discount. Plainly, this idea should be a non-starter.

To the extent that these shipper groups support a 45% or 50% general discount because these sums may approximate the prevailing average discount in the market (both groups point out that the average discount was 40% in 1991), again that is certainly not a basis on which to fix the general discount level. Even if one were to assume, *arguendo*, that 45% or 50% were the “average” discount today, by definition that means that a substantial amount of traffic moves at lesser discounts. The object of the general discount at issue in this proceeding is not to provide any shipper who otherwise lacks a discount program a windfall benefit of an average discount level that is greater than that offered to many other shippers in the market today. What rational policy goal would be advanced by such an approach?

And where is the revenue that carriers need to sustain their businesses to come from? If, as shippers agree, the market is competitive, then how are carriers to raise the revenues to replace those which they would be giving away by virtue of a directive to offer larger discounts than those which they are negotiated? And if these shippers succeed in driving additional carriers out of the market in an era of a tightening supply of motor carrier services, have they really served the interests of the shipping community? Neither Conference nor NITL ask, much less answer, these questions.

If the core purpose of this proceeding is to identify a means whereby shippers dealing with bureau carriers receive market level rates, the appropriate test of the general discount level is not whether it approximates an average discount or the relatively high discount level which Conferences and NITL propose. Rather, the test should be whether

the discount is one that is offered in the marketplace and not destructive of carrier revenues. No one has suggested that a 35% discount does not meet these tests. The Board should find that it does and terminate this proceeding.

4. The General Discount Should Not Override Negotiated Discounts

NITL argues that whatever discount level is adopted, that discount should apply for all shippers that have a lesser discount in place, *i.e.*, that the Board “should prohibit individual rate bureau members from establishing alternative discounts that are smaller than collective-set discounts.” NITL at 7. For reasons articulated by Bureaus in their initial comments in this proceeding, the Board should reject this radical notion that shippers and carriers cannot exercise their free market right to set discounts at whatever level they agree upon. As Bureaus there explained, and as the ICC acknowledged in *Georgia-Pacific*, a variety of factors dictate the rates that properly apply on any specific shipment. Carriers, including those that participate in collective ratemaking, as well as shippers, should retain the flexibility to negotiate an appropriate rate level in light of these factors so that the carrier earns a fair return and the shipper benefits from the carrier’s ability to provide the required service. The Transportation Policy set forth at 49 U.S.C. § 13101(a)(2)(D), (F) expressly obligates the Board to oversee the motor carrier industry in a manner that will “allow a variety of price and service options to meet challenging market demands and the diverse requirements of the shipping public” and so that efficient and well-managed carriers may “earn adequate profits, attract capital, and maintain fair wages and working conditions.” Adopting a mandatory discount that would override other, market-determined discounts would frustrate these goals.

Moreover, the decision to apply any particular discount is that of the carrier and its customer – neither the bureau or any antitrust immunity has anything to do with independent decisions, made by free market actors, as to how much rates will be discounted. Even if it had the authority to do so, there is no reason why the Board should interfere with these decisions so as to provide the shipper with a substantial windfall (particularly at the 45% or 50% general discount levels that have been proposed), and the carrier with a significant revenue shortfall. Surely, the shipper groups are not suggesting that any shipper today paying a 30% or 35% discount from a benchmark rate is entitled as a matter of legal fiat to an additional 15% or 20% discount just because the benchmark rate (which may be identical to, or lower than, independently-made benchmark rates of individual carriers) may have been collectively made. Such a position is entirely without merit.

There is, moreover, an even more fundamental legal flaw with the contention that bureau carriers must be constrained in terms of the discounts that they independently offer to shippers. NITL's proposal to limit the ability of Bureau carriers to establish their own rate discounts runs directly into the fact that the Board has no regulatory control over any rate or discount that a carrier (including a bureau member carrier), in the exercise of its independent judgment, may choose to establish. A bureau member carrier, in short, has no less right to establish any particular rate or discount than any other carrier and cannot be forced to forego market rates that are the product of negotiation. *See* 49 U.S.C. 13701(a)(1)(C) (authorizing the Board to assess the reasonableness only of rates "collectively made" by motor carriers, not individual carrier discounts from those rates).

See also 49 U.S.C. § 13703(a)(4) (guaranteeing the right of bureau carriers to independently establish rates).

Shippers point to no provision of the Interstate Commerce Act that grants the Board authority to override negotiated discounts. Their proposal would reduce available price service options and ultimately discourage market pricing, contrary to the very purpose of deregulation and the pro-competitive statutory goals reflected in the Act.

5. Bureaus Do Not Impose Loss of Discount Penalties

The Conferences, NITL and TCPC urge the Board to address a concern that their members may be forced to pay undiscounted class rates as a result of loss of discount penalties that carriers may assess on delinquent shippers. Bureaus have already addressed this issue in their initial comments. Quite simply, the issue is not one for this case for several reasons.

First, Bureaus do not maintain collectively-made loss of discount penalties, or any other late-pay penalties today in their tariffs. Bureau and non-bureau carriers may individually establish such provisions, but that is not a matter over which Bureaus, or the Board, have any control.

Second, to the extent that there is any federal regulatory body with jurisdiction to address carrier interest charges of the sort proposed by Conferences (at page 24 of their Comments) or late-pay loss of discount penalties, it is the Federal Motor Carrier Safety Administration (“FMCSA”), which inherited the ICC’s jurisdiction and regulations over motor carrier extension of credit. *See* 49 U.S.C. §§ 13706, 13707; 49 CFR Part 377. If prohibiting late-pay penalties based on class rates is sound policy – and Bureaus take no position on that issue – then it is sound policy regardless of whether the shipper is

charged class rates published by a bureau or by an individual carrier. The Board should not intrude into the FMCSA's unquestioned jurisdiction to address this matter on an industry-wide basis by attempting to address it more narrowly with respect to the use of only one particular category of class rates.

Third, to the extent that it is proposed to constrain individual carriers from relying on bureau class rates in connection with late-pay penalties (Conferences at 24) or to constrain carriers that happen to belong to a rate bureau from collecting a certain rate or rate penalty (NITL at 8), this again would stretch Board jurisdiction well beyond statutory limits. The proponents of this idea overlook that Bureau carriers are statutorily guaranteed the opportunity to establish whatever rates they choose by 49 U.S.C.

13703(a)(4) ("Any carrier which is party to an [approved] agreement . . . is not, and may not be, precluded from independently establishing its own rates")

Moreover, as relevant here, the Board's jurisdiction to assess rate reasonableness reaches only to "rates, rules and classifications made collectively by motor carriers" under approved section 13703 agreements. *See* 49 U.S.C. § 13701(a)(1)(C). Any late payment penalties that carriers may individually establish today fall outside of this reasonableness jurisdiction. This fact again underscores that if the late-payment issue is a matter that warrants a rule that would apply to all carriers, then the FMCSA is the body to which the shippers should take their issue so that it may be addressed in the industry-wide context of credit rules applicable to all carriers.

Finally, it is not at all clear that the late-payment penalty issue is either a widespread problem or one as to which shippers have no available remedies. It is certainly not the case that operating motor carriers, bureau members or otherwise, seek to

collect undiscounted class rates as a matter of routine practice from delinquent shippers. A carrier who made doing so an ordinary business practice would not long survive in the competitive market. The Conferences rely primarily on the *Humboldt* post-bankruptcy claims and, specifically, a Fourth Circuit decision holding that Negotiated Rates Act remedies are unavailable to shippers faced with a late pay penalty claim. *See In Re Apex Exp. Corp.*, 190 F.3d 624 (4th Cir. 1999). It bears note that the Fourth Circuit decision is at odds with ICC and Board precedents that establish that Negotiated Rates Act “unreasonable practice” remedies are available to shippers in late payment cases subject to 49 U.S.C. § 13711. *See, e.g., Portion-Pac, Inc. – Petition for Declaratory Order – Certain Rates and Practices of Riteway Services, Inc.*, No. 41241 (Nov. 19, 1999). Shippers are also free to defend late-pay cases on other grounds, including that the carrier failed to comply with credit rule requirements. If additional protections from the risk of unreasonable late payment penalties are appropriate, the parties seeking those protections should plead their case to Congress or the FMCSA.¹³

6. General Rate Increases are Beyond the Scope of this Proceeding

Not surprisingly, the Conferences and NITL seek to inject general rate increase (“GRI”) issues into this proceeding. Conferences suggest that bureaus do not provide adequate notice of GRIs and ask that bureaus be required to provide the cost justification

¹³ TCPC argues that “the most widespread situation” where shippers pay undiscounted class rates is the late-pay loss of discount setting, addressed above, and states that carriers “are allowed to impose a [sic] loss of discount provisions in their tariffs pursuant to 49 CFR 377.” If TCPC believes that to be the case, then it should petition the FMCSA to change that rule. As noted above, the Bureaus do not publish collectively-made loss-of-discount penalties.

for GRIs upon shipper request. NITL suggests without any evidence that past GRIs have not been cost-justified (the unexplained absence of any past protests to these GRIs is notable) and urges that, "Any new collective rate-making regime should prohibit the rate bureaus from taking GRIs without demonstrating that increases are needed to recoup actual cost increases sustained by their members." NITL at 9.

The procedures governing the adoption of GRIs, and the extent to which carriers may be required to make submissions of cost data, are not issues that were raised by the February 11 notice instituting this proceeding, which concerned solely the adjustment of existing rates to prevailing market levels. Thus, the issues that the shipper groups raise are beyond the scope of this proceeding.

Bureaus, however, disagree that existing procedures do not provide adequate notice to shippers of GRIs. In the case of the three rate bureaus party to these comments, notice of a GRI is mailed to each subscriber to each Bureau's publications at least six weeks prior to the effective date of the proposed increase. Consistent with procedures set forth in each STB-approved section 13703 agreement, the notice advises of a meeting to discuss the increase and affords all interested parties an opportunity to submit comments or attend the meeting. Thus, if shippers believe that they lacked notice of any increase, it is not for lack of the notice being provided by the Bureaus.¹⁴

¹⁴ The Halogenated Solvents Industry Alliance, Inc. filed its comments in this proceeding and in the National Classification Committee ("NCC") proceeding. There is no question, however, that the focus of its concern is with NCC. HSIA asks for certain procedural changes to allow, *inter alia*, any shipper access to data on which any proposed reclassification or collective action may be based and to let all shippers know of such proposed action. What is most curious about its proposals is that HSIA has never, to the knowledge of any of the Bureaus, availed itself of the opportunity to subscribe to the docket bulletins that Bureaus issue in advance of their meetings or of the opportunity to participate in those meetings. Bureaus have never even heard of HSIA prior to the filing of its comments, although clearly it has had an interest in some classification matters.

As to the factors that are considered in proposed rate increases, there is no mystery here either. Bureau carriers must contend with the same labor and non-labor (including fuel) costs and revenue needs that confront non-bureau carriers. Thus, the GRIs that bureau carriers implement are not essentially different than those that other carriers – including the market price leaders – implement.

Conferences suggest, incorrectly, that rate bureau members are somehow constrained from taking revenue needs into account in adjusting collectively made rates. That notion would mark a radical departure from the past. Revenue needs have historically been considered in rate bureau general rate increase proceedings, and existing precedent supports this approach. In any event, the critical point is that this entire subject area of general rate increase standards is not a matter that was raised in the notice instituting this proceeding and therefore the issue is not before the Board here. *See EC-MAC I*, February 11 Decision at 8-9 (indicating that this proceeding was being commenced solely to assess the level of class rates and that GRI standards are not part of this proceeding).¹⁵

Further, HSIA's procedural proposals are unnecessary and outside the bounds of this proceeding for the reasons noted above. To the extent that group also calls for either a 45% rate rollback or a minimum 45% discount, its unsupported proposals should be rejected for the reasons stated above.

¹⁵ Conferences make the unsubstantiated and unexplained contention that carriers make collective decisions to "reduce service quality" with antitrust immunity and that such decisions "find their way into tariffs and contracts throughout the industry." Conferences at 11. It is not true that carriers take collective decisions with respect to service levels. The level of service that a carrier may offer is a matter in all cases of that carrier's independent judgment and such matters have nothing to do with the collective ratemaking process.

Whether taken independently or collectively, however, the highly competitive market in which bureau carriers operate serves as the best regulator of GRIs. As the ICC found after its careful study of the issue, there is no basis for the notion that bureaus can use their immunity to avoid the market's impact. *See Investigation*, 7 I.C.C.2d at 463-464. In any event, where dialogue fails, shippers retain the right to protest GRIs and the Board the right to review and consider such protests.

CONCLUSION

Bureaus submit for the reasons stated above that this proceeding is premature. Congress contemplated that the Board would review matters of significance to motor carrier collective ratemaking at the end of a five year period that began only a few months ago, with the enactment of the Motor Carrier Safety Act of 1999. This proceeding should therefore be discontinued to allow more time for the Board to assess the current impacts of collective ratemaking. At a minimum, the Board should give the market more time to assess the 35% discounts that Bureaus have established, and the comparable discounts that other rate bureaus have published. If within the next year or so the shipper community believes that these discounts have not resolved their concerns about class rates, the matter might be considered at that time.

Further, Bureaus urge the Board not to take any action that would unduly interfere with rates or discounts that were the product of carrier/shipper negotiation. To do so would undermine the core purposes of deregulation.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "D. H. Coburn", with a long horizontal flourish extending to the right.

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Attorney for Rate Bureaus

May 11, 2000

ANNOUNCED MOTOR CARRIER INCREASES -- SEPTEMBER/OCTOBER 1999¹

Carrier	Increase	Effective Date
ABF	5.1	September 13, 1999
A-P-A	5.4	September 7, 1999
American Freightways	5.2	October 1, 1999
Central Freight	5.5	September 13, 1999
CF Motor Freight	5.53	September 1, 1999
Con-Way	5.7	October 4, 1999
GI Trucking	5.5	October 1, 1999
Next Day	5.0	September 1, 1999
Old Dominion	4.9	September 13, 1999
Overnite	4.9	September 27, 1999
Pitt Ohio	5.8	August 2, 1999
PJAX	5.0	September 1, 1999
Motor Cargo	5.5	October 4, 1999
Roadway	5.2	September 12, 1999
Ward Trucking	4.95	September 20, 1999
Watkins	5.42	September 20, 1999
USF Holland	5.7	October 4, 1999
Viking Freight	5.3	October 11, 1999
Yellow Freight	5.5	September 1, 1999

¹ The collectively made GRIs of the Bureaus, announced to be effective October 1, 1999, ranged between 4.9% and 5.5%.

CERTIFICATE OF SERVICE

I hereby certify that I have this 11th day of May, 2000, the foregoing Reply Comments of Rate Bureaus were served by first-class mail, postage prepaid on the persons listed on the Service List.


David H. Coburn