

ORIGINAL

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

204537

REPLY OF
MIDDLEWEST MOTOR FREIGHT BUREAU, INC.
AND
PACIFIC INLAND TARIFF BUREAU, INC.
TO
PETITION FOR RECONSIDERATION



Docket Number
S5M 22 8

S5M 25 9

S5M 34 10

S5M 45 16

S5M 46 21

S5M 55 2

S5M 58 4

S5M 60 11

S5M 63 4

S5M 70 12

S5M 116 1

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¹ This proceeding also embraces *Middlewest Motor Freight Bureau, Inc. - Renewal of Agreement*, Section 5a Application No. 34 (Sub-No. 10); and *Pacific Inland Tariff Bureau, Inc. - Renewal of Agreement*, Section 5a Application No. 22 (Sub-No. 8).

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Middlewest Motor Freight Bureau, Inc. (MWB) and Pacific Inland Tariff Bureau, Inc. (PITB) (hereinafter jointly referred to as MWB/PITB) file this joint reply to the Petition for Reconsideration submitted on behalf of the National Small Shipments Traffic Conference, Inc. (NASSTRAC or Petitioner).

RELEVANT BACKGROUND

In its decision served November 20, 2001, the Board declined to adopt either of the two conditions for approval of collective ratemaking agreements it was considering in this proceeding, *viz.*, (1) ordering a rollback of the general rate levels of bureau class rates; or (2) requiring that bureau class rates be subject to an automatic minimum

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discount rule. Instead it decided to impose two new conditions for approval. The first requires issuance of a "truth-in-rates" notice whenever a bureau carrier quotes or lists rates that are based on or refer to a collectively set rate. Essentially the notice would indicate that the collectively set rate is not necessarily the prevailing rate, that carriers offer discounts from such rates, and that such discounts fall within an identified range. The other condition requires a certification by bureau members that they will not apply a loss-of-discount rule that reinstates an undiscounted class rate as a penalty for late payment.

The Decision became effective on December 20, 2001, and directed the bureaus to file range of discount information by January 22, 2002, and amended agreements by March 20, 2002.² Petitions for Reconsideration were filed by MWB and PITB, jointly; EC-MAC Motor Carriers Service Association, Inc., Niagara Frontier Tariff Bureau, Inc. and Rocky Mountain Tariff Bureau, Inc. (EC-MAC), jointly; Southern Motor Carriers Rate Conference, Inc. (SMC); Western Motor Tariff Bureau, Inc. (WMTB); and NASSTRAC.³

Generally, the Rate Bureaus oppose giving the truth-in-rates notice at all (MWB/PITB and EC-MAC); the circumstances in which it must be given or its content (MWB/PITB, EC-MAC, SMC); or its application to them (WMTB). They also oppose the prohibition against loss-of-discount rules (MWB/PITB, EC-MAC, SMC); or its application to them (SMC and WMTB). Each Rate Bureau petition describes different practical problems and/or legal deficiencies resulting from the Board's Decision and

² By a decision served January 11, 2002, in this proceeding, the Board held the compliance dates in abeyance.

³ By decision served December 3, 2001, the due date for petitions for reconsideration was extended to December 31, 2001.

offers alternative suggestions from its own perspective. While MWB/PITB do not endorse any of the suggested alternatives to the extent they are inconsistent with their position set forth in their Petition for Reconsideration, the other Bureau petitions confirm that compliance will be burdensome, confusing, subject to differing interpretations, discriminatory, yet without any discernible benefit to the shipping public.

NASSTRAC is the only shipper group seeking reconsideration. Like MWB/PITB, it was caught by surprise by the conditions imposed by the Board. (Petition, p. 5). While it expresses lukewarm support for the truth-in-rates notice and the prohibition against loss-of-discount rules, NASSTRAC argues that the Board committed material error when it “relieved the rate bureaus from any obligation to maintain or enhance minimum discount programs currently in effect”. (Petition, p. 1).

ARGUMENT

A petition for reconsideration will be granted only upon a showing that the prior action will be affected materially because of new evidence or changed circumstances or that it involves material error. 49 C.F.R. § 1115.3(b). NASSTRAC does not base its petition on new evidence or changed circumstances. Rather, it asserts that the Board committed material error in declining to mandate discounts.

At the outset, NASSTRAC’s petition is based on the erroneous premise that the Board “relieved the rate bureaus from any obligation to maintain or enhance minimum discount programs currently in effect”. (Petition, p. 1). Of course, the Board did no such thing. The discount programs alluded to by NASSTRAC relate to the rules adopted voluntarily by the bureaus in 1999 in conjunction with their annual general rate increases (GRIs) to ensure that every customer of a bureau carrier automatically receives a

discount.⁴ We emphasize that these rules were adopted voluntarily. They were never required or imposed by the Board. NASSTRAC is simply wrong in contending that the Board's Decision relieved the bureaus from an obligation to maintain these rules (Petition, p. 1); or that it "authorized the rate bureaus to abandon" them (Petition, p. 5); or that it "make[s] automatic discount programs voluntary" (*Id.*) Plainly, Petitioner has a serious misconception of the Board's Decision. The discount rules in effect are and always have been voluntary and the Board's Decision did nothing to change that proposition. This claim of error is, therefore, meritless.

What the Board did was to decline adopting any requirement to maintain automatic or minimum discount rules. It reasoned that such an action would constitute rate prescription – a result which was inconsistent with its objective (Decision, p. 7). In addition, the Board concluded that it could not arrive at an appropriate discount level that would reflect market conditions and achieve its objective. While NASSTRAC obviously disagrees with the Board's conclusion, it fails to demonstrate that the Board committed error in declining to mandate discounts or that its underlying rationale is erroneous.

Petitioner's arguments are based entirely on a hypothetical concern. Acknowledging that all of the bureaus currently have automatic discount rules in place, NASSTRAC speculates that the bureaus might cancel them and therefore they should be prescribed in order to "institutionalize" them. These rules have been in place for well over two years now and Petitioner does not point to any evidence, action, statement or comment to suggest that any bureau contemplates canceling its automatic discount rule.

⁴ EC-MAC, RMB, NFTB and MWB adopted automatic discount rules after their GRIs were protested by NASSTRAC and suspended by the Board. STB Docket No. ISM 35006, served September 30, 1999. SMC and PITB had previously adopted discount rules and their GRIs were not protested or suspended.

MWB and PITB certainly have no intention of doing so. And, in view of the intense competition in the trucking industry, it would be economic suicide for a carrier to eliminate discounts.⁵

Even in the unlikely event that a bureau cancelled an automatic discount rule, a statutory mechanism exists for any affected shipper to challenge the reasonableness of the rates resulting from such action. 49 U.S.C. § 13701, § 13703(a)(5)(A), § 14701(b), and 49 C.F.R. § 1132.1. Certainly these procedures provide an adequate remedy and appropriate forum if this circumstance ever arose.

The remainder of NASSTRAC's petition repeats the same arguments for mandatory discounts it made in the comment phase of this proceeding. They have been considered by the Board and are no more persuasive now particularly in view of the discount rules maintained by the bureaus. The well-worn refrain about the small, unsophisticated shipper who is unable to negotiate discounts no longer carries the day. There is no evidence of any actual shipper who is not protected by the safety net provided by the discount rules in place. These rules likewise safeguard any large shipper from having to pay undiscounted class rates on vendor or customer return shipments arranged by the vendor or customer.⁶

⁵ Along these same lines, Petitioner posits that it would be in a bureau carrier's economic interest to charge a few shippers undiscounted rates in order to drive the lower end of the range of discounts down to zero. (Petition, p. 5). It is difficult to imagine how it would be in the carrier's economic interest to engage in such a practice since it would likely never obtain the traffic. Of course, MWB/PITB's suggestion that any truth-in-rates notice be limited only to those shippers who are quoted or offered undiscounted rates would address the Board's objective and presumably Petitioner's concern.

⁶ We believe this category of shippers is also more hypothetical than real. NASSTRAC asserts that vendors and customers often have their own preferred carriers and may be unwilling to ship via the shipper's designated carrier. More often than not, any shipper willing to pay the freight for return shipments has the ability to dictate the carrier to be used, or require the vendor to pay the freight charges of its preferred carrier.

Since the Board declined to prescribe a mandatory discount rule, it is unnecessary to dwell at length on NASSTRAC's argument that the Board has the authority to impose mandatory discounts as a condition of approval of the bureaus' collective ratemaking agreements. (Petition, p. 7). As previously argued, we disagree with such a contention. Although the Board has jurisdiction over collective ratemaking agreements as well as jurisdiction over the reasonableness of collectively set rates, its authority with respect to each is separate and distinct under the Act. The Board's authority to suspend, investigate and prescribe rates and rate levels exists wholly apart from its authority to impose conditions on collective ratemaking agreements. Compare 49 U.S.C. §§ 13701(a), (b) and (d); 13703(a)(3), 5(A), and (c); and 14704. The statute, regulations and due process mandate certain procedural and substantive requirements for rate investigations and prescription. *Id.*, Sections 13701(b), (d), 14701, 14704; and 49 C.F.R. Parts 1130, 1132 and 1133. These requirements provide for the development of necessary facts, proper allocation of the burden of proof, and specific findings of unreasonableness as prerequisites to the exercise of the Board's prescription authority.

NASSTRAC suggests that the Board's remedial authority over collectively established rates can be melded with its authority over ratemaking agreements to enable it to prescribe rates as a condition of approval of a ratemaking agreement. This argument is meritless for two reasons. As a matter of statutory construction, this interpretation would render superfluous the rate provisions of the Act. If the Board could prescribe rates under its supervisory authority over rate bureau agreements, the rate provisions of the Act would be unnecessary. More importantly, such a result would permit the Board to

circumvent the requirements of the Act and greatly expand its jurisdiction. Such an effort could not withstand judicial scrutiny.⁷

NASSTRAC next attempts to counter the argument that a mandated discount would interfere with carriers' right of independent action under 49 U.S.C. § 13703(a)(4). (Petition, p. 7). Petitioner argues that a mandatory discount rule would not interfere with this right because it only applies to a carrier's own rates and when a carrier charges an undiscounted or minimally discounted rate, that rate is not its own.

We are puzzled by these arguments. The automatic discount rules maintained by MWB/PITB are rules of general application, i.e., they apply to all participants in the tariff. Under the right of independent action, a carrier is free to except itself from the application of that discount. It can apply a lower discount, a higher discount or none at all, the result of which is its own rate. Obviously, a Board imposed discount level on a bureau carrier would infringe on that statutory right. Ironically, a prescribed discount level could well have the unintended effect of encouraging carriers to reduce their independently established discounts down to the government-sanctioned level.

Finally, it is evident that Petitioner is not satisfied with the truth-in-rates notice adopted by the Board. First, it urges that the notice needs to be coupled with a mandatory discount rule. (Petition, p. 9). Then, in apparent acknowledgement that the bureaus have voluntarily met that demand, it suggests in the alternative that the notice contain detailed information about the distribution of discounts. While this recommendation is not further explained, it goes well beyond that adopted by the Board and is objectionable for the same reasons set forth in MWB/PITB's Petition. In any event, we submit that Petitioner's

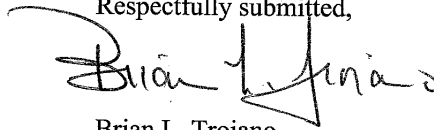
⁷ NASSTRAC also attempts to find support for an expansion of the Board's jurisdiction on the ground that the bureaus voluntarily adopted rules it now wants mandated. (Petition, p. 7). Suffice it to say that the bureaus' voluntary actions cannot confer subject matter jurisdiction where it does not exist by law.

disappointment with the notice requirement confirms our position that it is not likely to achieve any useful purpose.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that NASSTRAC's Petition be denied.

Respectfully submitted,



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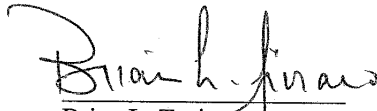
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DATED: JANUARY 22, 2002

Certificate of Service

I hereby certify that I have on this the 22nd day of January 2002 served a copy of the foregoing Reply to Petition for Reconsideration on all parties of record by first class U.S. Mail, postage prepaid.


Brian L. Troiano