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SERVICE DATE - NOVEMBER 19, 1999

SURFACE TRANSPORTATION BOARD<sup>1</sup>

DECISION

No. 41241

PORTION-PAC, INC.  
--PETITION FOR DECLARATORY ORDER--  
CERTAIN RATES AND PRACTICES OF RITEWAY SERVICES, INC.  
A/K/A GOLDEN ARROW FREIGHT SYSTEMS, INC.

Decided: November 15, 1999

We find that collection of the undercharges sought in this proceeding would be an unreasonable practice under 49 U.S.C. 10701(a) and section 2(e) of the Negotiated Rates Act of 1993, Pub. L. No. 103-180, 107 Stat. 2044 (NRA) (now codified at 49 U.S.C. 13711). Accordingly, we will not reach the other issues raised in this proceeding.

BACKGROUND

This matter arises out of a court action in the Superior Court of Arizona, Maricopa County, in Riteway Services, Inc. a/k/a Golden Arrow Freight Systems, Inc. v. Portion-Pac, Inc., Case No. CV 92-02271. The court proceeding was instituted by Riteway Services, Inc. a/k/a Golden Arrow Freight Systems, Inc. (Riteway<sup>2</sup> or respondent), a former motor common and contract carrier, to

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<sup>1</sup> The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the ICC Termination Act or the Act), 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 Act provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the Act. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 13709-13711. Therefore, this decision applies the law in effect prior to the Act, and citations are to the former sections of the statute, unless otherwise indicated.

<sup>2</sup> Riteway was originally incorporated in California under the name West Roads Transport, Inc. On August 18, 1987, the corporate name was changed to Riteway Services, Inc. Thereafter, on January 20, 1989, the corporate name was changed to Golden Arrow Freight Systems, Inc. (GA). In a decision served March 16, 1989, the ICC, in response to a request filed by respondent, amended its records to recognize the name change to GA and directed respondent, if it had not already done so, to amend its tariff schedules to reflect the new name. Respondent failed to amend its tariff

collect undercharges from Portion-Pac, Inc. (Portion-Pac or petitioner). Riteway seeks undercharges of \$52,424.06 (plus attorney's fees and costs), allegedly due, in addition to amounts previously paid, for services rendered in transporting 152 shipments of table sauces and related food products between November 16, 1988, and September 14, 1989.<sup>3</sup> The shipments were transported from petitioner's facility at La Mirada, CA, to various destinations in Arizona and Nevada. By order dated January 6, 1994, the court stayed the proceeding and referred the issue of rate reasonableness to the ICC for determination.<sup>4</sup>

Pursuant to the court order, Portion-Pac, on April 6, 1994, filed a petition for declaratory order requesting the ICC to resolve issues of tariff applicability, rate reasonableness, and unreasonable practice. By decision served April 25, 1994, the ICC established a procedural schedule for development of the record. On May 2, 1994, respondent filed a response to the petition for declaratory order objecting to any broadening of the single issue authorized by the court. On August 1, 1994, petitioner filed its opening statement. Respondent filed its reply on September 12, 1994, and Portion-Pac submitted its rebuttal on October 21, 1994.

Portion-Pac asserts that respondent's attempt to collect the claimed undercharges constitutes an unreasonable practice under section 2(e) of the NRA and that the undiscounted rates Riteway now seeks to assess are unreasonable. Petitioner also contends that respondent's failure to adopt the filed tariffs of Riteway Services, Inc., when respondent changed its name to GA, renders those tariffs inapplicable to shipments transported by GA and invalidates respondent's undercharge claims with respect to GA handled shipments. Portion-Pac further contends that respondent's effort to disallow originally applied discounts for late payment of freight charges based on a "loss-of-discount" tariff provision is in violation of ICC credit regulations<sup>5</sup> and constitutes an unreasonable practice.

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<sup>2</sup>(...continued)  
schedules.

<sup>3</sup> Respondent originally sought undercharges of \$50,230.22 based on 128 shipment claims identified in Exhibit A to the court complaint. During the course of the underlying court proceeding, claims for 24 additional shipments transported between February 24, 1989, and April 29, 1989, were submitted. The additional submissions increased respondent's total claim for undercharges to \$52,424.06.

<sup>4</sup> The court found that Riteway was entitled to summary judgment in the amount of \$52,424.06 (plus interest, attorney fees, and costs) but denied respondent's request for enforcement of its judgment, concluding that Portion-Pac had established a prima facie case with respect to the question of rate reasonableness to merit referral of that issue to the ICC.

<sup>5</sup> Petitioner asserts that respondent has failed either to demonstrate that it has complied with the ICC's credit regulations or prove the factual elements necessary to invoke the loss of discount provision. More particularly, in referring to the "loss-of-discount" credit regulation provision  
(continued...)

Portion-Pac supports its assertions with affidavits from Russell Chapman, petitioner's Inventory Control Coordinator,<sup>6</sup> and Michael Bange, president of Champion Transportation Services, Inc., a transportation consultant retained by petitioner. Mr. Chapman states that he was responsible for arranging for all of Portion-Pac's truck transportation requirements, including selecting carriers, negotiating rates and services, and dealing with the carriers on a day-to-day basis.<sup>7</sup> According to Mr. Chapman, in early 1988 Mr. Gary Alexander, identified by Mr. Chapman as a district sales representative for Transport, offered petitioner a 35% discount off class rates. Mr. Chapman asserts that, for the rest of 1988, the freight bills submitted to petitioner by Riteway show the application of a 35% discount. Attached to Mr. Chapman's statement are two 1988 freight bills for shipments at issue in this proceeding. The freight bills indicate the application of a 35% discount and identify the carrier as Riteway Services, Inc. (Exhibit 3).<sup>8</sup>

At the beginning of 1989, when a truck bearing the GA name arrived to pick up Portion-Pac traffic, Mr. Chapman contacted respondent's representative Doug Ball to clarify the situation. Mr. Chapman states that he was advised by Mr. Ball that GA had taken over Riteway and that Mr. Ball offered to increase petitioner's discount up to 60% off the class rate if petitioner would continue to tender its traffic to GA. Mr. Chapman asserts that he agreed to use GA's service, that Mr. Ball

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<sup>5</sup>(...continued)

requiring the carrier to issue revised freight bills within 90 days following expiration of the authorized credit period [49 CFR 1320.2(g)(2)(vi)], Portion-Pac states that there is no indication on the record of respondent's compliance with this requirement.

<sup>6</sup> In its reply, respondent objects to the receipt of, and moves to strike, the photo-copied affidavit of Mr. Chapman dated June 3, 1993, submitted by petitioner in its opening statement for the reasons that (1) it is not an original affidavit, (2) it was not originally prepared for this proceeding before the Board, and (3) it is not in compliance with the Board's Modified Procedure rules in 49 CFR 1112. Mr. Chapman's statement is an affidavit sworn to and notarized under California seal that appears to have been submitted in the underlying court proceeding. We find no basis for respondent's objections. Respondent's motion to strike is denied.

<sup>7</sup> Mr. Chapman states that Portion-Pac began using the services of a carrier named Riteway Transport, Inc. (Transport) in early 1986 and that he engaged in rate negotiations with Transport's General Traffic Manager, Ronald Nowicki. The negotiations were confirmed in a letter dated April 16, 1986 (Exhibit 1 to Mr. Chapman's statement). The record indicates that Mr. Nowicki was also the General Traffic manager for Riteway Services, Inc.

<sup>8</sup> These bills assist in dispelling the confusion that exists on the record with regard to Riteway Transport, Inc., and Riteway, Services, Inc.—two ostensibly different carriers with similar names and logos, located at the same address, controlled by the same principals, that employed the same personnel. While the evidence is not clear as to what role, if any, was played by Transport in the historical movement of Portion-Pac's traffic, it is apparent that the shipments subject to this proceeding were transported and billed by Riteway Services, Inc.

confirmed that the new 60% discount would be put into effect, that GA issued freight bills for shipments tendered by Portion-Pac containing the statement "AGREED DISCOUNT 60.0%," and that each of the freight bills was paid by petitioner.<sup>9</sup> Mr. Chapman maintains that the rates originally assessed by respondent reflect the rate level generally available from other carriers that serviced petitioner's facility, that the rates respondent now seeks to collect are more than double the amounts originally billed, and that Portion-Pac never would have used a carrier that attempted to charge the rates respondent here seeks to assess.

Mr. Bange conducted an audit and analysis of the balance due bills and claims of respondent. He notes that the exhibit attached to respondent's court complaint includes the original undiscounted amount assessed, the original discounted charge paid by Portion-Pac, the late charge assessed, and the claimed undercharge amount due for each of the listed 128 shipments.<sup>10</sup> Mr. Bange attaches to his affidavit various appendices containing copies of respondent's freight bills including originally issued freight bills and representative "balance due" freight bills that reflect originally issued freight bill data as well as the claimed balance due amounts. Exhibit A contains 14 GA representative "balance due" bills that show the original application of a 60% discount to the initially assessed charge. Exhibit B contains the original freight bills issued by Riteway for the 6 "LOSA" pro numbered shipments to which a 35% discount was applied. Exhibit H contains 10 representative original freight bills to which a 60% discount was applied issued by GA for shipments transported between February 7, 1989, and September 14, 1989. From his examination of the complaint filed by respondent in the court proceeding, the responses provided by respondent to discovery, and the "balance due" bills, Mr. Bange maintains that petitioner was offered freight rates that were not properly or timely filed; that petitioner tendered its freight to Riteway in reliance upon the offered rates; that respondent originally billed petitioner for its services at the offered rates; and that the amounts originally billed by respondent were collected. Mr. Bange is of the opinion that these circumstances provide the basis for a finding of unreasonable practice.

Respondent contends that the subject shipments were transported pursuant to filed tariffs RMB 583 and RWSI 600, which provided for discounts conditioned upon payment of freight charges within 29 days of shipment (Item 2245 of RMB 583 and Item 162 of RWSI 600). It asserts that Portion-Pac failed to pay its originally assessed discounted freight charges within the required 29-day period, a failure that under the terms of the tariff provisions resulted in the forfeiture of the

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<sup>9</sup> Attached as Exhibit 4 to Mr. Chapman's statement are four sample GA freight bills for shipments here at issue in which the 60% discount was applied.

<sup>10</sup> The exhibit attached to respondent's court complaint also includes the date of shipment and the freight bill pro number for each of the shipments listed. Of the 128 shipments listed in the exhibit, 6 with shipment dates between November 16, 1988, and December 20, 1988, contain pro numbers with the prefix LOSA. The remaining 122 shipments with shipment dates between February 7, 1989, and September 14, 1989, contain pro numbers with the prefix GAFS.

originally authorized discounts.<sup>11</sup> Respondent admits that it did not amend its tariff filings but argues that at all times the same corporate entity (whether named Riteway or GA) held the same interstate operating authority in MC-200348 Sub 1; maintained the same designation of agents and insurance filings previously filed; and by virtue of participating powers of attorney had the same tariffs on file, including RMB 583 and RWSI 600.

Respondent supports its position with an affidavit from Jack D. Bennallack, an officer and stockholder of Riteway responsible for the overall supervision of respondent's administrative functions and traffic operations in 1988 and 1989. Mr. Bennallack states that respondent extended discounts to petitioner of 35% in 1988 and 60% in 1989 pursuant to the provisions of tariff RMB 583 and Item 2245 and tariff RWSI 600 and Item 162 (Exhibits C and D to Mr. Bennallack's affidavit). He asserts that the discounts were conditioned on petitioner's agreeing to and in fact paying the billed freight charges within 29 days from the date of shipment. Mr. Bennallack states that none of the freight bills for the subject shipments was paid by the tariff due date of 29 days. Attached to Mr. Bennallack's affidavit as Exhibits G and H are recap summaries of respondent's freight undercharge claims against Portion-Pac. Exhibit G is an open account listing as of February 3, 1992, of the 128 shipments identified in respondent's originally filed court complaint that sets forth the original undiscounted freight charges and discounted amounts paid. Two (2) of the shipments listed in Exhibit G (Pro Numbers GAFS-010669 and GAFS-010925) indicate that their originally assessed freight charges totaling \$498.20 remain unpaid.<sup>12</sup> Exhibit H is an open account listing as of March 27, 1992, of the 24 additional Portion-Pac shipments referred to in note 3 that were not included in respondent's underlying court complaint.

Also attached to Mr. Bennallack's affidavit as Exhibit I are copies of 143 of the 152 "balance due" freight bills issued for the shipments identified in Exhibits G and H.<sup>13</sup> An examination of these rebilled balance due statements indicates that 136 of the 143 statements

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<sup>11</sup> Although respondent asserts that its original freight bills were not paid within the 29-day period required by the tariff provisions, it does acknowledge petitioner's payment of the originally assessed discounted charges. The record in this proceeding does not indicate when payments were made by or on behalf of petitioner.

<sup>12</sup> These originally assessed unpaid freight charges are not undercharge claims but rather open accounts receivable that do not require Board consideration.

<sup>13</sup> Petitioner in its rebuttal contends that respondent's claims for those nine shipments for which "balance due" freight bills were not furnished in its Exhibit I remain unsupported and should be dismissed. Included among the challenged claims are the 6 "LOSA" shipments billed in 1988. We note that Exhibit B to Mr. Bange's statement contains the original freight bills issued by Riteway for the 6 "LOSA" shipments. The record here contains representative "balance due" freight bills as well as other documentation sufficient to identify and support all of Riteway's undercharge claims for the shipments at issue. We find petitioner's request for dismissal to be without basis.

contain in their upper right hand corner the dates February 5, 1990, July 12, 1990, October 22, 1990, or September 9, 1991.<sup>14</sup> These dates appear to reflect the initial rebilling date. Of the 136 rebilled balance due statements with legible rebilling dates, 36 were issued on February 5, 1990, 31 on July 12, 1990, 25 on October 22, 1990, and 44 on September 9, 1991.

#### DISCUSSION AND CONCLUSIONS

We will dispose of this proceeding under section 2(e) of the NRA. Accordingly, we do not reach the other issues raised.

At the outset, we recognize that the court referred the single issue of rate reasonableness for our consideration. Nevertheless, our use of section 2(e)'s "unreasonable practice" provisions to resolve this matter is fully appropriate. The Board, as a general rule, is not limited to deciding only those issues explicitly referred by the court or raised by the parties. Rather, we may instead decide cases on other dispositive grounds within our jurisdiction and, in cases where section 2(e) provides a dispositive resolution--one that was adopted by Congress as a simple surrogate for the more complicated rate reasonableness provisions--we rely on it. Cf. Amoco Fabrics and Fibers Co. v. Max C. Pope, Trustee of the Estate of A.T.F. Trucking, No. 40526 (ICC served Feb. 26, 1992). Thus, we have jurisdiction to issue a ruling under section 2(e) of the NRA here. The Ormond Shops, Inc., Thomas J. Lipton, Inc. and Lionel Leisure, Inc. v. Oneida Motor Freight, Inc. Debtor-in-Possession, and Delta Traffic Service, Inc., No. MC-C-30156 (ICC served Apr. 20, 1994); and Have a Portion, Inc. v. Total Transportation, Inc., and Thomas F. Miller, Trustee Of The Bankruptcy Estate of Total Transportation, Inc., No. 40640 (ICC served Feb. 7, 1995).

Section 2(e)(1) of the NRA provides, in pertinent part, that "it shall be an unreasonable practice for a motor carrier of property . . . providing transportation subject to the jurisdiction of the [Board] . . . to attempt to charge or to charge for a transportation service . . . the difference between the applicable rate that [was] lawfully in effect pursuant to a [filed] tariff . . . and the negotiated rate for such transportation service . . . if the carrier . . . is no longer transporting property . . . or is transporting property . . . for the purpose of avoiding application of this subsection."<sup>15</sup>

We note that section 2(e)'s availability is not limited to situations where the originally billed rate was unfiled. In evaluating whether a carrier's collection efforts would be an "unreasonable

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<sup>14</sup> The upper right hand corner of the remaining 7 rebilled balance due statements are either blank or contain markings that cannot be interpreted.

<sup>15</sup> Section 2(e), as originally drafted, applied only to transportation service provided prior to September 30, 1990. Here, we note, the shipments at issue moved before September 30, 1990. In any event, 49 U.S.C. 13711(g), which was enacted in the ICC Termination Act as an exception to the general rule noted in footnote 1 to this decision, deletes the September 30, 1990 cut-off date as to proceedings pending as of January 1, 1996.

practice” under section 2(e), the Board must consider, *inter alia*, whether the shipper was offered a rate by the carrier “other than that legally on file with the Board for the transportation service.” Section 2(e)(2)(A) (emphasis added). If the carrier and shipper agreed to a price that was embodied in a filed rate that cannot be applied to the involved shipments, then the shipper was offered a rate not legally on file “for [that] transportation service.” Thus, even if “some of [a carrier’s undercharge claims] are based on it billing and collecting an erroneous [filed] rate, if the so-called erroneous rate was negotiated between the shipper and [carrier] and if the shipper reasonably relied on the rate, the rate would meet the definition of a ‘negotiated rate’ and trigger the application of the provisions of the NRA.” American Freight System, Inc. v. ICC (In re American Freight System), 179 B.R. 952, 957 (Bankr. D. Kan. 1995).

It is undisputed that Riteway no longer transports property.<sup>16</sup> Accordingly, we may proceed to determine whether Riteway’s attempt to collect undercharges (the difference between the applicable filed tariff rate and the negotiated rate) is an unreasonable practice.

Initially, we must address the threshold issue of whether sufficient written evidence of a negotiated rate agreement exists to make a section 2(e) determination. Section 2(e)(6)(B) defines the term “negotiated rate” as one agreed on by the shipper and carrier “through negotiations pursuant to which no tariff was lawfully and timely filed . . . and for which there is written evidence of such agreement.” Thus, section 2(e) cannot be satisfied unless there is written evidence of a negotiated rate agreement.

Here the record contains copies of originally issued freight bills and virtually all of the “balance due” freight bills that indicate originally assessed class rates to which in 1988 discounts of 35% and in 1989 discounts of 60% were applied. The record also contains copies of filed tariffs RMB 583 and RWSI 600, Items 410 and 670, that provide for the application of discounts of 35% and 60%. We find this evidence sufficient to satisfy the written evidence requirement. E.A. Miller, Inc.--Rates and Practices of Best, 10 I.C.C.2d 235 (1994). See William J. Hunt, Trustee for Ritter Transportation, Inc. v. Gantrade Corp. C.A. No. H-89-2379 (S.D. Tex. March 31, 1997) (finding that written evidence need not include the original freight bills or any other particular type of evidence, as long as the written evidence submitted establishes that specific amounts were paid that were less than the filed rates and that the rates were agreed upon by the parties).

In this case the evidence indicates that the parties conducted business in accordance with agreed-to negotiated discount rates that were originally billed by Riteway and paid by Portion-Pac. The consistent application of discounts of 35% for the 1988 shipments and 60% for the 1989 shipments confirm the testimony of Mr. Chapman and reflect the existence of negotiated rates. The evidence further indicates that Portion-Pac relied upon the agreed-to discount rates in tendering its

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<sup>16</sup> GA was coded inactive as a carrier and its common and contract authorities were revoked by the ICC, effective February 9, 1990.

traffic to Riteway, and that petitioner would not have used respondent to provide transportation service had respondent attempted to charge the undiscounted rates it is here attempting to collect.

Based on the course of conduct of the parties and the manner in which the subject transportation service was rendered during the period November 16, 1988, through September 14, 1989, it does not appear that a loss of discount condition was part of the negotiated rate agreed to by the parties. Assuming, however, that such a condition was part of the negotiated rate agreement, the record in this proceeding supports the conclusion that respondent failed to comply with the regulatory preconditions outlined in the ICC credit rules necessary to justify the application and enforcement of the condition.

Carriers may invoke “loss-of-discount” provisions only if they satisfy certain preconditions: (1) the loss-of-discount penalty must be set forth in the carrier’s tariff, 49 CFR 1320.2(g)(1)(i) and (2)(i); (2) the carrier must specifically state the liquidated damages that apply to late payments in the original freight bill for the shipment, 49 CFR 1320.3(c); (3) the carrier (or its successor) must issue a revised freight bill that includes the liquidated damages charge within 90 days after the expiration of the authorized credit period, 49 CFR 1320.2(g)(2)(vi); and (4) the carrier may apply liquidated damages “only to the nonpayment of original, separate and independent freight bills and shall not apply [them] to aggregate balance-due claims sought for collection on past shipments by a bankruptcy trustee, or any other person or agent.” 49 CFR 1320.2(g)(2)(iii). See Payment of Rates & Charges--Penalty for Nonpayment, 4 I.C.C.2d 340 (1988), 5 I.C.C.2d 88 (1988), 5 I.C.C.2d 691 (1989). In ICC v. Transcon Lines, 115 S. Ct. 689 (1995), the Supreme Court determined unequivocally that the ICC could enforce its credit regulations to prevent carriers from invoking “loss-of-discount” tariff provisions to collect liquidated damages for overdue freight charges where these preconditions were not fully satisfied.

From the record before us, while there is some uncertainty as to whether Riteway was in full compliance with the second requirement, it is apparent that respondent has failed to satisfy the third and fourth of the requirements listed above. Under the second requirement, when a carrier extends credit, its freight bill or separate written notice accompanying that bill (or a group of freight bills presented at one time) must state that “failure timely to pay freight charges may be subject to tariff penalties” or contain a statement of similar import. 49 CFR 1320.3(c). The bills or other notice must also indicate the time by which payment must be made; any applicable service and/or collection expense charges; and relevant discount terms. Id. Except for two original GA freight bills for shipments transported on September 12 and 14, 1989 (Pro Numbers GAFS-011303 and GAFS-011359),<sup>17</sup> none of the original freight bill copies submitted on this record contain such language. Mr. Bennalack in his affidavit does assert that a separate notice advising of the loss of discount in the event of failure to make payment within 29 days was included with each bill or packet of bills

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<sup>17</sup> Bennalack affidavit Exhibits E and I and Bange affidavit Exhibit H at 19.

sent to petitioner or petitioner's paying agent.<sup>18</sup> Mr. Bennallack's assertion being unrefuted, we conclude that respondent has complied with the second requirement.

Under the third requirement, a carrier must issue revised freight bills or notices of imposition of collection expense charges for late payment within 90 days after expiration of the authorized credit period. 49 CFR 1320.2(g)(2)(vi). Thus, Riteway should have issued all revised bills assessing the "loss-of-discount" amount for collection costs of the unpaid freight bills within 119 days (29-day credit period plus 90 days) of the transportation. As reflected in Exhibit I to Mr. Bennallack's affidavit, Riteway's revised freight bills indicate that to the extent a rebilling date can be determined on this record, the rebilling occurred well after 119 days from the November 1988-September 1989 period during which the subject shipments were transported.<sup>19</sup> We find that Riteway has clearly not complied with this requirement.

It also appears that, in addition to being untimely, Riteway's revised freight bills invoking the "loss-of-discount" penalty also violated the fourth requirement, the "anti-batching" prohibition at 49 CFR 1320.2(g)(2)(iii). The purpose of this rule is to protect shippers from being besieged by aggregate late-payment claims from the carrier or its successor, after the carrier has gone out of business. The rule establishes that reissued bills may not be accumulated and sent in aggregated batches, but instead must be sent out on a continuing basis as late-payment penalties on separate shipments become due. As indicated above, of the 136 rebilled balance due statements contained in Exhibit I to Mr. Bennallack's statement with legible rebilling dates, 36 were issued on February 5, 1990, as the carrier was going out of business; 31 on July 12, 1990; 25 on October 22, 1990; and 44 on September 9, 1991, for shipments transported by Riteway between November 16, 1988, and September 14, 1989. That kind of aggregate imposition of late-payment penalties is in violation of Rule 1320.2(g)(2)(iii). Virginia Design Packaging Corp. v. Standard Trucking Co., Inc., No. 41563 (ICC served Apr. 9, 1996)].

Because Riteway failed to comply with all of the necessary regulatory preconditions as outlined in the credit rules, it should not be permitted to invoke any "loss-of-discount" condition contained in its negotiated rate agreement with Portion-Pac so as to collect the full undiscounted rate as a late-payment penalty. See Dillard Dept. Stores--Pet. for Decl. Order--P\*I\*E Nationwide, Inc., No. 40751, slip op. at 11-13 (ICC served May 12, 1995).

In exercising our jurisdiction under section 2(e)(2), we are directed to consider five factors: (1) whether the shipper was offered a transportation rate by the carrier other than the rate legally on

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<sup>18</sup> A copy of the separate notice is attached to Mr. Bennallack's affidavit as Exhibit F. The notice is undated and is not directed to any specific shipper.

<sup>19</sup> The latest date of shipment was September 14, 1989. The earliest rebilling date indicated in respondent's rebilled balance due statements was February 5, 1990, 144 days after the latest shipment date.

file [section 2(e)(2)(A)]; (2) whether the shipper tendered freight to the carrier in reasonable reliance upon the offered rate [section 2(e)(2)(B)]; (3) whether the carrier did not properly or timely file a tariff providing for such rate or failed to enter into an agreement for contract carriage [section 2(e)(2)(C)]; (4) whether the transportation rate was billed and collected by the carrier [section 2(e)(2)(D)]; and (5) whether the carrier or the party representing such carrier now demands additional payment of a higher rate filed in a tariff [section 2(e)(2)(E)].

Here, the evidence establishes that a negotiated discount rate was offered to Portion-Pac by Riteway; that Portion-Pac reasonably relied on the offered rate in tendering its traffic to Riteway; that the negotiated rate was billed and collected by Riteway; and that Riteway now seeks to collect additional payment based on a higher rate filed in a tariff. Therefore, under 49 U.S.C. 10701(a) and section 2(e) of the NRA,<sup>20</sup> we find that it is an unreasonable practice for Riteway to attempt to collect undercharges from Portion-Pac for transporting the shipments at issue in this proceeding.<sup>21</sup>

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

It is ordered:

1. Respondent's motion to strike Mr. Chapman's statement is denied.
2. This proceeding is discontinued.
3. This decision is effective on its service date.
4. A copy of this decision will be mailed to:

The Honorable Thomas W. O'Toole  
Superior Court of Arizona  
Maricopa County  
201 West Jefferson St.  
Phoenix, AZ 85003-2205

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<sup>20</sup> Our findings apply only to the undercharge claims and not to claims based on original freight bills that were never paid.

<sup>21</sup> While our decision here is based on our finding under section 2(e) of the NRA, we recognize that there is also merit to petitioner's assertion that GA's claims for undercharges are invalid because of its failure to adopt the Riteway tariffs [see Infinity Systems, Inc.--Petition for Declaratory Order--Certain Rates and Practices of Superior Fast Freight, Inc., STB Docket No. 41911 (STB served June 23, 1997), and Security Services v. Kmart Corp., 511 U.S. 431 (1994)].

No. 41241

Re: Case No. CV 92-02271

By the Board, Chairman Morgan, Vice Chairman Clyburn and Commissioner Burkes.

Vernon A. Williams  
Secretary