

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE HOUSEHOLD GOODS MOVERS)
ANTITRUST LITIGATION) MDL DOCKET No. 1865
_____)

DONALD J. BEACH, et al., Individually and)
on Behalf of All Others Similarly Situated,) No. 2:07-cv-764-DCN
)
Plaintiffs,)

v.)

ATLAS VAN LINES, INC., et al.,)
)
Defendants.)
_____)

GARY MOAD, et al., Individually and)
on Behalf of All Others Similarly Situated,) No. 2:07-cv-2861-DCN
)
Plaintiffs,)

v.)

ATLAS VAN LINES, INC., et al.,)
)
Defendants.)
_____)

ROBERT E. BOONE, JR., Individually and)
on Behalf of All Others Similarly Situated,) No. 2:08-cv-486-DCN
)
Plaintiffs,)

v.)

ATLAS VAN LINES, INC., et al.,) **ORDER AND OPINION**
)
Defendants.)
_____)

This matter is before the court on plaintiffs’ motion for partial summary judgment and defendants’ cross-motion for summary judgment. Plaintiffs assert they are entitled to

summary judgment on the applicability of two of defendants' affirmative defenses: statutory immunity and the filed rate doctrine. Defendants have filed a cross-motion for summary judgment asking the court to enter summary judgment in their favor and dismiss plaintiffs' complaints. Like plaintiffs' summary judgment motion, defendants' motion hinges on whether the conduct at issue is either 1) statutorily immunized, or 2) protected by the filed rate doctrine.¹

I. FACTS AND BACKGROUND

Plaintiffs are individuals who have used defendants' services to move household goods. The Beach plaintiffs, all residents of South Carolina, filed suit in this court. The Moad and Boone plaintiffs filed suit in Illinois and Alabama federal district courts, respectively. Those cases were then transferred to this court by the Judicial Panel on Multidistrict Litigation pursuant to 28 U.S.C. § 1407. The Moad and Boone plaintiffs originally alleged more causes of action than the Beach plaintiffs but have since voluntarily dismissed the claims that do not track the Beach plaintiffs' claims. The defendants are a household goods motor carrier industry trade association and four household goods motor carriers.

Plaintiffs filed this putative class action against defendants seeking treble

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Defendants also ask for summary judgment on plaintiffs' 49 U.S.C. § 14704(b) claim in count two of their complaint. Section 14704(b) provides that a carrier "is liable . . . for amounts charged that exceed the applicable rate for transportation or service contained in a tariff in effect under section 13702." Defendants brief argument on this matter primarily rests on their contention that plaintiffs' case is really a rate reasonableness dispute that should be brought before the Surface Transportation Board (STB). As the court also notes below, it does not construe plaintiffs' claims as involving rate reasonableness; thus, they are properly before the court, not the STB.

damages under Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, and Section 4 of the Clayton Antitrust Act, 15 U.S.C. § 15, as well as for recovery under Section 14704 of the Interstate Commerce Commission Termination Act (ICCTA), 49 U.S.C. § 14704. Plaintiffs allege that defendants have conspired to unlawfully impose fuel surcharges on customers who purchased moving services from them. According to plaintiffs, defendants represent that such fuel surcharges are intended only to compensate them for increased fuel costs when, in fact, defendants have been using the fuel surcharge as a means of boosting their profits. Compl. ¶ 1.

The household goods moving industry is regulated by certain provisions of Title 49 of the United States Code. Under 49 U.S.C. § 13701(a)(1), any “rate, classification, rule, or practice related to transportation or service provided by a carrier . . . for transportation or service involving a movement of household goods [or] rates, rules, and classifications made collectively by motor carriers under agreements approved pursuant to section 13703 must be reasonable.” Household goods carriers are required to charge customers the rates contained in their tariffs. 49 U.S.C. § 13702(a). These tariffs must be published and available for inspection by the STB and by individual shippers. 49 U.S.C. § 13702(c)(1).

Section 13703 permits household goods carriers to collectively agree on certain business matters without violating the antitrust laws. One area where agreement is allowed is for the establishment of “rate adjustments of general application based on industry average carrier costs (so long as there is no discussion of individual markets or particular single-line rates).” 49 U.S.C. § 13703(a)(1)(G). Plaintiffs’ claims involve this

subsection. The carriers may submit such agreements to the STB for approval, and the STB may approve the agreement only if it finds such agreement is in the public interest. 49 U.S.C. § 13703(a)(2).

The American Moving and Storage Association, Inc. (AMSA) is a trade association for the moving and storage industry. According to plaintiffs, AMSA publishes tariffs applicable to all of its members, which agree to charge their customers the rates contained in the tariffs. The tariff at issue in this case is Tariff 400-N, which contains defendants' Item 16 Fuel Cost Price Adjustment.

Defendants had entered into a collective rate-making agreement that predated enactment of the ICCTA. This agreement was approved by the Interstate Commerce Commission (ICC), the STB's predecessor. The STB renewed the approval of the agreement. The agreement had a provision that allowed the carriers to increase or decrease general rates, provided discussions of such changes were limited to industry average carrier costs. Tariff 400-N furthered this purpose. Each defendant was required to publish and make available for inspection Tariff 400-N, but the tariff was not filed with or approved by the STB. The term "transportation charge," as used in Tariff 400-N, refers to the total cost of a move, which is based on factors such as the shipper, weight, mileage, place of origin, destination, and costs such as fuel.

Tariff 400-N has provisions for a fuel surcharge in the Item 16 Fuel Cost Price Adjustment, which plaintiffs contend is a rate adjustment. Plaintiffs allege that defendants' use of the term "fuel surcharge" suggests that the charge only compensates defendants for the actual increase in the cost of fuel above the cost of fuel already

included in the transportation charge. Compl. ¶ 59. According to plaintiffs, defendants manipulated their formula by using flawed data in such a way as to produce fuel surcharges that return far more money than that required to cover increases in the cost of diesel fuel.

In their answers, defendants deny plaintiffs substantive allegations and assert numerous affirmative defenses. Several of the defendants asserted two affirmative defenses on which plaintiffs now seek partial summary judgment: statutory immunity under 49 U.S.C. § 13703 and the filed rate doctrine. Plaintiffs note that in his March 31, 2008 order denying defendants' motion to dismiss, Judge Houck held that "[t]he filed rate doctrine does not preclude the plaintiffs' claims." Plaintiffs now say that discovery has confirmed this holding. Further, plaintiffs assert that defendants are not entitled to statutory immunity because their fuel surcharge cost model was not based on industry average carrier costs as required by section 13703, because the ICCTA eliminated the filed rate doctrine for household goods carriers, and because, in any event, defendants failed to comply with the tariff publishing requirement of section 13702. Defendants have filed a cross-motion for summary judgment asking the court to enter summary judgment in their favor and dismiss plaintiffs' complaints. Both motions turn on whether the conduct at issue is either 1) statutorily immunized, or 2) protected by the filed rate doctrine.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when, after considering the full evidentiary record, there are no genuine issues of material fact and the moving party is entitled to

judgment as a matter of law. Fed. R. Civ. P. 56(c). When the party moving for summary judgment does not bear the ultimate burden of persuasion at trial, the burden for summary judgment may be discharged by pointing out to the court that there is an absence of evidence to support the nonmoving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). The nonmovant must then "make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Id. at 322. Evidence should be viewed in the light most favorable to the nonmoving party and all inferences drawn in its favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). However, a mere "scintilla" of evidence will not preclude summary judgment. Id. at 252.

III. DISCUSSION

A. Statutory Immunity

Section 13703 of the ICCTA provides an exemption from antitrust laws for certain collective activities. 49 U.S.C. § 13703. However, "exemptions from the antitrust laws are strictly construed and strongly disfavored." Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409, 421 (1986). "The Supreme Court has consistently construed the reach of exemptions from antitrust laws narrowly, even when Congress confers these exemptions in terms." U.S. v. Gosselin World Wide Moving, N.V., 411 F.3d 502, 508 (4th Cir. 2005) (citing Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 126 (1982)). "This narrow construction of antitrust immunity is appropriate because the robust marketplace competition that antitrust laws protect is a 'fundamental national economic policy.'" Id. (quoting Carnation Co. v. Pac. Westbound Conference,

383 U.S. 213, 218 (1966)).

Section 13703(a)(1)(G) requires that rate adjustments be “based on industry average carrier costs.” The Household Goods Carriers Bureau Committee (HGCBC) of the AMSA used a cost model to create the fuel surcharge matrix in early 2000. The cost model was designed to fix the fuel surcharge percentage necessary to recoup the increased cost of fuel at any given price per gallon. The HGCBC determined industry average carrier costs by gathering data from the Department of Transportation and from a number of household goods carriers that served as a representative sample of the industry. (Harrison Dep. 254:7-258:21, 271:1-19, Aug. 21, 2008.) The matrix was intended to recoup increased fuel costs that were based on total industry miles and total industry revenue. (Harrison Decl. ¶ 17.) The industry’s total increased fuel costs were based on the miles driven and the average fuel consumption rate. The total increased fuel costs were then divided by the total industry revenue to determine the percentage that each individual transportation charge would need to be increased to recover the total increased fuel cost.

Though this formula makes sense mathematically, it appears defendants used flawed data in implementing the surcharge program. The household goods moving industry keeps statistics for different categories of goods. Goods transported by defendants are categorized as First Proviso (household goods), Second Proviso (office moves), and Third Proviso (goods requiring special handling). According to an example of defendants’ cost model provided by defendants, defendants used all the mileage from the First, Second, and Third Provisos in their cost model, but omitted revenue derived

from Second and Third Proviso shipments. (AMSA 14826.) Thus, it appears defendants omitted hundreds of millions of dollars of revenue from their equation, resulting in excessive fuel surcharge percentages.² (See AMSA 12145.) Joseph Harrison, AMSA's former president and its Federal Rule of Civil Procedure 30(b)(6) deponent, had this to say about this data at his deposition:

Q. Second and third proviso bring in revenue, correct?

A. Yes.

Q. Second and third proviso were not included in your formula to come up with this fuel surcharge?

A. Based on that, what I just saw, that appears to be correct.

Q. And they should have been, shouldn't they have?

A. Well, the surcharge only applies to household goods. It doesn't apply to office moves, so there wouldn't be any reason to do it.

Q. Sir, your fuel surcharge, you testified, was based on total revenue and total miles. That's your testimony, is it not?

A. Yes.

Q. Okay. Do you agree with me, based on this document, that you left out of the formula the revenue that came into this industry on second and third proviso traffic?

MR. STANLEY: Object to the form.

THE WITNESS: Well, based on the footnote, it appears that the revenue used in the formula, and I'm looking at a different page than you're looking at although the footnote is the same and the methodology is the same, we used first proviso transportation revenues.

BY MR. SIEGEL:

Q. Well, if you were just going to report first proviso revenue, why didn't you just report first proviso miles?

MR. BLAD: Object to form.

THE WITNESS: I can't answer that question.

(Harrison Dep. 285:5-286:17, Aug. 21, 2008.) Mr. Harrison agreed that if either the mileage data were inflated or the revenue data were understated in the cost model, then the model would yield a greater fuel surcharge than incremental costs. (Id. 242:18-243:7,

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Alternately, defendants could have inflated the mileage by including over a billion extra miles of Second and Third Proviso moves. (See AMSA 12145.)

250:9-251:11.) Further, Mr. Harrison said, “We have a responsibility under the Interstate Commerce Act to develop justifications for collective rate-making actions based on industry average costs, not fictitious industry average costs.” (Id. 267:18-22.) Mr. Harrison also acknowledged that the fuel surcharge was not supposed to produce profit, but rather was intended to be “reflective of fuel costs.” (Id. 64:13-15.)

Plaintiffs provide an example that calculates the fuel surcharge for the average household goods shipment using figures from an Atlas Fuel Surcharge Study. (ATLAS 240-56.) Using defendants’ cost model, the resulting fuel surcharge, calculated the way the formula is supposed to work according to defendants, is significantly less than the surcharge produced by the Item 16 Fuel Cost Price Adjustment. The court notes that, as a matter of basic math, a trip comprised of average distance and weight should impose the average increase in fuel cost. The Chief Executive Officer of defendant Atlas agrees:

Q. Before I ask you anything else, would you agree with me that if the fuel surcharge is designed – the matrix is designed to be revenue-neutral and capture the incremental cost of fuel at any price level as we have discussed earlier, that mathematically, on your average trip, it should return pretty close to the true incremental cost of fuel?

MR. CHRISTOPHER WOOD: Object to the form.

THE WITNESS: I think those are a lot of assumptions, but based on those assumptions, I would agree to that.

(Hoover Dep. 31:18-32:8, Aug. 22, 2008.) That defendants’ fuel surcharge returns far more than the actual increased cost of fuel on the average trip indicates that their formula could not have been based on industry average carrier costs. Thus, defendants have run afoul of the immunity provision by not conforming to the mandate of section 13703(a)(1)(G).

Defendants counter that their conduct is immunized from antitrust liability under

49 U.S.C. § 13703(a)(6) because they were operating under an approved collective rate-making agreement and merely carried out the terms of that agreement when they adopted Tariff 400-N.³ Defendants contend that once the agreement was approved, immunity attached to all actions in carrying out the agreement's terms, including the fuel surcharge provision. Moreover, according to defendants, plaintiffs have forfeited their current challenge because they failed to request the STB to review its approval decision and they failed to challenge the STB's decision under the APA. Defendants say, in any event, this court should hold the plaintiffs to the extremely high "arbitrary and capricious" standard of review. That is, plaintiffs could prevail only if the agency action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2).

Regarding defendants' argument that section 13703(a)(6) shields them from liability, the court finds that defendants have misconstrued how the statute works. Section 13703(a)(6) only provides immunity if the rate-making agreement otherwise complies with the statutory provisions, including section 13703(a)(1)(G). Defendants assert that Congress exempted their collective rate-making agreement from the rate adjustment provision because Congress provided that approved rate-making agreements in existence on December 31, 1995, be treated as approved by the STB without explicitly requiring that they be amended to include the provisions of § 13703(a)(1). 49 U.S.C. §

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The parties apparently do not dispute that defendants had an approved collective rate-making agreement, originally approved by the ICC and subsequently re-approved by the STB. In 2007, the STB decided to terminate the approval of all motor carrier agreements, including defendants' agreement.

13703(d)(1). To accept this argument, however, means that Congress would have countenanced immunity for carriers with agreements in contravention of the statute. See Coyne & Delany Co. v. Blue Cross & Blue Shield of Virginia, Inc., 102 F.3d 712, 715 (4th Cir. 1996) (“Absent clear congressional intent to the contrary, we will assume the legislature did not intend to pass vain or meaningless legislation.” (citation omitted)). The agreement certainly could not go beyond what the governing statute itself provides. Defendants also cannot complain about plaintiffs’ lack of challenge to the STB, as their claim does not assert a fault with the agreement itself, but rather with defendants’ alleged improper implementation of it. Plaintiffs’ position is that the agreement was not carried out under its terms.

Defendants also point out that their collective rate-making agreement did not require them to limit the fuel surcharge to industry average carrier costs; rather, it only required that *discussion* of rate increases or decreases be limited to industry average carrier costs. This argument is a non-starter. Discussion of the rates necessarily precedes a decision to change them.

Defendants also contend that, even if section 13703(a)(1) is relevant, subsection (a)(1)(B) (rates for household goods carriers), not subsection (a)(1)(G) (rate adjustments for all motor carriers), would apply. Subsection (a)(1)(B) does not require industry average carrier costs to be considered. Defendants assert that because (a)(1)(G) does not specifically mention household goods carriers, like (a)(1)(B) does, it does not apply to them. It is true that (a)(1)(B) applies specifically to household goods. However, the problem with defendants’ argument is that (a)(1)(G) is not limited to non-household

goods carriers. The proper reading of the statute is that Congress gave the household goods carriers special dispensation for establishing “rates” under (a)(1)(B), but intended for the “rate adjustment” provision to apply to all motor carriers.⁴ Moreover, the court finds that the rate adjustment provision in (a)(1)(G) applies because a “rate,” as that term is found in (a)(1)(B), is simply “the price of a given service by a motor carrier.”

(Harrison Dep. 44:6-7, Aug. 21, 2008.) Thus, a fuel surcharge “adjusts” the rate charged for movement of household goods. Defendants themselves called the fuel surcharge a “Fuel Cost Price *Adjustment*.” (AMSA 1481) (emphasis added.) Defendant AMSA also referred to the fuel surcharge as a “percentage *adjustment* to compensate your mover for the higher cost of diesel fuel” in a document entitled “Moving 101.” (Emphasis added.)

Finally, defendants say that even if the rate adjustment provision does apply, their fuel surcharge nevertheless is “based on” industry average carrier costs. Defendants cite Gonzales v. Carhart, 550 U.S. 124 (2007), for the proposition that this court should give the phrase “based on” its ordinary meaning. The court recognizes that “based on” does not necessarily mean “equal to,” but defendants proposed construction of the term stretches it beyond its logical limits. Defendants contend that they did indeed use average national fuel costs as a source—if not a mathematical determinant—for the fuel

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This makes sense given the difference between “rates” and “rate adjustments.” A “rate” increase would be understood to increase a carrier’s overall rate of return. Thus, an increase in rates could lead the shippers and the STB to investigate further to ensure the rate is reasonable. A “rate adjustment” on the other hand is understood to account for an increase in a specific carrier operating cost. If the carriers are properly using rate adjustments to recoup increased costs, and not to disguise increases in overall rates of return, no one would have any need to look past the adjustment because it is a profit-neutral mechanism.

surcharge. Defendants conclude that, because they used a national average cost of fuel and multiplied it by average industry data, they made adjustments “based on” industry average carrier costs. Under defendants’ reasoning, as long as their fuel cost average is accurate, any calculation they come up with is “based on” industry average carrier costs. Defendants’ position places the term “based on” far afield from its “ordinary meaning.”

B. The Filed Rate Doctrine

The filed rate doctrine mandates that “the rate of the carrier duly filed is the only lawful charge.” Louisville & Nashville R. Co. v. Maxwell, 237 U.S. 94, 97 (1915).

Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict and it obviously may work a hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination.

AT & T v. Central Office Telephone, Inc., 524 U.S. 214, 222 (1998) (citing Louisville, 237 U.S. at 97). “This rigid approach was deemed necessary to prevent carriers from intentionally ‘misquoting’ rates to shippers as a means of offering them rebates or discounts.” Maislin Indus., U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 127 (1990).

The doctrine was first applied in the antitrust context in Keogh v. Chicago and North West Railway Company, 260 U.S. 156 (1922). In Keogh, the Supreme Court held that a private shipper may not bring a cause of action against a group of freight carriers that collectively agreed on shipping rates and had them filed with, and approved by, the ICC, as required by the Interstate Commerce Act. Id. at 161. The Court reasoned that a rate filed with and approved by the ICC was a legal rate, and a legal rate can not cause an

antitrust injury. Id. at 162-63. The Court also concluded that were Keogh able to maintain its lawsuit, it would undermine the authority of the ICC and force a court to engage in speculation about what a proper rate should be, a task for which courts are not well-equipped. Id. at 163-64. Additionally, adjudication would grant the plaintiff a rebate, in the form of damages, that other consumers would not receive in contravention of Congress's goal to prevent discrimination among shippers. Id. at 163.

Over the years, the Supreme Court has upheld the filed rate doctrine. In Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409 (1986), the Court addressed the question of “whether [it] should continue to respect the rule of Keogh.” Id. at 417. The Court ultimately reaffirmed the doctrine's vitality, noting that there was no evidence that Congress had intended to change the Keogh rule in enacting the Reed-Bulwinkle Act and the Motor Carrier Act of 1980. Id. at 418-21. The Court did, however, recognize various developments that undermined the reasoning of the doctrine, but said that any change “must come from Congress, rather than from this Court.” Id. at 424. Again in Maislin, the Court said that if “strict adherence” to the “filed rate doctrine has become an anachronism in the wake of the [Motor Carrier Act of 1980],” it was up to Congress to change the statute. Maislin, 497 U.S. at 136.

After Square D and Maislin were decided, Congress passed the ICCTA. Before the ICCTA, the filed rate doctrine had been applied to bar antitrust liability when the pertinent regulatory statute required the *filing* of tariffs and prohibited rate discrimination. The ICCTA changed the law in two key ways: 1) it replaced the requirement applicable to household goods carriers that rates be contained in *filed* tariffs

to one that they be contained in *published* tariffs, 49 U.S.C. § 13702(c)(1), and 2) it eliminated the prohibition on rate discrimination, see In re Olympia Holding Corp., 88 F.3d 952, 956 n.7 (11th Cir. 1996) (“The ICCTA has removed the prohibition against unreasonable discrimination with respect to motor carriers.”).

Congress’s decision to replace the filing requirement with a publishing requirement is significant. Congress kept the filing requirement for carriers providing services in “noncontiguous domestic trade.” See 49 U.S.C. § 13702(b)(1) (“A carrier providing transportation or service described in subsection (a)(1) shall *publish and file* with the Board tariffs containing the rates established for such transportation or service.”) (emphasis added). In the part of the statute applicable to household goods carriers, however, Congress specifically excepted the filing requirement, leaving only a publishing requirement. See 49 U.S.C. § 13702(c)(1) (“A carrier providing transportation described in subsection (a)(2) shall maintain rates and related rules and practices in a *published* tariff.”) (emphasis added). Given the different treatment of these two classes of carriers, Congress clearly recognized a distinction between filing and publishing.

Thus, it appears Congress has abrogated the filed rate doctrine by statute, and the Court of Appeals for the Seventh Circuit has held as much. In Tempel Steel Corp. v. Landstar Inway, Inc., 211 F.3d 1029 (7th Cir. 2000), the Seventh Circuit addressed the filed rate doctrine in the context of an action for damages against a motor carrier for a machine press damaged during transport from the United States to Mexico. In the course of holding that the district court had properly entered summary judgment in favor of the shipper, the court noted that the filed rate doctrine no longer existed. Id. at 1030. The

court noted that, until the passage of the ICCTA in 1995, tariffs had legal effect, and the filed rate doctrine prevented shippers and carriers from altering filed rates by contract. Id. The ICCTA, however, “abolished the tariff filing requirement and the filed-rate doctrine, and it canceled the legal effectiveness of most extant tariffs.” Id. (citations omitted).

The United States District Court for the Northern District of Illinois followed Tempel Steel and held that the tariff at issue there did not have legal status under the filed rate doctrine because the doctrine is “defunct for motor transport.” Chen v. Mayflower Transit, Inc., 315 F. Supp. 2d 886, 916 (N.D. Ill. 2004) (quoting Tempel Steel, 211 F.3d at 1031). Recognizing the difference between publishing and filing, the court noted that Mayflower published rather than filed its tariff. Id. Thus, said the court, the filed rate doctrine did not apply. Id.

The court finds the statutory text and the Seventh Circuit’s holding persuasive. Also persuasive to the court is defendant AMSA’s past recognition that the filed rate doctrine no longer exists for household goods carriers. In December 1996, past AMSA president Joseph Harrison wrote to North American Van Lines’ Senior Counsel apparently regarding rulemaking proceedings before the STB. In the letter, Mr. Harrison wrote, “I didn’t change the reference to elimination of the filed rate doctrine since, as we discussed, it’s a fact.” (AMSA 8338.) Around the same time in December 1996, Mr. Harrison submitted comments to the STB in his capacity as Secretary of the HGCBC.⁵

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The HGCBC was an autonomous committee of AMSA. Mr. Harrison served as President of AMSA and as Secretary of the HGCBC.

The Committee's attorneys, along with Mr. Harrison, signed the submission. The comments contained the following statement: "*Notwithstanding its elimination of the filed tariff doctrine*, Congress obviously intends that published tariffs afford sufficient safeguards to consumers and other tariff users." (UVL/MTI 627) (emphasis added.) What makes Mr. Harrison's remarks particularly persuasive is that he was a Class II practitioner before the ICC. Such status, attained after demonstrating expertise through a testing procedure, conferred on Mr. Harrison the ability to practice before the ICC "as a lawyer even though [he] didn't have a law degree." (Harrison Dep. 22:11-24:2, Aug. 21, 2008.) Defendants' current litigation posture notwithstanding, the court believes Mr. Harrison's previous belief that the filed rate doctrine no longer exists carries significant weight.

Moreover, even if the filed rate doctrine endures, the court agrees with Judge Houck's earlier ruling that the doctrine does not apply in this case. In his order denying defendants' motion to dismiss, Judge Houck did not rule on whether the filed rate doctrine still existed. Instead, he noted that, even if the doctrine endures, it would not preclude this action. (Order Denying Mot. Dismiss, March 31, 2008.)

Judge Houck was correct because defendants did not publish their actual rates in the manner required for protection under the filed rate doctrine. Pursuant to 49 U.S.C. § 13702(c)(1), household goods carriers must "maintain rates and related rules and practices in a published tariff [that must] be made available for inspection by shippers upon reasonable request." The STB has promulgated rules interpreting the tariff requirements applicable to household goods carriers. These rules provide, in part, that

“tariffs . . . must provide the specific applicable rates . . . and must be arranged in a way that allows for the determination of the exact rate, charges and service terms applicable to any given shipment.” 49 C.F.R. § 1310.3.

Household goods carriers routinely discount the collectively set rates in Tariff 400-N; therefore, the tariff rates are really just a maximum amount the carriers can charge. The carriers’ discounting tariff, Tariff 104-G, lists discounts from zero to sixty-five or seventy percent, which are potentially applicable to every shipment without the shippers knowing beforehand which discount they will get. Thus, there is no way for shippers to determine the applicable rate before the discount process takes place. The carrier has wide discretion to choose the rate at the time of service, as the following deposition testimony from Greg Hoover, Chief Executive Officer of Atlas Van Lines, illustrates:

- Q. So he could willy-nilly decide to discount it zero or 65; it’s entirely up to him?
- A. To the agent?
- Q. Right. Is that correct?
- A. Yes.

(Hoover Dep. 65:6-10, Aug. 22, 2008.) In their depositions, the CEO’s of Wheaton and Mayflower/United confirmed that discounting is left almost entirely to the agents’ discretion. (Burns Dep. 40:22-42:1, Aug. 23, 2008; Larch Dep. 86:17-87:1, Aug. 25, 2008.)

Defendants assert that discounting does not render their Tariff 400-N rates indefinite because shippers learn the precise discount they will receive before the transaction is consummated, so they can compare other discounted prices. However, when an agent can “willy-nilly” decide to select from a range of discounts without

reference to any objective criteria, nothing about the rate is “arranged in a way that allows for the determination of the exact rate, charges and service terms applicable to any given shipment.” There simply is no way for a shipper to examine defendants’ tariffs and determine the applicable rate for a shipment. Therefore, even if the filed rate doctrine still existed for household goods carriers, it would not apply in this case.⁶

IV. CONCLUSION

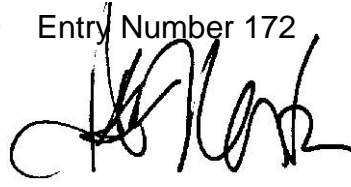
For the foregoing reasons, plaintiffs’ motion for partial summary judgment is **GRANTED**, and defendants’ cross-motion for summary judgment is **DENIED**.

AND IT IS SO ORDERED.

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After briefing for these motions had ended, defendants filed a supplemental authority brief bringing to the court’s attention the recent case of Pacific Bell Telephone Co. v. linkLine Communications, Inc., 129 S. Ct. 1109 (2009). The issue in linkLine was whether a regulated entity that has no duty to deal with competitors under antitrust laws can be charged with an unlawful “price squeeze” claim under Section 2 of the Sherman Act. The Court held that the plaintiffs had no Section 2 claim, in part, because granting the requested relief would have forced courts to monitor pricing conduct already regulated by the FCC. Id. at 1120-21. Thus, defendants cite linkLine for the proposition that “district courts should be wary about applying the antitrust law to conduct that is regulated by an agency authorized by Congress to regulate the industry, especially where applying the antitrust law would require the court to monitor pricing issues that are better left to the regulatory process.” Def. Supp. Br. 2.

Plaintiffs do not necessarily disagree with this proposition, but they posit that it is little more than a platitude. The court agrees and finds that linkLine in no way affects this case. There is no chance of conflict between this court’s potential decision and any agency decision because, unlike linkLine, this case involves a horizontal price fixing claim under Section 1 of the Sherman Act, conduct that, if proven, is illegal per se. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218 (1940). Defendants’ citation to linkLine dovetails with their earlier argument that plaintiffs’ claims amount to nothing more than a rate reasonableness challenge properly brought before the STB. The court disagrees. Whether defendants’ fuel surcharge is based on industry average carrier costs and therefore eligible for antitrust immunity under section 13703(a)(1)(G) is unrelated to the reasonableness of defendants’ rates.



DAVID C. NORTON
CHIEF UNITED STATES DISTRICT JUDGE

September 10, 2009
Charleston, South Carolina