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SERVICE DATE - JUNE 25, 1999

SURFACE TRANSPORTATION BOARD¹

DECISION

No. 40819

UARCO INCORPORATED

v.

JAMES B. ORR and FREIGHTWAYS EXPRESS, INC.

Decided June 22, 1999

We find that, in general, the charges originally billed for the shipments subject to this proceeding were properly assessed in accordance with applicable published tariffs and that the claimed undercharges may not be collected. Alternatively, we find that the collection of some of the higher charges would be an unreasonable practice under 49 U.S.C. 10701(a) and that the class rates now sought to be charged are unreasonably high. In addition, we find that a basis exists for collection of overcharges by the shipper.

BACKGROUND

This matter arises out of a court action in the Chancery Court of Shelby County, Tennessee, in James B. Orr and Freightways Express, Inc. v. Uarco, Incorporated, No. 91799-2. The court proceeding was initiated by James B. Orr and Freightways Express, Inc. (Freightways or defendant), an operating motor carrier, to collect undercharges from UARCO, Incorporated ("UARCO" or complainant).² Freightways seeks undercharges in the amount of \$117,606.36 allegedly due, in

¹ The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the ICC Termination Act or the Act) abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board) effective January 1, 1996. 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. 13701(a) and 13710(a). Therefore, this decision applies the law in effect prior to the Act, and citations are to former sections of the statute, unless otherwise indicated.

² By letter submitted on May 5, 1999, counsel for complainant has advised that, effective March 31, 1998, UARCO has merged into The Standard Register Company, and no longer exists as a separate corporation. In this decision, however, we will continue to refer to the complainant as

addition to amounts previously paid, for services rendered in transporting shipments of paper products from January 1982 through February 1984. The shipments were less-than-truckload (LTL) movements transported from UARCO's plant facility located at Kennett, MO, in direct or interline service, to points in numerous states.³ UARCO denied liability for the claimed undercharges and also filed a counterclaim for overcharges paid to Freightways. By order dated April 20, 1992, the court stayed its proceeding; referred the issues of tariff applicability, tariff interpretation, unreasonable practice, and rate reasonableness to the ICC; and directed UARCO to institute the appropriate proceedings before the ICC.

Pursuant to the court order, UARCO filed a complaint on June 17, 1992, requesting the ICC to resolve issues of tariff applicability, unreasonable practice, and rate reasonableness. Complainant maintains that the discount rates that were originally billed were the applicable rates, that application of the higher class rates on which defendant's undercharge claims are based would constitute an unreasonable practice under 49 U.S.C. 10701(a), and that the class rates are unreasonably high. In addition, based on its own "post audit" of the shipments at issue, UARCO asserts that Freightways owes it \$17,686.34.

By decision served July 28, 1992, the ICC established a procedural schedule for development of the record. Complainant filed its opening statement on March 29, 1993; defendant filed its opening statement and argument on June 8, 1993; and UARCO filed its rebuttal statement on July 22, 1993.⁴

By decision served October 4, 1993, the ICC reopened the proceeding and, in recognition of its newly adopted standards for rate reasonableness announced in Georgia-Pacific Corp.--Pet. for Declar. Order, 9 I.C.C.2d 103 (1992) (GPac-I), reconsidered, 9 I.C.C.2d 796 (1993) (GPac-II), applied, 9 I.C.C.2d 1052 (collectively, Georgia-Pacific), aff'd sub nom. Oneida Motor Freight, Inc. v. I.C.C., 45 F.3d 503 (D.C. Cir. 1995) (Oneida), afforded the parties an opportunity to supplement the record with respect to the rate reasonableness issue. UARCO filed a supplemental statement on December 3, 1993, to which Freightways did not file a response.

²(...continued)
UARCO.

³ Subsequent to these shipments, Freightways left the LTL business in 1984 and now engages solely in truckload transportation. Affidavit of James N. Clay, III, at 6.

⁴ Also on July 22, 1993, UARCO filed a motion to disqualify James N. Clay III as attorney for Freightways, arguing that, under the Canons of Ethics, Mr. Clay's participation as a witness in this proceeding disqualifies him from functioning as defendant's attorney. Freightways did not submit a reply.

We will deny the motion. Mr. Clay is a 50% shareholder in Freightways and one of defendant's two directors. In effect, Mr. Clay chose to represent himself. We do not view our Canons of Ethics as barring litigants from representing themselves.

By decision served December 21, 1993, the ICC reopened the record and established a procedural schedule permitting the parties to invoke the alternative procedure under section 2(e) of the Negotiated Rates Act of 1993 (NRA)⁵ and to submit new evidence in light of that new law.⁶ Neither party submitted evidence in response to that decision.

DISCUSSION

I. Tariff Applicability and Unreasonable Practice

The parties agree that they intended to do business under filed tariffs published in series ICC FWXP 601, ICC MWB 129, and ICC SMC 128. The charges originally assessed were determined by applying published discounts and allowances to class rates. We must determine whether those discounts and allowances were applicable, and, if not, whether application of the higher class rates would be an unreasonable practice or would result in the assessment of unreasonable rates.

Freightways asserts that the discounts were improperly applied in three respects. First, it claims that, under the terms of the tariff, the discounts did not apply to shipments that were transported from UARCO's Kennett, MO facility between April 1, 1982, and March 31, 1983, because they were moved by a cartage agent. Second, Freightways claims that it is entitled to reimbursement of discounts because UARCO failed to meet the 60-day notice of claim requirement set forth in the tariff. Third, Freightways claims that certain UARCO shipments should not be included in the daily aggregate of shipments for purposes of applying the increased discount provisions of the tariff. We will address each of these arguments separately.

A. Use of "Cartage Agent"

Defendant entered into a one-year contractual agreement with Collier Transportation, Inc. (Collier), effective April 1, 1982, under which Collier provided local cartage service from UARCO's plant to Freightways' terminal facilities. Item 20(2) of Freightways tariff FWXP 601 contained the following provision:

⁵ Pub. L. No. 103-180, 107 Stat. 2044. Section 2(e) was subsequently codified at 49 U.S.C. 13711.

⁶ The ICC's prior unreasonable practice policy was invalidated by the Supreme Court in Maislin Indus. v. Primary Steel, 497 U.S. 116 (1990) (Maislin). The NRA substantially restored the ability of the ICC (and now the Board) to find that assessment of undercharges is an unreasonable practice, and it provided several new grounds on which shippers may defend against payment of undercharges.

Rates provided for in this tariff apply only when pickup service is performed by Freightways Express, Inc., or when shipments are delivered to carrier's terminal by or at the expense of the Consignor. Shipments delivered to carrier's terminal by cartage agents, at the expense of Freightways Express, Inc., will not be subject to the provisions of this Tariff.

(Item 902-65 of Supplement 355 to tariff ICC MWB 129 contained a similar provision.) Accordingly, Freightways maintains that the discount allowances were improperly applied to shipments that were picked up by Collier.

The loss-of-discount provisions would apply where pickup services were provided by an independent entity functioning on its own behalf. However, where pickup services were provided by an owner-operator or subcontractor under lease acting in the capacity of, or as the alter ego to, the line haul carrier, performance of those services could readily be viewed as having been provided by the line haul carrier itself,⁷ and thus would not have been subject to the loss-of-discount provisions. Otherwise, shippers would have no means of knowing when they would be eligible for the discount, and the tariffs would not serve their intended function of clearly identifying the rate that shippers must pay to receive a clearly identified service. Thus, the nature of the relationship between Collier and Freightways renders the tariff provision ambiguous. It is well-settled that, where an ambiguity exists in a tariff, the ambiguity is resolved in favor of the shipper.⁸

The record in this proceeding provides ample support for concluding that, during the period Collier was used to pick up UARCO's traffic,⁹ Collier functioned as an unidentified subcontractor of Freightways, and that the pickup service can be deemed to have been provided by Freightways. In particular, complainant has shown¹⁰ that: (1) Freightways advertised and held Collier's terminal out to the public as being Freightways' own terminal; (2) all services performed for UARCO were performed under Freightways' name, operating authority, and tariffs; (3) all bills of lading issued to UARCO at the time of pickup identified Freightways as the carrier, and (4) Collier was authorized to sign documents on behalf of Freightways.

⁷ Freightways itself acknowledges that Freightways could be viewed as having performed the pickup services. Deposition of James N. Clay, IV, at 71, attached as Appendix N to UARCO's opening statement.

⁸ See, e.g., Rebel Motor Freight, Inc. v. ICC, 971 F.2d 1288, 1294-95 (6th Cir. 1992).

⁹ Prior and subsequent to the period during which its contract with Collier was in effect, Freightways used its own drivers and equipment to pick-up UARCO's freight. Deposition of James N. Clay III, at 18, Appendix M to UARCO's opening statement.

¹⁰ See generally the opening statement of UARCO at 8-11.

Alternatively, we find that it would be an unreasonable practice for Freightways to charge UARCO the higher class rates without first informing complainant of the cartage arrangement. UARCO neither authorized the use of a cartage agent nor knew that one was being used.¹¹ Under the Interstate Commerce Act, common carriers had a duty to apply the lowest tariff rates for a given service and to avoid deceptive activities that would allow them to charge higher rates for extra services that were not rendered. While this duty was most frequently invoked in decisions holding that carriers were obliged to use routes with the lowest available rate (rather than circuitous routes with higher rates),¹² the same principles apply here, where the unannounced use of a cartage agent would otherwise serve to increase rates without providing any additional service to the shipper.¹³

B. The 60-Day “Claim” Requirement

Freightways seeks to recover multiple shipment pickup discounts payments that it paid to UARCO, based on the failure of complainant to comply with the 60-day claim notice requirement set forth in paragraph 4 of Item 94800 (10950) of the applicable rules tariff (ICC SMC 128-L). That provision stated:

4. Payment of this discount will be made by the originating carrier upon presentation of a claim filed with the carrier within 60 days of the date of the bill of lading. The claim will be a written statement itemized to show the date of shipment, name of consignee and weight of shipment, or by including with the statement memorandum copies of the bills of lading and/or freight bills.

UARCO acknowledges that it did not submit a written claim for each of the discount payments it received from Freightways. It maintains, however, that in view of the standard practice adopted by Freightways for payment of discounts, compliance with the 60-days’ notice provision was meaningless and unnecessary. Under that standard practice, Freightways did not await a claim, but instead routinely issued refund checks that were accompanied by computer statements

¹¹ UARCO opening statement at 10 and Appendix K. UARCO rebuttal statement, attachment 4.

¹² See, e.g., Northern Pacific Ry. Co. v. Solum, 247 U.S. 477 (1918); Hewitt-Robins, Inc. v. Eastern Freight-Way, Inc., 371 U.S. 84 (1962); Maislin, 497 U.S. 116, 129 n.11.

¹³ Here, it is undisputed that Freightways used Collier only for its own convenience. Opening statement of UARCO, deposition of James N. Clay, III, at 35 and 40. In his verified statement attached as Appendix J to UARCO’s opening statement, UARCO Traffic Manager Donald Salenger states that UARCO experienced no change in service while Freightways’ agreement with Collier was in effect.

identifying each UARCO shipment by date, consignee, weight, destination, and freight bill number.¹⁴

The obvious purpose of the claim notice requirement was to give Freightways an opportunity to verify before payment that the subject shipments were eligible for the discount. Based on information already in its possession, Freightways was in a position to determine the applicability of the discount. It would be a pointless elevation of form over substance to construe the claim notice requirement as indispensable where, as here, the carrier was fully capable of verifying that the discount provisions of the tariff applied.¹⁵ Indeed, the ICC consistently declined to enforce tariff provisions requiring shippers to provide annotations or other documentation where, as here, the documentation was not necessary for proper and complete performance of carrier service.¹⁶ This policy, which was noted by the Supreme Court in Maislin, 497 U.S. at 129 n.11, does not contravene the filed rate doctrine.¹⁷

Accordingly, we find that it would be an unreasonable practice for Freightways to disallow the multiple shipment pickup discounts it previously granted to UARCO. The evidence shows that Freightways and UARCO had mutually agreed to verify the shipments' qualification for discounts by the use of computer printouts issued by Freightways. Freightways should not be permitted, well after the compliance period has passed, to impose the additional requirement on UARCO.

¹⁴ Opening statement of UARCO at 18, verified statement of Donald Salenger at 6-7; rebuttal statement of UARCO, verified statement of Donald Salenger at 3-4.

¹⁵ See Dunlop Tire Corporation--Petition for Declaratory Order--Certain Rates and Practices of Bender & Loudon Motor Freight, Inc., No. 40884 (STB served Feb. 14, 1996) (a requirement that a shipper certify "in writing" that a discount tariff should apply did not have to be literally applied where the purpose of the certification requirement was clearly met), citing L.B. Foster Company--Petition for Declaratory Order--Certain Rates and Practices of C&H Nationwide, Inc., D/B/A C&H Transportation Company, No. 40306 (ICC served Sept. 6, 1990) (L.B. Foster) (because carrier acquiescence was clear, discount tariff was held applicable even though shipper failed to mark a bill of lading to indicate that the carrier approved use of the rate).

¹⁶ See Standard Brands, Inc. v. Central R. Co. of N.J., 350 I.C.C. 555, 558-59 (1974) ("In the present circumstances, [the certification requirement] serves no purpose except to create a trap for the unsuspecting shipper. . . . We find the involved endorsement requirement had no bearing on the nature of the commodity being shipped or the service performed . . ."); L.B. Foster, supra.

¹⁷ Accord, Carriers Traffic Service v. Anderson, Clayton & Co., 881 F.2d 475 (7th Cir. 1989), holding that the ICC did not contravene the filed rate doctrine by finding that, because a shipper had in fact satisfied a "load-and-count" requirement contained in a discount rate tariff, the carrier committed an unreasonable practice in refusing to apply the tariff based on the shipper's failure to meet a requirement that compliance be noted on the bills of lading.

C. The Aggregation Requirement

Freightways contends that certain discounts, provided under a tariff allowing for increased discounts based on the daily aggregated number and/or weight of shipments tendered from the same origin point, were inappropriately applied to UARCO because shipments destined to points not named in the tariff were included in the aggregate totals. Supplement 355 to Tariff MWB 129, Item 902-65 provides for a 10% or 15% discount based on aggregated weight or shipment totals. Paragraph (3) of Item 902-65¹⁸ states:

(3) The number and weight of all LTL or AQ [any quantity] shipments tendered to the carrier at one time, at one place from one consignor, may be used to make up the aggregate. Only those LTL or AQ shipments that meet the requirements of this item will be given the discount.

Defendant argues that only those shipments moving in the Midwest territory embraced within the MWB tariff may be considered in arriving at the aggregate totals used to determine the size of the discount. UARCO maintains that all shipments tendered to Freightways on a single day, including shipments destined to Southern Motor Carrier Rate Conference territory that were not themselves eligible for discounts, should be considered in ascertaining the aggregate totals used to determine the size of the discount applicable to other shipments.

UARCO's interpretation is reasonable; a shipper could reasonably expect that a carrier would provide shippers with an incentive to aggregate shipments that are not eligible for discounts with shipments that are eligible for discounts so as to effect volume-related operational economies. The Freightways' interpretation would ignore the language in the first sentence of the above-quoted provision that "all" shipments may be used to make up the aggregate. In any event, as discussed above, any ambiguity should be construed against the carrier.

II. Overcharges by Freightways

UARCO, relying on a "post audit" analysis of the shipments at issue, asserts that it is due a net balance of \$17,686.34 as a result of overcharges assessed by Freightways. The audit was conducted by Carriers Traffic Service, Inc. (CTS), a consulting company to the motor carrier and shipping industry that was retained by complainant. Charles S. Byes, President of CTS, submitted a verified statement in support of this assertion. Mr. Byes states that, in the course of the audit, documents relating to 5,996 shipments were examined. According to Mr. Byes, the audit revealed instances of both undercharges and overcharges, but that on balance the overcharges exceeded the undercharges by \$17,686.34.

¹⁸ This provision is reproduced in Exhibit 4 to the verified statement of Charles S. Byes, which appears in Appendix I to UARCO's opening statement.

The validity of UARCO's claim for overcharges depends upon the correctness of the tariff analysis submitted by Mr. Byes. In his statement, Mr. Byes presented 12 sample shipments, of which five provided a basis for UARCO's overcharge claim. (These five shipments are discussed below.) The record, however, does not allow us to determine the total extent of the claimed overcharges. Additional information is required with respect to those shipments not included in Mr. Byes' sample. Further, Mr. Byes did not submit workpapers explaining how the application of his analysis to all of the subject shipments produced the net overcharge total.¹⁹ Thus, we must leave to the court the process of aggregating claim totals by applying the tariff applicability findings discussed in this decision.

A. Shipment Covered by Pro 589188, Dated May 3, 1982

Mr. Byes argues that an additional discount of 7% should apply to this shipment, under Item 10950 of tariff SMC 128, resulting in a \$2.54 overcharge. Mr. Byes actually cites Item 94800 (10950) of tariff SMC 128-L,²⁰ under which a multiple shipment discount of 7% applied when certain conditions were met. However, the copy of this tariff attached to Mr. Byes' statement shows that tariff SMC 128-L did not become effective until July 26, 1982. Because this shipment moved on May 3, 1982, it was governed by tariff SMC 128-K.²¹ Item 10950 of that tariff indicates that a discount of 7% applied when 11 or more shipments with an aggregate weight of 20,000 pounds or more were picked up at Kennett, MO. The bill of lading for this shipment shows that it was part of a multiple tender of 23 shipments, but does not indicate the aggregate weight of the shipment. A draft corrected freight bill included in Exhibit 10 to Mr. Byes' statement indicates that the aggregate weight was 27,280 pounds. If UARCO can verify this aggregate weight, it would appear to be entitled to the 7% discount.

We note, however, that Freightways may have already paid the multiple shipment pickup discount in accordance with its procedure of issuing refund checks for discounts due to UARCO. Accordingly, UARCO should be prepared to show that, for this and similar shipments for which overcharges based on a multiple shipment discount are claimed, payment of the discount had not previously been made by Freightways under its direct refund payment procedure.

B. Shipment Covered by Pro 601745, Dated July 1, 1982

Mr. Byes maintains that the 7% multiple-shipment discount of Item 10950 of tariff ICC SMC 128 also applies to this shipment. However, for UARCO's \$14.42 overcharge claim to be recognized, complainant must establish, as discussed above, that payment of the discount under Freightways' direct refund payment procedure had not been made.

¹⁹ Workpapers were included only for the sample shipments included in Mr. Byes' analysis.

²⁰ A copy is attached to Mr. Byes' verified statement as Exhibit 3.

²¹ Appendix J, Exhibit 4 to UARCO's opening statement.

C. Shipment Covered by Pro 659778, Dated May 2, 1983

No discounts were applied to this shipment. Mr. Byes maintains that UARCO is entitled to (1) an 8% discount under Item 68/70 of tariff FWXP 601 (which applies to all shipments tendered at Kennett, MO), (2) a 10% discount under Item 18005 of tariff SMC 570, and (3) a 7% discount under Item 10950 of tariff SMC 128. Application of these three discounts would produce a total overcharge claim of \$7.93.

From the record we can only verify an overcharge claim of \$2.54, based on the application of the 8% discount of Item 68/70 of tariff FWXP 601. Exhibit 6 to Mr. Byes' verified statement contain the pages of tariff SMC 570-A that include the item 18005-O provisions.²² However, Paragraph (c) of Note A of that tariff item indicates that the discount will not apply when a claim is made for the multiple pickup allowance of the tariff SMC 128 series. There is evidence that such an allowance was paid.²³ Unless UARCO can provide evidence to the contrary, the payment of this allowance would appear to remove the shipment from the discount provisions of tariff SMC 570. In sum, unless UARCO can show that the conditions for application of the discount in Item 18005-O of tariff SMC 570-B were satisfied and that payment of the multiple-shipment discount of Item 10950 of tariff SMC 128 had not been made under Freightways' direct refund payment procedure, complainant's overcharge claim for this shipment is limited to the amount of \$2.54.

D. Shipment Covered by FWXP Pro 700258, Dated February 23, 1984

No discounts were applied to this shipment. Mr. Byes maintains that a 30% discount applies to this shipment under Item 50 of tariff FWXP 601. He also maintains that an additional discount of 25% under Item 68/70 of the same tariff²⁴ is applicable.

We agree that a discount is due for this shipment. On the date of this shipment, tariff FWXP 601-B applied. Item 68 of this tariff indicates that a loading allowance of \$.75/cwt. applies on shipments loaded at Kennett, MO, and that an additional 25% discount applies on LTL traffic between points directly served by Freightways. However, Item 68, effective on February 23, 1984 (the date of the shipment), indicates that these discounts do not apply in conjunction with the aforementioned 30% discount provided by Item 50. In other words, either the discount of Item 50 or the discount of Item 68 applies, but not both. As previously indicated, the applicable discount is the

²² ICC tariff records indicate that tariff SMC 570-B was in effect at the time the subject shipment was transported. That tariff, however, is no longer in the Board's files. Thus, we are unable to verify whether or not the pertinent provision is identical in that tariff.

²³ Exhibit 3 of Appendix J to UARCO's opening statement contains a copy of a check stub for a "May Loading Allowance." The check stubs in this exhibit appear to cover the period from October 1982 to December 1983.

²⁴ Exhibit 1 to Mr. Byes' verified statement contains copies of the tariff FWXP 601 series.

discount that results in the lowest overall charge. Applying this principle, we conclude that the discount resulting from the application of Item 68 should be applied. Item 68 provides for a loading allowance of \$7.50 as well as a discount of \$17.80, resulting in a overcharge claim totaling \$25.30.

E. Shipment Covered by Pro 698284, Dated February 1, 1984

No discounts were applied to this shipment. Mr. Byes maintains that a 30% discount is applicable to this shipment under Item 50 of tariff FWXP 601, as well as an 18% discount under Item 68/70 of the same tariff.

We agree. On the date the subject shipment was transported, tariff FWXP 601-B was in effect. A review of the tariff indicates that the 30% discount under Item 50 was applicable to the shipment and that an additional discount of 18% under Item 70 also applied.²⁵ We concur with Mr. Byes that a total overcharge claim of \$57.15 is due for this shipment.

III. Unreasonable Rates

Apart from our findings on rate applicability, we find that the undiscounted class rates were unreasonably high under former 49 U.S.C. 10701(a) and the rate reasonableness standards established in Georgia Pacific, *supra*.²⁶

Under the Georgia Pacific standards, we determine the reasonableness of a 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.” GPac-I, 9 I.C.C.2d at 156; GPac-II at 806-09. If it is established that a challenged rate is “significantly in excess of comparable rates that reflect the prevailing market rates at the time of the shipment(s) at issue, [i.e., that the contested rate would not have moved the traffic had it been quoted at the time, then] the challenged rate will be deemed unreasonable.” GPac-I, 9 I.C.C.2d at 156-57; GPac-II at 809. Our Georgia-Pacific standards do not consider carrier costs and return on investment.²⁷ GPac-II, at 810.

²⁵ Item 70, canceled on February 23, 1984, did not contain the restriction on dual application appearing in item 68, discussed above.

²⁶ Application of the Georgia Pacific standards is consistent with our approach to determining rate reasonableness for past transportation. See Marmon Holdings, Inc. — Petition for Declaratory Order — Rates and Practices of Certain LTL Motor Carriers, No. 41287 (STB served July 31, 1998). It is particularly appropriate here, where Freightways is no longer engaged in competing for LTL traffic such as that involved here. See affidavit of James N. Clay, III, at 6.

²⁷ For this reason, we will not consider UARCO’s argument that Freightways’ return would have been unreasonably high if the increased rates here being sought had been charged.

Based on a study submitted on behalf of UARCO by Bruce D. Hocum,²⁸ we find that the class rates that Freightways seeks to apply were unreasonably high under our Georgia Pacific standards. Mr. Hocum reviewed 35 representative sample bills of lading for the subject movements and tariff information pertaining those shipments. Mr. Hocum then performed a relevant rate comparison to determine the prevailing LTL discount percentage offered by competitive motor carriers operating at or near Kennett, MO, for similar movements. The carriers, tariffs, and discounts considered by Mr. Hocum are identified in the table below:

Carriers	Tariffs or Unfiled Schedule	Discount Percentage Off Class Rate	Year Effective
Arkansas Express, Inc.	ICC MWB 129, Item 916-48	15%	1983
Marshfield Drayage Co., <u>et al.</u> ²⁹	ICC MWB 129, Item 923-96-E	12% and 15%	1983
Wichita-Southeast Kansas Transit, Inc.	ICC MWB 129, Item 946-7-B	25% and 30%	1984
Churchill Truck Lines, Inc.	ICC MWB 129, Item 799-72	3%-15%	1981
Luna Truck Lines, Inc.	ICC MWB 129, Item 938-95	30%	1983
Advance Transportation Company	ICC ADTC 601-C, Item 935	35%	1983
Ozark Transfer Company	ICC MWB 129, Item 933-12-B	30%	1983

²⁸ Mr. Hocum was retained by complainant to review documentation pertaining to the basis and reasonableness of the undercharge claims asserted against UARCO by Freightways. He is Vice President of Samuel Rubinstein Transportation Consultants, Inc. Mr. Hocum's affidavits in support of UARCO are set forth in Appendix L to UARCO's opening statement; UARCO's December 3, 1993, supplemental statement; and attachment 2 to UARCO's rebuttal statement.

²⁹ Includes Be-Mac Transport, Inc.; Churchill Truck Lines, Inc.; Lee Way Motor Freight, Inc.; Luna Truck Lines, Inc.; Manley Truck Lines, Inc.; Ozark Motor Lines, Inc.; Razorback Express, Inc.; Smith's Transfer Corp.; Texas-Oklahoma Express, Inc.; Wichita-Southeast Kansas Transit, Inc.; and Woodline Motor Freight, Inc.

Carriers	Tariffs or Unfiled Schedule	Discount Percentage Off Class Rate	Year Effective
Specter Red Ball, Inc.	ICC SPEC 601-A, Item 10	5% - 20%	1981 ³⁰
Consolidated Freightways	Schedule CFWY 872-A ³¹	35%	1984
Yellow Freight Systems	YES Discount Table ³²	12% - 20%	1983 ³³

The deeply discounted rates revealed in this table, which are not out of line with those initially granted to UARCO, shows that the class rates that Freightways seeks to apply did not reflect prevailing market levels and are thus unreasonable under Georgia-Pacific.³⁴

Freightways contends that the comparison for Wichita-Southeast Kansas Transit, Inc., is invalid because the compared discount rate became effective in 1984, after Freightways left the LTL business.³⁵ We disagree. The last shipments at issue moved in February 1984. We have no reason to believe that discounts for the entire year 1984 are significantly different from those for 1983 or early 1984.³⁶ Similarly, we have no reason to believe that discounts published to become effective in September 1981 are significantly different from the prevailing market rates for January 1982, when the first of the shipments at issue here moved.

³⁰ See UARCO's supplemental statement filed on Dec. 3, 1993.

³¹ A contract (unfiled) rate. As explained in GPac-I, 9 I.C.C.2d at 164, the rate comparisons do not have to be based on filed tariff rates.

³² Ibid.

³³ See UARCO's supplemental statement filed on Dec. 3, 1993.

³⁴ When a particular level of rates is found unreasonable, we are not required to prescribe the exact rate levels that would have been reasonable. Oneida, 45 F.3d at 507-08.

³⁵ The compared discount rates offered by Consolidated Freightways would also be subject to this objection.

³⁶ If the discounts in the above table are grouped by year and averaged, the average discount level for 1983 (29%) is only one percentage point lower than the average discount level for 1984 (30%). See the rebuttal verified statement of Bruce D. Hocum at 5.

Freightways also argues more broadly that any evidence of rates charged by motor carriers that were not actually serving UARCO's plant is irrelevant. We disagree. Our reliance on rates charged by non-serving carriers is proper, GPac-I, 9 I.C.C.2d at 164:

Finally, rather than establishing the specific rates offered for or used by the traffic at issue, a shipper may establish the average discounts from class rates that were available and used in similar situations during the time at issue. But those discount levels must have been available under conditions reflecting the traffic at issue.

In any event, we note that the filed, discount tariff rates that Freightways originally charged are also probative,³⁷ because they actually moved UARCO's traffic (prior to, during, and subsequent to the period when Collier's services were being used).³⁸ Indeed, Freightways published a new tariff provision containing a 10% discount for all of Freightways customers a little more than one month after the opening of UARCO's Kennett facility in September 1980.³⁹

CONCLUSIONS

We find that the originally charged rates were the applicable tariff rates. We reject Freightways' attempt to re-bill UARCO based on the provisions of the discount tariffs relating to the use of "cartage agents," the submission of "claims" for discounts within 60 days of the bill of lading date, and the aggregation of shipments to determine the size of discounts applicable for shipments eligible for the discounts. Under longstanding precedent, any tariff ambiguities concerning these provisions are resolved in favor of the shipper. Alternatively, we find that invalidation of the discount tariffs due to the aforementioned provisions relating to cartage agents and the 60-day deadline for the submission of discount claims would be an unreasonable practice. We also find that the higher class rates sought to be applied by the Freightways were unreasonable under the standards of Georgia-Pacific. Finally, we find that there is a basis for UARCO's collection of overcharges under its counterclaim against Freightways, although we are unable to determine the exact amount owed.

³⁷ Under our Georgia-Pacific methodology, the rate originally charged for the shipment may be included in the cluster. GPac-I, 9 I.C.C.2d at 157.

³⁸ As discussed above, the retention of Collier by Freightways did not affect the level of service provided to UARCO. Nor did Freightways attempt to raise UARCO's rates during the period Collier was retained. By its own conduct, Freightways indicates that its retention of Collier did not result in a service change that would justify an increase in rates to the levels of the class rates.

³⁹ See UARCO's rebuttal statement, Exhibit A and verified statement of Donald Salenger at 3.

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

It is ordered:

1. This proceeding is discontinued.
2. This decision is effective on the date of service.
3. A copy of this decision will be mailed to:

Kenny W. Armstrong, Clerk
Chancery Court
Shelby County Courthouse, Room 308
140 Adams Avenue
Memphis, TN 38103

Re: Case No. 91799-2

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

Vernon A. Williams
Secretary