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BEFORE THE
SURFACE TRANSPORTATION BOARD

Sec. 5A Application No. 118 (Sub-No. ~~1~~ 2), et al.,
EC-MAC MOTOR CARRIERS SERVICE ASSOCIATION, INC., ET AL.
(and embraced dockets)

Reply of the
Halogenated Solvents Industry Alliance, Inc.
to Petitions for Reconsideration

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The Halogenated Solvents Industry Alliance, Inc. ("HSIA") respectfully submits this reply to the petitions submitted by various parties seeking Board reconsideration of the decision served November 20, 2001 in this docket and embraced cases.

Statement of HSIA's Interest

HSIA is a non-profit trade association representing companies that manufacture, distribute and use halogenated solvents such as dichloromethane and trichloroethylene. Such solvents are often shipped by motor carrier, both in bulk tanker and, in packaged form, in truckload or less-than-truckload shipments. Several HSIA members formulate industrial and commercial products (e.g., aerosols, adhesives, and coating removers) with chlorinated solvents and ship these products exclusively by motor freight, often by common carrier.

Summary

None of the arguments advanced by the Rate Bureaus justifies reconsideration. The "truth-in-rates" condition was a logical outgrowth of the issues noticed by the Board in its decision of February 11, 2000 inviting comments, and the need for the condition was amply established by the Board's factual findings.

The "Truth-in-Rates" Condition Was Within the Scope of the Board's Notice

The Board proceeded in this matter by issuing a public notice and seeking comment. See the decision served February 11, 2000 and the accompanying Federal Register notice published the same day, 65 Fed. Reg. 7099. The Rate Bureaus argue, however, that the "truth-in-rates" condition was not fairly within the scope of the issues as to which comment was sought.

HSIA submits that the "truth-in-rates" condition was well within the scope of the Board's notice. The Board solicited comments from the Rate Bureaus and other interested parties regarding whether benchmark rates should be rolled back to lower levels because the benchmark rates were far above actual competitive levels. The Board was aware of evidence that most shippers are able to negotiate discounts from the benchmark rates, and that some Rate Bureaus maintain minimum "default" discounts. The problem the Board sought to avoid was abuse by the Rate Bureaus of their power to set above-market rates given the Board's finding that "not every shipper is in fact in a position to shop for a reasonable and competitive [discount] rate."[1]

Ultimately, the Board in its November 20, 2001 decision decided that an across-the-board rollback of rates could be disruptive to both carriers and shippers, who had long done business on the basis of a system of discounts from the current rate structure. The Board therefore found that a less drastic measure -- the "truth-in-rates" condition -- would accomplish the Board's overriding objective to "put in place a mechanism under which knowledgeable shippers and carriers can enter into arm's length transactions that reflect actual market conditions."

[1] Decision served December 18, 1998 in this docket, at 6.

The "truth-in-rates" condition was in effect a "lesser included remedy" that was logically related to the rate rollback that was first proposed by the Board. Rather than rolling back rates to some calculated average market level, Rate Bureaus members would simply be required to provide information about the range of market discounts. The similarity of the "truth-in-rates" condition to the original rollback proposal is amply demonstrated by the fact that the Rate Bureaus' objections to it, as stated in their petitions for reconsideration, are so similar to their objections to the originally proposed rate rollback. That is, the rate rollback (or "truth-in-rates" condition) is said to be unnecessary or inappropriate because each shipper's traffic and circumstances differ, and/or because shippers are so sophisticated, and competitive processes so efficient, that shippers always receive the appropriate discounts. There is precious little, if anything, in the record as supplemented by the petitions for reconsideration, that was not already in the record prior to November 20, 2001.

To the extent the Rate Bureaus feel they did not have the chance to comment previously on the "truth-in-rates" condition, they now are availing themselves of the opportunity to marshal arguments against it. For the reasons stated below, however, those arguments are unpersuasive and have already been considered by the Board.

There is therefore no need for the Board to solicit additional comments and arguments, but in the event the Board decided to do so, for the sake of developing an even more extensive record, the Board should set an expedited schedule given that the Rate Bureaus have already had considerable time to develop and present their arguments concerning the "truth-in-rates" condition.

The "Truth-in-Rates" Condition is Not "A Solution in Search of a Problem."

The Rate Bureaus claim that the "truth-in-rates" condition is "a solution in search of a problem"[2] because all shippers are so sophisticated that they are able to negotiate the appropriate market discounts. This same argument was previously considered and rejected by the Board in its February 11, 2000 decision in this case. There, the Board recalled the decade-long undercharge crisis as providing abundant evidence both that shippers are not always sophisticated and knowledgeable concerning motor carrier rates, *and* that carriers are not above taking advantage of their shippers' lack of sophistication. Decision served February 11, 2000, fn. 11 and accompanying text.

The Rate Bureaus claim that the record is "devoid of any evidence"[3] to support the Board's finding that there are shippers paying "above market" rates. Yet the Board's conclusion that "not every shipper is in fact in a position to shop for a reasonable and competitive [discount] rate" was reached long ago, in the Board's December 18, 1998 decision. Although the Rate Bureaus unsuccessfully petitioned for reconsideration of that decision, the Board denied those petitions, and the Rate Bureaus did not attempt to seek judicial review. The time for collateral attack on that finding is long past.

The Rate Bureaus' submissions here undercut their argument that shippers are uniformly sophisticated and not in need of the modicum of protection offered by the "truth-in-rates" condition. Most tellingly, the Rate Bureaus argue at length that "truth-in-rates" notices would be misleading and confusing to shippers, because shippers would

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[2] Petition of Rate Bureaus for Reconsideration at 6.

[3] Petition of Rate Bureaus for Reconsideration at 6.

somehow assume that they are always entitled to the maximum discount.[4] It is puzzling how shippers could at the same time be so sophisticated that they always know how to negotiate the right discount, yet so naïve that they will be misled if given concrete information that might assist them in negotiating with the carriers.

The Rate Bureaus implicitly acknowledge a problem when they state that "[s]hippers active in the market understand fully that rates are negotiated and that significant discounts may be available for their freight."[5] The logical corollary of that statement is that shippers who are not active in the market, or only participate occasionally, may have no knowledge about the system of benchmark rates and discounts.

If, as the Rate Bureaus suggest, there are no unsophisticated shippers, and most if not all shippers receive discounts below the benchmark rates, then there can be no harm in disclosing the range of discounts as required in the "truth-in-rates" condition. Such disclosure would not mark the ending point of the negotiation between carrier and shipper, but rather the beginning point. The carrier is certainly free to explain the range of issues that may affect the level of discounts, such as those set out on page 11 of the Rate Bureaus' filing. If the shipper ends up demanding a discount that the carrier does not want to give, the carrier is free to decline the business, and the shipper will either find another carrier willing to give the discount, or will learn that such discounts are not available given the shipper's circumstances.

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[4] Petition of Rate Bureaus for Reconsideration at 9-12.

[5] Petition of Rate Bureaus for Reconsideration at 6.

NASSTRAC's Petition for Reconsideration Should be Granted

NASSTRAC has asked the Board to clarify that existing minimum or default discounts, provided by some of the Rate Bureaus, should be maintained. HSIA agrees. Although the "truth-in-rates" condition will provide some assistance to shippers in negotiating with the carriers, the net effect of the Board's decision could be harmful if it is seen as giving a green light to eliminating the protection of those minimum discounts. While the Board in its November 20 decision declined to mandate automatic minimum discounts for fear of becoming involved in prescribing rates, the Board can and should mandate that the status quo be maintained, at least during a transitional period of three to five years during which the effectiveness of the "truth-in-rates" condition can be assessed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have, this 22nd day of January, 2002, caused copies of the foregoing filing to be served upon parties of record in Sec. 5A Application No. 118 (Sub-No. 1), et al., EC-MAC Motor Carriers Association, Inc., et al.

Scott N. Stone