

RECORD NO. 10-1047

In The
United States Court of Appeals
For The Fourth Circuit

**DONALD J. BEACH; SCOTT HANSEN; JEFFREY L. STOLOFF;
BURNETTA NIMONS; THOMAS SCHOLTENS; NATALIE
TRUEWORTHY; GARY MOAD; LAUREL MOAD; ROBERT E.
BOONE, on behalf of himself and all others similarly situated,**

Plaintiffs – Appellees,

v.

**AMERICAN MOVING & STORAGE ASSOCIATION,
INCORPORATED; ATLAS VAN LINES, INCORPORATED; UNITED
VAN LINES, INCORPORATED; MAYFLOWER TRANSIT, LLC;
WHEATON VAN LINES, INCORPORATED,**

Defendants – Appellants.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA AT CHARLESTON**

BRIEF OF APPELLANTS

**Nikole Setzler Mergo
Marguerite S. Willis
NEXSEN PRUET, LLC
1230 Main Street, Suite 700
Post Office Drawer 2426
Columbia, SC 29202
(803) 771-8900**

**R. Bruce Holcomb
Christopher H. Wood
ADAMS HOLCOMB LLP
1875 Eye Street, N.W.
Washington, DC 20006
(202) 580-8820**

**Alan M. Wiseman
Thomas A. Isaacson
Stephen Weissman
Grant Mandsager
HOWREY LLP
1299 Pennsylvania Ave., N.W.,
Washington, DC 20004
(202) 383-6638**

**Robert K. Stanley
Kathy L. Osborn
BAKER & DANIELS LLP
300 North Meridian Street
Suite 2700
Indianapolis, IN 46204
(317) 237-1254**

**Michael J. Morris
David Wells
THOMPSON COBURN LLP
One US Bank Plaza
St. Louis, MO 63101
(314) 552-6082**

**John P. Linton
DUFFY & YOUNG
96 Broad Street
Charleston, SC 29401
(843) 720-2044**

**Duke R. Highfield
YOUNG, CLEMENT, RIVERS LLP
28 Broad Street
Charleston, SC 29401
(843) 720-5456**

Counsel for Appellants

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

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No. 10-1047 Caption: Donald Beach v. American Moving & Storage Ass'n

Pursuant to FRAP 26.1 and Local Rule 26.1,

Am. Moving & Storage Ass'n who is appellant, makes the following disclosure:
(name of party/amicus) (appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO
2. Does party/amicus have any parent corporations? YES NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:
3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? YES NO
If yes, identify all such owners:
4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? YES NO
If yes, identify entity and nature of interest:
5. Is party a trade association? (amici curiae do not complete this question) YES NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:
There is no such member.
6. Does this case arise out of a bankruptcy proceeding? YES NO
If yes, identify any trustee and the members of any creditors' committee:

CERTIFICATE OF SERVICE

I certify that on January 20, 2010 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

A. Hoyt Rowell, III
Howard Louis Siegel
Robert S. Wood
T. Christopher Tuck
Daniel O. Myers
1037 Chuck Dawley Blvd, Bldg. A
Mount Pleasant, SC 29465

Mark C. Tanenbaum
John P. Algar
Mia Lauren Maness
241-243 East Bay Street
Charleston, SC 29413-0757

s/ Alan Wiseman

(signature)

01/20/2010

(date)

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No. 10-1047 Caption: Donald Beach v. American Moving & Storage Ass'n

Pursuant to FRAP 26.1 and Local Rule 26.1,

Atlas Van Lines, Inc. who is appellant, makes the following disclosure:
(name of party/amicus) (appellant/appellee/amicus)

- 1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO
- 2. Does party/amicus have any parent corporations? YES NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:
Atlas World Group, Inc.
- 3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? YES NO
If yes, identify all such owners:
- 4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? YES NO
If yes, identify entity and nature of interest:
- 5. Is party a trade association? (amici curiae do not complete this question) YES NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:
- 6. Does this case arise out of a bankruptcy proceeding? YES NO
If yes, identify any trustee and the members of any creditors' committee:

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Howard Louis Siegel
Robert S. Wood
T. Christopher Tuck
Daniel O. Myers
1037 Chuck Dawley Blvd, Bldg. A
Mount Pleasant, SC 29465

Mark C. Tanenbaum
John P. Algar
Mia Lauren Maness
241-243 East Bay Street
Charleston, SC 29413-0757

s/ Nikole Mergo

(signature)

01/20/2010

(date)

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 10-1047 Caption: Donald Beach v. American Moving & Storage Ass'n

Pursuant to FRAP 26.1 and Local Rule 26.1,

Mayflower Transit, LLC who is appellant, makes the following disclosure:
(name of party/amicus) (appellant/appellee/amicus)

- 1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO
- 2. Does party/amicus have any parent corporations? YES NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:
UniGroup, Inc.
- 3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? YES NO
If yes, identify all such owners:
- 4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? YES NO
If yes, identify entity and nature of interest:
- 5. Is party a trade association? (amici curiae do not complete this question) YES NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:
- 6. Does this case arise out of a bankruptcy proceeding? YES NO
If yes, identify any trustee and the members of any creditors' committee:

CERTIFICATE OF SERVICE

I certify that on January 26, 2010 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

A. Hoyt Rowell, III
Howard Louis Siegel
Robert S. Wood
T. Christopher Tuck
Daniel O. Myers
1037 Chuck Dawley Blvd, Bldg. A
Mount Pleasant, SC 29465

Mark C. Tanenbaum
John P. Algar
Mia Lauren Maness
241-243 East Bay Street
Charleston, SC 29413-0757

s/ John P. Linton
(signature)

01/26/2010
(date)

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

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No. 10-1047 Caption: Donald Beach v. American Moving & Storage Ass'n

Pursuant to FRAP 26.1 and Local Rule 26.1,

United Van Lines, LLC who is appellant, makes the following disclosure:
(name of party/amicus) (appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO
2. Does party/amicus have any parent corporations? YES NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:
UniGroup, Inc.
3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? YES NO
If yes, identify all such owners:
4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? YES NO
If yes, identify entity and nature of interest:
5. Is party a trade association? (amici curiae do not complete this question) YES NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:
6. Does this case arise out of a bankruptcy proceeding? YES NO
If yes, identify any trustee and the members of any creditors' committee:

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A. Hoyt Rowell, III
Howard Louis Siegel
Robert S. Wood
T. Christopher Tuck
Daniel O. Myers
1037 Chuck Dawley Blvd, Bldg. A
Mount Pleasant, SC 29465

Mark C. Tanenbaum
John P. Algar
Mia Lauren Maness
241-243 East Bay Street
Charleston, SC 29413-0757

s/ John P. Linton

(signature)

01/26/2010

(date)

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

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No. 10-1047 Caption: Donald Beach v. American Moving & Storage Ass'n

Pursuant to FRAP 26.1 and Local Rule 26.1,

Wheaton Van Lines, Inc. who is Appellant, makes the following disclosure:
(name of party/amicus) (appellant/appellee/amicus)

- 1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO
- 2. Does party/amicus have any parent corporations? YES NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:
- 3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? YES NO
If yes, identify all such owners:
- 4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? YES NO
If yes, identify entity and nature of interest:
- 5. Is party a trade association? (amici curiae do not complete this question) YES NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:
- 6. Does this case arise out of a bankruptcy proceeding? YES NO
If yes, identify any trustee and the members of any creditors' committee:

CERTIFICATE OF SERVICE

I certify that on January 25, 2010 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

A. Hoyt Rowell, III
Howard Louis Siegel
Robert S. Wood
T. Christopher Tuck
Daniel O. Myers
1037 Chuck Dawley Blvd., Bldg. A
Mount Pleasant, SC 29465

Mark C. Tanenbaum
John P. Algar
Mia Lauren Maness
241-243-East Bay Street
Charleston, SC 29413-0757

s/Duke R. Highfield
(signature)

01/25/10
(date)

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STATEMENT OF SUBJECT MATTER AND
APPELLATE JURISDICTION

The District Court had jurisdiction over this case pursuant to 28 U.S.C. §§ 1331 and 1337. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1292(b). The District Court made the findings required by 28 U.S.C. § 1292(b). (*See Order*, Nov. 20, 2009, Joint Appendix (“JA”) 451.) Defendants-Appellants filed a timely Petition for Permission to Appeal Pursuant to § 1292(b) on December 4, 2009. On January 13, 2010, this Court granted that Petition.

STATEMENT OF ISSUES PRESENTED FOR APPEAL

1. 49 U.S.C. § 13703(a)(6) provides that if the Surface Transportation Board (“STB”) approves a motor carrier’s ratemaking agreement, “it may be made and carried out under its terms . . . and the antitrust laws . . . do not apply.” The STB approved the Agreement at issue, which limited household goods carriers’ ratemaking to “discussion” of “industry average carrier costs.” Does the mere fact that carriers adopted a fuel surcharge based on an erroneous methodology or data deprive them of statutory antitrust immunity, where they limited their discussions to industry-wide, aggregate data?
2. Nearly a century ago, in *Keogh v. Chicago & Northwestern Railway Co.*, 260 U.S. 156, 163 (1922), the Supreme Court announced that the “legal rights of shipper as against carrier in respect to a rate are measured by the published tariff.” Where the *Keogh* doctrine applies, it bars treble damages antitrust challenges to carriers’ rates. Did the *Keogh* doctrine survive the ICC Termination Act of 1995 (“ICCTA”), in which Congress did not address this settled doctrine?
3. The STB has jurisdiction over the reasonableness of carriers’ rates, classifications, rules and practices under 49 U.S.C. § 13710(a)(2). Plaintiffs have challenged carriers’ fuel surcharges as “excessive,” and the underlying practices as “unreasonable.” Do these challenges, and the damages issues they raise, place these claims within the primary jurisdiction of the STB, rather than a federal court?

STATEMENT OF THE CASE

A. Nature of the Case

This case involves an attempt to pursue a treble damages antitrust claim stemming from collective ratemaking that is immunized from such claims by both an express statute and a long-settled judicial doctrine.

Defendants-Appellants are carriers of household goods under the brand names Atlas, Mayflower, United and Wheaton along with the American Moving and Storage Association, a trade association. For more than 60 years, household goods carriers operated under the extensive regulation and oversight of the STB and its predecessor, the Interstate Commerce Commission (“ICC”). Their collective ratemaking agreement (“Agreement,” JA 69), was approved by the ICC and the STB. In accordance with that regulatory scheme and the Agreement, Defendants collectively adopted rates for the interstate carriage of household goods and had antitrust immunity for those rates. In 2001, pursuant to the procedures set forth in the Agreement, Defendants adopted Tariff 400-N, which included a fuel surcharge in Item 16.

Plaintiffs are individuals who shipped household goods via Defendant carriers. They claim that an error existed in the data used to calculate the fuel surcharge (“data error”) that caused the fuel surcharge to yield more than the added cost of fuel. They assert that, despite statutory collective ratemaking and the STB-

approved Agreement, the data error renders Defendants' adoption of the fuel surcharge published in Tariff 400-N a *per se* violation of the Sherman Antitrust Act, 15 U.S.C. § 1. Plaintiffs seek treble damages and purport to represent a class comprised of the millions of household goods shippers who used Defendant carriers' services between March 2003 and March 2007.

B. Course of Proceedings

In 2007, without first pursuing any remedies before the STB, Plaintiffs brought actions in three district courts which were consolidated for pre-trial proceedings before the Honorable C. Weston Houck, and later transferred to the Honorable David C. Norton. Recognizing the importance of immunity and other dispositive defenses, the parties agreed to focus initial discovery on those issues.

Plaintiffs' Complaint alleges that Defendants improperly calculated the fuel surcharge as a percentage of the entire transportation charge. (*See Compl.* ¶ 66, JA 61.)¹ Following discovery, Plaintiffs revised their theory to focus on a data error.² Plaintiffs then moved for partial summary judgment on the defenses of statutory

¹ The ICC, however, repeatedly had approved such fuel surcharges. *See* 38 Fed. Reg. 34, 771 (Dec. 18, 1973); 39 Fed. Reg. 5537 (Feb. 13, 1974); *Effect of Modifying Proclamation No. 3249*, 350 I.C.C. 563 (1975); 44 Fed. Reg. 33,230 (June 8, 1979); 44 Fed. Reg. 37,427 (June 26, 1979).

² Essentially, the fuel surcharge depended on the relationship between industry-wide increased fuel costs—which, in turn, were based partly on industry-wide miles traveled—and industry-wide revenues. The error Plaintiffs assert involved a

immunity and the *Keogh* doctrine. Defendants cross-moved for summary judgment on the immunity and *Keogh* defenses as well as on the issue of primary jurisdiction.

By Order and Opinion dated September 10, 2009 (“*Slip Op.*” JA 431), the District Court granted Plaintiffs’ Motion for Partial Summary Judgment and denied Defendants’ Cross-Motion for Summary Judgment. The court held that there were no material factual disputes.

As to the statutory immunity defense, the court held that Defendants’ conduct was governed by 49 U.S.C. § 13703(a)(1)(G), which permits motor carriers to enter into agreements for rate adjustments “based on industry average carrier costs,” and not by subsection (B), which permits agreements on rates by household goods carriers without regard to industry average costs. The District Court interpreted § 13703(a)(1)(G) and the Agreement, which also contains the

mistake regarding *which* industry-wide mileage and revenue data Defendants used in computing the formula. The mileage data appear to come from a larger set of transactions than the revenue data, thus increasing the percentage surcharge. Plaintiffs concede the validity of the fuel surcharge methodology in principle. Indeed, the parties and the District Court all agreed that the formula itself, *i.e.*, the formula previously approved by the ICC, was correct. (*Slip Op.* at 7, JA 437.)

Defendants do not dispute, for purposes of this appeal only, that a data error occurred, or that the resulting fuel surcharge sometimes produced a fuel surcharge in excess of the added fuel costs. This appeal focuses on the legal ramifications, if any, of the assumed data error. Plaintiffs’ overheated rhetoric regarding the data error and the fuel surcharge levels it produced are thus unwarranted, and irrelevant to the legal issues presented.

phrase “industry average carrier costs,” to require that the data Defendants discussed and used in establishing the fuel surcharge be error-free, and not merely aggregate in nature. Based on this interpretation, the court concluded that the data error violated § (a)(1)(G) and the Agreement, and removed the fuel surcharge from the statutory grant of immunity in § 13703(a)(6). The court did not find the data error to be deliberate, or that Defendants ever discussed individual carriers’ costs when developing the fuel surcharge.

Regarding *Keogh*, the District Court held that the ICCTA’s changes to tariff requirements in 1995 abolished that doctrine, notwithstanding (1) the absence of any language in the Act reflecting an intention to negate the *Keogh* doctrine and (2) the Act’s continued requirement that Defendant carriers maintain and publish tariffs. Alternatively, the court held that Defendant carriers’ historical practice of unilaterally discounting maximum tariff rates forfeited all protection of the *Keogh* doctrine. The District Court also rejected the argument that the case properly belonged before the STB under the doctrine of primary jurisdiction.

Defendants timely moved to have that Order certified for an immediate appeal pursuant to 28 U.S.C. § 1292(b). On November 20, 2009, the District Court certified the above legal rulings for interlocutory appeal. On January 13, 2010, this Court granted Defendants’ Petition to allow the § 1292(b) appeal.

STATEMENT OF FACTS

A. The Regulatory Background

The rates charged by household goods motor carriers have been subject to regulatory oversight since Congress passed the Motor Carrier Act of 1935.

Ch. 498, 49 Stat. 543 §§ 216, 217(a). The Act compelled household goods carriers to abide by reasonable rates published in tariffs filed with the ICC. *Id.* The ICC had the power to: (1) investigate rates; (2) suspend proposed rates; (3) invalidate non-complying rates; and (4) prescribe a particular rate. *Id.* § 216.

In 1948, Congress exempted common carriers' statutorily authorized collective rate discussions, and the resulting rates, from antitrust liability via the Reed-Bulwinkle Act, now codified at 49 U.S.C. § 13703(a)(6). As Congress stated in passing that Act: "resort to [the antitrust] laws is not necessary in the case of common carriers because the objective of reasonable prices is achieved . . . by clothing governmental authorities with the power to fix reasonable rates and charges." S. Rep. No. 44, 80th Cong., 1st Sess. 4 (1947).

The ICCTA eliminated the tariff requirement for the entire motor carrier industry *except* household goods motor carriers, who must still abide by rates contained in published tariffs subject to STB jurisdiction and available for inspection by the STB and shippers. 49 U.S.C. § 13702(c). The post-ICCTA statutory scheme also continues to require that household goods rates be

reasonable, *id.* § 13701(a)(1), and permits shippers to challenge household goods rates as unreasonable before the STB. *Id.* §§ 13701, 13702. The STB has numerous other rate enforcement mechanisms. *See, e.g., id.* §§ 13701(b), 13703(a)(5), 13710(a)(2).

The ICCTA details Defendants' continuing right to engage in collective ratemaking with antitrust immunity. Section 13703(a)(6) provides:

If the [STB] approves the agreement or renews approval of the agreement, it may be made and carried out under its terms and under the conditions required by the [STB], and the antitrust laws, as defined in the first section of the Clayton Act (15 U.S.C. 12), do not apply

B. The Agreement Governing Collective Ratemaking

In accord with this regulatory scheme, Defendants for decades participated in a collective rate bureau governed by an approved ratemaking agreement, under which they adopted public tariffs. The ICC and later the STB regulated both the ratemaking agreement and the tariffs and rates resulting therefrom.

As described by the District Court, it is uncontested that:

[Appellants] 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.

(*Slip Op.* at 4, JA 434.) Many agency decisions approved and continued the Agreement.³ Defendants' collectively set rates later included fuel surcharges, which the ICC first authorized in 1973. *See* 38 Fed. Reg. 34,771 (Dec. 18, 1973).

The STB-approved Agreement provides the procedures for collective adoption of rates, such as the fuel surcharge at issue here. As the District Court explained: “[T]he 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.” (*Slip Op.* at 4, JA 434.) The exact language of the Agreement required that, in the process of ratemaking, “discussion” be limited to “industry average carrier costs.” (JA 74.)

C. Tariff 400-N and the Fuel Surcharge

Pursuant to the Agreement, Defendants adopted Tariff 400-N, which became effective January 1, 2002. Defendants published and made Tariff 400-N available for inspection as required by statute. *See* 49 U.S.C. § 13702(c). Item 16 of that

³ *See Motor Carrier Bureaus—Periodic Review Proceeding, STB Ex Parte 656*, 2004 STB LEXIS 791 (Dec. 13, 2004) (Dkt. No. 150-10); *EC-MAC Motor Carriers Serv. Ass’n, Inc., et al., Sec. 5a Application No. 118 (Amendment No. 1)*, *et al.*, 1999 STB LEXIS 737 (Dec. 27, 1999) (Dkt. No. 150-9); *EC-MAC Motor Carriers Serv. Ass’n, Inc., et al., Sec. 5a Application No. 118 (Amendment No. 1)*, *et al.*, 1998 STB LEXIS 976 (Dec. 18, 1998) (Dkt. No. 150-8); *Household Goods Carriers’ Bureau, Inc. – Agreement Sec. 5a Application No. 1*, 1993 MCC LEXIS 90 (July 7, 1993), 1988 MCC LEXIS 209 (Mar. 30, 1998), 1987 MCC LEXIS 284 (July 15, 1987), and 1985 MCC LEXIS 13 (Dec. 24, 1985) (Dkt. No. 150-7). The STB withdrew approval of the Agreement effective January 1, 2008.

tariff provided for a fuel surcharge based on the national average price of diesel fuel. (JA 104.) The data error occurred during the development of the fuel surcharge, which is the only rate or charge Plaintiffs challenge in this case. Despite having opportunities to challenge the fuel surcharge and seek relief before the STB, Plaintiffs never have done so.

Item 16 was a pre-established matrix that set out the fuel surcharge as a percentage figure, to be applied against the base transportation charge. (JA 104-05.) Defendant carriers almost always discounted this base transportation charge off the maximum rates found in Tariff 400-N and in accordance with discounted rates set forth in their individually-determined exceptions tariffs, Tariffs 104-G. There is no dispute that Defendants applied the fuel surcharge percentages from Tariff 400-N to these individually discounted transportation charges under their respective Tariffs 104-G. It is also undisputed that the actual dollar amount of the fuel surcharge was lower (expressed in dollar terms) than if the Tariff 400-N percentage had been applied to an undiscounted, maximum tariff rate.⁴

⁴ For example, consider a fuel surcharge of 5% (based on Tariff 400-N and the prevailing price of diesel fuel) and a base transportation charge of \$1000. A carrier might discount the base transportation charge by 50%, and then apply the 5% fuel surcharge to the resulting \$500 base transportation charge.

SUMMARY OF ARGUMENT

A. Statutory Immunity

An error underlying a collectively set rate does not extinguish Defendants' antitrust immunity. The governing statute, 49 U.S.C. § 13703(a)(6), conditions the availability of antitrust immunity solely on whether Defendants followed the ratemaking procedures set forth in an STB-approved agreement. So long as Defendants observe those procedures, there can be no private damages claim challenging the resulting tariff or rates.

Here, the Agreement requires that, in developing a tariff, Defendants limit their "discussion" to "industry average carrier costs." (JA 74.) That is, the data must be of a certain type—*i.e.*, aggregate industry-wide data, as opposed to data specific to individual carriers or markets. Since there is no dispute that Defendants abided by that procedure, § 13703(a)(6) immunizes the fuel surcharge from antitrust challenge.

The District Court erroneously interpreted the requirement that Defendants can only discuss "industry average carrier costs" to mean that Defendants cannot use or even discuss flawed or incorrect industry data. But, the phrase does not create such a precision requirement, and the imposition of treble damages liability for mere discussion of erroneous data within the confines of an otherwise proper collective ratemaking process creates an impractical limitation. When collectively

setting rates, Defendants must have some freedom to discuss various sets of data, calculations and methodologies without fear that antitrust liability will follow if any of those are later found to have contained an error. Stripping away immunity for such an error would thwart the entire collective ratemaking system, embraced by statute and approved by the STB. No one knowingly would have risked such ruinous liability due to a mere error.

B. The *Keogh* Doctrine

The District Court likewise committed legal error when it held that the ICCTA abrogated the *Keogh* doctrine. Nearly a century ago, the Supreme Court established a bright-line rule in *Keogh* that barred treble damages antitrust claims challenging carriers' regulated rates. The Court has reaffirmed *Keogh*'s vitality, holding that the doctrine survives until Congress explicitly revokes it. *Maislin Indus., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 135 (1990); *Square D v. Niagara Frontier Tariff Bureau*, 476 U.S. 409, 424 (1986) ("If there is to be an overruling of the *Keogh* rule, it must come from Congress, rather than from this Court.").

The ICCTA did not explicitly revoke the application of *Keogh* to household goods rates, or even address it. Instead, the Act preserved the regulatory rate oversight for household goods carriers that is the very core of the doctrine: it vests the STB with authority to ensure that household goods carriers' rates "must be reasonable."

The District Court's alternative ruling that unilateral discounting vitiates the application of the *Keogh* doctrine is also flawed. Numerous cases have applied the *Keogh* doctrine where rates were based on market forces below the maximum tariff rate. To hold otherwise would deprive Defendants of protection from antitrust claims for doing the very thing that antitrust law encourages – lowering prices.

C. Primary Jurisdiction

These same regulatory oversight principles are the foundation of the STB's primary jurisdiction. The crux of Plaintiffs' Complaint is that "the method by which Defendants agreed and conspired to calculate" the fuel surcharge in Item 16 of Tariff 400-N was "unreasonable." (*Compl.* ¶ 60, JA 55.) The ICCTA confers upon the STB sole responsibility to: (1) ensure that any "rate, classification, rule or practice" related to the transportation of household goods is "reasonable;" (2) "stop or prevent" non-compliance; (3) "invalidate" unreasonable rates; and (4) prescribe reasonable ones. 49 U.S.C. §§ 13701(a) and (b). The Supreme Court has long held that "[w]henver a rate . . . is attacked as unreasonable . . . there must be preliminary resort" to the agency charged with ensuring rate reasonableness. *Great N. Ry. Co. v. Merchs. Elevator Co.*, 259 U.S. 285, 291 (1922).

There is no reason to depart from these long-standing precepts here. Plaintiffs' claim necessarily involves a determination not only of whether the actual fuel surcharges were unreasonable, (as alleged in the Complaint), but also

whether the “but for” hypothetical fuel surcharges alleged by Plaintiffs to sustain their claim of antitrust injury would have been reasonable. It also requires a determination of whether the published Item 16 fuel surcharge met the requirements promulgated by the STB at 49 C.F.R. § 1310.3 that it provide “the specific applicable . . . charges” and be “arranged in a way that allow[ed] for the determination of the exact . . . charges . . . applicable to any shipment.” All of those determinations are squarely within the STB’s expertise and primary jurisdiction.

ARGUMENT

STANDARD OF REVIEW

The *de novo* standard of review applies to the statutory immunity and *Keogh* doctrine issues. The statutory immunity issue involves the interpretation of the Agreement and statutory provisions. The *Keogh* issue involves the interplay of the ICCTA and the *Keogh* doctrine as well as the application of that doctrine to an industry where carriers heavily discount rates. See *Dolan v. Fid. Nat'l Title Ins. Co.*, No. 09-2697-cv, 2010 U.S. App. LEXIS 2814, at *2 (2d Cir. Feb. 11, 2010) (applying *de novo* standard to review of dismissal under *Keogh* doctrine). While the primary jurisdiction issue is reviewed under the abuse of discretion standard, *Env'l Tech. Council v. Sierra Club*, 98 F.3d 774, 789 (4th Cir. 1996), the District Court's decision to exercise jurisdiction was based entirely on its interpretation of the statutory scheme. Although the District Court made some factual findings regarding the existence of the data error and the discounting of rates, Defendants do not dispute those findings for purposes of this appeal. Thus, the appeal turns entirely on issues of law.

I. THE ALLEGED CONDUCT HAS STATUTORY IMMUNITY FROM PLAINTIFFS' ANTITRUST CLAIMS.

A. The Fuel Surcharge In Tariff 400-N Complies With The Terms Of The STB-Approved Agreement.

The governing statute expressly immunizes motor carriers' collective ratemaking against federal antitrust actions. 49 U.S.C. § 13703(a)(6). That immunity has four requirements: (1) the Agreement has been approved by the STB; (2) the Agreement was made under the conditions required by the STB; (3) the Agreement was carried out under its terms and the STB-required conditions; and (4) the action raises a claim under federal antitrust law.

Here, not only did Plaintiffs concede below that the STB provided the necessary approval of the Agreement, (*see Compl.* ¶ 54, JA 54), but the District Court's holding to the same effect is correct and undisputed.⁵ Moreover, there is no dispute that the Agreement was made under the conditions required by the STB. There also is no dispute that this private treble damages action under the Clayton Act constitutes a claim under the "antitrust laws." Therefore, only the third requirement is at issue on this appeal: whether Defendants complied with the Agreement's terms and any STB conditions in adopting the fuel surcharge. If they

⁵ *See Slip Op.* at 4 (JA 434); *see also EC-MAC Motor Carriers Serv. Ass'n, Decision No. 29669*, 2001 STB LEXIS 880, at *2 (Nov. 19, 2001) (Dkt. No. 151-19) ("Because their underlying agreements were approved by our predecessor, the Interstate Commerce Commission (ICC), the rate bureaus enjoy antitrust immunity").

did, then the formation and implementation of the fuel surcharge, which is the only conduct Plaintiffs allege violates the antitrust laws, is immune from Plaintiffs' attack.⁶

1. A data error does not violate the Agreement.

The Agreement defines the procedures for rate changes in Article 6. (JA 73-75.) Subsection (a), governing "general rate increases," requires that "discussion" be limited to "industry average carrier costs." (JA 74.)⁷

a. The Agreement governs what types of data may be discussed, not the precision of that data.

The phrase "industry average carrier costs" imposes an aggregation requirement. That is, the discussions leading to the tariff charges must use aggregate cost information, as distinguished from data specific to individual carriers or markets. This requirement follows as a matter of law directly from the Agreement's language and its purpose, *i.e.*, to avoid collusion by participating carriers who discuss their particular costs or the costs in specific markets.

⁶ Plaintiffs did not argue, nor did the District Court find, that there are any additional conditions required by the STB relevant here.

⁷ Plaintiffs allege that subsection (a) applies to the fuel surcharge. (*See Compl.* ¶ 64, JA 60.) Alternatively, subsection (c), governing "changes in tariff structures," might apply. Subsection (c) contains the same language limiting "discussion" to "industry average carrier costs." So, for present purposes it does not matter which subsection governs.

First, the phrase’s purpose is to prevent “*discussion*” of individual carriers or markets. Subsection (a) allows “general rate increases or decreases, provided *discussion of such increases* or decreases is limited to industry average carrier costs and, after July 1, 1984, *does not include discussion of individual markets or particular single-line rates.*” (Emphasis added.) The directive regarding industry average carrier costs is not that the agreed rate must match such costs but, rather, that the *process* of arriving at the agreed rate can only involve discussion of cost data at an aggregate, industry level instead of carrier- or market-specific data. Ratemaking agreements are process documents. *I.C.C. v. Am. Trucking Ass’ns, Inc.*, 467 U.S. 354, 356 (1984) (Agreements “describe the manner in which a bureau will negotiate collective tariffs.”).

The Agreement’s sole relevant limitation—on permissible “discussion”—focuses on the ratemaking *process*. Yet, the District Court dismissed this point without even considering it. The court concluded that because the fuel surcharge involved a data error, and “[d]iscussion of the rates necessarily precedes a decision to change them” (*Slip Op.* at 11, JA 441), Defendants must have violated the “discussion” requirement.

But that begs the question whether the Agreement only limits the discussion to data that is aggregate in nature or also requires that the data meet some precision requirement. By consistently linking the phrase “industry average carrier costs” to

a prohibition on *discussion* of individual carriers or markets, the Agreement focuses on an aggregation requirement, not a precision one. Defendants thus could discuss all aspects of rates—even in error—so long as they limited discussion to industry-wide data. It is undisputed that they did so.

Second, given the Agreement's focus on what topics Defendants could discuss, it would be illogical to impose a precision requirement. If the Agreement barred the participants from discussing imprecise data, they could never even debate whether they were using the correct data or making correct calculations from that data.

Third, requiring that the tariff precisely match some measure of industry costs would leave the participants highly vulnerable to antitrust claims based on a customer's after-the-fact assertion that some element of the data or calculation was inaccurate. Given the antitrust laws' four-year statute of limitations, a claim based on a purported data error could encompass millions of transactions. Regardless of whether the particular data error at issue here was large or small, a precision requirement would offer no safe harbor for minor or unintentional errors nor would it provide any basis for defining the type or magnitude of allowable errors. The threat of treble damages would always loom. In entering into the Agreement, the carriers could not have intended to impose on themselves an infallibility requirement, nor would the ICC or STB have required it. The Agreement's silence

regarding the type or magnitude of allowable imprecision reinforces the non-existence of any precision requirement in the first place.

The details of the fuel surcharge calculation, as approved by the ICC, illustrate the chaos that a precision requirement would necessarily create. The calculation did contain the following steps, among others:

1. Calculate the trip miles.
 - a. Identify the number of “shipment miles.”⁸
 - b. Divide the shipment miles by the average number of shipments in a truck load.
2. Calculate the number of gallons used by dividing the trip miles by the assumed miles per gallon of diesel fuel.
3. Calculate the revenues for the shipments.
4. Calculate the percentage surcharge applicable to those revenues that is needed to cover an assumed increase in price per gallon of diesel fuel.

Antitrust plaintiffs could point to any step in this process and argue that there was a data or methodological error. They could argue that the prior quarter’s data should have been used instead of the prior year’s data (or vice versa). *E.g.*, *CSX Transp., Inc. v. STB*, 584 F.3d 1076 (D.C. Cir. 2009) (complex litigation over whether rate should be based on one year or four years of prior data). They could argue that no historical data is sufficiently precise to estimate future conditions,

⁸ The “shipment miles” are the sum of all individual moves. Because a truck may carry more than one shipment at a time or be empty, the shipment miles will often differ from the trip miles for that truck. The industry aggregate data are kept in shipment miles, which need to be converted to trip miles.

such as fuel efficiency, or that the tariff must be recalculated more often. *E.g.*, *ExxonMobil Oil Corp. v. FERC*, 487 F.3d 945, 957 (D.C. Cir. 2007) (describing ratemaking procedure which is “adjusted annually to reflect predictions of industry-wide changes in costs”). Creative litigants could second-guess these and many other aspects of a ratemaking methodology.

The opportunities for such second-guessing in the context of antitrust litigation are illustrated by the fact that ratemaking processes before federal and state agencies can involve complex and vigorous disputes over the calculations of costs and revenues, both historical and prospective. *E.g.*, *CSX Transp., Inc. v. STB*, 568 F.3d 236, 239 (D.C. Cir.), *modified*, 584 F.3d 1076 (D.C. Cir. 2009) (describing a ratemaking process that is “both expensive and time-consuming” and can cost up to \$5 million to litigate). But, there is a crucial difference between contesting such matters in a regulatory proceeding that sets future rates, and contesting them in antitrust litigation that challenges a rate adopted years before. Antitrust litigation, with exposure for treble damages and attorneys’ fees and the threat of class actions, is potentially ruinous. It would be folly for the Agreement’s participants to accept those risks if any arguable deviation from the “correct” data and calculations could strip them of antitrust immunity. *See Horizons Int’l v. Baldridge*, 811 F.2d 154, 164 (3d Cir. 1987) (describing as a “defect” the possibility that registrants under the Webb-Pomerene Act could be held liable to

antitrust plaintiffs through “after the fact determinations that their activities were not exempt” and noting that Congress amended the Act to fix the defect).

By contrast, an aggregation requirement poses no such problem. Data is either aggregated or it is not. The aggregation requirement imposes an understandable, bright-line rule and allows the participants to limit their discussions to aggregate data without fear of antitrust plaintiffs second-guessing their every step.

Fourth, requiring a rate to precisely match costs and revenues ignores the fact that the Agreement’s “industry average carrier costs” language also applies to general rate increases. As the District Court recognized, a general rate increase may well “increase a carrier’s rate of return.” (*Slip Op.* at 12 n.4, JA 442.) Yet, by definition, increasing the carriers’ rate of return means that incremental revenues will exceed, rather than match, incremental costs. Under the District Court’s interpretation, the carriers could not carry out a basic type of ratemaking.

b. The Agreement provides a complete defense as a matter of law.

Defendants are entitled to summary judgment on their statutory immunity defense as a matter of law. *See Marrowbone Dev. Co. v. District 17, UMW*, 147 F.3d 296, 300 (4th Cir. 1998) (interpretation of agreement is a legal question). In opposing the § 1292(b) Petition, Plaintiffs argued that the District Court ruling was based on findings of fact regarding Defendants’ failure to comply with the

Agreement. Again, however, the only respect in which Defendants even allegedly violated the Agreement was by using “flawed data” in computing the fuel surcharge. (*Slip Op.* at 11, JA 441.) Such conduct would violate the Agreement only if the Agreement imposed a precision requirement. It did not.

Because the Agreement imposes only an aggregation requirement, the sole relevant factual issue is whether Defendants discussed non-aggregate, *i.e.*, carrier-specific, data. Plaintiffs have never even alleged, much less proved, that there was such a discussion.

2. Any attack on the Agreement’s validity is not properly before this Court.

Because Defendants carried out the terms of an STB-approved agreement, § (a)(6) of 49 U.S.C. § 13703 confers antitrust immunity. That provision does not condition antitrust immunity upon satisfying a provision of § (a)(1), which defines the carriers’ “[a]uthority to enter” the Agreement to begin with. Accordingly, as a matter of law, there is no need to show that actions carrying out the Agreement “under its terms” must also comply with a provision of § (a)(1).

First, the language of § (a)(6) looks only to the terms of the Agreement, not the terms of § (a)(1). *Cf. Nat’l Ass’n of Recycling Indus. v. Am. Mail Line, Ltd.* (“*NARF*”), 720 F.2d 618, 619 (9th Cir. 1983) (“the approval process itself shields conference agreements from the antitrust laws . . . even if the [rates] violate other Shipping Act provisions”). *Second*, § 13703(d)(1) provides that agreements

approved prior to December 31, 1995, the day before the effective date of the ICCTA, as the Agreement was, are treated as approved by the STB with no further requirement that they comply with subsection (a)(1).⁹ *Third*, Plaintiffs have not argued that the STB improperly approved the Agreement. As the District Court recognized, Plaintiffs' claim "does not assert a fault with the agreement itself." (*Slip Op.* at 11, JA 441.)

Fourth, any argument that the Agreement fails to comply with § (a)(1), if made, would be for the STB, not this Court.¹⁰ The statute provides a mechanism for parties wishing to challenge the STB's approval of an agreement. *See* 49 U.S.C. § 13703(c)(1). The Agreement is public. *Id.* §§ 13702(b), (c). Plaintiffs failed to exhaust their administrative remedies. Thus, they cannot seek review of this issue by a federal court in the first instance. *See Thetford Props. IV Ltd. P'ship v. U.S. Dep't of Hous. & Urban Dev.*, 907 F.2d 445, 447 (4th Cir. 1990) (no

⁹ This contrasts with the Motor Carrier Act of 1980, amending the predecessor of § 13703(a)(1), which required carriers to amend all ratemaking agreements then in effect to comply with the revised statute and submit the amended agreement to the ICC. Pub. L. 96-296, 96th Cong., 94 Stat. 793 § 14(e). Congress's decision not to impose such a requirement on existing agreements in the ICCTA was clearly a conscious one.

¹⁰ Although the validity of the Agreement itself is for the STB, not this Court, any such challenge would fail on the merits. The pertinent language of the Agreement was required by the ICC. *See Motor Carrier Rate Bureaus – Implementation of 96-296, Ex Parte No. 297 (Sub-No. 5)*, 364 I.C.C. 464, 1980 ICC LEXIS 9, at *71 (Dec. 19, 1980) (Dkt. No. 151-21).

party is entitled to judicial relief until the prescribed administrative remedy has been exhausted); *see also United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) (rejecting argument that was not raised before the ICC even though the ICC “had a predetermined policy on this subject which would have required it to overrule the objection if made”); *ExxonMobil*, 487 F.3d at 962 (denying review of argument that petitioners failed to raise in ratemaking proceeding).

Finally, Defendants are entitled to rely upon the STB’s approval as certifying that the Agreement is proper and, therefore, can justifiably look only to the Agreement’s terms. Otherwise, Defendants could obtain STB approval for the Agreement and engage in collective ratemaking relying upon the Agreement, only to have private litigants appear years later claiming that the STB should never have approved the Agreement. *See NARI*, 720 F.2d at 620 (where statutes provided for collective ratemaking and antitrust immunity, the “possibility of such potential retroactive [antitrust] liability for rates” set pursuant to an approved agreement but “later declared unlawful would place carriers in a position of great uncertainty” and “would be fundamentally contrary to the Congressional intent behind the . . . regulatory scheme”).¹¹

¹¹ *Cf. Chevron/Texaco Exploration & Prod. Co. v. FERC*, 387 F.3d 892, 897 (D.C. Cir. 2004) (when tariff filing is consistent with the method set forth in a rate rule, but exposes a flaw in that rate rule, the agency should devise a new rate rule “to be thereafter observed”).

B. Even If Antitrust Immunity Requires Compliance With 49 U.S.C. § 13703(a)(1), The Fuel Surcharge In Tariff 400-N Is Proper.

If, despite the foregoing, Plaintiffs could use this private antitrust litigation to argue, for the first time, that the Agreement does not comply with § (a)(1), and therefore the STB should not have approved it, such an argument would fail.

Subsection (a)(1) does permit the terms of the Agreement Plaintiffs challenge.

Subsection (a)(1) has two provisions potentially applicable here. The Agreement complies with both. Subsection (a)(1)(B) applies to “rates for the transportation of household goods” and § (a)(1)(G) applies to “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).” The District Court held that § (a)(1)(G) governs household goods carriers’ fuel surcharges.

(Slip Op. at 11-13, JA 441-43.)

1. If subsection (a)(1) applies to the fuel surcharge at all, § (a)(1)(B) is the operative provision.

To the extent that immunity requires compliance with § (a)(1), the applicable subsection is § (a)(1)(B) because it specifically governs the carriage of “household goods.” Section 13703 also governs other sectors of motor carrier transportation, such as general freight. The fact that one subsection specifically, and exclusively, applies to household goods carriers strongly indicates that it is the governing provision here. That conclusion is consistent with §§ 13701(a)(1)(A),

13702(a)(2) and 13702(c), which also apply only to “movement of household goods,” and § 13710(b), which excludes “transportation of household goods.” By distinguishing household goods carriage from all other sectors of motor carrier transportation, these four sections demonstrate a pattern and intention of providing separate provisions exclusively for household goods.

It is true, as the District Court noted, (*Slip Op.* at 11-12, JA 441-42), that § (a)(1)(G) does not expressly exclude household goods. But, neither does that subsection affirmatively state its applicability to household goods. With respect to household goods carriage, the specificity of § (a)(1)(B) trumps the generality of § (a)(1)(G). *See Rusello v. United States*, 464 U.S. 16, 23 (1983) (“Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally.”). It is illogical that Congress would have singled out household goods rates in § (a)(1)(B) only to then create a separate provision, § (a)(1)(G), that would swallow most of those very same rates.

The District Court focused on the fact that § (a)(1)(G) concerns “rate adjustments.” (*Slip Op.* at 12, JA 442.) For carriers other than household goods carriers, the statute has separate provisions for rates, *see* § (a)(1)(A), and rate adjustments, *see* § (a)(1)(G). For these carriers, the District Court could be correct that § (a)(1)(G) governs fuel surcharges rather than § (a)(1)(A). But for household

goods carriers in particular, the statute does not distinguish between rates and rate adjustments; both types are governed by § (a)(1)(B). Indeed, the STB has acknowledged household goods carriers' authority to impose fuel surcharges with no requirement that such surcharges be tied to industry costs. *Petition to Allow Short-Term Notice of Fuel Cost-Related Increases*, 1996 STB LEXIS 128, at *3 (Apr. 19, 1996) (Dkt. No. 151-24).

Subsection (a)(1)(B) does not require that household goods rates bear some specified relationship to carrier costs. Instead, the STB (not the antitrust court) may approve household goods ratemaking agreements under § 13703(a)(2), and may review the resulting rates for reasonableness under § 13701(a)(c). Accordingly, as Plaintiffs concede (and the District Court did not disagree), if § (a)(1)(B) applies, neither the Agreement nor Defendants' conduct in establishing the fuel surcharge run afoul of any statutory requirement.

2. Even if § (a)(1)(G) applies to the fuel surcharge, Defendants complied with its requirements.

Even if § (a)(1)(G) applies to the fuel surcharge in Tariff 400-N, Defendants retain antitrust immunity because that subsection tracks the language of the Agreement. Both focus on "industry average carrier costs." For the same reasons that the Agreement's use of that phrase imposes only an aggregation requirement, and not also a precision requirement, § (a)(1)(G)'s use of that same phrase likewise does not create a precision requirement.

Subsection (a)(1)(G)'s language focuses on the essence of the aggregation element, *i.e.*, assuring that carriers limit their discussion to industry-wide data:

- The rate adjustment must be based on “industry average” costs.
- There must be no discussion of “individual markets or particular single-line rates.”
- The rate adjustment must be one of “general application.”

By contrast, nothing in § (a)(1)(G) specifies a precision requirement. The statute contains no directive that the rate adjustment must be “equal to” carrier costs. Congress would have used that familiar phrase, or a synonym, had it so intended.¹² *See Nevada Dep’t of Motor Vehicles v. Hutchings*, 795 P.2d 497, 500 (Nev. 1990) (interpreting statute requiring that certain salaries “be ‘set based upon’ prevailing rates” and noting that “[w]e are confident that, had the legislature intended to require that such salaries be set ‘at’ prevailing rates, it would have expressly so stated”).

The term “based on” is not the same as “equal to.” *See McDaniel v. Chevron Corp.*, 203 F.3d 1099, 1011-12 (9th Cir. 2000) (“In the context of statutory interpretation, courts have held that the plain meaning of ‘based on’ is synonymous with ‘arising from’ and ordinarily refers to a ‘starting point’ or a ‘foundation.’”); *see also Watson v. FEMA*, No. 06-20651, 2006 WL 3420613, at

¹² A LEXIS search of the United States Code yields 76 references to the phrase “equal to cost.”

*2 (5th Cir. Sept. 6, 2006) (interpreting statutory phrase “based on” to mean “in reference to” rather than “equal to”). The phrase “based on” merely defines a point of reference. Subsection (a)(1)(G) does not require precise matching of rates and costs but only requires that the inputs underlying the methodology be industry-wide, which they indisputably were. The extent to which the methodology matches rates and costs presents a reasonableness question—not a prerequisite for antitrust immunity.

While the statute’s clear terms govern, *see United States v. Mitchell*, 39 F.3d 465, 468 (4th Cir. 1994); *Hawkins v. United States*, 244 F.2d 854, 857 (4th Cir. 1957), there also are strong policy reasons why Congress would not have intended to impose a precision requirement. For the same reason as discussed above regarding the Agreement, a statutory precision requirement would threaten carriers with treble damages antitrust exposure whenever someone claimed that, in hindsight, there was some error in the data or other aspect of the ratemaking methodology.

Additionally, reading a precision requirement into § (a)(1)(G) would assume only a *single* permissible rate adjustment. This ignores the complexities—and entirely appropriate debate about which data are “best” or “correct”—that are inherent in the ratemaking process. *See CSX Transp.*, 568 F.3d at 239. It likewise overlooks the statutory requirement that rates must be “reasonable.” 49 U.S.C.

§§ 13701(a), (b). *See Mont.-Dak. Utils. Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246, 251 (1951) (“Statutory reasonableness is an abstract quality represented by an area rather than a pinpoint.”).

C. Private Antitrust Litigation Is Not Necessary To Assure Rate Reasonableness.

The terms of the statute’s express antitrust immunity provision govern regardless of policy considerations. But, it is noteworthy that denying a private antitrust claim creates no unfairness. Unlike some antitrust immunity provisions that, if applicable, leave injured parties with no recourse, the ICCTA merely defines the forum in which injured shippers may seek compensation. *Cf. NARI*, 720 F.2d at 621 (rejecting argument that applying antitrust liability under the Shipping Act would leave plaintiff “without any effective remedy,” noting that “[p]rivate remedies do exist under the Shipping Act,” and that “[t]he path to more effective remedies begins in Congress, not the courts”). The ICCTA assigns rate reasonableness challenges to the STB, *see* 49 U.S.C. §§ 13702(c)(5), 13710(a)(2), 14701(b), and provides the STB with substantial powers. The STB can investigate the reasonableness of any rate, *id.* § 13703(a)(5), suspend an unlawful rate, *id.*, prescribe a lawful rate, *id.* § 13701(b), and order reparations “in an amount equal to all sums assessed and collected that exceed the determined reasonable rate.” *Id.* § 13701(d)(4).

There is nothing unfair in requiring an injured party to pursue the process devised by Congress for compensation. These enforcement mechanisms provide “strong incentives for motor carriers to abide by the terms of their rate-bureau agreements.” *I.C.C. v. Am. Trucking Ass’ns, Inc.*, 467 U.S. 354, 368 (1984). Congress “envisioned that the [STB]—and not the threat of antitrust liability—would be the primary enforcer of the guidelines.” *Id.*

Accordingly, because there is no dispute regarding any relevant fact, Defendants are entitled to summary judgment on their statutory immunity defense.

II. PLAINTIFFS’ TREBLE DAMAGES CLAIM IS FURTHER BARRED BY THE *KEOGH* DOCTRINE.

The District Court also erred as a matter of law when it concluded that the *Keogh* doctrine presents no bar to Plaintiffs’ claim for treble damages.

A. Congress Did Not Abrogate the *Keogh* Doctrine in the ICCTA.

1. The *Keogh* doctrine continues to apply, absent a clear legislative statement that the doctrine is abrogated.

For nearly a century, the *Keogh* doctrine has barred shippers from basing treble damages actions on a claim that their carriers’ published tariff rates were artificially high. The Supreme Court has reaffirmed the vitality of this bright-line doctrine in recent years. *Maislin*, 497 U.S. at 135; *Square D*, 476 U.S. at 421-23 (“[f]or *Keogh* represents a longstanding statutory construction that Congress has

consistently refused to disturb”; “the Keogh rule has been an established guidepost at the intersection of the antitrust and interstate commerce statutory regimes for some 6 1/2 decades”).¹³

Congress’ consistent refusal to revoke *Keogh*, despite ample legislative scrutiny of the transportation and energy industries, provides “powerful support” for the doctrine’s “continued viability.” *Id.* at 417. To be sure, Congress has partially deregulated significant portions of both industries. The Supreme Court has repeatedly held, though, that these “[g]eneralized congressional exhortations to ‘increase competition,’” *Maislin*, 497 U.S. at 135, are “insufficient to overcome the strong presumption of [the *Keogh* doctrine’s] continued validity.” *Square D*, 476 U.S. at 424.

Thus, “[i]f there is to be an overruling of the *Keogh* rule, it must come from Congress, rather than from this Court.” *Id.* In *Square D*, the Court refused to infer

¹³ Numerous courts of appeals have recognized this principle. *E.g.*, *Dolan*, 2010 U.S. App. LEXIS 2814 (applying doctrine to affirm dismissal of antitrust claims); *Tex. Commercial Energy v. TXU Energy, Inc.*, 413 F.3d 503, 508 (5th Cir. 2005) (“[T]he filed rate [Keogh] doctrine is very much a part of current federal antitrust law. It has been consistently applied as a defense to antitrust actions by various circuits and by the Supreme Court for decades.”); *Pub. Util. Dist. No. 1 v. Dynegy Power Mktg., Inc.*, 384 F.3d 756, 761 (9th Cir. 2004) (“Snohomish’s claims are barred by the filed rate doctrine”); *Town of Norwood, Mass. v. New England Power Co.*, 202 F.3d 408, 421 (1st Cir. 2000) (affirming dismissal of antitrust claims and refusing to “revisit[] the filed rate doctrine or . . . carve out exceptions that test the limits of the Supreme Court’s reaffirmation of the doctrine in *Square D*”); *Wegoland Ltd. v. NYNEX Corp.*, 27 F.3d 17 (2d Cir. 1994) (applying the doctrine to affirm dismissal of treble damages RICO claims).

that the Reed-Bulwinkle Act's provision for express antitrust immunity weakened the independent bar under the *Keogh* doctrine: "Nothing in the Act or in its legislative history . . . indicates that Congress intended to change or supplant the *Keogh* rule."¹⁴ 476 U.S. at 417. It further held that the Motor Carrier Act of 1980 ("MCA") could not overrule *Keogh* by mere implication:

Congress must be presumed to have been fully cognizant of this interpretation of the statutory scheme, which had been a significant part of our settled law for over half a century, and . . . did not see fit to change it when [it] carefully reexamined this law in 1980. [Respondent has] pointed to no specific statutory provision or legislative history indicating a specific congressional intention to overturn the longstanding . . . construction; harmony with the general legislative purpose is inadequate for that formidable task.

Square D, 476 U.S. at 420.

¹⁴ One likely reason the Court declined to view Congress's grant of statutory immunity as supplanting the *Keogh* doctrine is that each is premised on a separate aspect of the regulatory scheme. Statutory immunity is predicated on permissible collective ratemaking pursuant to agency-approved ratemaking agreements. *See* 49 U.S.C. § 13703(a)(6) (applying antitrust immunity to conduct in making or carrying out approved agreements). The *Keogh* doctrine, by contrast, turns not on the permissibility of collective ratemaking, but rather on the agency's rate oversight. Because of these different foundations, statutory immunity and the *Keogh* doctrine logically have different requirements. While the former depends on defendants having carried out the approved agreement, an alleged violation of the ratemaking agreement is irrelevant to the latter. *Square D*, 476 U.S. at 414 (dismissing antitrust claim under *Keogh* even where the plaintiff alleged that "the activities of the respondents were not authorized by the [ratemaking] agreement").

In *Maislin*, the Court likewise refused to infer that the MCA revoked *Keogh* although that Act “substantially deregulated the motor carrier industry.” 497 U.S. at 133. Instead, the Court again found that congressional silence in the face of such settled law reaffirmed *Keogh*’s vitality. *Id.* at 135 (“Nothing in the MCA repeals sections 10761 and 10762 or casts doubt on our prior interpretation of those sections.”).

2. The ICCTA preserved the regulatory system that underlies the *Keogh* doctrine.

The ICCTA’s silence on *Keogh* with respect to household goods should, likewise, be read to preserve the doctrine, not weaken it. Indeed, the ICCTA left intact the regulatory oversight that is at the very core of the doctrine—mandating the STB (and not the federal judiciary) with ensuring that household goods carriers’ rates “must be reasonable” and with policing compliance. 49 U.S.C. § 13701(a)(1). Congress gave the STB authority to carry out its mandate by requiring that household goods carriers “maintain rates and related rules and practices in a published tariff” that “must be available for inspection by the Board” and by shippers. 49 U.S.C. § 13702(c)(1). Carriers are “bound by the tariff,” can provide transportation “only if the rate for such transportation and service is contained in a tariff,” and “may not charge or receive a different compensation for the transportation or service than the rate specified in the tariff.” *Id.* §§ 13702(a)

and (c)(3). Shippers who believe they paid unreasonable rates for household goods transportation may complain to the STB. *Id.* § 13702(c)(5).

The ICCTA thus *preserved* the key structural elements that underlie the *Keogh* doctrine: the twin mandates that (1) an agency ensure that carriers' rates and practices are reasonable, and (2) carriers' published rates and practices bind them. These mirror the underpinnings of the *Keogh* doctrine, namely that: (1) "[w]hat rates are legal is determined by the Act to Regulate Commerce," as vested in the ICC, and (2) the carriers' published rates were binding on them and "had to be collected," and that shippers' rights "are measured by the published tariff." *Keogh*, 260 U.S. at 162-63; *see also Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577-78 (1981) ("The considerations underlying the [*Keogh*] doctrine . . . are preservation of the agency's primary jurisdiction over reasonableness of rates and the need to insure that regulated companies charge only those rates of which the agency has been made cognizant.") (alteration in original) (internal quotation omitted).

Nonetheless, the District Court inferred the abolition of the doctrine from the ICCTA's continuation of the long-standing requirement that carriers publish their tariffs, but its removal of the requirement that they file those tariffs with the STB. (*Slip Op.* at 14-15, JA 444-45.) That inference contradicts the holdings of both *Maislin* and *Square D* that the *Keogh* doctrine stands absent a clear legislative

statement “indicating a specific congressional intention to overturn the longstanding *Keogh* construction.” *Square D*, 476 U.S. at 420; *see also Maislin*, 497 U.S. at 135.

The District Court’s inference elevates form over substance, contrary to the purposes at the heart of the *Keogh* doctrine. The doctrine hinges on the substantive oversight vested in the administrative agency to ensure that published carrier tariff rates are reasonable—not on the procedural detail of whether carriers formally file their tariffs with an administrative agency before or after publication. *See E. & J. Gallo Winery v. EnCana Corp.*, 503 F.3d 1027, 1040 (9th Cir. 2007) (“[A]lthough the Supreme Court initially applied the Filed Rate Doctrine [*Keogh*] to actual filed rates, courts have held that the principles underlying this doctrine preclude challenges to a wide range of [regulatory agency] actions, not just the act of literal rate filing.”). Rates which are published but not filed still “must be available for inspection by the [STB].” 49 U.S.C. § 13702(c)(1).

That the existence of a legal tariff triggers the *Keogh* doctrine, regardless of the tariff’s filing, was highlighted in *Square D*. There, the Court held that *Keogh* immunity applied despite the fact that the tariff rates had not been affirmatively approved by the ICC in the way that the tariff in *Keogh* had been. *Square D*, 476 U.S. at 417.

3. The *Keogh* doctrine does not require that the tariff be filed with the regulatory agency.

Courts in the Fifth and Ninth Circuits have also interpreted *Keogh* to apply in cases involving rates not filed with the regulatory agency. For example, the Ninth Circuit has held that, despite the fact that defendant utilities no longer filed natural gas rates with FERC, *Keogh* barred treble damages actions over their unfiled rates because the FERC retained regulatory authority over them, even where it declined to exercise that authority. *E. & J. Gallo*, 503 F.3d at 1040. It also separately affirmed dismissal of a treble damages claim alleging unreasonable rates by electricity generators, even though partial deregulation had eliminated filed rates in favor of market rates. *Snohomish*, 384 F.3d at 760-61. The Fifth Circuit reached a similar conclusion in an overcharge action against a power generator that no longer filed its rates, where the regulatory agency retained rate oversight. *See Tex. Commercial Energy*, 413 F.3d at 509.

The District Court here erred by concluding, based upon a decision of the Seventh Circuit and a district court opinion from that circuit, that the ICCTA's removal of the tariff filing requirement thereby eliminated the *Keogh* doctrine. Both cases are inapposite. The first case, *Tempel Steel Corp. v. Landstar Inway, Inc.*, 211 F.3d 1029 (7th Cir. 2000), was not an antitrust case seeking treble damages, did not concern household goods carriers, did not concern rates, and did not directly address *Keogh*. Instead, that case concerned a general freight shipper's

claim under the Carmack Amendment for reimbursement of expenses incurred as a result of property damage to a large piece of machinery while in transit. The Carmack Amendment expressly made motor carriers liable for cargo damage en route from the United States to Mexico (where the shipper's machinery was damaged). 49 U.S.C. § 14706(a)(1). The defendant carrier took the position that the court "should have applied its tariff in lieu of the Carmack Amendment," where the "tariff" purported to disclaim all liability. *Id.* at 1030.

The Seventh Circuit rejected that argument. It held that after the ICCTA, carriers that no longer faced a tariff requirement (*i.e.*, all carriers *other than household goods carriers* and certain ones engaged in non-contiguous domestic trade) simply entered into contracts, which they called "tariffs" merely "out of habit." *Id.* Those agreements between shippers and carriers thus had no legal effect apart from their status as contracts. *Id.* Not so for household goods tariffs, like Tariff 400-N, which the ICCTA continues to require, with carriers legally bound to charge only the rates contained therein. 49 U.S.C. §§ 13702(a), (c)(3). Indeed, the authority *Tempel* relied on to support its holding recognizes that Congress specifically retained rate regulation over household goods movers. *See Munitions Carriers Conf. v. United States*, 147 F.3d 1027, 1029 (D.C. Cir. 1998).

Reliance on the second case cited below, *Chen v. Mayflower Transit, LLC*, 315 F. Supp. 2d 886 (N.D. Ill. 2004), is equally misplaced for the above reasons

and others. The Magistrate Judge in *Chen* did not even discuss *Keogh*, *Square D*, or *Maislin*. *Id.* at 891. Unlike this case, *Chen* did not raise a challenge to a fuel surcharge, or to any other tariff rate for that matter; the plaintiff did not challenge the tariff rate as unlawful, but only the defendant's subsequent conduct in applying the rate. *Id.* *Chen* also erred in treating household goods tariff requirements the same as the general freight carrier in *Tempel*, where there was no tariff requirement at all. More recent district court decisions support application of the *Keogh* doctrine. *See, e.g., United Van Lines, LLC v. Anthony*, No. 08-CV-11243, 2010 U.S. Dist. LEXIS 8672, at **8-9 (D. Mass. Feb. 3, 2010) (applying *Keogh* doctrine to a household goods carrier's rates that were contained in a published, but not filed, tariff); *Laufer Group Int'l, Inc. v. RGL-ROAM Enters.*, No. H-08-1083, 2009 U.S. Dist. LEXIS 78452, at **4, 8 (S.D. Tex. Sept. 1, 2009) (applying *Keogh* doctrine to tariff that was published but not filed).

The District Court's reliance on two distinguishable cases out of the Seventh Circuit in the face of controlling Supreme Court authority favoring continued application of *Keogh* constitutes legal error.

B. Discounting Does Not Forfeit *Keogh* Immunity.

The alternative ground the District Court cited for rejecting the *Keogh* doctrine is that Defendant carriers "routinely discount the collectively set rates in Tariff 400-N." (*Slip Op.* at 18, JA 448.) According to the District Court,

Defendant carriers' discounting meant that they "did not publish their actual rates in the manner required" by 49 C.F.R. § 1310.3, which states 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." (*Slip Op.* at 17-18, JA 447-48.)

There are several problems with the District Court's reasoning. *First*, the District Court ignored the definiteness of the fuel surcharge table set forth in Item 16 of Tariff 400-N and instead focused on separate tariffs, Tariffs 104-G, which set forth each Defendant carrier's individually-established discounts to the maximum collective tariff rates prescribed by Tariff 400-N. (*See Slip Op.* at 18-19, JA 448-49.) The court found that, because Defendants' individual 104-G tariffs were lacking in "objective criteria" for determining discounts available to shippers, *Keogh* protection did not apply to the collective Tariff 400-N, including the fuel surcharge table in Item 16. *Id.*

The District Court thus analyzed the issue as if Plaintiffs were challenging the discounted transportation charges in the Defendant carriers' individual 104-G exceptions tariffs, rather than the fuel surcharge percentages set forth in Item 16 of the collective Tariff 400-N. Indisputably, however, Plaintiffs challenge the fuel surcharge percentages and no other rates—in Tariff 400-N *or* Defendants' respective 104-G tariffs. Item 16 clearly specifies the exact percentage applying to

the transportation charges (discounted or not) when the published price per gallon of diesel fuel was at a particular level. (See JA 105.) For purposes of *Keogh* protection, it makes no difference that the surcharges published in Item 16 were in percentage terms instead of absolute dollar terms. See, e.g., *In re Hawaiian & Guamanian Cabotage Antitrust Litig.*, 647 F. Supp. 2d 1250, 1268-70 (W.D. Wash. 2009) (dismissing antitrust conspiracy claim and holding that *Keogh* doctrine bars challenge to fuel surcharge expressed as a percentage of base rate); *In re Universal Serv. Fund Tel. Billing Practices Litig.*, 300 F. Supp. 2d 1107, 1142-43 (D. Kan. 2004) (barring, under *Keogh* doctrine, antitrust challenge to published surcharges that were expressed in percentage terms). In short, the only conduct that Plaintiffs challenge is the establishment of the fuel surcharge percentages, and they have neither alleged nor proven that Defendants charged anything other than those percentages.¹⁵

Second, even if Defendants' pricing is treated as a discount to the fuel surcharge percentages, federal courts have repeatedly applied *Keogh* protection in

¹⁵ If Plaintiffs were correct that the discounted transportation charges in Tariff 104-G were insufficiently definite, then—at most—the *undiscounted*, Tariff 400-N rates would be the lawful tariff rates. But, the fuel surcharge percentages in Item 16 of Tariff 400-N would remain unaffected. Accordingly, the *Keogh* doctrine would still apply to both the maximum tariff rates *and* the fuel surcharge percentages Plaintiffs challenge. See *Maislin*, 498 U.S. at 130 (even agency cannot prevent collection of the lawful tariff rate due to the carrier's unreasonable practices when the carrier attempts to collect the tariff rate after the parties had negotiated a lower rate).

situations where the tariff did not contain the actual rates that were charged to customers. *See, e.g., Pub. Util. Dist. No. 1 v. IDACORP Inc.*, 379 F.3d 641, 651 (9th Cir. 2004) (“while market-based rates may not have historically been the type of rate envisioned by the filed rate doctrine, we conclude that they do not fall outside of the purview of the doctrine”); *Dynegy*, 384 F.3d at 760 (the filed rate doctrine precluded treble damages action where “FERC has waived many of the requirements that applied under the cost-based system”). This makes sense because the antitrust laws are designed to promote discounting and other forms of price and non-price competition. *E.g., Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223 (1993) (“Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition.”) (quoting *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 340 (1990)). The District Court’s rule would stand the antitrust laws on their head by *adding* potential treble damages liability for carriers that discount their rates, while leaving *Keogh*’s ban on treble damages in place for carriers that charge the higher, maximum tariff price.

Finally, the law disfavors creating exceptions to the *Keogh* doctrine. Rather, it is “applied strictly to prevent a plaintiff from bringing a cause of action even in the face of apparent inequities.” *Marcus v. AT&T Corp.*, 138 F.3d 46, 59 (2d Cir.

1998). The Second Circuit recently considered and rejected five purported exceptions to the doctrine. *Dolan*, 2010 U.S. App. LEXIS 2814, at **4-14.

III. THE STB'S PRIMARY JURISDICTION SHOULD BE RESPECTED.

The governing statute mandates that any “rate, classification, rule or practice” related to the transportation of household goods “must be reasonable,” and vests the STB with sole authority to police that mandate including, if necessary, “to stop or prevent” its violation. 49 U.S.C. §§ 13701(a) and (b). The Supreme Court has long held that “[w]henver a rate . . . is attacked as unreasonable . . . there must be preliminary resort” to the agency charged with ensuring that carrier rates are reasonable. *Great N. Ry.*, 259 U.S. at 291.

The Supreme Court repeatedly has reaffirmed this doctrine over the years and held that courts should ordinarily defer to the governing agency’s primary jurisdiction over rate disputes.¹⁶ The crux of Plaintiffs’ Complaint is their claim that the fuel surcharges they paid under Tariff 400-N were unreasonably high: it is

¹⁶ *E.g.*, *Reiter v. Cooper*, 507 U.S. 258, 268 (1993) (primary jurisdiction “is a doctrine specifically applicable to claims properly cognizable in court that contain some issue within the special competence of an administrative agency”); *Maislin*, 497 U.S. at 119 (“The [Interstate Commerce] Act altered the common law by lodging in the [Interstate Commerce] Commission the power theretofore exercised by courts, of determining the reasonableness of a published rate.”) (internal quotation omitted); *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 63 (1956) (“We have concluded that in the circumstances here presented the question of . . . the reasonableness of the tariff as applied, was within the exclusive primary jurisdiction of the Interstate Commerce Commission.”).

a rate reasonableness claim dressed in antitrust clothing. (*Compl.* ¶ 60, JA 55 (alleging that “the method by which Defendants agreed and conspired to calculate” the fuel surcharge is “unreasonable”).)

The District Court did “not construe plaintiffs’ claims as involving rate reasonableness” (or, implicitly, the reasonableness of a classification, rule, or practice) under 49 U.S.C. § 13701(a) and, instead, construed the fuel surcharge as a “rate adjustment” under 49 U.S.C. 13703(a)(1)(G). (*Slip Op.* at 2 n.1, 7, JA 432, 437.) However, Congress vested the STB with authority to determine the reasonableness of both rates and rate adjustments, and primary jurisdiction in the STB is thus appropriate regardless of how the fuel surcharge is characterized. *In re Steve D. Thompson Trucking, Inc.*, 989 F.2d 1424, 1433 (5th Cir. 1993) (“rate reasonableness is one area where uniformity and agency knowledge are essential to a proper result”).

Here, “the character of the controverted question and the nature of the enquiry necessary for its resolution” support referral to the STB. *Great N. Ry.*, 259 U.S. at 291. STB regulations broadly define a tariff rate to embrace any “applicable rates, charges and service terms,” which includes fuel surcharges. 49 C.F.R. § 1310.3(a).

The District Court’s refusal to yield to the STB’s primary jurisdiction was flawed for another reason: it gave primacy to its own interpretation of whether the

tariff met the requirements of 49 C.F.R. § 1310.3 rather than to that of the agency charged by law with making that determination. Courts should be loath to usurp an agency's role. *See W. Pac. R.R.*, 352 U.S. at 63. That is particularly true here, because the question of whether the fuel surcharge matrix in Item 16 “provided the specific applicable . . . charges” and was “arranged in a way that allow[ed] for the determination of the exact . . . charges . . . applicable to any shipment” under 49 C.F.R. § 1310.3. is squarely within the STB's expertise. *See Milne Truck Lines v. Makita U.S.A.*, 970 F.2d 564, 567 (9th Cir. 1992) (“Broadly speaking, the doctrine of primary jurisdiction requires that disputes regarding tariff construction be referred to the ICC if interpretation of the disputed term or phrase implicates larger issues of transportation policy that demand uniform administration by an expert body.”). As an example of STB involvement with some of the very matters at issue here, the STB permitted Defendants' statutory antitrust immunity to continue, despite its knowledge of industry-wide discounting practices, pending a ruling on the overall renewal of the Agreement. *See Household Goods Carriers Bureau Committee – Agreement*, 2000 STB LEXIS 80, at *2 (Feb. 11, 2000) (Dkt. No. 151-40); *STB Ex Parte 656*, 2004 STB LEXIS 791, at *2, n.2 (Dkt. No. 150-10). The STB also invited comment from the motor carriers and the public on any aspect of the Agreements, which certainly included fuel surcharges. *Id.*

All of these are issues that “have been placed within the special competence of an administrative body.” *W. Pac. R.R.*, 352 U.S. at 64 (quotation omitted). Likewise, Plaintiffs’ claim requires that a trier of fact compare the actual fuel surcharges with the hypothetical fuel surcharges that Plaintiffs claim would have prevailed absent the alleged conspiracy. Those evaluations of the actual and hypothetical fuel surcharges are appropriately addressed by the STB in the first instance. *Norfolk & W. R. Co. v. B. I. Holser & Co.*, 629 F.2d 486, 488 (7th Cir. 1980) (“the ICC should have primary jurisdiction when it is necessary to have an ‘examination of the underlying cost-allocation which went into the making of the tariff in the first instance’”) (citing *W. Pac. R.R.*, 352 U.S. at 69).

Because Plaintiffs’ claims inherently raise issues of rate reasonableness, and also implicate interpretation and application of agency regulations—matters for the STB in the first instance—this Court should respect the STB’s primary jurisdiction.

CONCLUSION

Defendants-Appellants respectfully request that this Court reverse the District Court's Order with directions to enter summary judgment in favor of Defendants-Appellants.

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Respectfully submitted,

Michael J. Morris
David Wells
THOMPSON COBURN LLP
One US Bank Plaza
St. Louis, MO 63101

John P. Linton
DUFFY & YOUNG
96 Broad Street
Charleston, SC 29401

Attorneys for United Van Lines,
LLC and Mayflower Transit, LLC

Robert K. Stanley
Kathy L. Osborn
BAKER & DANIELS LLP
300 North Meridian Street
Suite 2700
Indianapolis, IN 46204

/s/ Alan M. Wiseman
Alan M. Wiseman
Thomas A. Isaacson
Stephen Weissman
Grant Mandsager
HOWREY LLP
1299 Pennsylvania Avenue NW
Washington, DC 20004

Attorneys for American Moving and
Storage Association, Inc.

R. Bruce Holcomb
Christopher H. Wood
ADAMS HOLCOMB LLP
1875 Eye Street, N.W.
Washington, DC 20006

Attorneys for Atlas Van Lines, Inc.

Duke R. Highfield
YOUNG CLEMENT RIVERS
LLP
28 Broad Street
Charleston, SC 29401

Attorneys for Wheaton Van Lines,
Inc.

Nikole Setzler Mergo
Marguerite S. Willis
NEXSEN PRUET, LLC
1230 Main Street, Suite 700
Post Office Drawer 2426
Columbia, SC 29202
Phone 803-771-8900
Facsimile 803-253-8277

Attorneys for Atlas Van Lines, Inc.
and American Moving and Storage
Association, Inc.

REQUEST FOR ORAL ARGUMENT

Defendants-Appellants request oral argument. This appeal presents numerous questions of first impression in this Circuit.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because:

[X] this brief contains [11,133] words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*

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Dated: February 22, 2010

/s/ Alan M. Wiseman
Counsel for Appellants

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 22nd day of February, 2010, I caused this Brief of Appellants to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

Mia L. Maness
MARK C. TANENBAUM, PA
241-243 East Bay Street
Charleston, South Carolina 29413
(843) 577-5100

Counsel for Appellees

T. Christopher Tuck
Robert S. Wood
A. Hoyt Rowell, III
Daniel O. Myers
Howard L. Siegel
RICHARDSON, PATRICK, WESTBROOK & BRICKMAN, L.L.C.
P.O. Box 1007 (29465)
1037 Chuck Dawley Blvd, Bldg. A
Mt. Pleasant, South Carolina 29464

Counsel for Appellees

I further certify that on this 22nd day of February, 2010, I caused the required number of bound copies of the Joint Appendix to be hand-filed with the Clerk of the Court and a copy of the Joint Appendix to be served, via U.S. Mail, postage prepaid, upon counsel for the Appellees, at the above address.

/s/ Alan M. Wiseman
Counsel for Appellants