

SEC. 5A APPLICATION NO. 118 (AMENDMENT NO. 1), *ET AL.*¹

EC-MAC MOTOR CARRIERS SERVICE ASSOCIATION, INC., *ET AL.*

Decided February 9, 2000

The Surface Transportation Board, on reconsideration, affirms its prior decision conditioning approval of motor carrier rate bureau agreements on reductions in benchmark rates to competitive levels.

BY THE BOARD:

In our prior decision in this proceeding, we announced that we intended to approve current motor carrier rate bureau agreements only if “benchmark” rates were reduced to competitive levels. Various motor carrier rate bureaus filed a petition for reconsideration of our prior decision, to which various shipper groups replied in opposition. In this decision, we deny the petition for reconsideration.

BACKGROUND

The provisions of 49 U.S.C. 13703(d) and (e), as adopted by the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), limited rate bureau approvals to 3 years and provided that existing motor carrier rate bureau agreement approvals would expire on December 31, 1998, unless they were extended by the Board. To implement section 13703, and to address other rate bureau issues that had been raised earlier, we initiated a proceeding in a decision served in this docket on May 20, 1997 (the *1997 Decision*), and notice published on the same day at 62 Fed. Reg. 27,653 (1997). In the *1997 Decision*, we indicated that we would be addressing “fundamental questions concerning

¹ This decision embraces six other motor carrier rate bureau dockets: Sec. 5a Application No. 34 (Amendment No. 8), *Middlewest Motor Freight Bureau, Inc.*; Sec. 5a Application No. 46 (Amendment No. 20), *Southern Motor Carriers Rate Conference, Inc.*; Sec. 5a Application No. 22 (Amendment No. 7), *Pacific Inland Tariff Bureau, Inc.*; Sec. 5a Application No. 60 (Amendment No. 10), *Rocky Mountain Motor Tariff Bureau, Inc.*; Sec. 5a Application No. 45 (Amendment No. 13), *Niagara Frontier Tariff Bureau, Inc.*; and Sec. 5a Application No. 25 (Amendment No. 8), *The New England Motor Rate Bureau, Inc.*

the appropriate role for rate bureaus in the trucking industry, and the need for antitrust immunity, given today's regulatory environment.'

After reviewing the extensive public comments filed in response to the *1997 Decision*, we issued a decision, *EC-MAC Motor Carriers Service Association, Inc., et al.*, 3 S.T.B. 926 (1998) (the *1998 Decision*).² The *1998 Decision* did not categorically find that approval of rate bureau agreements would contravene the public interest. It did, however, find no basis for shielding from antitrust scrutiny the existing rate setting process, in which rate bureaus collectively publish class rates at levels that, the bureaus say, are almost never charged, and from which, the bureaus say, actual rates are nearly always discounted. Accordingly, the Board announced its inclination to approve rate bureau agreements, and thereby protect the parties establishing rates collectively from the operation of the antitrust laws, only if class rates are reduced to reflect market-based levels.³

In response to a letter from the Republican and Democratic leadership of the Committee on Transportation and Infrastructure of the U.S. House of Representatives,⁴ however, the Board decided to defer initiating the proceeding to effect appropriate rate reductions required for continued antitrust immunity. The letter, which was received shortly before the *1998 Decision* was due to be issued, read in pertinent part as follows:

As you know, the Committee on Transportation and Infrastructure intends to pass legislation next year to reauthorize the Surface Transportation Board. As part of this reauthorization process, we will be reviewing a number of provisions contained in [ICCTA] related to motor carriers * * *. We therefore urge the Board to refrain from taking action in any case that would set major new policies or overturn existing practices in the motor carrier area before Congress has the opportunity to more fully consider and act upon these issues.

The Board thus postponed the effectiveness of the *1998 Decision*, in order to give Congress time to move forward with legislation that would address the status of rate bureaus. The Board temporarily extended approval of existing

² We also issued a decision indicating our intent to approve the agreement of the National Classification only if certain changes are made to the classification process. *National Classification Committee — Agreement*, 3 S.T.B. 917 (1998) (*NCC Decision*).

³ The decision also indicated, among other things, the Board's inclination to allow rate bureaus whose agreements were approved to expand their operations to a nationwide basis.

⁴ The letter was signed by the Honorable Bud Shuster, Chairman; the Honorable James L. Oberstar, Ranking Democratic Member; the Honorable Thomas E. Petri, Chairman, Subcommittee on Surface Transportation; and Nick J. Rahall, II, Ranking Democratic Member, Subcommittee on Surface Transportation.

agreements and indicated that it would initiate further proceedings to effect reductions in base rates unless instructed otherwise, either by legislation, or by some other form of clear expression from Congress to the contrary.

By petition filed on January 27, 1999, four of the rate bureaus involved in this proceeding ("Petitioners" or "the bureaus") requested reconsideration of the *1998 Decision*. Replies supporting Petitioners' request for reconsideration were filed by: Midwest Motor Freight Bureau, Inc.; Andrew F. Popper, Professor of Law; and Grant M. Davis, Ph.D. Replies in opposition to the petition for reconsideration were filed by: The National Industrial Transportation League (NITL); the Health and Personal Care Distribution Conference, Inc., jointly with the National Small Shipments Traffic Conference, Inc. (HPCDC/NASSTRAC); and the Transportation Consumer Protection Council, Inc. (TCPC).

Because we find that the petition for reconsideration is without merit, we are, by separate notice initiating the proceeding that we discussed in the *1998 Decision* to effect reductions of class rates to market levels. 65 Fed. Reg. 7099 (2000).

DISCUSSION AND CONCLUSIONS

Under 49 CFR 1115.3, petitions for reconsideration of Board decisions may be granted only upon a showing of material error, new evidence, or changed circumstances. The bureaus argue that the *1998 Decision* should be reversed on the basis of material error. They raise a variety of alleged mistakes, which can be broken down into two basic categories: (1) Congress did not intend for the Board to undertake a broad-based proceeding to reduce class rates; and (2) there have been no individual shipper motor carrier rate complaints, and there is no evidence that class rates are too high.⁵ We find that reconsideration is not warranted.

1. *Requiring Adjustments to the Bureau-Initiated Rate Structure Comports With the Congressional Intent.* The bureaus argue that the legislative history underlying ICCTA reflects a Congressional presumption that collective ratemaking is beneficial, and that our directive that carriers wanting continued immunity must reduce collectively set rates to market levels thus contravenes the Congressional intent. ICCTA, however, did not tell us that we should or should

⁵ The bureaus also argue that the *1998 Decision* overlooks the benefits of collective ratemaking and the need of bureau carriers to recoup cost increases through general rate increases (GRIs).

not approve collective ratemaking agreements, and our *1998 Decision* did not find that collective ratemaking is necessarily harmful, or, for that matter, that it is necessarily beneficial. Rather, it simply found that it would not be in the public interest for the Government to protect collective ratemaking from legal challenge under the antitrust laws unless the collectively set class rates, which may be charged to shippers, are set at market levels. Whatever the benefits of collective ratemaking may be, our decision does not foreclose any carrier from taking advantage of them if it wants to do so.

The bureaus suggest that, in enacting ICCTA, Congress wanted the Board to approve the existing practice of setting inflated rates, from which rates charged to particular shippers may be discounted. To the extent that ICCTA addresses the levels of collectively set rates, however, it specifically requires that they be reasonable. Further, ICCTA contains no limitation on what the Board should consider when engaging in the statutorily-mandated periodic review of rate bureaus, and indeed section 13703(c) provides that we “shall change the conditions of approval or terminate it *when necessary* to protect the public interest.” [Emphasis added.] Our determination that it is not in the public interest for a regulatory agency to immunize above-market rates, which some shippers may be required to pay, from the antitrust laws does not contravene any Congressional directive contained in ICCTA.⁶

More importantly, recent legislation essentially ratifies those aspects of the *1998 Decision* that Petitioners challenge. As noted, just before the *1998 Decision* and the *NCC Decision* were to be issued, the leadership of both Parties of our authorizing committee of the House of Representatives suggested that Congress would be reviewing motor carrier rate bureau issues during 1999, and asked the Board not to proceed with any final decision until after such review was completed. Subsequently, the Board issued its decisions, telling Congress how it intended to proceed absent a directive to the contrary. In section 227 of the Motor Carrier Safety Improvement Act of 1999, H. R. No. 3419 (Nov. 19, 1999), Congress addressed the specific issues that were discussed by the Board in the *1998 Decision* and the *NCC Decision*.⁷ Insofar as the *1998 Decision* is concerned, Congress prospectively changed the three-year periodic rate bureau

⁶ The bureaus note (at 9) that Congress, in passing ICCTA, wanted reduced regulation of motor carriers. But government approval of a collective ratesetting process that allows carriers to set and charge rates that they seem to admit are above market levels without being subject to the antitrust laws can hardly be viewed as deregulatory.

⁷ NITL (on December 9, 1999), some of the rate bureaus (on December 15, 1999), and HCPDC/NASTTRAC (on December 22, 1999) filed letters expressing their views of the effect on this legislation on these proceedings.

review set up in ICCTA to a five-year periodic review;⁸ Congress directed the Board not to follow through with the intention expressed in the *1998 Decision* to allow rate bureaus to operate on a nationwide basis; but in all other respects, Congress did not stand in the way of the Board's going forward with the approach outlined in the *1998 Decision*.⁹ The *1998 Decision* did not contravene the Congressional intent underlying ICCTA, and Congress by its action in essence sanctioned that decision in the 1999 motor carrier legislation.¹⁰

2. *Adjustments to the Bureau-Initiated Rate Structure Are Necessary.* Apart from the issue of Congressional intent, Petitioners and their supporters argue that there is no evidence that collectively set rates are higher than they should be; that there have been no formal rate complaints filed at the Board by shippers paying collectively set rates; and thus that a Board proceeding conditioning rate bureau immunity on reductions, to competitive levels, in class rates that shippers may pay constitutes "intrusive" regulatory intervention with the free market. We disagree.

First, we must emphasize that we are not meddling or intruding in private business at all. Rather, the rate bureaus themselves have filed applications asking us to immunize them from the laws that would otherwise govern private businesses operating in the free market. If the rate bureaus do not want us to "intrude" into their affairs, they can withdraw their applications for immunity, and we will leave them to set whatever rates they want, however they want to set them, subject to whatever laws will apply to their unimmunized conduct. If they want immunity from the laws that govern private businesses in the free market,

⁸ In a letter received by FAX on February 8, 2000, Chairman Shuster and Congressman Rahall of the Committee on Transportation and Infrastructure, U.S. House of Representatives, express the view that the change from a 3-year to a 5-year periodic review requires maintenance of the status quo "until such time as any proceeding is initiated within the five-year process." We will not require any specific changes until we complete the proceedings that we are now initiating.

⁹ In particular, the statute provides that "Nothing in section 227 [other than the directive not to allow nationwide expansion of rate bureau agreements], including the amendments made by [section 227], shall be construed to affect any case brought under this section that is pending before the Board as of the date of the enactment of this paragraph."

¹⁰ On January 28, 2000, we received a letter from Chairman Shuster and Congressman Rahall of the Committee on Transportation and Infrastructure, U.S. House of Representatives. The letter, as pertinent to this proceeding, states that, in its 1999 motor carrier legislation, Congress intended that the public interest be defined in the context of the national transportation policy (NTP) factors found at 49 U.S.C. 13101. The parties in their presentations generally did not address each of the NTP factors in detail, and thus the *1998 Decision* did not mechanically go through each one individually. Nevertheless, we agree that the NTP is clearly relevant to any public interest determination we might make, particularly given the language of section 13703(a)(3).

however, then they must demonstrate to us that immunity is in the public interest. And our view has been, and still is, that carriers should not be given immunity to collectively set, and to charge, rates that are above competitive levels; rather, if carriers want to set and charge rates above competitive levels, they must do so individually and not through their rate bureaus.

The bureaus say that we are overreacting: motor carrier shippers do not pay undiscounted rates (petition at 3-5), but to the extent that they do, it is only because the market and the transportation characteristics of their traffic warrant it (petition at 4, 11, 14), or because they are unwilling to shop around (petition at 6). Thus, the bureaus view our efforts to reduce class rates that some shippers may pay as "a solution in search of a problem." Petition at 13.

We do not agree. We cannot forget the undercharge crisis that developed when a number of carriers went into bankruptcy, and the representatives of their estates sought and collected millions of dollars on the basis of the class rate structure. We should point out in this regard that some of the undercharge cases that have come before us in recent years have involved referrals from courts addressing continuing attempts by operating carriers to charge class rates instead of the discounted rates that were originally billed. For shippers sued in court in such cases, the collective ratesetting process is hardly benign.¹¹

But apart from the undercharge crisis, shipper groups representing a broad spectrum of shippers in the proceeding have demonstrated that, while many of their members obtain discounts (some more than 70%), some pay undiscounted rates for a variety of reasons. The rate bureaus suggest that these shippers must not mind paying full price, or else they would find other carriers or would file complaints at the Board. But there are institutional barriers associated with legal remedies — attorneys fees, the user fee that we are required to charge, and the disruption caused by litigation — that many motor carrier shippers, particularly those that would be forced to pay class rates, are likely unable to overcome.¹²

The bureaus complain that our decision will deplete carrier revenues based on what they consider to be an unsupported assumption that class rates are

¹¹ The argument that shippers may be charged undiscounted class rates rather than discount rates because of the transportation characteristics of their traffic ignores the fact that the classification system is supposed to rate commodities by their transportation characteristics. Accordingly, two articles with the same rating, and thus the same class rate, ought to have the same transportation characteristics, and a decision to discount one but not the other would have to be based on something other than transportation characteristics.

¹² The bureaus argue that we should not worry about the level of class rates because they have little (if any) impact on the rates that actual shippers pay. If the level of the class rates were irrelevant, however, then the bureaus would not have objected to reducing them.

unreasonable, but their argument misconstrues the entire thrust of our action. In fact, although it is unlikely that any individual rate that is not at a market-based level could survive a challenge on reasonableness grounds,¹³ the *1998 Decision* did not make a finding that any class rate was unreasonable. To the contrary, the decision did not preclude carriers from charging any rates they choose to charge; it simply found that, if they want immunity to collectively set rates that shippers may be forced to pay, their collective rates would have to reflect market-based levels.¹⁴ The *1998 Decision*, which does not find any rate to be unreasonably high, and which does not foreclose any rate bureau from demonstrating that the undiscounted bureau rates do in fact reflect the going rate levels in a competitive market, ought to be revenue-neutral if the market is as competitive as the bureaus say it is.¹⁵

In their letter of December 15, 1999, some of the rate bureaus assert that their actions last month establishing 35% discounts for any shipper using otherwise undiscounted class rates (actions taken in response to a Board decision suspending several GRIs) moot the need for further proceedings. An automatic minimum discount to a level deemed to reflect market rates might be one way to address the concerns raised in the *1998 Decision*,¹⁶ although it does not appear to us that the discount provisions published in connection with the recent GRIs are in fact automatic minimum discounts.¹⁷ In any event, the bureaus are free to

¹³ See, *Georgia-Pacific Corp. — Pet. for Decl. Order — Oneida Motor Freight, Inc.*, 9 I.C.C.2d 103 (1992), 9 I.C.C.2d 796 (1993), 9 I.C.C.2d 1052 (1993), *aff'd sub nom. Oneida Motor Freight, Inc. v. ICC*, 45 F.3d 503 (D.C. Cir. 1995).

¹⁴ To quote the Board's decision (at 8), "Any motor carrier that wants to do so should be able to set its baseline rates at unrealistically high levels, and perhaps it should even be permitted to charge those undiscounted rates to shippers willing to pay them. If it is to do so, however, we believe that it should be required to do so pursuant to individual rather than collective action."

¹⁵ Petitioners' witness, Dr. Silberman, argues that, if we require a reduction in the class rates to competitive marketplace levels, we will also have to provide for surcharges for recoupment of lost revenue. The argument contravenes Petitioners' assertion that class rates are rarely, if ever, charged. But if in fact Dr. Silberman's premise, rather than that of Petitioners, is correct, our *1998 Decision*, as we have noted, does not foreclose any carrier from charging any rate to achieve any revenue level it wants. Our decision simply provides that a carrier that wants to charge above-market rates will not be able to hide behind the shield of the collectively-set rate.

¹⁶ Such automatic discounts would minimize the disruptions (which in any event are not a basis for resisting changes that are in the public interest) that some of the bureaus have alleged could result from substantial changes to the way they currently operate.

¹⁷ It appears that the "default" discounts would not apply if a shipper is given any other discount, no matter how small, and they might be revoked if a carrier or a bankrupt carrier's estate considered payment to be untimely.

make a formal proposal in this regard, to which other parties may respond,¹⁸ but we are not prepared to find, without further proceedings, that any bureau has satisfied our concerns to date.¹⁹

3. *Other Issues.* Petitioners and their supporters raise various other issues, but none has merit. Professor Popper states that the *1997 Decision* was legally inadequate because “the Board did not tip off anyone that the Board was about to re-institute and conclude with what is presented as a final judgment rate regulation, with potentially devastating market consequences, for numerous small LTL carriers.” But as we have noted, this case is not about “final judgment rate regulation,” or, for that matter, about any form of rate regulation, and thus it should have no market consequences on carriers whose rates are in fact market-based. Moreover, the *1997 Decision* did indeed alert the public that levels of bureau-set rates charged to shippers were deemed important by the Board. The notice instituted an extremely broad review of all aspects of the rate bureau process that specifically alluded to 1995 Interstate Commerce Commission (ICC) and Department of Transportation (DOT) reports recommending eliminating antitrust immunity, and that asked (at 3 n.8) “[1] why class rates are set at particular levels; [2] how many shippers actually pay class rates, and why any shipper would pay collectively set rates in today’s economic and regulatory environment; and [3] assuming that at least some shippers pay class rates, how the Board should ensure that collectively set rates are reasonable.” The fact that the public knew that this case might turn on the way in which class rates are set and charged is reflected in the many comments addressing the question.

Some rate bureau interests assert that we did not adequately explain why we do not share the view expressed by the ICC in *Investigation of Motor Carrier Collective Practices*, 7 I.C.C.2d 388 (1991) — before it decided (with the DOT) to recommend abolishing immunity for collective ratesetting — that collective ratemaking is essentially benign because so few shippers actually pay the

¹⁸ We have already noted that the provisions of 49 U.S.C. 13701 explicitly require that collectively determined rates be reasonable, and that rates above market levels could not likely survive a rate reasonableness challenge. Given the extensive discounting typically occurring in the motor carrier industry, it may be that a 35% discount would not in fact bring class rates down to market levels.

¹⁹ A renewal application has been filed by the Household Goods Carriers Bureau Committee (HGB). Acting under Board-approved antitrust immunity, HGB’s members also establish benchmark rates from which individual carriers seem to discount the actual rates paid by many shippers. In a separate notice, we will ask whether we ought to require collectively set rates on household goods to be reduced to market levels as a condition of approval of HGB’s agreement.

collectively set rates. We can only respond that the record developed in this case, conducted under a new statute that directed us to review rate bureau activities, makes it clear that some shippers pay collectively set rates. The shipper groups say that their members sometimes must pay class rates,²⁰ and Petitioners, while they challenge the claim, seem to admit that it is probably true.²¹ If it is not true, and if shippers do not in fact pay above-market collectively set rates, then we do not understand why the rate bureaus would object to adjusting the class rate structure so that the rates that the bureaus set are those that the shippers typically do pay.

Finally, the bureaus have complained that the *1998 Decision* will improperly interfere with their right under 49 U.S.C. 13703(a)(1)(G) to GRIs based on "industry average carrier costs." But our decision merely found that there are grounds for commencing a proceeding to determine the extent to which bureau class rates that may be charged to some shippers must be reduced to attain parity with competitive, market based rates. Once the process is completed, class rates may be subjected to GRIs that are, as required under the statute, limited to demonstrated cost increases. Until a methodology for determining how to measure such increases is established, however, any complaint about cost recovery is premature.

SUMMARY

In summary, we find that reconsideration is not warranted, and we will initiate the proceeding contemplated in the *1998 Decision*.²²

It is ordered:

1. The petitions for reconsideration are denied.
2. This decision is effective on February 11, 2000.

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

²⁰ See, for example, the replies filed by HPCDC/NASSTRAC, at 12-16, and by TCPC at 3-4.

²¹ See, for example, the Petition at 14-15.

²² We believe that our action here advances the relevant NTP factors. As noted, it does not limit the rates that individual carriers can charge, and thus it should not adversely affect those NTP considerations relating to carrier profits. And to the extent that our action requires carriers wishing to charge above-market rates to do so individually rather than collectively, it should encourage competition and reasonable rates; it should meet shipper needs; and it should promote price and service options.