

EX PARTE NO. MC-180 (SUB-NO. 3)¹REGULATIONS IMPLEMENTING SECTION 7
OF THE NEGOTIATED RATES ACT OF 1993

Decided February 25, 1997

The Board denies the National Motor Freight Traffic Association's (NMFTA) petitions to reopen the proceedings in *Reg. Implementing Sec. 7 of the NRA*, 1 S.T.B. 29 (1996) (*Repeal Decision*), and *Policy Statement on the Transportation Industry Regulatory Reform Act*, Ex Parte No. MC-222 (STB served April 3, 1996) (*Policy Statement II*).

BY THE BOARD:

In *Reg. Implementing Sec. 7 of the NRA*, 1 S.T.B. 29 (1996) (*Repeal Decision*), we rescinded the rules previously issued by the Interstate Commerce Commission (ICC)² implementing the off-bill discounting provisions of section 7 of the Negotiated Rates Act of 1993, Pub. L. No. 103-180 (NRA), and terminated that proceeding. In another decision, *Policy Statement on the Transportation Industry Regulatory Reform Act*, Ex Parte No. MC-222 (STB served April 3, 1996) (*Policy Statement II*), we denied petitions to reopen, reconsider, and stay a prior decision of the ICC,³ which, among other things, interpreted the off-bill discounting provisions of section 7 of the NRA.

¹ This proceeding also includes *Policy Statement on the Transportation Industry Regulatory Reform Act of 1994*, Ex Parte No. MC-222. These cases are consolidated for disposition in a single decision because the petitions disposed of here raise the same issue.

² The rules were issued in *Regs. Implementing Section 7 of the "Negotiated Rates Act of 1993"*, 9 I.C.C.2d 1263 (1993) (*Implementation Decision*).

³ *Policy Statement on Regulatory Reform Act*, 10 I.C.C.2d 251 (1994) (*Policy Statement I*).

The National Motor Freight Traffic Association (NMFTA) has filed petitions to reopen both proceedings. We deny the petitions because NMFTA has failed to demonstrate that either *Repeal Decision* or *Policy Statement II* involves material error. 49 CFR 1115.4.⁴

BACKGROUND OF SECTION 7

"Off-bill discounting" generally refers to a practice by which motor carriers provide discounts, credits or allowances to parties other than the freight bill payer, without notice to the payer. Section 7 of the NRA sought to prohibit off-bill discounting, and to promote "truth-in-billing," by directing the ICC to issue regulations directed at two objectives. First, the regulations were to prohibit a motor carrier from providing a discount from the "rate set forth in its tariff or contract" to a person other than the payer of the freight bill or its agent.⁵ Second, the regulations were to require certain disclosures by a motor carrier issuing a freight bill.⁶

The ICC adopted regulations in compliance with section 7's directive. *Implementation Decision*. The regulations, which were published at 59 Fed. Reg. 2303 (1994), tracked the language of the statute by prohibiting off-bill discounting and requiring disclosure of the basis for any rates, charges, or allowances, and any pre-conditions affecting those rates, charges, or allowances. On March 23, 1994, the ICC issued a further decision responding to inquiries it had received and inviting additional questions and comments.

When Congress substantially eliminated motor carrier tariff filing in the *Transportation Industry Regulatory Reform Act of 1994*, Pub. L. No. 103-311 (*TIRRA*), the ICC issued *Policy Statement I* to provide interpretive guidance to the public concerning the new law. In that decision, the ICC offered its view

⁴ NMFTA has neither proffered new evidence nor contended that substantially changed circumstances warrant reopening. Therefore, reopening is inappropriate under either of those alternative grounds. *Id.*

⁵ The regulations were not, however, to prohibit "a motor carrier from making payments or allowances to a party to the transaction for services that would otherwise be performed by the motor carrier," if those payments or allowances "are reasonably related to the cost that such party knows or has reason to know would otherwise be incurred by the motor carrier." Section 7(c).

⁶ These disclosures included "the actual rates, charges or allowances for the transportation service," and, if the rate, charge or allowance "is dependent upon the performance of a service by a party to the transportation arrangement," a notice to the payer "that a reduction, allowance or other adjustment may apply." Sec. 7(b).

that, after *TIRRA*, section 7 of the NRA no longer prohibited off-bill discounts with respect to billings based on certain rates, such as individually determined rates, that were no longer required to be filed with the ICC. Rather, the ICC held, the off-bill discounting provisions continued to apply only to collectively set rates and any other rates still subject to the statutory tariff filing requirement. *Policy Statement*, 10 I.C.C.2d at 256. NMFTA filed a petition for reconsideration.⁷

In the *ICC Termination Act of 1995*, Pub. L. No. 104-88 (*ICCTA*), Congress reformulated the requirements of section 7. First, it repealed the directive that the ICC issue regulations prohibiting off-bill discounting. Second, rather than requiring the Board to maintain truth-in-billing regulations, it placed specific truth-in-billing requirements in the statute itself. *See*, 49 U.S.C. 13708. Now, the statute no longer requires that we maintain regulations prohibiting the practice of granting off-bill discounts; it does, however, affirmatively require carriers to disclose certain information when they engage in the practice. *Id.*

In response to this legislative change and the requirements of section 204(a) of the *ICCTA*, 49 U.S.C. 701 note,⁸ we issued *Repeal Decision*. We explained that, because Congress had repealed, and had not reenacted, the requirement that regulations be maintained prohibiting off-bill discounting and providing for truth-in-billing, and because it had instead incorporated the truth-in-billing requirements directly into the statute, the regulations would be rescinded. 1 S.T.B. at 30.

Additionally, because the issues raised by the pending petitions to reopen *Policy Statement I* had been mooted by the *ICCTA*, we issued a separate decision denying the petitions to reopen *Policy Statement I*, and discontinued that proceeding. *Policy Statement II*. In particular, we noted that the *ICCTA's* repeal of the requirement that we maintain regulations prohibiting off-bill discounting made it unnecessary for us to reconsider whether unfiled, individually determined rates were subject to that prohibition. *Id.* at 1.⁹

⁷ Among other things, NMFTA contended that all motor carrier rates -- both filed and unfiled -- were subject to the off-bill discounting provisions.

⁸ Section 204(a) of the *ICCTA* provides that "[t]he Board shall promptly rescind all regulations established by the Interstate Commerce Commission that are based on provisions of law repealed and not substantively reenacted by this Act."

⁹ In seeking reconsideration of *Policy Statement I*, petitioners had also argued that, because motor carriers were, under *TIRRA*, still required to file their collectively determined rates, rate
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THE NMFTA PETITIONS.

A. *The MC-180 (Sub-No. 3) Proceeding.*

In its petitions to reopen these proceedings, NMFTA claims that Congress did not intend to repudiate the ban on off-bill discounting. To support its claim, it points out that the legislative history of the *ICCTA* is silent as to why Congress repealed the statutory language directing us to issue regulations prohibiting off-bill discounting. It also notes that the truth-in-billing requirements were expanded, and were incorporated directly into the statute. NMFTA argues that these two facts, taken together, evince an intent on the part of Congress to require the Board to maintain regulations prohibiting off-bill discounting and providing for truth-in-billing.

NMFTA also contends that the rulemaking should be reopened to address unresolved questions raised by it and other parties in earlier pleadings. Because truth-in-billing requirements have been incorporated into the statute, in section 13708, NMFTA contends that we must resolve questions that arose under the repealed truth-in-billing regulations. Specifically, it asks us (1) to determine which party is entitled to a discount under a variety of circumstances; and (2) to address the prohibition against causing false or misleading information to be entered on freight bills. MC-180 (Sub-No. 3) petition at 6. Moreover, it argues that we should address the legality of alleged schemes that it asserts are designed to avoid full disclosure on freight bills. *Id.* It states that only this agency can provide the clarifications that it requests. *Id.*

B. *Policy Statement II.*

NMFTA contends that *Policy Statement II* should be reopened to clarify whether the provisions of new 49 U.S.C. 13708 requiring truth-in-billing apply only to collectively determined tariff rates, as the ICC had held with respect to

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bureaus may continue to file their members' individually determined rates. Because the *ICCTA* repealed the requirement that rate bureaus file collectively determined rates, we found that that issue had also been rendered moot. *Id.* at 2.

the prohibition on off-bill discounting in *Policy Statement I*, 10 I.C.C.2d at 256.¹⁰

DISCUSSION

We see no basis for reopening the MC-180 (Sub-No. 3) proceeding and adopting new rules governing truth-in-billing and prohibiting off-bill discounting. At the outset, we do not believe that we have jurisdiction to impose regulations governing the day-to-day activities of motor carriers, beyond the authority specifically conferred in the statute. The statute does not give us specific authority over off-bill discounting or truth-in-billing.

In any event, we do not share NMFTA's view that off-bill discounting is now prohibited. Section 7 of the NRA directed the ICC to prohibit the practice, but the *ICCTA* lifted that directive. To put it as plainly as we can, the plain language of 49 U.S.C. 13708 simply does not require regulations prohibiting off-bill discounting. Resort to legislative history, which is inappropriate in the face of such plain statutory language, is unavailing, in any event: the legislative history, as NMFTA concedes, is silent as to why Congress repealed the ban. Silence cannot be relied on to imply an intention different from that which is evident from the plain language of the statute.

NMFTA contends that Congress' expansion of the truth-in-billing requirements in the *ICCTA* evinced an intent that the ICC's regulations be maintained, but we disagree. The fact that Congress retained and added to the off-bill discounting disclosure requirements in the statute is not inconsistent with Congress' action in repealing the directive that we prohibit off-bill discounting. To the contrary, the expanded disclosure requirements signal a willingness to accept off-bill discounting, so long as it is clearly disclosed.

NMFTA also fails to establish a need for the truth-in-billing regulations that we have eliminated. Those regulations were initially adopted pursuant to a specific statutory directive. Specific disclosure provisions have now been expressly incorporated into the statute at 49 U.S.C. 13708; they are clear and unambiguous; and they do not require amplification or explanation by the Board. They are perfectly capable of being enforced in court by the parties to

¹⁰ In its petition to reopen *Policy Statement II*, NMFTA relies, in part, on the existence of the regulations issued by the ICC in *Implementation Decision*. Because those regulations have now been repealed, we will not address that argument here.

a given transaction, which is a change in approach to these matters that runs throughout the motor carrier sections of the *ICCTA*.

Nor has NMFTA established that we committed error by declining to address questions that had arisen under the repealed truth-in-billing regulations. The *ICCTA* transferred to the Board narrowly circumscribed jurisdiction over motor carriers. For motor carriers in general, it did not confer on the Board any authority to determine, through rulemakings, adjudications, or otherwise, either the circumstances entitling a party to a discount or the propriety of particular practices relating to what NMFTA describes as the falsification of freight bill information. Thus, the Board lacks jurisdiction over all of the activities to which NMFTA calls attention.

Finally, NMFTA contends that the ICC erred in holding, in *Policy Statement I*, that Section 7, in its original form, applied only to billings based on filed rates. We will not reopen *Policy Statement I*. The issue is clearly moot, as the *ICCTA* eliminated tariff filing for most motor carriers and amended Section 7 by repealing the directive that we maintain regulations prohibiting off-bill discounting and by adopting statutory truth-in-billing standards. And, although we lack jurisdiction over these matters, we observe, as we have elsewhere in this decision, that no rates are subject to the repealed off-bill discounting prohibition. We also note that, on the other hand, motor carrier rates generally *are* subject to the truth-in-billing requirements. *See*, 49 U.S.C. 13708(a)(applying the truth-in-billing requirements to "motor carrier[s] subject to jurisdiction under subchapter I of chapter 135," that is, to all such carriers engaged in interstate transportation for compensation).

CONCLUSION

In conclusion, we see no basis on which to continue these proceedings. Off-bill discounting is not prohibited by statute, while truth-in-billing provisions are expressly embodied in the statute. Given the limits on our authority over motor carriers, we have no business adopting regulations of the sort requested by NMFTA.

It is ordered:

1. The petitions to reopen are denied.
2. This decision is effective on April 11, 1997.

By the Board, Chairman Morgan and Vice Chairman Owen.