

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 APPELLEES

**Howard L. Siegel
Robert S. Wood
A. Hoyt Rowell, III
T. Christopher Tuck
Daniel O. Myers
RICHARDSON, PATRICK,
WESTBROOK & BRICKMAN, LLC
1037 Chuck Dawley Boulevard, Building A
Post Office Box 1007
Mount Pleasant, South Carolina 29465
(843) 727-6500**

Counsel for Appellees

**Mark C. Tanenbaum
John P. Algar
Mia Lauren Maness
MARK C. TANENBAUM, PA
241-243 East Bay Street
Post Office Box 20757
Charleston, South Carolina 29413
(843) 577-5100**

Counsel for Appellees

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

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No. 10-1047 Caption: In re Household Goods Movers Antitrust Litigation

Pursuant to FRAP 26.1 and Local Rule 26.1,

Donald J. Beach who is Appellee, 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 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:

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s/Mia Lauren Maness
(signature)

01/26/10
(date)

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Pursuant to FRAP 26.1 and Local Rule 26.1,

Scott Hansen who is Appellee, 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:
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<p>Nikole Setzler Mergo Marguerite S. Willis Nexsen Pruet, LLC Post Office Drawer 2426 Columbia, SC 29202</p> <p>R. Bruce Holcomb Christopher H. Wood Adams Holcomb LLP 1875 Eye Street, N.W. Washington, DC 20006</p>	<p>Alan M. Wiseman Thomas A. Isaacson Stephen Weissman Grant Mandsager Howrey LLP 1299 Pennsylvania Ave., N.W. Washington, DC 20004</p> <p>Robert K. Stanley Kathy L. Osborn Baker & Daniels, LLP 300 North Meridian Street, Suite 2700 Indianapolis, IN 46204</p>	<p>Michael J. Morris David Wells Thompson Coburn, LLP One US Bank Plaza St. Louis, MO 63101</p> <p>John Linton Duffy & Young 96 Broad Street Charleston, SC 29401</p> <p>Duke R. Highfield Young, Clement, Rivers, LLP 28 Broad Street Charleston, SC 29401</p>
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Pursuant to FRAP 26.1 and Local Rule 26.1,

Burnetta Nimons who is Appellee, 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
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Pursuant to FRAP 26.1 and Local Rule 26.1,

Thomas Scholtens who is Appellee, 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
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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:
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Pursuant to FRAP 26.1 and Local Rule 26.1,

Jeffrey L. Stoloff who is Appellee, 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:

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Pursuant to FRAP 26.1 and Local Rule 26.1,

Natalie Trueworthy who is Appellee, 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:
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If yes, identify any trustee and the members of any creditors' committee:

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No. 10-1047 Caption: In re Household Goods Movers Antitrust Litigation

Pursuant to FRAP 26.1 and Local Rule 26.1,

Robert E. Boone who is Appellee, 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:
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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:
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No. 10-1047 Caption: In re Household Goods Movers Antitrust Litigation

Pursuant to FRAP 26.1 and Local Rule 26.1,

Gary Moad who is Appellee, 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:
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Pursuant to FRAP 26.1 and Local Rule 26.1,

Laurel Moad who is Appellee, 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:
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STATEMENT OF ISSUES PRESENTED FOR APPEAL

1. The District Court found there was no genuine issue of material fact that Defendants discussed, agreed to impose, and did impose Fuel Cost Price Adjustments that were vastly in excess of industry average carrier costs. Did Defendants forfeit antitrust immunity under 49 U.S.C. § 13703(a)(6) by violating their own rate bureau agreement when they engaged in this behavior? Did Defendants lose statutory immunity because their conduct violates 49 U.S.C. § 13703(a)(1)(G), which limits immunity to rate adjustments of general application, provided they are based on industry average carrier costs?
2. Is the filed rate doctrine applicable to fuel surcharges that are not filed, published, or defined, and fail to contain information necessary to disclose the amount due the carrier?
3. Did the filed rate doctrine for Household Goods Carriers survive the ICC Termination Act of 1995?
4. Did the District Court abuse its discretion in ruling that it has jurisdiction to hear this case?

STATEMENT OF THE CASE¹

A. Nature of the Case

On March 19, 2007, Plaintiffs filed a class action complaint against Defendants under the federal antitrust laws of the United States, Section 1 of the Sherman Antitrust Act of 1890, 15 U.S.C. § 1, and Section 4 of the Clayton Antitrust Act of 1914, 15 U.S.C. § 15, as well as for recovery pursuant to Section 14704 of the Interstate Commerce Commission Termination Act of 1995 (ICCTA), 49 U.S.C. § 14704, of unreasonable, excessive, and unlawful fuel surcharges by Defendants. The claims stem from Defendants' imposition of fuel surcharges (Appendix 104-05), which Defendants represented merely recouped their increased cost of fuel above the base charge for fuel included in their transportation charge. In fact, the fuel surcharges produced revenue for the Defendants far greater than their actual increase in fuel cost.

B. Course of the Proceedings

After the original complaint was filed, additional class action complaints alleging nearly identical claims were filed in two other district courts. *Gary Moad*,

¹ Plaintiffs include their own version of the Statement of the Case, the Statement of the Facts, and the Standard of Review, although not required by Rule 28(b), Fed. R. App. P., because Defendants have failed to adhere to the sectional distinctions and content mapped out by Rule 28(a), Fed. R. App. P. Instead, they insinuate argument into a section where no argument should appear. *Hayes v. Invesco, Inc.*, 907 F.2d 853, 854 n.3 (8th Cir. 1990); *Hamblen v. County of Los Angeles*, 803 F.2d 462, 464 (9th Cir. 1986).

et al. v. Atlas Van Lines, et al. was filed on May 4, 2007, in the United States District Court for the Northern District of Illinois. *Robert E. Boone, Jr., et al. v. Atlas Van Lines, Inc., et al.* was filed on December 14, 2007, in the United States District Court for the Northern District of Alabama. Following motions made to the Judicial Panel on Multidistrict Litigation (Appendix 24), the three actions were consolidated for pretrial proceedings in the District of South Carolina.

On June 8, 2007, Defendants filed a joint motion to dismiss, claiming that the filed rate doctrine precluded Plaintiffs' claim and that Defendants enjoyed statutory immunity. On March 31, 2008, the District Court issued its order denying the joint motion to dismiss. (Appendix 30).

In February 2008 a related group of the original Defendants – Allied Van Lines, Inc.; North American Van Lines, Inc.; Sirva Inc. and Sirva Worldwide Inc. – filed a voluntary petition for protection under Chapter 11 in the United States Bankruptcy Court for the Southern District of New York. A Suggestion of Bankruptcy was filed in the District of South Carolina on February 11, 2008. (Appendix 30). Plaintiffs reached a class settlement with the bankrupt estate that was approved by the bankruptcy court on April 15, 2009.

On April 30, 2008, Defendants filed answers raising the same two affirmative defenses – statutory immunity and the filed rate doctrine. Thereafter discovery commenced. Each Defendant served a sworn declaration relating to

these issues. (Appendix 171-97). Subsequently, discovery focusing on these issues was completed.

Plaintiffs filed a motion for partial summary judgment on October 14, 2008, following completion of discovery. Defendants filed a cross motion for summary judgment on December 5, 2008.

C. Disposition Below

The District Court issued an Order and Opinion on September 10, 2009, granting Plaintiffs' partial motion for summary judgment and denying Defendants' motion for summary judgment. On September 21, 2009, Defendants moved for leave to appeal. On November 20, 2009, the District Court issued an Order granting Defendants' motion and certifying an interlocutory appeal of its September 10 Order and Opinion. On December 4, 2009, Defendants timely petitioned this Court for permission to appeal. The Court granted the petition on January 13, 2010.

STATEMENT OF FACTS

All of the facts set forth herein are uncontested. Defendants have filed a brief with this Court stating that they do not challenge any of the District Court's findings that there are no genuine issues of material fact.

A. Facts Relied on by Plaintiffs on Immunity Issues

1. Defendants agreed in 2001 to impose a fuel surcharge calculated as a stipulated percentage of the transportation charge when fuel prices increased to certain benchmark levels.

2. Defendant American Moving & Storage Association's (AMSA) Rule 30(b)(6), Fed. R. Civ. P., witness, Joseph Harrison, testified that the fuel surcharge was intended to compensate Defendant household goods carriers for increases in their cost of fuel and that it was required to be based upon industry average carrier costs. The cost of fuel increased in direct proportion to the number of miles traveled. Mr. Harrison filed a Declaration under oath, stating that Defendants devised the formula by which the fuel surcharge applicable to each benchmark fuel price was determined based on total industry miles and total industry revenue.

3. The District Court found that Defendants did not use in their formula total miles and total revenue, but that they either overstated their distance driven by a billion miles or understated their revenue received by hundreds of millions of dollars.

4. The District Court found that Defendants' fuel surcharges were not, in fact, based on industry average carrier costs and that they returned amounts vastly in excess of increases in fuel costs.

5. The District Court found no genuine issue that Defendants, in violation of their Rate Bureau Agreement, had discussions about and promulgated rates of general application that were not based on industry average carrier costs.

B. Facts Relied on By Plaintiffs on the Filed Rate Issue

6. The District Court found no genuine issue that the transportation rates that Defendants charged were never filed or published in any tariff. The rates were left largely to the discretion of Defendants' agents.

7. The District Court found no genuine issue that Defendants did not comply with 49 C.F.R. § 1310.3, which requires: "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."

8. The District Court concluded, "There simply is no way for a shipper to examine Defendants' tariffs and determine the applicable rate for a shipment."

9. Because the fuel surcharge imposed for a given shipment was calculated as a percentage of the transportation charge, shippers could not determine *ex ante* the exact fuel surcharge that would be imposed.

SUMMARY OF ARGUMENT

A. Defendants Failed to Contest the Facts Underlying the District Court’s Finding That Defendants Violated Their Rate Bureau Agreement. Those Uncontested Facts Preclude the Application of Statutory Immunity as a Matter of Law.

Defendants circumvented the decisions of the Interstate Commerce Commission (ICC), the Surface Transportation Board (STB), the applicable statutes, and their own Rate Bureau Agreement, all of which restricted any fuel surcharge to their increased fuel costs. In using a formula that could have produced a fuel surcharge for each benchmark fuel price approximating the actual fuel cost increase, Defendants used data to produce a set of fuel surcharges that would surreptitiously return revenue greatly in excess of increased fuel costs. Defendants earned hundreds of millions of dollars in illegal profits by imposing these surcharges from 2001 until their activities were exposed in 2007.

Defendants were signatories to an ICC/STB-approved ratemaking agreement (“Rate Bureau Agreement”) that allowed limited collective ratemaking and exempted them from the antitrust laws, *provided* the Rate Bureau Agreement was followed. The Rate Bureau Agreement permitted collective determination of general rate increases, but *only if* discussion of these increases was “limited to industry average carrier costs.” (Appendix 434). In 2001, Defendants agreed to impose a fuel surcharge on all household goods moves and included that surcharge

as Item 16 in their joint tariff, Tariff 400-N. It is the illegality of that 2001 *agreement to impose an illegal fuel surcharge* that is the focus of this litigation.²

Defendants' Rate Bureau Agreement, the statutory scheme, and decisions of the ICC and STB placed specific restrictions on legally permissible agreements regarding fuel surcharges. Both the ICC and the STB repeatedly ruled that fuel surcharges must return no more than the carriers' increased fuel costs. Defendants' Rate Bureau Agreement mirrors these uniform rulings and the statutory restrictions that specifically prohibit general rate increases that exceed or are born of discussion beyond industry average carrier costs. Defendants have expressly conceded that any joint agreement that did not comply with the terms of their Rate Bureau Agreement would not be entitled to statutory immunity.

The District Court found no genuine issue that Defendants' discussions about the fuel surcharges were not – as required by Defendants' Rate Bureau Agreement – limited to industry average carrier costs. The District Court further found no genuine issue that Defendants' fuel surcharges were based on a formula that could have approximated actual average industry carrier fuel cost increases if Defendants had, in fact, used data reflecting total industry miles and total industry

² The overwhelming majority of Defendants' brief is written in defense of their Rate Bureau Agreement. Neither Plaintiffs nor the District Court have challenged the Rate Bureau Agreement itself. Instead, the Rate Bureau Agreement is only important because Defendants failed to abide by its terms and therefore do not have statutory immunity.

revenue for the base year. The District Court found no genuine issue that Defendants overstated their mileage by approximately a billion miles, thereby overstating their fuel costs, or understated their revenue by hundreds of millions of dollars, ensuring that their fuel surcharge formula could not have been based on the industry average carrier cost of fuel. Defendants did not, and do not here, challenge these findings. Those uncontested facts preclude statutory immunity as a matter of law.

B. Defendants' Joint Agreement to Impose a Fuel Surcharge That Was Not Based On Industry Average Carrier Costs Was in Direct Violation of 49 U.S.C. § 13703(a)(1)(G) and Therefore Not Immune From the Antitrust Laws.

The relevant statute, 49 U.S.C. § 13703(a)(1)(G), is a codification of the limitation on available statutory immunity. It provides potential antitrust immunity for agreements on “rate adjustments of general application,” but only when they are “based on industry average carrier costs.” Defendants called their fuel surcharge a “Fuel Cost Price Adjustment.” The District Court’s conclusion that the fuel surcharge could not have been based on industry average carrier costs precludes the application of statutory immunity as a matter of law. Defendants’ bald assertion that they are protected as long as they used an “aggregation” approach, regardless of whether they misused the data they aggregated, has never been endorsed by any court or agency. The argument was invented for this appeal.

C. The Filed Rate Doctrine is Inapplicable Where Defendants Fail to File, Publish, or Even Have Definite Rates.

Defendants in fact do not publish their transportation rates in tariffs as required by federal regulations promulgated by the STB. Within a broad range, the rates that shippers actually pay are left completely to the discretion of Defendants' agents, thereby violating 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."

When a tariff does not contain a component necessary for calculating the total charge, the tariff is incomplete and invalid, because it "cease[s] to satisfy the fundamental purpose of tariffs; to disclose the freight charges due to the carrier," and is therefore not entitled to any filed rate protection that might otherwise exist. *Security Servs., Inc. v. Kmart Corp.*, 511 U.S. 431, 437 (1994). Defendants' tariffs did not contain a necessary component, namely the discount that would be granted. The District Court concluded, and again Defendants do not contest, "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." (Appendix 19). Because the actual transportation charge was indeterminate, the actual fuel surcharge was indeterminate, and therefore necessarily unpublished. The District

Court further concluded that the filed rate doctrine was rendered inapplicable to household goods carriers by Congress's passage of the ICCTA, which removed the industry's tariff filing requirement. Though that conclusion is correct and provides independent ground for the court's ruling, it is not necessary for an affirmance of the District Court's resolution of the cross motions for partial summary judgment.

D. Primary Jurisdiction.

Primary jurisdiction is not a doctrine that deprives a district court of jurisdiction. Whether to refer the claim to an agency is a matter within a district court's discretion, which will only be reversed on a showing of abuse. In this case no technical issues require the STB's expertise, and the agency has already decided in a consistent line of opinions every issue that was before the District Court. This case has nothing to do with "rate reasonableness." The clear, objective legal standard for a fuel surcharge is that the surcharge must be designed to return no more than the actual industry average increase in fuel costs.

ARGUMENT

STANDARD OF REVIEW

Two standards of review apply to the issues before this Court. The District Court's grant or denial of a motion for summary judgment is reviewed *de novo*. *Henson v. Liggett Group, Inc.*, 61 F.3d 270, 274 (4th Cir. 1995). A motion for summary judgment should be granted "if there is no genuine issue as to any

material fact and . . . the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c)(2); *Henson*, 61 F.3d at 274. The *de novo* standard applies to the questions of law involving statutory interpretation and impact of the ICCTA on the filed rate (or *Keogh*) doctrine. *Stone v. Instrumentation Lab. Co.*, 591 F.3d 239, 242-43 (4th Cir. 2009). The District Court’s decision to retain this case, rather than transferring it to the Surface Transportation Board under the primary jurisdiction doctrine, is reviewed for abuse of discretion. *Envtl. Tech. Council v. Sierra Club*, 98 F.3d 774, 789 (4th Cir. 1996).

I. DEFENDANTS DO NOT HAVE STATUTORY IMMUNITY WHEN THEY FAIL TO COMPLY WITH THE TERMS OF THEIR RATE BUREAU AGREEMENT.

A. Defendants Violated the Provision of Their Rate Bureau Agreement Limiting Their Discussions of General Rate Increases To Industry Average Carrier Costs.

Household goods carriers are entitled to statutory antitrust immunity only “with respect to making or carrying out” a rate bureau agreement approved by the STB. 49 U.S.C. § 13703(a)(6). Transgressions of a rate bureau agreement expose carriers to antitrust liability. *ICC v. Am. Trucking Ass’ns, Inc.*, 467 U.S. 354, 368 (1984) (interpreting predecessor of section 13703(a)(6)). Indeed, Defendants concede that their entitlement to statutory antitrust immunity depends on strict compliance with their STB-approved Rate Bureau Agreement. (Appellants’ Br. 11).

Defendants' Rate Bureau Agreement permitted joint determination of "general rate increases ... *provided discussion ... is limited to industry average carrier costs.*" (Appellants' Br. 9; Appendix 434) (emphasis added). The quoted passage tracks language in the Motor Carrier Act of 1980, § 14(a), 94 Stat. 793, which modified the potential antitrust immunity for motor carriers established originally in the Reed-Bulwinkle Act of 1948, 62 Stat. 472. The Reed-Bulwinkle Act had given the ICC largely unlimited discretion to approve rate bureau agreements and thereby confer antitrust immunity, and the Motor Carrier Act established specific guidelines to which rate bureau agreements had to conform to be eligible for antitrust immunity. *See Am. Trucking*, 467 U.S. at 356. The immunity provision was revised again in the ICCTA, but the apparent purpose of this revision was merely to restate the substance of the previous provision more elegantly.

The fuel surcharges adopted by Defendants were unquestionably a general rate increase, i.e., "a general adjustment of substantially all the rates published in a rate bureau's tariff or tariffs." *Motor Carrier Rate Bureaus – Implementation of P.L. 96-296*, 364 I.C.C. 464, 491 (1980). The issue is whether the agreement establishing them transgressed the provision in Defendants' Rate Bureau Agreement limiting discussion to industry average carrier costs. As the District Court concluded, there is no genuine issue that the surcharges when adopted would

predictably return and when imposed did in fact return revenue vastly in excess of industry average carrier cost increases.

The District Court found no genuine issue that Defendants' agreed to a fuel surcharge formula that was manipulated by the inclusion of nearly a billion extra miles without including the corresponding revenue for those miles.³ (Appendix 438). The District Court concluded, "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.*" (Appendix 439) (emphasis added).

The Second Circuit Court of Appeals interpreted the language in the Motor Carrier Act, which Defendants' Rate Bureau Agreement tracks, as imposing a limitation on the amount of a general rate increase, not merely on the discussion of it. *See Niagara Frontier Tariff Bureau, Inc. v. United States*, 826 F.2d 1186, 1191 (2d Cir. 1987) (noting that the statute permits "collective action to establish general rate increases, provided that such increases are limited to industry average costs and that no discussion of individual markets or particular single-line rates is involved"). The interpretation makes sense because Congress was presumably

³ The ratio between miles and revenue is the key determinant in the accuracy of Defendants' formula. The variables must be calculated for and applied to the same universe of service, such as service provided to all shippers or service provided to a particular category of shippers. If miles are calculated for all shippers while revenue is calculated only for a category, the formula will return biased results, producing revenue in excess of the increased fuel costs.

interested in restraining the effects of collusive behavior, which it was authorizing within strict bounds, not merely the manner in which collusion occurred.

Even if the Rate Bureau Agreement limited only discussion, rather than the rate increases themselves, the fact that the surcharges returned revenue far in excess of industry average carrier cost increases itself necessarily implies that discussion exceeded permissible bounds. As the District Court concluded, Defendants' argument that they could comply with the limitation on "discussion" while actually adopting fuel surcharges in excess of industry average carrier costs "is a non-starter," because "[d]iscussion of the rates necessarily precedes a decision to change them." (Appendix 441).

Defendants failed to explain below and do not explain before this Court how they could possibly have reached an agreement to impose rates that grossly exceeded industry average carrier costs without discussing matters beyond industry average carrier costs. Defendants argue that the limitation in their Rate Bureau Agreement actually permitted them to "discuss all aspects of rates." (Appellants' Br. 19). But the argument that the language in their Rate Bureau Agreement should be construed loosely has been explicitly rejected by the Eleventh Circuit Court of Appeals. *See Am. Trucking Ass'n, Inc. v. United States*, 688 F.2d 1337, 1349 (11th Cir. 1982) (construing equivalent language in Motor Carrier Act and ICC rule), *rev'd on other grounds sub nom., ICC v. Am. Trucking Ass'n, Inc.*, 467

U.S. 354 (1984). The court rejected the argument that the language means only “that *when* costs are discussed only industry average information may be used, but that the statute could not mean that only cost information may be discussed.” *Id.* Defendants were not permitted to discuss “all aspects of rates.” They could not discuss demand factors or any other variable that would affect rates beyond industry average carrier costs, and no reasonable person could conclude that Defendants could adopt a schedule of fuel surcharges producing revenue grossly in excess of average industry cost increases without discussing *something* more than average industry costs.

In summary, the District Court found that (1) the surcharge was not based on industry average carrier costs and (2) Defendants’ discussions leading to the adoption of the fuel surcharge were not limited to industry average carrier costs. Defendants chose not to offer evidence on these issues and do not contest the relevant facts now. Defendants state in their brief, “Although the District Court made some factual findings regarding the existence of the data error . . . , Defendants do not dispute those findings for purposes of this appeal.”⁴ (Appellants’ Br. 15). The uncontested facts have a necessary legal implication –

⁴ The misleading euphemism “data error” appears repeatedly in Appellants’ brief, but was never used in the District Court’s Order and Opinion. The misleading implication that this was a simple and innocent mistake is belied by the facts established and uncontested in the District Court. *See infra* section II-H.

that Defendants transgressed the bounds of their rate bureau agreement and thus have no statutory antitrust immunity.

B. Statutory Immunity is an Affirmative Defense and Defendants Failed to Offer Any Evidence to Establish Compliance With Their Rate Bureau Agreement.

In responding to Plaintiffs' motion for partial summary judgment, Defendants ignored their obligation under Rule 56(e), Fed. R. Civ. P., to come forth with facts to support each of the elements of their defense and create a genuine issue for trial. Section 13703(a)(6) grants immunity with respect to *making or carrying out* an approved agreement *under its terms*. Evidence that the agreement was "approved" and nothing more falls far short of sustaining their obligation in responding to a motion for summary judgment on the issue of statutory immunity. And "approval" is the *only* evidence Defendants offered. Had Defendants reached an agreement to fix the compensation they would pay their independent drivers, they could not support the statutory immunity defense by simply presenting evidence that they had an approved rate bureau agreement. Plaintiffs' submission in support of their motion establishes that there is no genuine issue as to the fact that Defendants' discussions of Item 16 were not limited to industry average carrier costs. But even if Plaintiffs had engaged in no discovery and come forth with no evidence, Defendants would still have been obligated to come forward with *some* evidence to establish that their discussions

leading to the agreement to adopt Item 16 were limited to industry average carrier costs. Those were the terms of their approved agreement. A party may not satisfy its Rule 56(e) obligation by ignoring it or relying solely on counsel to argue it.

II. COLLECTIVE AGREEMENTS ON RATE ADJUSTMENTS MUST SATISFY THE REQUIREMENT OF SECTION 13703(a)(1)(G) THAT SUCH RATE ADJUSTMENTS BE BASED ON INDUSTRY AVERAGE CARRIER COSTS TO BE ELIGIBLE FOR IMMUNITY.

The discussion in the previous section demonstrates that Plaintiffs are entitled to summary judgment on the issue of statutory immunity because Defendants violated their Rate Bureau Agreement. That conclusion renders unnecessary any consideration of whether section 13703(a)(1)(G) of the current regulatory statute applies to household goods carriers. Nevertheless, if the Court chooses to address this issue, subparagraph (G) does apply to household goods carriers.

A. The Immunity Paragraph of 49 U.S.C. § 13703 Is Conditioned on Satisfaction of the Requirements Contained in the Preceding Paragraphs.

Statutes creating antitrust immunity are narrowly construed. *See United States v. Gosselin World Wide Moving, N.V.*, 411 F.3d 502 (4th Cir. 2005). Defendants' attempt to detach the antitrust immunity provision of 49 U.S.C. § 13703(a)(6) from the statutory conditions in paragraph (a)(1), which limit eligibility for antitrust immunity, would result in an unwarranted and expansive

scope of immunity inconsistent with the language, scope, and structure of the statute.

The provisions of section 13703 critical to the instant case follow:

§ 13703. Certain collective activities; exemption from antitrust laws

(a) Agreements.—

(1) Authority to enter.— A motor carrier providing transportation or service subject to jurisdiction under chapter 135 may enter into an agreement with one or more such carriers to establish—

(A) through routes and joint rates;

(B) rates for the transportation of household goods;

(C) classifications;

(D) mileage guides;

(E) rules;

(F) divisions;

(G) *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); or

(H) procedures for joint consideration, initiation, or establishment of matters described in subparagraphs (A) through (G).

(2) Submission of agreement to Board; approval.— An agreement entered into under paragraph (1) may be submitted by any carrier or carriers that are parties to such agreement to the Board for approval and may be approved by the Board only if it finds that such agreement is in the public interest.

* * * *

(6) Effect of approval.—If the Board approves the agreement or renews approval of the agreement, it may be made and carried out under its terms and the conditions required by the Board, and the antitrust laws, as defined in the first section of the Clayton Act (15 U.S.C. § 12), do not apply to parties and other persons with respect to making or carrying out the agreement.

49 U.S.C. § 13703(a) (emphasis added).

Paragraph (1) of subsection (a) grants motor carriers “[a]uthority to enter” into rate bureau agreements to establish collectively a particular set of outcomes and procedures, specified in subparagraphs (A) through (H). 49 U.S.C. § 13703(a)(1). The statute grants carriers no authority to enter into a rate bureau agreement that covers any matter outside the specified list of items. A compliant agreement may be submitted to the STB for approval. 49 U.S.C. § 13703(a)(2). An agreement that does not satisfy the requirements of paragraph (1) may not even be submitted to the STB for approval. Moreover, the STB must refuse to approve even an agreement that does satisfy the requirements of paragraph (1) if it finds that the agreement is not in the public interest. 49 U.S.C. § 13703(a)(2). An approved agreement “may be made and carried out under its terms and under the conditions required by” the STB, and the antitrust laws “do not apply to parties and other persons with respect to making or carrying out the agreement.” 49 U.S.C. § 13703(a)(6). The logic of this provision is that a rate bureau agreement permitting collective action on a matter not specifically identified in subparagraphs (A) through (H) is ineligible for agency approval and consequent antitrust immunity. Any agency approval is ineffective, and the collective action contemplated by the agreement is fully subject to the antitrust laws.

In the instant case, however, Defendants’ Rate Bureau Agreement did contain restrictions that satisfied paragraph (1). Specifically, the Agreement

limited discussion of general rate increases to industry average carrier costs. When Congress revised in the ICCTA the antitrust immunity provision contained in the Motor Carrier Act, it likely intended merely to restate the substance of the prior provision in a simpler and more precise manner, especially given that the prior provision was distressingly convoluted.

Defendants argue implicitly that subparagraph (G), which authorizes rate adjustments of general application “based on industry average carrier costs,” is more rigorous than subparagraph (D)(i) of the Motor Carrier Act (49 U.S.C. § 10706(b)(3)(D)(i) (repealed)), which in effect authorized collective action on general, single-line rate increases or decreases “if discussion of such increases or decreases is limited to industry average carrier costs.” But there is no hint in the legislative history that Congress intended to work such a substantial change in the immunity requirement. Rather, Congress likely believed that the prior provision did in fact limit the level of rate adjustments by confining the discussion of them to industry average carrier costs, as the Second Circuit had found. *See Niagara Frontier Tariff Bureau, Inc. v. United States*, 826 F.2d 1186, 1191 (2d Cir. 1987). That is why Congress was content to permit rate bureau agreements approved under the Motor Carrier Act and in effect on the effective date of the ICCTA to remain in effect (49 U.S.C. § 13703(d)(1)), subject to periodic review by the STB (49 U.S.C. § 13703(c)(2)). And that is why the STB never insisted on its own

initiative (*see* 49 U.S.C. § 13703(c)(1)) or during periodic review that carriers revise their rate bureau agreements to conform to the language of the new statute. A revision was simply unnecessary to satisfy the manifest intent of Congress.

The District Court correctly ruled that section 13703(a)(6) provides potential antitrust immunity only with respect to rate bureau agreements that satisfy the requirements of subparagraphs (A) through (H):

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. § 13703(d)(1). To accept this argument, however, means that Congress would have countenanced immunity for carriers with agreements in contravention of the statute.

(Appendix 440-41).

Plaintiffs maintain that Defendants' Rate Bureau Agreement was not carried out under its terms, but that if its terms did not contain the restriction imposed by subparagraph (G), then the collective action setting fuel surcharges designed to return revenue far in excess of industry average carrier costs was never eligible for antitrust immunity. Despite Defendants' contrary assertion, Plaintiffs do not argue that the STB-approved Rate Bureau Agreement was invalid. Likewise, Defendants' argument that Plaintiffs were obligated to challenge that Agreement

before the STB is off point. Defendants' Rate Bureau Agreement was not inherently defective. Defendants have simply failed to abide by its limitations and those of the ICCTA.

B. Defendants' Fuel Surcharge Was a Rate Adjustment That Was Not "Based On Industry Average Carrier Costs."

If subparagraph (G) of the immunity provision (49 U.S.C. § 13703(a)(1)(G)) applies to household goods carriers, Defendants' fuel surcharge agreement violated it. That provision authorizes "rate adjustments of general application based on industry average carrier costs."

i. Defendants' Surcharge Was a Rate Adjustment of General Application.

Defendants' surcharge applied "general[ly]" to all shippers, and it was an "adjustment[]" to the transportation charge. In the transportation industry the term "rate" simply means "the price of a given service by a motor carrier." (Appendix 213:3-10). Defendants' fuel surcharge was simply an adjustment to the rate charged for the transportation of household goods. The rate adjustment only applied when fuel costs rose above the fuel costs included in the base rate, or base transportation charge. For example, in April 2006 if the national average price per gallon of diesel fuel was below \$1.137, the fuel surcharge did not apply, and there was no adjustment to the base rate. However, the fuel surcharge would apply and the rate would be *adjusted* when diesel fuel prices exceeded \$1.137 per gallon.

Indeed, Defendants themselves labeled their surcharge a “Fuel Cost Price Adjustment.” (Appendix 255-56) (emphasis added).

ii. Defendants’ Surcharge Was Not Based On Industry Average Carrier Costs.

After reviewing the evidence amassed during discovery, the District Court found no genuine issue that Defendants’ surcharge yielded revenue substantially exceeding the increase in industry average fuel costs. Defendants argue, however, that their surcharge nevertheless was “based on” industry average costs. Courts interpreting a term must be guided by its “ordinary meaning.” *Gonzales v. Carhart*, 550 U.S. 124, 152 (2007). Defendants’ stunning interpretation of the term “based on” bears no resemblance to the term’s ordinary meaning.

Defendants argue that “based on” as used in subparagraph (G) contains neither a “precision” requirement nor a directive that the rate adjustment be “equal to” carrier costs. But Plaintiffs have never contended otherwise, and the District Court never so held. When rates are adjusted by a percentage amount strictly to reflect a percentage change in costs, the rate adjustment will never “equal” the cost change. For example, if fuel costs represent 25% of a transportation rate and increase by 50%, the rate adjustment to account solely for the increased fuel costs would be 12.5%. Congress recognized that a rate change that accounts only for increased costs will be “based on” those costs even though the percentage change in rates will not equal the percentage change in costs. Congress did not intend to

authorize rate increases that exceed cost increases. Indeed, Congress in the ICCTA subjected the motor carrier industry to the forces of competition more fully than it had in the Motor Carrier Act, and it surely did not intend to prevent carrier cartels from raising rates *less* than a proportionate increase in costs. A “based on” standard provides more transparent authority for an agreement to raise rates less than a proportionate cost increase than would an “equal to” standard.

Moreover, ratemaking inherently involves a lag between the time rates are set and the time they are applied. In the meantime, the cost variables that determined what the rate was may change, causing the rates to diverge from actual costs. This same lag affects rate adjustments. Indeed, the concept of industry average carrier costs contains an assumption about the relevant period for which an average is calculated. Subparagraph (G) permits a surcharge that is calculated at a point in time as a percentage of transportation charge and is imposed later, even though when it is imposed it will not precisely equal average carrier cost increases as a result of changes in the cost conditions underlying the transportation charge. The statutory constraint is that the collective action to adopt the rate adjustment at the time it is adopted be designed to produce no more revenue than the increase in industry average carrier costs, even though actual revenue may diverge up or down from actual costs. Rate adjustments in the context of motor carrier rates are necessarily approximations, and Congress artfully took account of the imprecision

inherent in rate adjustments imposed prospectively by requiring that rate adjustments be “based on” average cost increases.

Defendants’ position, by contrast, makes a mockery of the statutory constraint. Defendants argue that a surcharge would satisfy the statute so long as it was calculated in a way that somehow incorporated industry average carrier costs as a variable. For instance, an agreement to impose a surcharge calculated as one hundred times the increase in industry average carrier costs would be “based on” industry average carrier costs under Defendants’ interpretation. Congress could not possibly have intended to impose such an empty requirement.

That the term does not bear the meaning Defendants now ascribe to it is demonstrated by Defendants themselves. Defendants defined the phrase “based on industry average carrier cost” to mean an estimate of actual costs in their description of their surcharge formula. Defendant AMSA’s 30(b)(6) witness, Joseph Harrison, agreed that Defendants were legally obligated to base their fuel surcharge formula on industry average carrier cost, and he explained that the formula used was supposed to cover fuel cost increases and no more. (Appendix 218:12-219:21). That formula depended critically on a calculation of (1) miles traveled and (2) revenue collected during a base year. The formula could have resulted in surcharges “based on industry average carrier costs.” But the formula produced exorbitant revenue because, even though mileage and revenue were

calculated as industry averages, the data for which averages were computed were not symmetrical for mileage and revenue.

A requirement that Defendants use numbers in their formula that were readily at hand and would have resulted in a sound approximation of increased costs is hardly burdensome. The District Court found no genuine issue that Defendants in developing their formula overstated distance traveled by a billion miles or understated revenue earned by hundreds of millions of dollars. That determination, in part, led the District Court to conclude that Defendants' "formula could not have been based on industry average carrier costs." (Appendix 439). And that is why Defendants' protestations about a "precision" requirement are a red herring. "Based on," in the case at bar, ironically means exactly what Mr. Harrison said it means.

C. The Defendant Household Goods Carriers Were Subject to Subparagraph (G).

Although Defendants' surcharge violated the requirement of subparagraph (G), Defendants contend that the subparagraph did not apply to them. Section 13703(a)(1) authorizes "motor carrier[s] providing transportation or service subject to jurisdiction under chapter 135" to enter into rate bureau agreements. Defendants do not dispute that household goods carriers are "motor carriers" and that they are "subject to jurisdiction" under the specified chapter. Rather, they argue that their fuel surcharges were "rates for the transportation of household goods," subject

only to the requirements of subparagraph (B) (49 U.S.C. § 13703(a)(1)(B)), and that subparagraph (G) applied only to carriers of other kinds of goods (which for convenience Plaintiffs designate herein as “freight”). (Appellants’ Br. 26).

By its terms, subparagraph (G) is not limited to freight carriers. Defendants argue, however, that it is implicitly so limited. Such a construction of the statute would expand the scope of potential antitrust immunity for household goods carriers, for they would be eligible for antitrust immunity for collectively determined “rate adjustments” even if not based on industry average carrier costs, and it is axiomatic that exemptions from the antitrust laws are construed narrowly. *See United States v. Gosselin World Wide Moving, N.V.*, 411 F.3d 502, 508 (4th Cir. 2005). Moreover, Defendants’ interpretation of the statute would lead to the peculiar result that household goods carriers are not subject to the requirement of subparagraph (G) pertaining to “rate adjustments” *because* it does not mention them, but they are eligible for immunity for collective action on “joint rates” (subparagraph (A)), “classifications” (subparagraph (C)), “mileage guides” (subparagraph (D)), and “rules” (subparagraph (E)) *even though* none of these provisions mentions household goods carriers. Tariff 400-N represents collective action in each of the latter set of areas. The only sensible interpretation of the statute, of course, is that household goods carriers are eligible for immunity based on collective activity pertaining to the enumerated areas, such as classifications

and mileage guides. But if they are, despite the fact that the relevant subparagraphs do not explicitly refer to them, then the most natural reading of the statute is that subparagraph (G) applies to them as well. Clearly it would make little sense to allow carriers to agree on rates for the transportation of household goods, but find that they acted illegally in promulgating rules or classifications. Yet using Defendants' statutory interpretation, (B) is the only section that mentions them specifically, therefore (B) contains the only subject upon which Defendants can reach joint agreements.

Considered from another angle, Defendants' interpretation is that subparagraph (A) applies only to freight carriers, whereas subparagraph (B) applies only to household goods carriers. But they insist that subparagraphs (C) through (H) apply to freight carriers and that subparagraphs (C) through (H) *except* (G) also apply to household goods carriers. If subparagraphs (C) through (H) supplement (A), logic dictates that they also supplement (B).

The District Court correctly concluded that subparagraph (G) applies to household goods carriers:

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.

(Appendix 441-42) (emphasis added) (footnote omitted).

D. The Limitation on Rate Adjustments Serves a Valid Purpose and Establishes An Objective Standard for Legality of Rates Without Resort to STB Review.

When a carrier imposes a “rate adjustment,” it represents to shippers and the STB that it is only passing through an increase in identifiable costs. That is the natural meaning of the statutory language and precisely how “rate adjustments” are defined. There is no reason for a shipper or the STB to suspect that the cartel is actually using the rate adjustment as a profit-generating mechanism.

Congress specifically limited “rate adjustments” eligible for an antitrust exemption to those “based on industry average carrier costs” to prevent cartels from increasing revenue and profits under the guise of a “rate adjustment” necessitated by increases in costs. In so declaring, Congress set up a simple standard. Industry average carrier costs are objective and relatively easy to calculate. Any question about the relationship between fuel surcharges and the statutory requirement that they be “based on industry average carrier cost” as applied to household goods carriers was resolved by the ICC in a 1990 decision on a household goods carriers’ petition regarding joint fuel surcharges. The ICC wrote: “With respect to collective action, fuel related increases may be filed on 10 working days’ notice . . . , subject to specific cost justification *based upon ‘industry*

average costs' and an expiration date of one year from the effective date of the proposal." *Amendment No. 3 To Special Tariff Authority No. 81-2500 Fuel-Related General Increases On Five Days' Notice, HGCB Petition to Reopen and Reconsider*, 1990 MCC LEXIS 128, at *2 (ICC Aug. 24, 1990) (emphasis added).

Defendants suggest that the STB has permitted household goods carriers to impose fuel surcharges that are not tied to industry costs. (Appellants' Br. 28). They are incorrect. In the case on which Defendants rely, (1) household goods carriers and (2) motor carriers providing service with water carriers in noncontiguous domestic trade sought permission to implement fuel surcharges on one day's notice, which was less than the notice normally required in implementing tariff changes. *Petition to Allow Short-Term Notice of Fuel Cost-Related Increases, STB Special Tariff Authority No. 9601*, 1996 STB LEXIS 128, at *1 (Apr. 19, 1996). The STB pointed out that it had no authority to impose any notice requirement on household goods carriers because they were no longer subject to a tariff filing requirement. *Id.* at *3. Therefore, the STB considered the petition solely as it related to motor carriers engaged in noncontiguous domestic trade. It said nothing about the permissible level of fuel surcharges, and it did not even hint that surcharges unrelated to cost would be permissible. Indeed, the petition strongly implied that the carriers intended to impose a surcharge solely reflecting increased fuel costs. *Id.* at *2.

Unquestionably, a surcharge is a kind of rate subject to the regulatory restrictions imposed on carriers. Otherwise, a carrier could evade regulation through the simple expedient of designating all charges imposed on shippers as “surcharges.” But the general authority to enter into an immune agreement establishing “rates for the transportation of household goods,” 49 U.S.C. § 13703(a)(1)(B), is supplemented and superseded by the authority to enter into an immune agreement establishing “rate adjustments of general application based on industry average carrier costs.” 49 U.S.C. § 13703(a)(1)(G). If regulated motor carriers *of any kind* enter into an agreement establishing a “rate adjustment,” that agreement can have no antitrust immunity unless the rate adjustment is “of general application based on industry average carrier costs.” Defendants contend that “the specificity of § (a)(1)(B) trumps the generality of § (a)(1)(G).” (Appellants’ Br. 27). But Defendants have the point backwards. Subparagraph (G) is the *specific* provision, applicable to a particular kind of rate, and subparagraph (B) is the *general* provision, applicable to the broad run of rates. (G) trumps (B).

Without question, Defendants were entitled to recoup their increased fuel costs through a rate adjustment. However, Defendants manipulated their formula and misled the shipping public as to the purpose of the rate adjustment. Defendants represented that they were merely passing on an increased operating cost through their surcharge when they explained, “The transportation charge may

be subject to a Fuel Surcharge (as shown on your shipping documents) that provides for a percentage adjustment to compensate your mover for the higher cost of diesel fuel.” (Appendix 427).

Defendants could have devised a formula that would have passed along no more than the industry average incremental costs of fuel. Mr. Harrison admitted that the fuel surcharge should not have collected more than increased costs. He further admitted that he knew it would have been illegal to skew the formula with numbers that would produce amounts in excess of actual increased costs. (Appendix 217:13-18, 240:18-22). Yet creating a formula that would produce excess revenue is exactly what Defendants did.

E. This Case Does Not Require a Determination of “Rate Reasonableness.”

Defendants repeatedly suggest that Plaintiffs are attempting to have the courts rule on the issue of “rate reasonableness.” To the contrary, the issue before this Court is simply this: Did Defendants use a methodology properly designed to establish fuel surcharges that reflected increases in fuel costs? To resolve Plaintiffs’ claim, the Court need not and should not determine in the abstract whether Defendants’ fuel surcharge was reasonable; rather the Court need only find that Defendants manipulated their own formula, which the ICC had determined could have resulted in an appropriate surcharge if used properly. The District Court so held, finding the issue undisputed on the record.

Whether Defendants' surcharge formula was based on industry average carrier costs, and therefore eligible for antitrust immunity, has nothing to do with the issue of "rate reasonableness." As the District Court noted: "Whether defendants' fuel surcharge is based on industry average costs and therefore eligible for antitrust immunity under section 13703(a)(1)(G) is unrelated to the reasonableness of defendants' rates." (Appendix 449 n.6). Congress has specified a simple, objective test that Defendants concede legally ties their fuel surcharge to the actual increase in the cost of fuel. Mr. Harrison testified that the formula was not supposed to produce profit and that Defendants could lawfully collect no more than the actual increases in fuel costs. (Appendix 217:13-14; 240:11-241:3). The method Defendants chose to calculate that amount was based upon a formula that required the use of industry revenue and industry miles attributable to the *same* universe of service. Defendants either used data that were asymmetrical or they did not. Checking the accuracy of that formula and verifying the obvious – that it produces revenue vastly in excess of industry average carrier cost increases – requires nothing more complicated than basic math skills. The formula with accurate data is the definition of rate legality and therefore rate reasonableness.

F. Defendants' Assertion that They Are Protected as Long as They Discuss Aggregate Numbers Is Without Authority.

Defendants assert that it does not matter what discussions they had with regard to the numbers they used in their formula, as long as they used *aggregate*

numbers – any aggregate numbers, false aggregate numbers or aggregate numbers that understate mileage by a billion. This bald assertion is breathtaking. Failing to cite a single authority for the proposition, Defendants simply state that the discussion limitation in their Rate Bureau Agreement imposes an *aggregation* requirement, not a precision requirement, i.e., that the provision prohibits discussion merely of individual costs.

This tortured interpretation ignores the holdings of *Niagara Frontier, supra*, *Am. Trucking Ass'n, Inc. v. United States*, 688 F.2d 1337, 1349 (11th Cir. 1982), *rev'd on other grounds sub nom., ICC v. Am. Trucking Ass'ns, Inc.*, 467 U.S. 354 (1984), and the clear language of their own agreement. What Defendants essentially argue is that they may literally discuss imposing any rates they want and may completely ignore the restriction relating to industry average carrier costs so long as they do not talk about their individual costs. Under this approach, Defendants are free to invent a fictitious set of average costs when they discuss rates.

The limitation on discussions is not simply a prohibition against discussing individual costs. Rather, as the *Niagara Frontier* court explained, the language should be interpreted to only allow “collective action to establish general rate increases, provided that [1] such increases are limited to industry average carrier

costs *and* [2] that no discussion of individual markets or particular single-line rates is involved.” *Niagara Frontier*, 826 F.2d at 1191 (emphasis added).

G. The District Court Did Not Impose a Precision Requirement.

Defendants assert that the District Court imposed an overly-burdensome “precision requirement” on their fuel surcharge formula. (Appellants’ Br. 11, 18). Considering that Defendants inflated their miles traveled by approximately a billion, Defendants’ characterization of their action as imprecision approaches the farcical. The District Court neither explicitly nor implicitly held that Defendants’ calculations had to be perfect. Rather, the District Court concluded that there was no genuine issue that Defendants’ formula did not generate fuel surcharges that even approximated industry average carrier cost increases. The data Defendants inserted into their formula were not merely imprecise; they resulted in surcharges that generated revenue wildly beyond industry average carrier costs. The term “based on” does not mean “the exact measure of.” It is not so strict. But it is also not so lax as to be meaningless. The statute requires that if carriers act jointly, they adopt rate adjustments expected to approximate industry average carrier costs. The surcharge formula Defendants used returned hundreds of millions of dollars in profits when it was required to be roughly revenue neutral.

H. The Fuel Surcharge Matrix Was Not A Mere “Data Error.”

While *scienter* is not an element of antitrust causes of action, Defendants’ attempt to cast themselves as the victims in this case by repeatedly referring to their manipulation of the formula as a “data error” and arguing that an innocent mistake is subjecting them to antitrust liability cannot go unchallenged.

It strains credulity to imagine that Defendants expended “considerable time and effort” to develop a methodology (Appendix 176 ¶16), which would generate fuel surcharges that their industry would depend upon to weather rising fuel costs, only to neglect to see if the formula actually worked. Defendants presumably would be at least interested in making sure that it did not return far *less* than was needed to cover their increased fuel costs.

Defendants could easily have examined a handful of hypothetical shipments at various increased fuel prices to determine the revenue their surcharges would generate. That due diligence would have demonstrated to Defendants the enormous excess revenue that their flawed methodology would return. As the District Court noted, referring to the testimony of Defendant Atlas’s Rule 30(b)(6) witness, this formula was simply about averages. All Defendants needed to do was

use the average shipment distance⁵ and the average transportation charge, information readily accessible to Defendants, in combination with the fuel surcharge percentage set for any increased fuel price, and they would have quickly discovered that their formula did not produce a fuel surcharge generating revenue anywhere close to the increased fuel cost on the average shipment. That their fuel surcharge matrix returned nearly four times their increased cost of fuel on the average shipment would have clearly and immediately established that their formula was not based on industry average carrier costs.

Even assuming, contrary to common sense, that Defendants did in fact neglect to test their formula before implementing it, Defendants pretend that they were unaware that it produced grossly excessive revenue in practice. Yet their internal documents, from carriers and shippers alike, characterized the fuel surcharge as “definitely excessive” (Appendix 277), “criminal” (Appendix 261), and an “absolute embarrassment to this industry.” (Appendix 276 ¶5). Defendants’ euphemistic “data error” did indeed result in victims, but Defendants are not among them.

⁵ The average shipment miles would need to be divided by two, because Defendants’ formula conservatively assumed that each truck carried an average of two shipments. But, even without dividing the average mileage by two, the fuel surcharge matrix returned at least twice as much fuel surcharge revenue as was required to recoup Defendants’ increased costs. (Appendix 319 n.1).

III. THE FILED RATE DOCTRINE IS INAPPLICABLE TO DEFENDANTS' RATES BECAUSE THE ACTUAL RATES WERE NOT CONTAINED IN DEFENDANTS' TARIFFS.

A. Defendants Ignored the Requirements of The Filed Rate Doctrine for Twelve Years Because They Assumed Congress Had Overruled the Doctrine with the Passage of the ICCTA.

This Court is, of course, not bound by past proclamations of a party or a party's counsel expressing opinions on the legal viability of the filed rate doctrine. In this case, however, Defendants' proclamations show clearly why their industry felt free to ignore the most basic requirements of the filed rate doctrine in failing to file, publish or pay attention to their stated tariff rates.

During this litigation, Defendants have repeatedly taken the position that the filed rate doctrine was not eliminated when Congress passed the ICCTA. Defendants insist that Plaintiffs' position and the District Court's ruling was in error. However, when Defendants first made that argument to the District Court, they failed to inform the Court that they operated for twelve years under the assumption that the filed rate doctrine indeed *had been eliminated* when Congress passed the ICCTA.

In 1995, Mr. Harrison, President of AMSA and Secretary of the Household Goods Carriers' Bureau Committee (HGCBC), wrote to North American Van Lines' Senior Counsel regarding the passage of the ICCTA and the HGCBC's suggestions on the STB's proposed regulations: "I didn't change the reference to

elimination of the filed rate doctrine since, as we discussed, it's a fact." (Appendix 446). Mr. Harrison was, of course, stating what his industry accepted as obvious.⁶ Just days earlier, Mr. Harrison, who was admitted as a Class 2 practitioner before the STB, submitted a pleading to the STB that he signed together with the HGCBC's attorneys. That pleading left no doubt about Defendants' position on whether Congress had eliminated the filed rate doctrine in the ICCTA: "*Notwithstanding its elimination of the filed tariff doctrine, Congress obviously intends that published tariffs afford sufficient safeguards to consumers and other tariff users.*" (Appendix 446-47) (emphasis added by District Court).

Defendants take the position in this litigation that Congress did not eliminate the filed rate doctrine knowing that they advanced the opposite position in a formal proceeding before the STB. Defendants, of course, may argue any position they choose in this case, subject only to the obligation of candor toward the courts. And counsel for Defendants were most likely unaware of the position Defendants and

⁶ Moreover, on March 16, 1998, the STB published its 1996/1997 Annual Report and noted: "The elimination of the tariff filing requirement for motor carriers (except for intermodal movements in noncontiguous domestic trade) precludes undercharge claims based on the filed rate doctrine from arising from transportation occurring now." See Surface Transportation Board 1996/1997 Annual Report, at 31 (available at <http://www.stb.dot.gov/stb/docs/ActivityReport1996-1997.pdf>). The only reasonable interpretation of this statement is that the elimination of the filing requirement was in essence the elimination of the filed rate doctrine. It appears that prior to the filing of Plaintiffs' pending lawsuit, Plaintiffs and Defendants were in complete agreement with the STB on the proposition that the filed rate doctrine had been eliminated.

previous counsel had taken before the STB. Plaintiffs do not maintain that Defendants' proclamations about the "obvious" death of the filed rate doctrine are authoritative. Those proclamations, however, as will be demonstrated in the following section, help shed light on why Defendants felt free to ignore the most basic form and content requirements of the doctrine, the statutes, and the federal regulations that governed those form and content requirements.

B. This Court Need Not Consider Whether Congress Eliminated The Filed Rate Doctrine Because Defendants Did Not Comply With The Doctrine In Any Event.

Even assuming for the purpose of argument that the filed rate doctrine as applicable to household goods carriers survived passage of the ICCTA, the doctrine does not protect Defendants from antitrust liability because they did not satisfy its most fundamental requirements. The applicability of the filed rate doctrine is dependent upon the filing of fixed, discernible rates. It is axiomatic that the filed rate doctrine could never operate as a defense when the carrier failed to file (or publish) its rates. When a filed tariff does not contain a component necessary for calculating the total charge, the tariff is incomplete and invalid, because it "cease[s] to satisfy the fundamental purpose of tariffs; to disclose the freight charges due to the carrier." *Security Servs., Inc. v. Kmart Corp.*, 511 U.S. 431, 437 (1994) (quoting *Jasper Wyman & Son – Petition for Declaratory Order –*

Certain Rates and Practices of Overland Express, Inc., 8 I.C.C.2d 246, 258 (1992)).

Under section 13702(c)(1) household goods carriers must “maintain rates and related rules and practices in a published tariff,” and the “tariff must ... be made available for inspection by shippers upon reasonable request.” 49 U.S.C. § 13702(c)(1). The STB has promulgated rules interpreting the tariff requirements applicable to household goods carriers. Specifically, the rules recognize that (1) the content of tariffs must be complete and clear,⁷ (2) the tariffs must be provided to shippers or available for inspection by them, and (3) carriers must give shippers effective notice of availability if the tariffs are not provided. The required content of a tariff is set forth in 49 C.F.R. § 1310.3(a):

(a) *Tariffs* prepared under this part must include an accurate description of the services offered to the public; *must provide the specific applicable rates, charges and service terms; 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.* Increases, reductions and other changes must be symbolized or highlighted in some way to facilitate ready identification of the changes and their effective dates.

(Emphasis added). In addition, 49 C.F.R. § 1310.4(a)(1) provides that carriers must either provide shippers with the “full text” of the comprehensive tariffs or

⁷ The STB explained that the required information in published tariffs must be “easily determinable from the tariffs” and “disclosed in a way that will be meaningful to individual consumers.” *STB Ex Parte No. 555 - Household Goods Tariffs, Notice of Proposed Rule Making*, 61 Fed. Reg. 56656, at 56656 (Nov. 4, 1996).

give shippers “actual notice” that the full text is “readily available for inspection by the shipper, free of charge upon request.”

Household goods carriers routinely discount the collectively set rates contained in Tariff 400-N. *See Motor Carrier Bureaus – Periodic Review Proceeding, Ex Parte No. 656*, 2007 WL 2946673, at *14 (STB May 4, 2007); *Investigation of Motor Carrier Collective Ratemaking and Related Practices and Procedures, Ex Parte No. MC-196*, 7 I.C.C.2d 388 (1991). The rates contained in Tariff 400-N, and its predecessor tariffs, are commonly called “benchmark rates” and are nothing more than the maximum amount that carriers have agreed to charge. (Appendix 448).

Each carrier Defendant in this case adopted Tariff 400-N, and each also developed a discounting tariff contained in Tariff 104-G, Defendants’ exceptions tariff. Each discounting tariff was essentially a list of percentages from zero to seventy, with the exception of Defendant Atlas which discounted up to sixty-five percent. Those discounts in Tariff 104-G were potentially applicable to every shipment, but the shipper had no way of knowing which discount might be offered by the carrier or the carrier’s agent. (Appendix 357-64, 448). Each carrier Defendant’s 30(b)(6) designee testified that there was no published, or for that matter written, list of criteria or factors that a carrier considered when determining what discount an individual shipper received. (Appendix 304:6-10, 308:8-20,

332:22-334:1, 354:17-355:1). Each designee also testified that the carrier's agents had unfettered discretion when determining the discount level for a given shipper within the specified range of discounts. (Appendix 304:6-10, 308:8-20, 332:22-334:1, 354:17-355:1). Most importantly, each designee testified that the shipper could not know what discount level he might be awarded until the carrier or the carrier's agent selected the discount. It is undisputed that Defendants each routinely discounted the tariff benchmark rates by whatever amount they chose depending on factors that were always in flux and never disclosed.

These uncontested facts formed the basis of the District Court's conclusion that in no event were Defendants protected by the filed rate doctrine:

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.)

* * * *

[T]here 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.

* * * *

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.

(Appendix 447-49) (footnote omitted).

Published rates simply did not exist. Neither Defendants’ Tariff 400-N written rules and regulations, nor the Tariff 104-G discount items, nor any other document provided any guidelines from which a shipper could determine the rate beforehand. If a carrier could determine the rate on the basis of any whim or secret criteria he chose at the moment he quoted a discount, then there was no definite rate before that moment. The admission that the transportation charge was a moving target subject to the whims of the carrier negotiating the charge means that a shipper could not possibly determine which discount would apply to his shipment, what his transportation charge would be, and whether the fuel surcharge that was a function of that transportation charge was appropriate, accurate, or legal. Defendants have failed to cite any legal authority for the proposition that “willy-

nilly” rates comply with the “specific applicable rates” and “exact rate” requirements of 49 C.F.R. § 1310.3(a).

Against both logic and the applicable law, Defendants appear to take the following position: Even though we have claimed in other quasi-judicial forums that the filed rate doctrine no longer exists, we now claim we are protected by the filed rate doctrine because we publish rates, notwithstanding that we do not publish the rates that we actually charge. Such a tariff is the legal antithesis of the tariffs that were at issue in *Keogh v. Chicago & N.W. Ry.*, 260 U.S. 156 (1922), *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986), and *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990). It bears not the slightest resemblance to the definite and uniform rates that were legally required to be charged, providing the foundation for the Supreme Court’s decisions.

In *Regular Common Carrier Conference v. United States*, 793 F.2d 376 (D.C. Cir. 1986), then-Judge Scalia addressed the statutory requirement that a rate must be contained in a tariff. The Freight Forwarders Tariff Bureau sought permission to publish a tariff rule that would allow freight forwarders, which were subject to the rate regulation of the Interstate Commerce Act, to “provide an average rate based on the average characteristic rating and mileage of freight tendered by the customer.” *Id.* at 378. The court recognized that “the rule does not provide that the ‘average rate’ offered to the shipper will be published in any

tariff.” *Id.* The court addressed the statutory requirements for publishing a rate set forth in 49 U.S.C. § 10761, which was the predecessor to the current statute – 49 U.S.C. § 13702:

Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission ... shall provide that transportation or service *only if the rate for the transportation or service is contained in a tariff* that is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving that person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device.

Id. at 379 (emphasis added). In the case at bar, the District Court recognized that the substance of section 10761 was carried forward to current section 13702, which provides:

Except when providing transportation for charitable purposes without charge, a carrier subject to jurisdiction under chapter 135 may provide transportation or service that is -- ... (2) for movement of household goods; *only if the rate for such transportation or service is contained in a tariff* that is in effect under this section. The carrier may not charge or receive a different compensation for the transportation or service than the rate specified in the tariff, whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device. A rate contained in a tariff shall be stated in money of the United States.

49 U.S.C. § 13702(a) (emphasis added).

The *RCCC* court held that the statutory “requirement for a ‘rate ... contained in a tariff’” is “utterly central to the Act.” *RCCC*, 793 F.2d at 379 (original

alteration). The court summarized the absolute requirement that the rate be contained in the tariff by quoting ICC Chairman Taylor's dissenting opinion in the underlying ICC decision:

The essential question before us, then, is whether the FFTB rule produces a "filed rate." We think Chairman Taylor's dissent answered that correctly:

What we have here ... is not a tariff rule that sets forth a rate, but rather a rule that simply announces *a pricing policy*. Essentially, the rule contains nothing more than an offer to negotiate and agree with shippers upon an "average rate." Clearly, the agreed upon rate will neither be published in nor readily ascertainable from any tariff on file with the Commission The proffered rule has been cleverly crafted to permit the forwarder *unfettered discretion* to secretly propose whatever "average rate" it wishes The filing is ... patently unlawful

Id. at 379-80 (original alterations) (emphasis added). The court distinguished volume discount tariffs and explained why the tariff provision was unlawful, specifically addressing the fact that the "rate" was not definite and could not be determined from the tariff itself:

The ICC argues that under many other tariff structures and rules approved by the Commission (but apparently not yet by the courts) the per-unit rate charged to a particular shipper does not appear on the face of the tariff. For example, under volume-discount rules competing carriers cannot determine the per-unit rate the carrier is charging without knowing the volume tendered by the shipper. But they do, at least, know *how* the per-unit rate is determined, enabling them to protest the application of a different formula to a particular shipper (and also enabling them to match the offer). Moreover, under the volume-discount rules the shipper himself *is* able to compute the precise per-unit rate to which he is entitled. Under the FFTB

“averaging” rule, by contrast, the carrier’s competitors do not even know how the “averaging” is conducted, and the shipper does not know whether it is conducted in the same fashion for him as it is for other shippers. For example, is the “average characteristic rating and mileage of freight tendered by the customer” to be computed on the basis of nationwide shipments or only shipments to a particular destination? (The rule does not say. In his letter to the Commission making the waiver application, FFTB’s General Manager asserted that the average would be computed on the basis of shipments “to a given area” – a disposition which, even if it were mandated, would be unacceptably vague.) For what period is the average to be computed – the past week, or month or year? (Again the rule does not say. FFTB’s General Manager contemplated nothing more specific than an average “for *a* past month” (emphasis added).) And how frequent shall be the “update[ing] as freight characteristic rating and mileage change”? We have no hesitation in holding that this unspecified “averaging” does not meet the requirement of § 10761(a) for a “rate ... contained in a tariff,” and therefore cannot be permitted under the waiver provision of § 10762.

Id. at 380 (original alterations) (citation omitted).

The problems of “unfettered discretion” and vagueness that doomed the “average rate” tariff in *RCCC* pale in comparison to the complete lack of any written rate parameters in the case at bar.

Defendants state that their Item 16 fuel surcharge percentages, which were applied to their transportation charges, were definite and unambiguous and that they, therefore, complied with the requirements of *Keogh*. But the percentages in the surcharge matrix did not exist in a vacuum. The percentages themselves were not rates and did not become rates until they were applied to transportation charges, and the transportation charges could not be calculated from the tariff

because, as Defendants concede, they were determined at the time of shipment based on factors that were unknowable by shippers. The STB's rule, 49 C.F.R. § 1310.3, requires that tariffs disclose exact *rates*, not percentages that are applied to indefinite rates. Defendants' citations of cases that approved percentages instead of absolute dollar terms (Appellants' Br. 42) are no more relevant to this inquiry than the line of decisions that allow them to impose fuel surcharges. It is the illegal and indefinite manner in which they imposed fuel surcharges that is at issue – not the fact they are stated in percentages.

Defendants' second filed rate argument is more a public relations appeal than a legal argument: discounting is good, we discount, therefore we are good and the filed rate doctrine protects us. Discounting may benefit shippers, if as a result of the practice the rates they are charged decline. But the STB has recognized that discounting off agreed upon rates does not necessarily result in competitive outcomes in the motor carrier industry generally or the household goods carrier industry specifically, which is in part why the agency has withdrawn its approval of rate bureau agreements. *See Motor Carrier Bureaus – Periodic Review Proceeding, Ex Parte No. 656*, 2007 WL 2946673, at *9-10, 14 (STB May 4, 2007). Defendants pass through the looking glass when they argue that refusing to apply the *Keogh* doctrine in this case because of their discounting would “stand the antitrust laws on their head.” (Appellants' Br. 43). They are in effect arguing that

the antitrust laws are served by an expansive interpretation of a doctrine that shields them from antitrust liability.

In any event, possible public policy advantages are not relevant to the issue of whether rates that are neither published as specific applicable rates nor arranged in a way that allows for the determination of the exact rate, charges, and service terms applicable to any given shipment are entitled to filed rate protection. No court has ever suggested such a result, and such a result would mean that filed rate protection is available to carriers regardless of whether they comply with applicable statutory and regulatory requirements related to filing or publishing rates in tariffs. Such a ruling would operate to negate the federal regulation, 49 C.F.R. § 1310.3, that mandates standards and procedures for rate publication.

Defendants cite *Public Util. Dist. No. 1 v. Dynegy Power Mktg., Inc.*, 384 F.3d 756 (9th Cir. 2004), suggesting it holds that “market-based” rates that have a “minimum and maximum” are entitled to filed rate protection. It does not. The case addressed an issue of preemption: whether the Federal Emergency Regulatory Commission (“FERC”) provided enough regulation to justify federal preemption of state laws. The court held that it did. But, as the opinion notes, the “market based” rates were struck down by FERC in an independent proceeding. The case hardly holds that such rates merit filed rate protection. The ICC has held that tariffs permitting motor carriers to charge between minimum and maximum rates, called

“range tariffs,” are unlawful. *See Range Tariffs of All Motor Common Carriers – Show Cause Proceeding, Ex Parte No. MC-213*, 1993 MCC LEXIS 112 (ICC Aug. 4, 1993).

IV. THE DISTRICT COURT CORRECTLY HELD THAT THE FILED RATE DOCTRINE NO LONGER APPLIES TO HOUSEHOLD GOODS CARRIERS.

The District Court correctly decided that the passage of the ICCTA rang the death knell for the filed rate doctrine for household goods carriers. (Appendix 444-45).

First promulgated in the antitrust context in *Keogh v. Chicago & N.W. Ry.*, 260 U.S. 156 (1922), the doctrine through the years came under increasing and vigorous questioning, culminating in Judge Friendly’s opinion in *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 760 F.2d 1347 (2d Cir. 1985), *rev’d*, 476 U.S. 409 (1986). On certiorari, the Supreme Court, calling Judge Friendly’s opinion “thoughtful and incisive,” *Square D Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409, 423 (1986), agreed that the *Keogh* decision may have been “unwise as a matter of policy.” *Id.* at 420. However, the Court refused to overrule the precedent. Its endorsement was tepid at best: “[I]t is more important that the applicable rule of law be settled than that it be settled right.” *Id.* at 424 (citation omitted). Ultimately the Court passed the issue to Congress: “If there is to be an

overruling of the *Keogh* rule, it must come from Congress, rather than from this Court.” *Id.*

In 1990 the Supreme Court again handed off to Congress responsibility for the filed rate doctrine. In *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990), the Court held that an ICC policy permitting motor carriers to charge rates below those contained in their filed tariffs directly conflicted with a carrier’s statutory duty to “file rates with the Commission” and to “charge only those rates” and was therefore invalid under the filed rate doctrine. *Maislin*, 497 U.S. at 126. The Court explained that if “strict adherence” to these statutory duties “as embodied in the filed rate doctrine has become an anachronism in the wake of the [Motor Carrier Act of 1980],” which substantially deregulated the motor carrier industry “in an effort ‘to promote competitive and efficient transportation services,’” *id.* at 133, “it is the responsibility of Congress” to change the statute. *Id.* at 136.

In 1995 Congress acted. The ICCTA retained a tariff *filing* requirement for carriers providing transportation “in noncontiguous domestic trade.” 49 U.S.C. § 13702(a)(1), (b)(1). Congress was fully cognizant that a filing mandate had been held to be a necessary condition for filed rate protection. It retained the requirement for some carriers, thereby potentially preserving the protection for

them, but omitted and abolished it for household goods carriers. As Judge Norton noted:

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.”).

(Appendix 444-45).

In so changing the law, Congress accepted the Supreme Court’s invitation and eliminated for household goods carriers a rule protecting anticompetitive conduct from antitrust damage liability that made little sense. “The preemptive effect of the filed rate doctrine, as its name plainly implies, *rested entirely on the filing requirement.*” *Ting v. AT&T*, 319 F.3d 1126, 1142 (9th Cir. 2003) (emphasis added). The District Court noted that two post-ICCTA precedents have recognized that the filed rate doctrine is “defunct for motor transport.” *Chen v. Mayflower Transit, Inc.*, 315 F. Supp. 2d 886, 916 (N.D. Ill. 2004), quoting *Tempel Steel Corp. v. Landstar Inway, Inc.*, 211 F.3d 1029 (7th Cir. 2000). (Appendix 446). Indeed, *Chen* arose out of a household goods carrier contract.

The import of Congress’s removal of the filing requirement was so obvious that, as previously noted, even Defendants, in a submission to the STB in 1996, conceded “the elimination of the filed tariff doctrine.” (Appendix 447).

V. THE DISTRICT COURT HAS JURISDICTION AND ITS DECISION TO RETAIN THE CLAIMS IS WITHIN ITS DISCRETION.

The argument that jurisdiction properly and exclusively resides in the STB requires no protracted discussion or analysis.⁸

Defendants' insistence that the STB's "primary jurisdiction" preempts that of the District Court misapprehends the doctrine. The District Court certainly has *jurisdiction*. The doctrine of primary jurisdiction is not, despite its name, jurisdictional. Indeed, it is invoked in claims which are concededly "properly cognizable in [the] court." *Cavalier Telephone, LLC v. Virginia Electric and Power Co.*, 303 F.3d 316, 323 n.10 (4th Cir. 2002) (emphasis deleted) (citation omitted).

Whether to refer a claim to an agency is a matter within the District Court's discretion, which will only be reversed on a showing of abuse. *Env'tl. Tech. Council v. Sierra Club*, 98 F.3d 774, 789 n.24 (4th Cir. 1996). The courts routinely look at four factors in determining whether to refer a matter to an agency: (1) whether the question is within the conventional experience of judges or it is within the agency's particular field of expertise; (2) whether the question is particularly within the agency's discretion; (3) whether there exists a substantial danger of inconsistent rulings; and (4) whether a prior application to the agency

⁸ The District Court judge himself characterized this appeal ground as a "throw away." Record on Appeal, Docket No. 170, Transcript of Hearing before the Hon. David C. Norton, November 19, 2009, 13-14.

has been made. *Global Naps N.C., Inc. v. BellSouth Telecomms., Inc.*, 455 F. Supp. 2d 447, 448 (E.D. N.C. 2006).

These criteria do not support referral. Under criterion (4), no application has been made to the STB. There is no danger of “inconsistent rulings” under criterion (3), as the STB, shortly after the initiation of the present suit, terminated its approval of all motor carrier rate bureau agreements, including the agreement at issue here.⁹

Addressing criteria (1) and (2) together, the questions decided are well within the conventional competence of the court and require no special agency expertise. *See, e.g., CSX Transp. Co. v. Novolog Bucks County*, 502 F.3d 247, 253 (3d Cir. 2007) (noting that a question turning on “precedent and statutory interpretation” requires no reference to the STB), *cert. denied*, 552 U.S. 1183 (2008); *BNSF Ry. v. Tri-City & Olympia R.R.*, No. CV-09-5062-EFS, 2009 U.S. Dist. LEXIS 94920, at *8 (E.D. Wash. Sept. 28, 2009) (finding STB expertise of no help in construing the terms and meaning of a contract).

⁹ “We conclude that termination of Board approval of all outstanding motor carrier bureau agreements has now become necessary and appropriate to protect the public interest. The public has a significant interest in having the competitive market set the rates for all shippers, without the restraint on competition that collectively set, antitrust-immunized class rates can produce. Our action today will protect all shippers, especially the small-volume or infrequent shippers who are most likely to lack the bargaining power to obtain market-driven discounts from the collectively set class rates.” *Motor Carrier Bureaus – Periodic Review Proceeding, Ex Parte No. 656*, 2007 WL 2946673, at *6 (STB May 4, 2007).

Moreover, the STB and its predecessor the ICC for over 35 years have consistently maintained that fuel surcharges may reflect only increases in fuel costs. *See, e.g.*, Common Carriers of Passengers, Express and Property & Freight Forwarders, 38 Fed. Reg. 34,771 (ICC Dec. 18, 1973); *Effect of Modifying Proclamation No. 3279 and Other Anticipated Energy Conservation Measures on the Operation of Carriers Subject to the Interstate Commerce Act*, 350 I.C.C. 563 (1975); Expedited Procedures for Recovery of Fuel Costs, 44 Fed. Reg. 33230 (ICC June 8, 1979); *Rail Fuel Surcharges, Ex Parte No. 661*, 2006 WL 2180211 (STB Aug. 3, 2006). Where the applicable agency has already construed and addressed the material question, referral serves no useful purpose. *United States v. W. Pac. R.R.*, 352 U.S. 59, 69 (1956) (“Certainly there would be no need to refer the matter of construction to the Commission if that body, in prior releases or opinions, has already construed the particular tariff at issue or has clarified the factors underlying it.”) *See also Madison County Mass Transit v. Hanfelder*, No. 00-CV-0179-DRH, 2001 WL 775977, at *2 (S.D. Ill. Feb. 7, 2001) (noting that courts have suggested that “primary jurisdiction does not require referral where the court already has clear guidance from the agency on the issue, and where referral would cause only further delay”).

Referral to the STB is neither appropriate nor necessary, and the District Court committed no abuse of discretion.

CONCLUSION

Collusive price fixing in violation of Section 1 of the Sherman Act is “the supreme evil of antitrust.” *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004); *see also FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 639 (1992) (“No antitrust offense is more pernicious than price-fixing.”); *TFWS, Inc. v. Schaefer*, 242 F.3d 198, 209 (4th Cir. 2001) (noting that horizontal price fixing “has been called ‘the paradigm of an unreasonable restraint of trade’”). It is illegal per se. *See United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940).

In the guise of merely recovering their increased costs, Defendants conspired to reap extraordinary profits by imposing a fuel surcharge on unsuspecting shippers. Their conduct was not exempt from the antitrust laws nor protected from treble-damage liability. Resort to the STB is unnecessary to determine that Defendants have no defense to Plaintiffs’ action.

REQUEST FOR ORAL ARGUMENT

Plaintiffs-Appellees request oral argument. Although the issues have been fully developed in the briefs, counsel believes the Panel would benefit from oral argument.

Respectfully submitted,

/s/ Howard L. Siegel

Howard L. Siegel

Robert S. Wood

A. Hoyt Rowell, III

T. Christopher Tuck

Daniel O. Myers

RICHARDSON, PATRICK,

WESTBROOK & BRICKMAN, LLC

P.O. Box 1007

1037 Chuck Dawley Blvd., Bldg. A

Mt. Pleasant, SC 29464

(843) 727-6500

AND

Mark C. Tanenbaum

John P. Algar

Mia Lauren Maness

MARK C. TANENBAUM

P.O. Box 20757

241-243 East Bay Street

Charleston, SC 29413

(843) 577-5100

Attorneys for Plaintiffs – Appellees

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Dated: March 25, 2010

/s/ Howard L. Siegel
Counsel for Appellees

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I hereby certify that on this 25th day of March, 2010, I caused this Brief of Appellees 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:

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

Counsel for Appellants

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

Counsel for Appellants

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

/s/ Howard L. Siegel
Counsel for Appellees