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SERVICE DATE – SEPTEMBER 20, 2002

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. 41192

THE TJX COMPANIES, INC.--PETITION FOR DECLARATORY ORDER--CERTAIN RATES  
AND PRACTICES OF SWEENEY TRANSPORTATION, INC., AND KNICKERBOCKER  
EAST-WEST, INC.

Decided: September 17, 2002

This case was instituted pursuant to an order of the U.S. District Court for the District of Massachusetts, asking us to rule on certain motor carrier rate reasonableness issues. In this decision we find that The TJX Companies, Inc. (TJX or petitioner) has failed to establish that Sweeney Transportation, Inc. (Sweeney or respondent), a motor common carrier of freight, charged unreasonable rates to TJX. Accordingly, we find that TJX is obligated to pay the freight charges billed to it for transportation Sweeney provided between November 1992 and January 1993.<sup>1</sup>

BACKGROUND

TJX is the parent company of TJ MAXX, a nationwide retailer of clothing. TJX operated distribution centers in Worcester, MA, and Evansville, IN. Wholesale vendors shipped clothing and housewares to the distribution facilities, which subsequently sent the goods to TJ MAXX retail stores.

Sweeney participated in the carriage of shipments into TJX's distribution centers. Sweeney provided two kinds of service to TJX. Respondent carried shipments from vendor locations to TJX's Worcester or Evansville facilities. This service is known as direct shipment. Sweeney also consolidated

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<sup>1</sup> The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the ICCTA provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be continued and shall be decided under the law in effect prior to January 1, 1996. Thus, references to statutory and regulatory provisions will be to those in effect prior to enactment of the ICCTA, except where noted.

shipments at its terminals in Hackensack, NJ, and Chicopee, MA, prior to movement to petitioner's facilities.<sup>2</sup> This is the consolidation service.

Sweeney began serving TJX in June 1986, first hauling shipments to Worcester, then adding those moving to Evansville. Sweeney initially handled petitioner's shipments for Sweeney's affiliated freight forwarder, Knickerbocker East-West, Inc. (East-West), assertedly at the rates TJX had been paying East-West's predecessor, Knickerbocker Dispatch, pursuant to a tariff designated Knickerbocker 1-F. Beginning January 1, 1987,<sup>3</sup> and continuing through June 30, 1990, respondent charged TJX for transportation services based on rates in an unfiled tariff designated KNIC 300-A. That tariff contained both truckload and LTL rates. All transportation charges during that 3½ year time frame were assessed under the direct shipment procedure.

Effective July 1, 1990, Sweeney began to handle most of TJX's traffic under the consolidation procedure—referred to by Sweeney as the “Northeast Consolidation” arrangement. Under the procedure, Sweeney's Chicopee terminal was the consolidation point for TJX's traffic, and respondent charged petitioner for the transportation of LTL shipments to Chicopee based on new “consolidation rates.” Truckload shipments from Chicopee to Evansville or Worcester, as well as any shipments moving directly from vendors to the distribution centers, were billed at truckload rates.<sup>4</sup>

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<sup>2</sup> Under its consolidation procedure, Sweeney would transport shipments from vendor locations to a specified Sweeney terminal, where the carrier would consolidate and load into single truckloads all shipments moving to the same TJX distribution center. The respondent assessed a less-than-truckload (LTL) charge for the movement of each shipment to the consolidation terminal and a truckload charge for the movement of the consolidated shipment from the terminal to the TJX facility. Prior to initiating this procedure, Sweeney charged a single rate, LTL or truckload as appropriate, for the movement from the vendor locations to the TJX distribution centers, even though the LTL shipments usually were transloaded at a Sweeney terminal. After initiating the consolidation procedure, Sweeney apparently continued to move shipments directly from vendor locations to TJX's facilities when a shipment filled a trailer or was sufficiently large as to make it unfeasible to reload the shipment at a consolidation terminal. These direct movements were billed at truckload rates.

<sup>3</sup> TJX's evidentiary presentation on the issue of rate reasonableness uses a January 1, 1987 starting date.

<sup>4</sup> In its rebuttal, TJX asserts that its examination of freight bills has revealed instances in 1990 in which Sweeney moved LTL shipments directly from vendor locations to distribution centers and moved truckload shipments under consolidation—practices resulting in the assessment of charges higher than those contained in respondent's rate sources. Petitioner presents an exhibit (REB-JRW/TOC-7)

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The rates for services were derived through extensive negotiations. Sweeney avers that the negotiations resulted in a contract that it reduced to writing. While it admits that TJX never signed the pertinent contract, Sweeney asserts that it moved TJX's goods at contract rates, and that petitioner paid for service at those rates, until the Northeast Consolidation program ended and Sweeney filed a tariff in May 1992. TJX does not offer an explanation for the source of the rates other than to say that the rates were contained in letters from Sweeney and that the shipper believed that these rates were also contained in tariffs on file with the ICC. The petitioner emphasizes that it never signed a contract. TJX says Sweeney did not even present it with a contract until after respondent had begun charging TJX for transportation at rates purportedly in the contract.<sup>5</sup> Sweeney increased the consolidation rates by 11% on January 2, 1991.

In April 1992, TJX learned that Sweeney secretly had been making payments to TJX's Assistant Vice President of Transportation, Joseph Francis. Shortly after this was discovered, Sweeney filed tariff SWEY 605, with an effective date of May 4, 1992. The tariff reflected a change in the manner in which Sweeney was to handle TJX's traffic. No longer was all LTL traffic to be routed

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<sup>4</sup>(...continued)

showing 12 examples of the asserted misroutings/misbillings that occurred between July 23 and December 19, 1990, and it queries how many times the practice occurred between July 1, 1990, and May 4, 1992, while the consolidation rates were in effect. Petitioner also cites examples of two billing errors it discovered.

Petitioner's allegations were submitted in response to Sweeney's assertions that its labor-intensive consolidation procedures during this period warranted rates higher than those it subsequently charged after May 4, 1992. But petitioner admittedly does not show that misroutings were other than occasional, and its exhibit reveals that it actually saved money as a result of 2 of the 12 misroutings set forth.

<sup>5</sup> In its rebuttal, TJX asserts that, when Sweeney began the Northeast Consolidation, the carrier also began an agreed-upon weight aggregation procedure. Under the procedure, Sweeney would aggregate the weights of multiple shipments picked up from a vendor during a single pickup, and it would bill TJX at the rate (often lower) applicable to the combined weight. Petitioner contends that, after 3 months of aggregating weights, respondent unilaterally stopped the procedure on September 25, 1990. Petitioner presents an extensive exhibit purporting to demonstrate that, by failing to continue aggregating weights through April 1992, Sweeney overcharged TJX by \$950,292.63. Respondent replies that the procedure was an experimental one that the parties had not incorporated into their draft contract. Respondent adds that the parties mutually decided to terminate the procedure because of administrative problems encountered from creating single freight bills from multiple bills of lading. Petitioner has cited nothing to support a claim that it was entitled to the aggregation procedure.

through Sweeney's Chicopee terminal. Instead, LTL shipments originating at points in the six New England States were to move to Chicopee. LTL shipments originating at points in New York, New Jersey, Pennsylvania, Delaware, Maryland, and Virginia were to move to Sweeney's Hackensack terminal. The tariff contained LTL "consolidation rates" for such movements as well as truckload rates governing movements from Chicopee and Hackensack to Evansville and Worcester. The truckload rates to Worcester were flat rates, while those to Evansville were mileage rates.<sup>6</sup> The truckload rates to Worcester remained at the same levels as prior to May 1992. The truckload rates to Evansville decreased 9.1%, from \$1.10 per mile to \$1.00 per mile. Overall, the LTL tariff rates were approximately 22% to 26.7% lower than those Sweeney had been charging previously.

Sweeney maintains that its filing of the tariff was the end result of an open bidding process and negotiations that had begun in January and early February 1992. It asserts that it was able to decrease its rates because it was reverting to a less labor-intensive method of handling TJX's traffic. Petitioner, on the other hand, contends that respondent filed its tariff unilaterally, and that the rate decrease resulted because of market forces that began to work once the secret payments ceased.

Sweeney provided service for TJX under tariff SWEY 605 until January 7, 1993, when it terminated service for petitioner because of nonpayment of freight bills. Between November 1992 and the date of termination, Sweeney handled 4,360 shipments, for which it billed, but was not paid, \$483,000 in freight charges.

In January 1993, TJX filed an action in the United States District Court for the District of Massachusetts<sup>7</sup> in which it alleged, *inter alia*, that Sweeney had charged it unreasonable rates. Sweeney countered for alleged unpaid freight charges. On December 2, 1993, the court stayed proceedings before it in order for the ICC to determine the applicability of the tariffs and the reasonableness of the rates which Sweeney claims are applicable to the disputed shipments. Shortly thereafter, on January 21, 1994, TJX filed a petition for declaratory order. The ICC subsequently issued procedural decisions and the parties filed various pleadings in response.

In a decision served in this proceeding on January 6, 1998, we disposed of pending motions, outlined the issues presented and the standards we would use to resolve them, and established a

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<sup>6</sup> Flat rates provide a fixed rate per truckload from origin to destination. Mileage rates vary by mileage and by mileage block - for example, x dollars per mile for 50-99 miles, y dollars per mile for 100-150 miles.

<sup>7</sup> The TJX Companies, Inc. v. Sweeney Transportation, Inc., et al., Civil Action No. 93-10087-K.

procedural schedule for the filing of pleadings. TJJ filed its opening statement on June 22, 1998, Sweeney filed its reply on October 29, 1998, and TJJ filed rebuttal on January 25, 1999.

In our January 6, 1998 decision, we declined to make a specific finding concerning the bribery of the TJJ employee, noting that doing so would interfere with the court's jurisdiction to resolve what is essentially an issue of state law. TJJ has asked us to reconsider this decision. For the same reasons indicated in our prior decision, we must decline to do so. We will confine our decision to the issues which the court asked that we address.

### PRELIMINARY MATTERS

Sweeney has filed a motion to strike TJJ's rebuttal, and TJJ has replied. Sweeney asserts that, in its rebuttal, petitioner filed 32 new exhibits, totaling hundreds of pages of traffic studies and tariffs, using new comparison carriers and new arguments. Sweeney avers that, in essence, TJJ filed a new opening statement.

In reply, TJJ contends that the material it submitted in rebuttal was proper as responsive to the evidence presented and to the allegations raised in Sweeney's reply statement. TJJ further asserts that, of the 17 pages of Sweeney's motion, only the first paragraph of page 1 relates to the motion to strike. The rest of respondent's pleading, TJJ argues, simply consists of impermissible arguments on the merits and should be rejected. Alternatively, if we consider any of the arguments advanced in the motion, TJJ argues that it should be granted the opportunity to submit responsive briefings.

The basis for Sweeney's pleading is valid. Petitioner's rebuttal contains substantial new rate comparison evidence that respondent should be permitted to address and to supplement.<sup>8</sup> In the interest of rendering a decision on a complete record, we will not strike the rebuttal. Rather, we will consider the material in both the rebuttal and the motion addressing the rebuttal. We see no reason, however, for allowing TJJ to submit an additional responsive briefing. TJJ has, in effect, presented and argued its case twice and has replied to Sweeney's motion. Its position is clear.

Sweeney also has filed a motion to strike the verified statement (and accompanying rate comparison charts) of former TJJ official Leo Murphy that petitioner submitted with its rebuttal. TJJ has replied to the motion. This motion also will be denied. The identical statement and charts were initially submitted with TJJ's opening statement. TJJ resubmitted them in response to allegations in Sweeney's reply. Sweeney has had the opportunity to address the assailed matter. Moreover, its

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<sup>8</sup> As we will subsequently discuss, TJJ has excluded from some of its exhibits pertinent comparison carrier rates that are higher than those of Sweeney. Sweeney has supplemented the evidence by providing the missing rates.

objections relate to the probative value of the matter and thus go to the weight to be accorded it, not to its admissibility.

## DISCUSSION AND CONCLUSIONS

Applicable Standards. In our January 6, 1998, decision, we stated that, to determine rate reasonableness, we would use a modified market-based analysis applied to motor carrier rates charged in the past under Georgia-Pacific Corp. - Petition for Declaratory Order - Certain Rates and Practices of Oneida Motor Freight, Inc., 9 I.C.C.2d 103 (1992) (GPac-I); 9 I.C.C.2d 796 (1993) (GPac-II) (collectively, Georgia-Pacific); 9 I.C.C.2d 1052, aff'd sub nom. Oneida Motor Freight v. ICC, 45 F.3d 503 (D.C. Cir. 1995). Under Georgia-Pacific, we determine the reasonableness of a challenged rate by comparing it with a “market-based cluster of price/service alternatives for the issue traffic” or, in other words, rates “at which a shipper was willing to ship and a carrier was willing to transport the goods.” 9 I.C.C.2d at 156. Any rate significantly above prevailing market-based rate levels for similar transportation services is considered to be presumptively unreasonable. GPac-I, 9 I.C.C.2d at 157.<sup>9</sup>

We recognized that the Georgia-Pacific standards were developed to guide the ICC (and now the Board) in making rate reasonableness determinations in proceedings in which defunct carriers were seeking undercharges, which is not the situation here. We nonetheless concluded that the Georgia-Pacific standards would be well-suited to our purpose here in determining the reasonableness of rates charged by Sweeney in the past. We thus directed the parties to submit rate comparison evidence in accordance with the standards outlined in GPac-I, 9 I.C.C.2d at 156-57; see also GPac-II, 9 I.C.C.2d at 806-09.<sup>10</sup>

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<sup>9</sup> We further stated that, because Sweeney is an operating carrier, we would also consider the criteria set forth in 49 U.S.C. 10701(e) and that, therefore, the parties could present evidence concerning the “honest, economical, and efficient management” standards of that section. The parties have not made any presentation under these standards.

<sup>10</sup> In GPac-I, 9 I.C.C.2d at 157, the ICC stated:

[W]e will look to evidence identifying what the price and service options available to the shipper in the market place were at the time the shipment(s) took place. This evidence could include: (1) other rates quoted by the same carrier, (2) contemporaneous rate offers from other carriers to move the traffic at issue, (3) rates for other shipments by the shipper under substantially similar transportation conditions (similar commodity, distance moved, volume, etc.) that moved at about the same time, (4) motor carrier contracts under which the shipment(s) at issue could have been made, (5) the rate originally charged for the shipment, (6) any other  
(continued...)

Burden of Proof. TJX contends at the outset that evidentiary deficiencies in Sweeney's pleadings mandate a Board ruling in TJX's favor on the issue of rate reasonableness. Petitioner argues that Sweeney failed to contradict TJX's factual assertions and that the Board must therefore accept TJX's presentation of the material relevant facts. Petitioner argues further that Sweeney bears the burden of proof and that, having failed to offer its own rate comparison studies as required by the Board, it has failed to prove that its rates were reasonable.

TJX's arguments are without merit. Petitioner bases its argument that we must accept its factual assertions unless rebutted by Sweeney on our rule of procedure at 49 CFR 1112.6, which provides that "[p]arties filing reply and rebuttal verified statements will be considered to have admitted the truth of material allegations of fact contained in their opponents' statements unless those allegations are specifically challenged." But this rule does not help TJX. A fair reading of Sweeney's reply shows that it controverts all of TJX's key arguments. The fact that the reply may not recite a specific rejection of all of the petitioner's factual allegations would not and could not justify our accepting TJX's claims as uncontroverted when they are, in fact, being vigorously disputed. The five propositions which TJX has identified at page 7 of its rebuttal as key facts or material allegations of fact do not, even if deemed to be conceded by Sweeney, support an argument that the rates charged by Sweeney are unreasonably high. TJX's assertions—that Sweeney bribed Mr. Francis, that Sweeney's rates were not filed in tariffs, that East-West was the alter ego of Sweeney, that Sweeney had no valid contract with TJX or that Sweeney's SWEY 605 tariff was defective have no direct bearing on the issue of rate reasonableness.

TJX proceeds to argue that Sweeney has the burden of proof on the rate reasonableness issue because all of the Sweeney rates at issue in this proceeding were illegal rates (*i.e.*, rates that were unfiled or that were contained in a void tariff) and hence are not entitled to a presumption of reasonableness. Indeed, TJX maintains that the Board must presume that Sweeney's rates were unreasonable. In support of the argument, petitioner cites Marmon Holdings, Inc.--Petition for Declaratory Order--Rates and Practices of Certain LTL Motor Carriers, Docket No. 41287 (STB served May 14, 1996) (Marmon). It also asserts that the Board tacitly recognized the evidentiary burden faced by respondent when, in our decision of January 6, 1998, we ordered both parties to present Georgia-Pacific rate comparison evidence.

Even assuming that all of the Sweeney rates involved in this proceeding were not properly filed, we do not see how that fact would mandate a conclusion that the rates should be presumed to be unreasonably high and that Sweeney should bear the burden of proving them reasonable. Marmon does not discuss or even mention a presumption, and the petitioning shipper in that proceeding had the

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<sup>10</sup>(...continued)

pertinent rates, and (7) other types of evidence, such as the shipper's private carriage alternatives."

burden of establishing that it was charged unreasonable rates. The Administrative Procedure Act, at 5 U.S.C. 556(d), provides that the proponent of an order (here, TJX, petitioning for a finding of unreasonableness) has the burden of proof. There is no merit in the argument that, in ordering both parties to submit evidence, we shifted that burden. TJX seeks declaratory relief here and therefore has the burden of demonstrating that it is entitled to it. Thus, in our decision served January 6, 1998, we placed the burden of going forward with the evidence on TJX.

There also is no merit in the argument that Sweeney's failure to present its own rate comparison studies mandates a ruling in TJX's favor. Again, TJX has the burden of proof.

Interpretation of the Georgia-Pacific Standards. In many of its exhibits, TJX excludes most or all of the rates of the trucking companies that TJX describes as comparison or comparable carriers where the rates were higher than those of Sweeney. In petitioner's view, Georgia-Pacific not only permits, but requires it to disregard a particular carrier's rates in instances in which that carrier's rates were "substantially higher" than those of the other comparable carriers. In support of this position, petitioner refers to statements in Georgia-Pacific (1) defining "market-based" rates as "rates indicative of levels at which a shipper was willing to ship and a carrier was willing to transport the goods," (2) indicating that the purpose of rate evidence "is to identify the going level of rates charged for similar transportation services," and (3) recognizing that evidence of rates quoted by other carriers to meet competition can provide an adequate measure of the market rate since they "represent rates at a level under which the traffic would move." GPac-I, 9 I.C.C.2d at 156-58. Petitioner argues that such statements show that a rate substantially higher than that quoted by another carrier for the same service must be eliminated from consideration, as a shipper would not be "willing to ship" at the higher rate, traffic "would not move" at that rate, and the rate thus would not be indicative of a "going level."

Similarly, TJX contends that it is permissible for parties to rely on the rates quoted by just one comparable carrier. According to petitioner, Georgia-Pacific squarely holds that shippers are entitled to establish the unreasonableness of a particular rate by "submit[ting] evidence of a single business or transport option that was available at the time that would have been unambiguously preferable to moving the traffic at issue at the challenged rate." GPac-I, 9 I.C.C.2d at 164. Inasmuch as each of its studies shows evidence of at least one business or transport option that, in its view, would have been unambiguously preferable to using Sweeney, TJX contends that such evidence by itself entitles it to a finding that Sweeney's rates were unreasonable wholly apart from whatever conclusion the Board might reach on this issue upon applying the "market-cluster" approach.

We reject petitioner's approach. TJX's interpretation of the Georgia-Pacific standards is grounded in phrases taken out of context and is wholly at odds with the standards' design and purport. As GPac-I, 9 I.C.C.2d at 157, clearly states, "[w]e will determine the reasonableness of a challenged rate by comparing that rate with evidence indicating the location of the market-based cluster of

price/service alternatives for the issue traffic.” (Emphasis added.) As that decision also states, a challenged rate will be deemed unreasonable “if it can be shown that the challenged rate is significantly in excess of comparable rates that reflect the prevailing market rates at the time of the shipment(s) at issue.” Id. As noted above, we thus “will look to evidence identifying what the price and service options available to the shipper in the market place were at the time the shipment(s) took place.” Id. In sum, under the Georgia-Pacific standards, we will look at challenged rates vis-a-vis the demonstrated relevant market-based cluster of alternatives, or prevailing market rates, to determine whether the challenged rates are significantly above the cluster and are thus unreasonable.

GPac-I at several points discusses the types of evidence that may be submitted. The language TJX cites regarding the permissibility of submitting evidence of a single business or transport option contemplates a situation in which a shipper from whom undercharges are sought is unable “[t]o show the location and extent of the cluster of relevant market-based rate and service options.” GPac-I, 9 I.C.C.2d at 164. It does not permit disregarding other relevant evidence, as petitioner would have us do. To adopt the interpretation advanced by TJX would be to nullify not only the discussion that both precedes and follows the language that TJX cites, but also the very concept of Georgia-Pacific.

With its interpretation of Georgia-Pacific as its justification, TJX, as noted, presents exhibits that exclude many comparison carriers’ rates that are higher than those of Sweeney.<sup>11</sup> Petitioner then presents analyses of the remaining rates based largely on comparisons of Sweeney’s rates with the lowest rates otherwise available. For example, where a Sweeney rate might be \$1.05 per mile, and the rates of comparison carriers are \$1.20, \$0.85, \$0.80, and \$0.70 per mile, TJX’s approach would require dropping the \$1.20 rate from its exhibit and showing the Sweeney rate as 50% higher than the lowest rate available (\$1.05 per mile compared to \$0.70 per mile). TJX apparently bases this facet of its approach on the assumption that, for each movement, a shipper would select the best rate available. The approach is not consistent with the market-based cluster analysis contemplated by Georgia-Pacific – or with the reality of the market place, which does not offer, much less guarantee, every shipper the best rate available under every possible circumstances – and we reject it.<sup>12</sup>

Sweeney has supplied most, if not all, of the rates TJX has omitted from its exhibits, many of which were contained in the tariffs or rate schedules that TJX submitted. We will proceed to analyze the rate evidence in light of the Georgia-Pacific standards.

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<sup>11</sup> Petitioner does not attempt to establish that the missing rates are substantially higher than those of other carriers; it simply does not present them.

<sup>12</sup> See, e.g., EC-MAC Motor Carriers Service Association, Inc., Et AL., STB Section 5a Application No. 118 (Amendment No. 1) (served Feb. 11, 2000) at 8 (“[I]n a market as diverse as the trucking industry, we would expect a broad range of rates and discounts.”).

Comparable Carriers. Before turning to an analysis of the rate evidence, we must address arguments regarding the suitability of five carriers cited by TJX as comparison or comparable carriers. Sweeney contends that these five carriers do not offer transportation services comparable to those at issue and that, therefore, petitioner's inclusion of their rates in its exhibits is improper. TJX disagrees.

Sweeney argues that Richard Dahn, Inc. (Dahn) is not a comparable carrier, because it hauls building materials, lime, feed, and grain, in bulk, and the tariffs cited by petitioner (DAHN 421 and DAHN 422) cover the movement only of such commodities. Sweeney submits a letter of August 25, 1998, in which Dahn's president, Thomas Dahn, confirms Sweeney's position and states that the subject tariffs were never used for the movement of clothing or retail store merchandise. TJX replies that, in both tariffs, the scope of operations includes general commodities (except explosives and household goods) between points in the United States, and that neither tariff contains restrictions as to shippers or commodities. For that reason, in TJX's view, Dahn is properly included for rate comparison purposes. In response, Sweeney submits a second letter from Thomas Dahn, dated February 17, 1999, in which Mr. Dahn states that only 6 of his company's 30 trailers are vans, that all of its shipments are truckload, and that Dahn has never hauled clothing. In Mr. Dahn's opinion, to compare his company with Preston Trucking Company, Inc. (Preston, discussed below) "simply doesn't make sense."

We agree with Sweeney that the rates of Dahn should not be used to determine the location of the market-based cluster of price/service alternatives for the subject traffic. While Dahn's authority and tariffs might enable that carrier to transport retail clothing if it so desires, the fact is that Dahn has never hauled clothing and was not a viable alternative for TJX.

Similarly, Sweeney argues that Pioneer Freight Systems, Inc. (Pioneer) is not a comparable carrier, as it handles only air freight and its tariffs cover only such traffic. Sweeney submits a letter dated September 28, 1998, in which Pioneer's president, Neil Hannaford, asserts that his company's tariffs were designed to cover the movement of air freight. Hannaford adds that the tariffs would not be used, nor were they ever used, for the movement of clothing or retail store merchandise or other Class 100 commodities. Mr. Hannaford also states that the services offered under the subject tariffs would not be comparable to the services offered by a carrier such as Sweeney to a retail department store such as TJ MAXX. Petitioner replies that, in Pioneer's tariffs PFSM 400 through PFSM 400C, copies of which it has submitted, the scope of operations is shown to encompass general commodities in packages (with exceptions) between points in the six New England states, New Jersey, and New York.

A review of the tariffs appears to confirm TJX's assertions regarding tariff applicability. Nevertheless, Mr. Hannaford's statements that his company does not handle clothing or retail store

merchandise or offer services comparable to those of Sweeney compel us to conclude that Pioneer was not a viable alternative for TJX. Its rates will not be considered.

Sweeney also contends that TJX has improperly used Sullivan Consolidation, Inc. (Sullivan) as a comparable carrier. Sweeney states that Sullivan's pertinent tariffs are "named shipper" tariffs published for the account of a shipper of paper and paper products and for a shipper of chemicals and chemical products. Sweeney submits a letter of August 17, 1998, in which Sullivan's pricing manager, Peter G. Beaulieu, confirms Sweeney's assertions, states that the tariffs would not be used for the movement of clothing or retail store merchandise, and asserts that the services Sullivan offers would not be comparable to those that a carrier such as Sweeney would provide to a retail department store. In reply, TJX asserts that, while Sullivan's tariffs were filed on behalf of specific shippers, the rate items are "freight, all kinds" (FAK) rates that would apply to TJX's traffic. Further, petitioner notes that, in the 1993 edition of the National Motor Carrier Directory (NMCD), Sullivan is described as a general freight carrier operating all van trailers. Nevertheless, to eliminate any doubt created by its reliance on Sullivan's tariffs, TJX submitted modified versions of several of its exhibits, employing the rates of new comparison carriers, but not those of Sullivan.

Sweeney objects also to the use of Goddard Transportation, Inc. (Goddard) as a comparison carrier, asserting that Goddard is a hauler of bulk shipments, primarily paper products. Sweeney submits a letter dated August 17, 1998, in which Goddard's president, Reginald Goddard, confirms Sweeney's contention and states that the tariff cited by TJX would not be used for the handling of clothing or retail store merchandise. In reply, petitioner disputes Sweeney's interpretation of Goddard's tariff. Nevertheless, in view of the objection, TJX has modified several of its exhibits by deleting Goddard's rates.

Finally, Sweeney objects to TJX's use of the rates of Preston, which TJX added in its modified exhibits. As shown on the Preston tariff submitted by TJX, Sweeney asserts, the goods would move at "released value rates." When a shipper tenders goods for transportation under such rates, it agrees to declare that the value of its shipment does not exceed a specified level, and the carrier's liability thus is limited. Here, Sweeney asserts, as the actual value of clothing shipments would far exceed the \$9 per pound per package specified in the tariff, TJX would not have used Preston to move its clothing.

We agree that released value rates are not comparable. TJX has not adequately rebutted Sweeney's claim that TJX would not have used released value rates. In any event, TJX did not use Preston.

Rate Reasonableness Analysis.<sup>13</sup>

We will separately examine the rate or rates covering each type of movement (e.g., vendor locations to a specified terminal) within each relevant time frame. Our analysis and conclusions will reflect certain realities of transportation markets. For example, competing carriers' rates do not always vary in a uniform manner. For the individual movements within a given group of movements, a carrier's pertinent rates may range from far lower to far higher than those of another carrier or carriers. We must look for patterns to examine how Sweeney's rates relate to those in the pertinent clusters.

Before proceeding to an examination of the rates in each group and time frame, we must comment on the significance of Sweeney's post-April 1992 rate reduction. As noted above, shortly after TJX learned that Sweeney had been making payments to a TJX officer, Sweeney filed a tariff reflecting changes in its service and reductions in its rates. Rates for LTL movements from points in New England states to Chicopee were reduced by 22% to 26.7%. Truckload rates for movements from New England states, New York, and New Jersey to Evansville were reduced by 9.1%. The parties debate the reasons for the reductions. TJX argues that they were occasioned by the discovery and consequent cessation of the bribes to Mr. Francis. TJX then would have us use the rate reductions as a basis for finding that the pertinent rates were unreasonable before they were reduced.

While we condemn such actions in the strongest possible terms, the fact that Sweeney was assertedly paying bribes does not, by itself, establish that the carrier was charging above-market rates to TJX. Sweeney might have been making any such payments to assure itself of traffic and a market rate of return during a period of intense competition following deregulation when many carriers lost traffic and went bankrupt. If so, the victims of the bribes were Sweeney's competitors, who were foreclosed from competing for TJX's traffic. TJX would not have been harmed if the effect of the bribes was simply that TJX paid prevailing market rates to Sweeney rather than to another carrier.

The fact that Sweeney published lower rates for its service to TJX after the payments were discovered might seem to indicate that the rates charged by Sweeney during the period it was paying Mr. Francis were indeed higher than they otherwise would have been. But that is different than saying that they were unreasonably high, i.e., above market rates. We are limited to performing a rate reasonableness analysis, under which there is a wide range of reasonable rates. The fact that Sweeney may have reduced its rates – even if it reduced them in response to the revelation that it had been paying off a TJX employee – provides no basis for finding the prior rates unreasonable. And, whether the new, reduced rates afford a different basis for the assessment of damages by the court is not for us to say.

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<sup>13</sup> A complete analysis of the rate comparison exhibits is set forth in the attached appendix. Our discussion here is based on that analysis.

Furthermore, as discussed in greater detail below, when Sweeney reduced its rates it also changed the way it handled TJX's traffic. Rather than routing all traffic through its Chicopee terminal, all traffic except New England traffic—i.e., traffic from New York, New Jersey, Pennsylvania, Delaware, Maryland and Virginia—was routed to Sweeney's Hackensack terminal. Thus, for most of the traffic the new rates applied to new movements, which cannot be compared to the prior movements. Another difficulty in considering these subsequent rates in the framework of our rate reasonableness standards is that Georgia-Pacific requires that the rates in the cluster be contemporaneous with the challenged rates, and the new rates obviously were not. For those reasons, we cannot use Sweeney's rates to TJX after May 4, 1992, to evaluate the reasonableness of that carrier's rates to TJX before that period.

I. 1987 through June 30, 1990.

During this period, Sweeney charged TJX for transportation services based on rates contained in an unfiled tariff designated KNIC 300-A. Petitioner contends that those rates, as well as subsequent rates of Sweeney that were contained either in an unfiled tariff or in an unconsummated contract, were therefore not the "legally applicable" rates. But the fact that those rates were not set out in filed tariffs does not affect our analysis of whether they were reasonable.<sup>14</sup>

Tariff KNIC 300-A contained both LTL and truckload rates, and all transportation charges during this 3½ year time frame were assessed under the direct shipment procedure. The record does not establish that Sweeney's rates during the period were significantly in excess of comparable rates. A summary of our rate analysis follows.

A. Vendor locations to TJX's Evansville facilities. Exhibits covering 64 LTL shipments show the following. For 17 of the 58 shipments that originated at points in Massachusetts, New York, New Jersey, and Pennsylvania, Sweeney's charges were between 1.2% and 27.4% lower than those of Consolidated Freightways Corporation of Delaware (CF). On 17 other shipments, Sweeney's charges

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<sup>14</sup> TJX contends that, in such situations, the Board is obligated to determine the reasonable rates that a shipper should have been charged. In support of this contention, petitioner cites a portion of GPac-I that assertedly sets forth the evidence the Board will examine "in setting a reasonable rate." TJX also cites a portion of our January 6, 1998 decision in which we assertedly stated that the Georgia-Pacific standards are well suited to the purpose "of determining the reasonable rate level for TJX's issue traffic." In advancing its position, petitioner has misrepresented statements in GPac-I and in our procedural decision. There is no merit to the position that we must determine the rates TJX should have been charged. Unless the rates that were charged were shown to be unreasonable, there is nothing that would require us to fix another rate level in the absence of a properly filed tariff rate. GPac-II, 9 I.C.C.2d at 821.

were higher than CF's by up to 9.9%. On 22 shipments, Sweeney's charges were higher than CF's by between 10.1% and 20.1%. Sweeney's charges were 85% and 182% higher on the remaining 2 shipments. On the 6 shipments from Connecticut and Rhode Island, Sweeney's charges were 7.7% to 12.2% higher than those of CF. Another exhibit comparing Sweeney's charges for 13 shipments with those of 4 other carriers shows (see appendix at 2) that, on 10 of the shipments, Sweeney's charges were higher, but by 13.7% or less. Thus, on more than one-half of the shipments compared, Sweeney's charges were lower than, or less than 10% above, those of another carrier.

In GPac-I, 9 I.C.C.2d at 156-157, the ICC stated that "any rate significantly above such market-based rate levels can be considered to be presumptively unreasonable . . . . If it can be shown that the challenged rate is significantly in excess of comparable rates that reflect the prevailing market rates at the time of the shipment(s) at issue, the challenged rate will be deemed unreasonable." (Emphasis added.) In that case, we found that rates charged by the defendant, Oneida Motor Freight, Inc., which were 150% and 200% of the highest comparison rates in the cluster, were unreasonably high.

In other cases in which we have found motor carrier rates to be unreasonably high, the challenged rate or rates have exceeded the cluster by a markedly greater percentage than have Sweeney's rates here. In Intermetro Industries Corporation—Petition for Declaratory Order—Certain Rates and Practices of Zurek Express, Inc., No. 40713 (ICC served May 30, 1995), the challenged rates exceeded those in the cluster by 35% to 45%. In Uarco Incorporated v. James B. Orr and Freightways Express, Inc., No. 40819 (STB served June 25, 1999), almost all of the challenged rates exceeded the rates in the cluster by a range of 15% to 35%. In The Stroh Brewery Company—Petition for Declaratory Order—Certain Rates and Practices of Rebel Motor Freight, Inc., No. 40862 (STB served Mar. 7, 1996) (Stroh), the challenged rate was "between 3 and 4½ times higher than rates in the market cluster" (Stroh at 5). In Dillard Department Stores, Inc.—Petition For Declaratory Order—Certain Rates and Practices of P\*I\*E Nationwide, No. 40751 (ICC served May 12, 1995), aff'd sub nom. Fidelcor Business Credit Corp. v. Dillard Dept. Stores, Inc., No. 91-953-Civ-J-99(S) (M.D.Fla. Sept. 19, 1997), the challenged rates exceeded those in the cluster by 20%. Here, where a number of the challenged rates were actually below the rates in the cluster, and some of those that exceed rates in the cluster do so by relatively modest amounts, we are unable to conclude that TJX has met its burden of demonstrating that Sweeney's rates were significantly higher than the market-based cluster.

B. Vendor locations and Sweeney's terminals to TJX's Worcester facilities. Exhibits comparing Sweeney's applicable rates for 25 LTL shipments with those of St. Johnsbury Trucking Company, Inc. (St. Johnsbury) establish that Sweeney's LTL rates to Worcester during this time frame were comparable to those of St. Johnsbury, were not significantly above a market cluster, and were not unreasonable. For 6 of the shipments, respondent's rates were lower than those of the comparison

carrier (by 1.5% to 13% on 5 and by 56.7% on one). On 15 additional shipments, Sweeney's charges were higher than St. Johnsbury's, but only by up to 9.1%. The largest discrepancy for the remaining 4 shipments was a Sweeney rate 14.7% higher than that of St. Johnsbury.

Another pertinent exhibit (T/J-8) compares truckload rates Sweeney offered TJX for service to Worcester with those that four carriers offered retailer Marshalls, Inc., for service from three points in New Jersey and Pennsylvania and all points in New York to points in Massachusetts.<sup>15</sup> However, as discussed in the appendix, the exhibit contains a number of deficiencies, most significantly its attempt to compare contract carrier rates that three carriers offered Marshalls with common carrier rates that Sweeney offered TJX.<sup>16</sup> We have stated that relevant evidence includes evidence of "motor carrier contracts under which the shipments at issue could have been made." (GPac-I, 9 I.C.C.2d at 157). The essence of contract carriage, however, is that parties work together to establish rates and other terms that meet their respective needs. Thus, while contract rates may, in some circumstances, be used in a market cluster analysis, the party seeking to introduce them must show that they could have been used in the circumstances at issue.<sup>17</sup> Here, the contracts at issue were not offered to TJX, and although Marshalls might have dealt in the same products as TJX, there is no basis for us to assume that TJX and a given carrier would have had the requirements and abilities enabling them to agree to the same terms that the carrier reached in negotiations with Marshalls.

As stated in the appendix, the exhibit does tend to show that, for service from three points-- Hackensack and Edison, NJ, and Lancaster, PA--to points in Massachusetts, Marshalls had available, from one common carrier, truckload rates far lower than those available to TJX. However, that is only one carrier, not a group of carriers. Moreover, as Sweeney's rate was a flat rate, whereas that carrier's rates (Lebarnold's) were mileage rates, comparisons using only a few points cannot give a full picture. Thus, it has not been shown that there were carriers that offered TJX rates similar to those offered Marshalls, or that would have done so had TJX sought such rates.

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<sup>15</sup> As noted in the appendix, the information in this exhibit relates to all three of the time frames under consideration in this proceeding. We will refer to the exhibit again below.

<sup>16</sup> Specific deficiencies are discussed in the appendix.

<sup>17</sup> We point out, in any event, that common and contract rates are not directly comparable, and that evidence of a contract carriage option, while relevant, is not necessarily probative. A showing that a shipper could have moved a shipment under contract carriage at a rate lower than that available under common carriage is best made in conjunction with a showing of contract terms. Terms such as volume guarantees, for instance, can induce reduced rates. Here, petitioner used contract rates for much of its "rate cluster" evidence, but it never demonstrated that it could have been in a position to actually use those contract rates had it sought to do so.

In sum, a cluster of relevant rate and service options has not been established. A general finding of rate unreasonableness for the truckload rates to Worcester is thus not supported.

C. Sweeney terminal and TJX facility locations to TJX's Evansville facilities. In the single relevant exhibit (T/J-10), TJX compares the truckload rates Sweeney offered it for service to Evansville with those that four carriers offered Marshalls for service to Itasca, IL (and in one instance, Indianapolis, IN).<sup>18</sup> Nearly all of the competing carriers' rates referenced in the exhibit were contract carrier rates. As noted above, there is no indication that the contract rates that these carriers offered Marshalls were established under circumstances comparable to those underlying the common carrier rates that Sweeney offered TJX. Here again, these rates charged by Sweeney cannot be found to be unreasonable based on contract rates charged by other carriers.

II. July 1, 1990 through May 3, 1992.

During this time frame, Sweeney handled most of TJX's traffic under the Northeast Consolidation arrangement, using the Chicopee terminal as the consolidation point. The parties dispute the source of the rates that Sweeney applied to the subject transportation. While Sweeney asserts that the rates were contract carrier rates, TJX emphasizes that it never signed a pertinent contract. Petitioner asserts, rather, that it received letters from Sweeney containing the rates, and that it believed that they were contained in tariffs on file with the ICC. Regardless of whether we accept petitioner's assertions regarding its beliefs, it is clear that the parties did not consummate a written agreement as required by ICC regulations that governed contract carrier service (49 CFR 1053.1). Sweeney's service therefore cannot be considered to have been contract carriage, which is not subject to rate reasonableness review, and so we may assess TJX's claims that these rates were unreasonable.<sup>19</sup>

Our analysis leads us to conclude that the record does not establish that Sweeney's rates during this period were significantly in excess of comparable rates. A summary of our rate analysis follows.<sup>20</sup>

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<sup>18</sup> As noted in the appendix, the information in the exhibit relates to all three of the time frames under consideration. As with the previous exhibit, we will refer to this exhibit again.

<sup>19</sup> As the rates were not contained in either a consummated contract or a filed tariff, they were not "the legally applicable" rates. As we have stated above, however, this does not affect our analysis of whether they were reasonable.

<sup>20</sup> We note that the parties dispute the quality of the service Sweeney provided to TJX during this time frame. Respondent contends that the Northeast Consolidation arrangement involved labor-intensive service that warranted its applying rates higher than those the carrier otherwise would have

(continued...)

A. Vendor locations to Sweeney's Chicopee terminal.

The parties present exhibits covering 62 LTL shipments that moved to Chicopee from points in Massachusetts, Connecticut, Rhode Island, New York, New Jersey, and Pennsylvania between October 1, 1990, and April 30, 1992. The exhibits compare Sweeney's applicable rates for the shipments with those of St. Johnsbury and New England Motor Freight (NEMF).

Sweeney addresses 34 shipments that St. Johnsbury might have handled. On 21 of them, covering origins in all six states, Sweeney's charges were lower (by 1% to 24.9%) than those of St. Johnsbury. Sweeney's charges were higher than St. Johnsbury's (by 1% to 67.2%) on the other 13 shipments, which moved from points in Massachusetts, Rhode Island, and New Jersey. The exhibits also show that, out of the 62 shipments, Sweeney's charges were lower (by 1% to 21.9%) than those of NEMF on 18 shipments, which originated in each state except Rhode Island. On 19 shipments, from points in three states, Sweeney's charges were 0.4% to 10.4% higher than NEMF's; on 24 shipments, from points in four states, Sweeney's charges were 11.2% to 31% higher; and, on 1 shipment, Sweeney's charge was 86.2% higher than NEMF's. We note Sweeney's contention that it provided a "fingerprinting" service that would have cost NEMF 22% more than it charged for each shipment.

Thus, the exhibits show that Sweeney's charges were (1) lower than those of St. Johnsbury for 21 of 34 shipments, and (2) lower than or less than 11% higher than those of NEMF on 37 of 62 shipments. In light of those rate patterns, the exhibits do not demonstrate that the overall level of Sweeney's rates was significantly above the market-based cluster of alternatives.

TJX presents two exhibits that compare certain LTL rates and charges of Sweeney with those that National Retail Transportation (National) offered TJX in a contract effective July 5, 1993. The two exhibits have minimal probative value. As discussed above, the common and contract carrier services presented here have not been shown to be comparable.

Finally, with respect to service from vendor locations to Chicopee, we refer to exhibit T/J-8, which we have discussed in section I.B above. The exhibit shows that a competitor of TJX was offered common carrier truckload rates far lower than those Sweeney gave TJX for service from two points in New Jersey and one in Pennsylvania to Massachusetts. But we do not believe that a general finding of unreasonableness can be based on evidence of service available to a competitor at three points,

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<sup>20</sup>(...continued)

charged. Petitioner, on the other hand, argues that no superior service was rendered; Sweeney simply charged high rates. In view of our findings based on an analysis of the rate evidence, we need not attempt to resolve this controversy.

particularly when other evidence shows that other rates were not that low or were even higher than those of the respondent.

B. Sweeney terminal and TJX facility locations to TJX's Evansville facilities.

Exhibit T/J-10 shows that the rates Sweeney offered TJX for service to Evansville were 32.5% higher than those a contract carrier offered Marshalls for service from Woburn, MA, to Itasca, IL, and 22% higher than those a common carrier offered Marshalls for service from Woburn to Indianapolis, IN. However, as discussed above, the contract rates offered to a competitor have not been shown to be comparable to common carrier rates offered TJX. Additionally, we note that the competitive situations associated with different traffic lanes vary substantially, and thus rate comparisons among different movements are of questionable value. Thus, there is nothing to suggest that any carrier would have made the asserted rates available to TJX. We conclude that the exhibit does not demonstrate that Sweeney's rates for the subject truckload traffic were unreasonably high.

III. May 4, 1992 through January 7, 1993.<sup>21</sup>

At the beginning of this time frame, Sweeney changed the manner in which it was to handle TJX's traffic. No longer was all LTL traffic to be routed through respondent's Chicopee terminal. Instead, LTL shipments originating at points in the six New England states were to move to Chicopee, while LTL shipments originating at points in New York, New Jersey, Pennsylvania, Delaware, Maryland, and Virginia were to move to respondent's Hackensack terminal. Sweeney filed its tariff SWEY 605, with an effective date of May 4, 1992, containing appropriate LTL "consolidation rates" as well as truckload rates governing movements to Evansville and Worcester. The truckload rates to Worcester were flat rates, while those to Evansville were mileage rates.

TJX contends that tariff SWEY 605 was void ab initio for the reasons that: (1) while it did contain mileage rates, it did not contain any distances, (2) Sweeney did not have a mileage tariff on file, and (3) Sweeney did not participate in a mileage tariff filed by another carrier or agent. Thus, it assertedly was not possible to determine the actual charges from consulting the tariff. See Security Serv., Inc. v. Kmart Corp., 511 U.S. 431 (1994); Jasper Wyman & Son, et al.--Petition for Declaratory Order, 8 I.C.C. 2d 246 (1992); 49 CFR 1312. But as we stated in our January 6, 1998 decision, as long as the freight charges that have been paid based on a void mileage rate were not unreasonable, we would not find them unlawful and would not retroactively alter the compensation to

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<sup>21</sup> We discuss in the appendix a rate comparison chart for this time period submitted by TJX and prepared by its former logistics manager, Mr. Leo Murphy. We have concluded that it is entitled to no weight in view of significant deficiencies. The sources for all of Sweeney's asserted rates are not given, and the asserted rate quotes of other carriers are undocumented and unverified.

which the carrier was entitled. TJX has alleged that all rates applied under tariff SWEY 605 were unreasonable, and the parties have submitted evidence addressing the allegations. Therefore, we have undertaken a complete analysis of the reasonableness of all of those rates, which leads us to conclude that the record does not establish that Sweeney's rates during this period were significantly in excess of comparable rates.

A. Vendor locations to Sweeney's Chicopee terminal.

The parties present exhibits covering 28 LTL shipments that Sweeney moved to Chicopee from points in Massachusetts, Connecticut, and Rhode Island during the subject time frame. The exhibits compare Sweeney's applicable rates for the shipments with those of St. Johnsbury and Preston. The exhibits show that Sweeney's charges were lower (by 6.5% to 12%) than those of St. Johnsbury on 9 shipments that originated at points in Massachusetts and Connecticut. Sweeney's charges were higher by 15% or less than those of St. Johnsbury on 6 other shipments that originated at points in Massachusetts and Rhode Island. Sweeney's charges ranged between 17.9% and 69.9% higher for the remaining 13 shipments.

As previously noted, Preston's rates were released value rates and therefore cannot be considered to be comparable. That leaves only one carrier, St. Johnsbury, to provide evidence of a market-based cluster of price/service alternatives. The rates of one carrier are not sufficient to sustain a complaint that respondent's rates exceeded the going rate for similar services, but in any event, the rate comparisons discussed above show that, while Sweeney's charges may appear high in a few instances, in some cases they appear low, and overall, they are not substantially out of line.

In exhibit T/J-7, petitioner presents information regarding 105 LTL shipments that St. Johnsbury transported for TJX between June 18 and December 22, 1992, from points in Maine, New Hampshire, and Vermont to Chicopee. As discussed in the appendix, the exhibit is misleading and entitled to little weight in view of TJX's failure to account for a consolidation charge applicable to each shipment. Petitioner's recalculation of charges for only 5 shipments to account for the consolidation charges is inadequate.

Finally, with respect to service from vendor locations to Chicopee, we refer to exhibit T/J-8. The exhibit shows that a competitor of TJX was offered contract carrier rates some 20% lower than the rates Sweeney offered TJX for service from Edison and Hackensack, NJ, and all points in New York to Massachusetts. As noted above, the contract rates offered a competitor here are not, standing alone, sufficient to show that the common carrier rates offered TJX are unreasonable.

B. Vendor locations to Sweeney's Hackensack terminal.

The parties present exhibits covering 67 LTL shipments that Sweeney moved to Hackensack from points in New Jersey and New York during the subject time frame. The exhibits compare Sweeney's applicable rates with those of St. Johnsbury. The exhibits also show that Sweeney's charges were lower (by up to 20.2%) than those of St. Johnsbury on 10 shipments (4 of 46 from New Jersey and 6 of 21 from New York). On 24 movements, Sweeney's charges were 2.5% to 6% higher than those of St. Johnsbury. Sweeney's charges were 14.9% to 33% higher for 23 movements and 37.4% to 52.9% higher for 10. New Jersey and New York origins were in all groups.

Again, a few of the rates seem on the high side (while some also seem quite low). But in any case, TJX has presented the rates of only one carrier to establish a cluster. As noted earlier, this is not enough. The complaint fails as to those rates.

C. Sweeney's Chicopee and Hackensack terminals to TJX's Evansville facilities.

TJX has presented an exhibit comparing charges Sweeney would have billed under tariff SWEY 605 with actual charges that four carriers billed for truckload movements from Chicopee and Hackensack to Evansville during the pertinent time frame. The exhibit lacks support, however, as petitioner does not tell us the origin of the comparison carriers' rates and whether they were common or contract rates.

D. Sweeney terminal and TJX facility locations to TJX's Evansville facilities.

Exhibit T/J-10 shows that Sweeney's rates for TJX were 17.6% and 8.7% higher than rates that two contract carriers offered Marshalls for service from Woburn to Itasca, and 9.9% higher than rates that a third contract carrier offered Marshalls for service from Hackensack to Itasca. These rate differentials are not particularly significant. But in any case, as we have noted, the contract rates offered a competitor here are not sufficient to show that the common carrier rates offered TJX are unreasonable. Further, given the differing competitive circumstances associated with different traffic lanes, service from Woburn to Itasca is of questionable comparability with service from Worcester to Evansville. We must conclude that this exhibit does not demonstrate that Sweeney's rates for the subject truckload traffic were unreasonably high.

E. Origins in eastern states to TJX's Worcester and Evansville facilities.

TJX has presented an exhibit comparing Sweeney's tariff rates with three carriers' contract rates that became effective July 19, 1993, for truckload service from the six New England states, New York, New Jersey, and Pennsylvania to Worcester and Evansville. The probative value of the

comparisons is questionable, as petitioner attempts to compare Sweeney's common carrier rates with contract carrier rates that were effective 6 months after TJX stopped using Sweeney. The comparisons cannot support a conclusion that Sweeney's common carrier rates were unreasonable when they were offered. Moreover, with regard to service to Evansville, the exhibit shows that Sweeney's rate was only 5.3% higher than the rate at the top of the cluster for service from all eight origin states shown.

Unpaid Transportation from November 1992 to January 1993. Sweeney asserts that it terminated service for TJX on January 7, 1993, because of nonpayment of freight bills. Respondent avers that, between November 1992 and the date of termination, it handled 4,360 shipments for which it billed, but was not paid, \$483,000 in freight charges.

Sweeney requests that the Board find that TJX engaged in "false and deceptive trade practices" in intentionally using respondent's services while intending not to pay for them. Sweeney asserts that, as TJX immediately was able to replace it when Sweeney ceased serving petitioner in January 1993, petitioner could have replaced Sweeney in November 1992 before incurring the unpaid freight charges. TJX, on the other hand, maintains that Sweeney had so entwined itself in TJX's distribution network over the course of 6 years that petitioner could not immediately stop using respondent's services when the bribery of Mr. Francis was uncovered. TJX asserts that it was unable to stop doing business with Sweeney until it had made alternative transportation arrangements in January 1993. Petitioner's continued refusal to pay unpaid freight charges apparently is grounded in its assertion that Sweeney's rates were unreasonable.

In our January 6, 1998 decision, we did not express an intention to investigate the matter of why TJX continued to request service from Sweeney, and why Sweeney continued to provide it, after TJX ceased paying for it. There is no reason to consider the matter now. We simply will reiterate what we stated in the January 6, 1998 decision, at 6: if TJX had not paid freight charges billed to it for transportation during the subject period, then Sweeney was entitled to collect the unpaid amount from TJX. The Interstate Commerce Act, at 49 U.S.C. 10743, required payment on delivery and did not provide shippers with any set-off rights. TJX is obligated to pay any unpaid freight bills issued for the subject transportation.

Concluding Comments. The United States District Court for the District of Massachusetts stayed proceedings before it in order to allow the parties to present transportation issues to the ICC for consideration. As the successor to the ICC, we now have resolved the issues that are within our primary or exclusive jurisdiction. We have analyzed the record in accordance with the standards set forth in Georgia-Pacific and have determined that TJX has failed to establish that Sweeney maintained unreasonably high rates during any of the time frames involved here. We also have determined that TJX is obligated to pay any unpaid freight bills Sweeney issued for transportation provided. We have

not considered other matters before the court, such as whether and to what extent TJX might have been damaged by the bribery of one of its employees. These matters remain for the court to consider.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

We find:

1. The record does not establish that the rates Sweeney charged TJX for the transportation described herein between 1987 and January 1993 are unreasonable.

2. Sweeney is entitled to collect unpaid freight charges billed to TJX for transportation performed between November 1992 and January 1993.

It is ordered:

1. Sweeney's motions to strike TJX's rebuttal and Leo Murphy's supplemental verified statement are denied.

2. TJX's request for leave to submit argument in response to Sweeney's motion to strike its rebuttal is denied.

3. This proceeding is discontinued.

4. This decision is effective on its service date.

5. A copy of this decision will be served on:

United States District Court for the District of Massachusetts  
(Attn: District Judge Robert E. Keeton  
Re: No. 93-10087-K)  
John W. McCormack Post Office and Courthouse, Room 306  
90 Devonshire Street  
Boston, MA 02109.

By the Board, Chairman Morgan and Vice Chairman Burkes.

Vernon A. Williams  
Secretary

## APPENDIX

## ANALYSIS OF RATE COMPARISON EXHIBITS

1. 1987 through June 30, 1990.A. Vendor locations to TJX's Evansville, IN facilities.

TJX's exhibit T/J-1 and Sweeney's reply exhibit MS-2<sup>1</sup> cover 64 less-than-truckload (LTL) shipments that moved to Evansville from points in Massachusetts, Rhode Island, Connecticut, New York, New Jersey, and Pennsylvania between February 24, 1987, and June 25, 1990. The exhibits compare Sweeney's applicable rates and charges for the shipments with those of Consolidated Freightways Corporation of Delaware (CF).<sup>2</sup>

The exhibits show that, for 17 of the 58 shipments that originated at points in Massachusetts, New York, New Jersey, and Pennsylvania, Sweeney's charges were between 1.2% and 27.4% lower than those of CF. On 17 other shipments, Sweeney's charges were higher than CF's by up to 9.9%. On 22 shipments, Sweeney's charges were higher than CF's by between 10.1% and 20.1%. Sweeney's charges were 85% and 182% higher on the remaining 2 shipments, which we view as outliers. On the 6 shipments from Connecticut and Rhode Island, Sweeney's charges were 7.7% to 12.2% higher than those of CF.

Exhibit T/J-6 compares Sweeney's applicable rates and charges with those of four other carriers TJX used for the transportation of 13 LTL shipments to Evansville from points in Massachusetts, Connecticut, New York, New Jersey, and Pennsylvania in 1987, 1989, and 1990. Of these shipments, 9 were handled by Lebarnd, Inc. (Lebarnd) from points in New York, New Jersey, and Pennsylvania in 1987 and 1989; 2 were transported by Yellow Freight System, Inc. (Yellow) from points in Connecticut and Pennsylvania in 1987; 1 was handled by Holland Motor Express, Inc. (Holland) from a point in Massachusetts in February 1987; and 1 was moved by Tran Star, Inc. (Tran Star) from a point in New Jersey in September 1990.

Sweeney's charges were in all instances higher than those of the four comparison carriers used in the latter exhibit. Sweeney's charge was 12.1% higher than that of Holland for the 1 pertinent

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<sup>1</sup> TJX designates its pertinent opening statement exhibits as "JRW/TOC-[No.]" and its pertinent rebuttal statement exhibits as "REB-JRW/TOC-[No.]" For simplicity, we will use the designations "T/J-[No.]" and "T/J-R[No.]" "MS" refers to the numbered exhibits that Martin Sweeney submitted with Sweeney's reply statement.

<sup>2</sup> TJX's exhibit also shows rates of Richard Dahn, Inc. (Dahn) but, as discussed in the body of the decision, Dahn is not an appropriate comparison carrier.

shipment; its charge was 74.5% higher than Tran Star's for the 1 shipment; its charges were 13.7% and 12.2% higher than those of Yellow for the 2 shipments. Its charges were up to 8.1% higher than those of Lebarnd for 7 pertinent shipments and 20.3% and 81% higher for the 2 others. Although a few of these charges appear quite high, for the most part they are within the relevant cluster.

B. Vendor locations and Sweeney's terminals to TJX's Worcester, MA facilities.

TJX's exhibit T/J-2 and Sweeney's reply exhibit MS-4 cover 25 LTL shipments that moved to Worcester from points in Massachusetts, Connecticut, New York, New Jersey, and Pennsylvania between May 23, 1989, and June 15, 1990. The exhibits compare Sweeney's applicable rates and charges for the shipments with those of St. Johnsbury Trucking Company, Inc. (St. Johnsbury).<sup>3</sup>

The exhibits show that, for 6 shipments that moved from points in New York, New Jersey, and Pennsylvania, Sweeney's charges were lower than those of St. Johnsbury (by 1.5% to 13% on 5 and by 56.7% on 1). On 15 additional shipments, Sweeney's charges were higher than St. Johnsbury's by up to 9.1%. On the remaining 4 shipments, Sweeney's charges were 11.4% to 14.7% higher than those of St. Johnsbury.

In Exhibit T/J-8, TJX compares the truckload rates and charges that Sweeney offered it for service to Worcester with those that four carriers offered retailer Marshalls, Inc., for service from points in New Jersey and Pennsylvania to points in Massachusetts (all points or Woburn, which is north of Boston, some 40 miles east of Worcester). The information in the exhibit relates to all three of the time frames under consideration in this proceeding and will be discussed in its entirety here and referenced again below with regard to other time frames.

The exhibit shows that Lebarnd's tariff rates for service for Marshalls effective May 21, 1988, July 27, 1989, February 28, 1990, and August 30, 1990, from Hackensack and Edison, NJ, and Lancaster, PA, to points in Massachusetts, ranged from less than 50% to approximately 80% of Sweeney's rates for service for TJX from those origin points to Worcester. However, the rates in the Lebarnd tariffs effective on the latter two dates were subject to a 6% fuel surcharge, and it is unclear whether the exhibit reflects the adjusted rates. Also, as Sweeney's rate was a flat rate, whereas Lebarnd's rates were mileage rates, comparisons using only a few points cannot give a full picture.

The exhibit next shows rates that Caretta Trucking, Inc. (Caretta) offered Marshalls in contract carrier schedules effective July 15, 1988, and May 1, 1989, for service from Hackensack and Edison and any New York point to points in Massachusetts. Sweeney's rates for TJX to Worcester are

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<sup>3</sup> TJX's exhibit also shows rates of Pioneer Freight Systems, Inc. (Pioneer) and Dahn but, as discussed in the body of the decision, Pioneer and Dahn are not appropriate comparison carriers.

shown to be some 75% higher than the Caretta rates effective July 15, 1988, and 13.6% higher than the Caretta rates effective May 1, 1989. The Caretta rate schedule indicates that the rate shown was not applicable where rates are named in "Item 4100" of its tariff. However, as TJX has not indicated to what this item refers, we cannot determine if the correct rate was applied to Marshalls' traffic. In any event, as we discuss in the body of the decision, the comparison of contract carrier rates for one shipper with common carrier rates for another is of questionable relevance absent showings which TJX has not made.

The exhibit also shows rates that Land Transport Corp. (Land) quoted Marshalls on April 6, 1990, for service from and to the same points that are shown for Southwest Motor Freight, Inc. (Southwest), discussed below. Sweeney's rates for TJX are shown to have been 10.2% to 22.4% higher than those quoted by Land. It is not clear whether Land was offering contract or common carrier service. Also, it is not shown that the addressee of the letter accompanying Land's rate quote is, in fact, Marshalls. In any event, overall, Sweeney's rates do not appear substantially out of line with those of Land.

Finally, the exhibit shows rates that Southwest offered Marshalls in a contract schedule effective September 11, 1992, for service from Hackensack and Edison and any New York point to Woburn. The rates are shown to have been 20% lower than Sweeney's rates for service to Worcester.<sup>4</sup> The Southwest rate schedule shows that the rates were applicable only for the account of "Customer No. 11910," but there is no indication that Marshalls was that customer. In any event, the rates are contract rates, which, as discussed elsewhere, cannot be used in these circumstances for a valid comparison.

C. Sweeney terminal and TJX facility locations to TJX's Evansville facilities.

In Exhibit T/J-10, TJX compares the truckload rates and charges Sweeney offered it for service to Evansville with those that four carriers offered Marshalls for service to Itasca, IL (and, in one instance, Indianapolis, IN). The information in the exhibit relates to all three of the time frames under consideration in this proceeding and will be discussed in its entirety here and referenced again below with regard to other time frames. Nearly all of the competing carriers' rates referenced in the exhibit are contract carrier rates. As noted above, the comparison of the contract carrier rates offered Marshalls with the common carrier rates Sweeney offered TJX is of questionable relevance.

More specifically, the exhibit shows, first, that Caretta's contract rates for Marshalls effective July 15, 1988, and reduced May 1, 1989, for service from Worcester, Hackensack, and Bronx, NY, to Itasca were some one-half to two-thirds as high as the rates Sweeney charged TJX for service from those points to Evansville. The exhibit next shows that, in a letter with attachments specifying agreed-to

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<sup>4</sup> Sweeney's charge relates to a shorter distance as well.

rates (apparently contract carrier rates), effective May 23, 1988, National Retail Transportation (National) offered to transport goods for Marshalls from Woburn to Itasca for a rate of \$1.40 per mile. The exhibit shows that Sweeney charged TJX approximately \$59 more to travel 65 miles farther. In other words, Sweeney's rate equates to \$1.37 per mile and thus is lower than National's.

The exhibit next compares rates of CRST, Inc. (CRST) with those of Sweeney. In apparent contract rates proposed December 13, 1990, CRST offered a rate of \$0.83 per mile for service from Woburn to Itasca, as compared with Sweeney's rate of \$1.10 per mile for service from Woburn to Evansville. In a contract carrier schedule of rates effective October 26, 1992, CRST offered Marshalls a rate of \$0.85 per mile from Woburn and \$0.91 per mile from Hackensack to Itasca, as compared with Sweeney's rate of \$1.00 for service to Evansville. The exhibit also shows that, in a tariff effective September 25, 1991, CRST offered Marshalls a rate of \$0.90 for service from Woburn to Indianapolis, as compared with Sweeney's rate of \$1.10 per mile for service to Evansville.

Finally, the exhibit shows that Southwest, in contract rates effective September 11, 1992, offered Marshalls service from Woburn to Itasca for \$944 or approximately \$0.92 per mile, as compared with Sweeney's rate of \$1.00 per mile for service from Woburn to Evansville. As previously noted in our discussion of Southwest, it is unclear that the subject rate is applicable to Marshalls.

The exhibit thus shows as follows. Before July 1, 1990, one contract carrier, Caretta, offered Marshalls rates far lower than Sweeney offered TJX for service from Worcester, Hackensack, and the Bronx to the Midwest. Another contract carrier, National, offered Marshalls service from Woburn at a rate that was slightly higher than Sweeney's equivalent rate. Between July 1, 1990, and May 3, 1992, the rates Sweeney offered TJX for service to Evansville were 32.5% higher than those CRST offered Marshalls for contract carrier service from Woburn to Itasca and 22% higher than CRST offered Marshalls for common carrier service from Woburn to Indianapolis. After May 4, 1992, Sweeney's rate for TJX was 17.6% higher than CRST's contract rate for service for Marshalls from Woburn to Itasca and 8.7% higher than Southwest's contract rates from and to those points. Also during this time frame, Sweeney's rate for service from Hackensack to Evansville was 9.9% higher than CRST's contract rate for Marshalls from Hackensack to Itasca. As noted, we cannot conclude that the contract rates offered another shipper for somewhat different movements are comparable to those that Sweeney charged TJX.

II. July 1, 1990 through May 3, 1992.

A. Vendor locations to Sweeney's Chicopee terminal.

TJX's exhibits T/J-3 and T/J-R3 and Sweeney's reply exhibits MS-7, DE-2, and DE-10<sup>5</sup> cover 62 LTL shipments that moved to Sweeney's Chicopee terminal from points in Massachusetts, Connecticut, Rhode Island, New York, New Jersey, and Pennsylvania, between October 1, 1990, and April 30, 1992. The exhibits compare Sweeney's applicable rates and charges for the shipments with those of St. Johnsbury and New England Motor Freight (NEMF).<sup>6</sup> Sweeney's exhibits MS-7 and DE-2, which address the rates of St. Johnsbury, are identical: both address only the first 28 and last 6 of the subject 62 shipments. Sweeney apparently omitted a page relating to the 28 other shipments.

The exhibits show that on 21 of the 34 shipments that Sweeney's exhibits address, covering origins in all six states, Sweeney's charges were lower (by 1% to 24.9%) than those of St. Johnsbury. Sweeney's charges were higher than St. Johnsbury's (by 1% to 67.2%) on the other 13 shipments, which moved from points in Massachusetts, Rhode Island, and New Jersey. The exhibits also show that, out of the 62 shipments, Sweeney's charges were lower (by 1% to 21.9%) than those of NEMF on 18 shipments, which originated in each state except Rhode Island. On 19 shipments, from points in three states, Sweeney's charges were 0.4% to 10.4% higher than NEMF's; on 24 shipments, from points in four states, Sweeney's charges were 11.2% to 31% higher; and, on 1 shipment, Sweeney's charge was 86.2% higher than NEMF's.<sup>7</sup>

In Exhibits T/J-R8 and T/J-R9, TJX compares certain LTL rates and charges of Sweeney with those that National offered TJX in a contract effective July 5, 1993. TJX's avowed purpose is to rebut Sweeney's inferences that TJX did not initially present evidence as to the rates TJX obtained after January 1993 because that information would not have supported TJX's case. Exhibit T/J-R8 compares Sweeney's actual rates and charges that were applied to 55 shipments with the rates and charges National would have applied to those shipments per its contract. The shipments moved between October 1, 1990, and April 30, 1992, from 36 points in Massachusetts, 10 in Connecticut,

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<sup>5</sup> Sweeney designates the exhibits it submitted with its motion to strike as "Defendant's Exhibit [No.]." For simplicity, we will use the designation "DE-[No.]."

<sup>6</sup> TJX's exhibit T/J-3 also shows rates of Dahn, Pioneer, Sullivan, Goddard, and Preston, and its exhibit T/J-R3 repeats the information regarding Dahn and Pioneer. As discussed in the body of the decision, these five carriers are not appropriate comparison carriers.

<sup>7</sup> We note, however, Sweeney's contention that its specialized service, i.e., "fingerprinting," would have cost NEMF an additional 22% of its charge on each shipment.

and 9 in Rhode Island, apparently to Sweeney's Chicopee terminal. Movements by National would have gone to its Avon, MA terminal, south of Boston, some 90 miles east of Chicopee. The exhibit shows that Sweeney's rates were higher for every shipment. TJX calculates that the average percentage difference is more than 40%.

In Exhibit T/J-R9, TJX compares all of the rates in National's contract schedule with the rates Sweeney charged TJX effective January 2, 1991 (when it apparently raised its rates 11% over what they had been since July 1, 1990). Again, Sweeney's rates are for service to Chicopee, and National's are for service to Avon. The exhibit shows the rates in six weight brackets for service from points in each of the six New England States. Sweeney's rates are in all instances higher than National's, ranging from 25% to more than 100% higher.

Exhibits T/J-R8 and T/J-R9 have minimal probative value. National's rates are contract carrier rates that, standing alone, are not comparable to Sweeney's common carrier rates, and that, in any case, move to a different destination point (Avon versus Chicopee) at different points in time. Given the differences in the transportation circumstances, we do not find the comparisons valid.

B. Sweeney terminal and TJX facility locations to TJX's Evansville facilities.

TJX's pertinent exhibit T/J-10 has been discussed above. As noted, the truckload rates Sweeney charged TJX for service to Evansville were 32.5% and 22% higher, respectively, than the contract rates CRST offered Marshalls for service from Woburn to Itasca and Indianapolis. Different locations are subject to different circumstances, including different coasts, and TJX did not show that the circumstances were similar at these different locations.

III. May 4, 1992 through January 7, 1993.

A. Vendor locations to Sweeney's Chicopee terminal.

TJX's exhibits T/J-4 and T/J-R4 and Sweeney's reply exhibits MS-8, DE-3, and DE-11 cover 28 LTL shipments that moved to Sweeney's Chicopee terminal from points in Massachusetts (18), Connecticut (7), and Rhode Island (3), between May 4, 1992, and January 4, 1993. The exhibits compare Sweeney's applicable rates and charges with those of St. Johnsbury and Preston.<sup>8</sup> Sweeney's three exhibits address the rates and charges of St. Johnsbury. Exhibits MS-8 and DE-3 are identical, and both are based on rates contained in a St. Johnsbury tariff effective January 1, 1992.

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<sup>8</sup> TJX's exhibit T/J-4 also shows rates of Dahn, Pioneer, Sullivan, and Goddard, and its exhibit T/J-R4 repeats the information regarding Dahn and Pioneer. As discussed in the body of the decision, these four carriers are not appropriate comparison carriers.

Sweeney's exhibit DE-11 is based on the same St. Johnsbury rates to which TJX refers in its exhibits, i.e., those proposed to TJX on February 14, 1992.

The exhibits show that, as to the 28 shipments, Sweeney's charges were lower (by 6.5% to 12%) than those of St. Johnsbury on 9 that originated at points in Massachusetts and Connecticut. Sweeney's charges were higher by 15% or less than those of St. Johnsbury on 6 other shipments that originated at points in Massachusetts and Rhode Island. Sweeney's charges ranged between 17.9% and 69.9% higher for the remaining 13 shipments, which originated in Massachusetts and Connecticut.

In Exhibit T/J-7, TJX presents information regarding 105 LTL shipments that St. Johnsbury transported for TJX between June 18 and December 22, 1992. The shipments moved from points in Maine, New Hampshire, and Vermont to Sweeney's Chicopee terminal.<sup>9</sup> The exhibit shows that nearly all of Sweeney's charges for the subject moves were much higher (generally in the range of 40% to 65%) than those that St. Johnsbury charged. On 19 moves (from points in each state), however, Sweeney's charge was only 2.5% higher (\$38.95 versus \$38). On 4 others, the moves were subject to a St. Johnsbury minimum charge, and Sweeney's charge was lower. Sweeney challenges this exhibit as misleading due to its failure to account for the "consolidation charges" that Sweeney applied to shipments delivered to its terminal by another carrier. The charge was \$1.65 per hundredweight (CWT), with a minimum of \$20 per shipment. In rebuttal, TJX asserts that the exhibit shows that the rate differential is far in excess of the consolidation charge, except with regard to a few minimum charges for small shipments. TJX has calculated the charges for 5 of the 105 shipments with the consolidation charges added to St. Johnsbury's rates. Its figures show that Sweeney's charges would have been higher by 11.1%, 12.0%, 12.3%, 15.8%, and 22.9%. The difference does not directly vary with the weight of the shipments, as the 12% difference is shown for the heaviest (8,855 lbs.) of the 5.

Sweeney is correct that this exhibit is misleading. The exhibit compares rates, but, by not accounting for the consolidation charge, it does not show both carriers' total charges for the shipments. Consideration of the charge changes the figures significantly. For instance, for a shipment rated at 500 lbs. moving from Hudson, NH, to Chicopee, Sweeney's rate is shown as \$11.88 per cwt, and St. Johnsbury's is shown as a much lower \$7.80 per cwt. In fact, Sweeney's charge for moving the shipment would have been \$59.40 (5 x \$11.88), and St. Johnsbury's, including the \$20 minimum consolidation charge, would have been \$59.00 (\$20 + (5 x \$7.80)). For another shipment rated at 500 lbs. moving from N. Troy, VT, to Chicopee, Sweeney's rate is shown as \$11.88 per cwt, and St. Johnsbury's is shown as a lower \$8.54 per cwt. But Sweeney's charge for moving the shipment would have been \$59.40, 5.3% lower than the \$62.70 (\$20 + (5 x \$8.54)) that a shipper would have paid

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<sup>9</sup> Two of the 105 shipments moved directly from New Hampshire and Maine to TJX's Evansville facility. The exhibit shows that Sweeney's rate was 18.4% higher than St. Johnsbury's for the move from Maine and 34.3% higher for the move from New Hampshire.

using St. Johnsbury. TJX has presented recalculated information for only 5 shipments, and there is nothing to suggest that such shipments were representative of the total number of shipments. As the total charge shown on exhibit T/J-7 for the St. Johnsbury shipments is under \$100 for some 70 of the 105 shipments, it is likely that consideration of the consolidation charges would greatly reduce the apparent difference in the two carriers' rates set forth in the exhibit, and the comparability of the carriers' rates would become clear. Certainly, Sweeney's charges would have been 32.8% lower than those via St. Johnsbury for the 19 moves on which Sweeney's rate was shown to be 2.5% higher (a charge of \$38.95 compared with a charge of \$58).

Finally, with respect to service from vendor locations to Chicopee, we refer to exhibit T/J-8. It shows that a competitor of TJX was offered contract carrier rates some 20% lower than the rates Sweeney offered TJX for service from Edison and Hackensack, NJ, and all points in New York to Massachusetts, but the contract move has not been shown to be comparable to Sweeney's service.

B. Vendor locations to Sweeney's Hackensack terminal.

TJX's exhibits T/J-5 and T/J-R5 and Sweeney's reply exhibits DE-12 and DE-13 cover 67 LTL shipments that moved to Sweeney's Hackensack terminal from points in New Jersey (46) and New York (21) between May 4, 1992, and January 7, 1993. The exhibits compare Sweeney's applicable rates and charges with those of St. Johnsbury.<sup>10</sup>

The exhibits show that Sweeney's charges were lower (by up to 20.2%) than those of St. Johnsbury on 10 shipments (4 of 46 from New Jersey and 6 of 21 from New York). On 24 movements, Sweeney's charges were 2.5% to 6% higher than those of St. Johnsbury. Sweeney's charges were 14.9% to 33% higher for 23 movements and 37.4% to 52.9% higher for 10. New Jersey and New York origins were in all groups. As to this group, while some of Sweeney's charges seem to be on the high side, others are low, and overall we do not find the rates to be unreasonable.

C. Sweeney's Chicopee and Hackensack terminal to TJX's Evansville facilities.

In Exhibit T/J-9, TJX compares charges Sweeney would have billed under its Tariff SWEY 605 with actual charges four carriers billed for truckload movements from Chicopee and Hackensack to Evansville between July 15, 1992, and January 7, 1993. The exhibit shows that, for movements from Chicopee, Mid-America Dairymen, Inc. (Mid-America) charged \$889, and Hub City (not otherwise identified) charged \$843. The \$992 charge that Sweeney would have applied was 11.6%

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<sup>10</sup> TJX's exhibit T/J-5 also shows rates of Dahn, Pioneer, Sullivan, Goddard, and Preston, and its exhibit T/J-R5 repeats the information regarding Dahn and Pioneer. As discussed in the body of the decision, these five carriers are not appropriate comparison carriers.

higher than Mid-America's charge and 17.7% higher than Hub City's. For movements from Hackensack, the exhibit shows that Hub City charged \$858, Land Transport charged \$842, and CP America (not otherwise identified) charged \$765. The \$861 that Sweeney would have charged was the equivalent of Hub City's charge, 2.3% higher than Land Transport's charge, and 12.5% higher than CP America's charge.

The exhibit thus shows that Sweeney's rates from Hackensack to Evansville were the same as, or 2.3% and 12.5% higher than, those of other carriers. Sweeney's rates from Chicopee to Evansville are shown to be 11.6% and 17.7% higher than those of the two comparison carriers. However, this exhibit is of questionable probative value. We are not told where the comparison carriers' rates can be found and whether they were common or contract rates. In any event, for these movements, Sweeney's rates do not appear substantially out of line with the comparison rates.

D. Sweeney terminal and TJX facility locations to TJX's Evansville facilities.

TJX's pertinent exhibit T/J-10 has been discussed above under time frame I, section C. As noted there, during time frame III, the truckload rates Sweeney charged TJX for service from Worcester to Evansville were 17.6% and 8.7% higher, respectively, than contract rates CRST and Southwest offered Marshalls for service from Woburn to Itasca. For service from Hackensack to Evansville, Sweeney's rates were 9.9% higher than contract rates CRST offered Marshalls for service from Hackensack to Itasca. But again, the comparison is with contract rates and thus has questionable validity.

E. Origins in eastern states to TJX's Worcester and Evansville facilities.

TJX's exhibit T/J-R10 compares Sweeney's tariff rates in SWEY 605, as of May 29, 1992, with the contract rates of three carriers, effective July 19, 1993, for truckload service from the six New England states, New York, New Jersey, and Pennsylvania, to Worcester and Evansville. TJX asserts that the truckload mileage rates for which it was able to contract in 1993 were all below the lowest truckload rate Sweeney ever offered between 1986 and 1993.

The exhibit shows that, for service to Worcester, Keystone Freight Corporation (Keystone), Lebarnold, and Mid-America charged between \$175 and \$384, as compared with Sweeney's \$625 for transportation from Maine, New Hampshire, Rhode Island, New Jersey, and New York. The exhibit also shows that, from points in Pennsylvania, the competing carriers charged \$554 or \$578, as compared with Sweeney's \$810. With regard to service to Evansville, the exhibit shows mileage rates of Lebarnold, Mid-America, and Four Star Transportation, Inc. (Four Star), as compared with Sweeney's mileage rate, for service from the six New England states, New Jersey, and New York. Lebarnold's rate was \$0.89 per mile from Massachusetts and \$0.92 per mile from five other states;

Mid-America's rate was \$0.95 per mile from all eight states; and Four Star's rate was \$0.85 per mile from six states. Sweeney's tariff rate to Evansville was \$1.00 per mile, which was 8.7% higher than Lebarnd's rate from five states and 12.4% higher from one state, 5.3% higher than Mid-America's rate from eight states, and 17.6% higher than Four Star's rate from six states.

With regard to service to Worcester, the exhibit shows that Sweeney's rates were 62.7% to 257% higher than those of another carrier from origins in five states, and 40.1% to 46.2% higher from origins in a sixth state. With regard to the service to Evansville, the exhibit shows that Sweeney's rate was as much as 17.6% higher than one carrier's (Four Star) from origins in six states, but 5.3% higher than the rate at the top of the cluster (Mid-America's) for service from all eight origin states shown. However, the probative value of the comparisons is questionable. TJX compares Sweeney's common carrier rates with contract carrier rates that did not become effective until 6 months after TJX stopped using Sweeney. There is no explanation of why the rates should be considered comparable. Moreover, Sweeney maintained the rates as back-up rates. There are no exhibits showing the extent to which TJX ever required the movement of truckload quantities directly from vendor points to its Worcester or Evansville facilities during the periods Sweeney served it.

#### IV. Leo Murphy's Chart.

Leo Murphy states that, while he was employed by TJX, he received a number of unsolicited bids from carriers seeking to handle LTL freight for TJX in the same regions as Sweeney. Mr. Murphy indicates that he received such bids from New Penn Motor Freight (New Penn), NEMF, St. Johnsbury, Overnite (not otherwise identified), and Parker (not otherwise identified). Sometime in 1993, Mr. Murphy prepared a chart based on Sweeney's rates and the rate bids received from the other carriers.<sup>11</sup>

Mr. Murphy's chart: (1) compares the rates Sweeney charged TJX from January 1, 1991, until May 3, 1992 ("the old Sweeney rates"), with the rates Sweeney charged TJX from May 4, 1992, until January 7, 1993 ("the SWEY 605 rates" or "the new Sweeney rates"), (2) compares the rate bids to the old Sweeney rates, and (3) compares the rate bids to the new Sweeney rates. The chart shows rates (apparently in dollars per mile) in each of seven weight categories, from origins in 20 different zones (identified by the first three numbers of zip codes) in the six New England states, New York, and New Jersey. For each zone and rate group, the chart shows the percentage difference between Sweeney's old and new rates, and between various carriers' rates and Sweeney's old and new rates. (The new rates are generally shown to be 22% to 26.7% lower than the old.) For each zone and state, Mr. Murphy has calculated the combined average savings that TJX assertedly would have realized had

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<sup>11</sup> The chart also uses rates of Preston, APA (not otherwise identified), and Cole (not otherwise identified). The source of such rates is not specified.

it used carriers other than Sweeney. Mr. Murphy asserts that the combined average savings for all competing carriers in all relevant areas would have been 42.9% versus the old Sweeney rates and 30% versus the SWEY 605 rates.

This submission is entitled to no weight. First, the old Sweeney rates are all taken from the rate schedule for LTL service to Chicopee. The new rates are those to Chicopee as listed in tariff SWEY 605 in part - all zip code groups in New Hampshire, Massachusetts, and Rhode Island, and one of each of the two zip code groups in Maine and Connecticut match. We do not know the source for the new rates shown for the remaining parts of Connecticut and Maine and for all points in Vermont, New York, and New Jersey.

Next, the chart is based on asserted rate quotes that are undocumented and thus unverifiable. Four of the carriers that assertedly made rate quotes are not even fully identified on the record. Moreover, we are told nothing about the rate quotes. We do not know when the quotes were made, for how long they were valid, what destination points they related to, and whether any conditions attached to them. Also, the comparison carriers vary not only by state, but also by zones within states.

Further, we note that, with regard to every zone in his chart, Mr. Murphy shows that at least one competing carrier's quoted rates are higher than some of Sweeney's old and/or new rates. In some instances, a competing carrier's rates are shown to be higher than Sweeney's for every weight category. Examples are Parker's rates compared to Sweeney's new rates in two Connecticut zones and Preston's rates compared to Sweeney's new rates in two New York zones. The validity of the rate comparisons is not fully explained, and thus the rate comparisons cannot be used.