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

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ARGUMENT

Statutory Antitrust Immunity Applies. Plaintiffs' caution against interpreting Defendants' ratemaking Agreement to provide complete immunity for data errors is a red herring. Plaintiffs persistently confuse the issues of antitrust immunity and complete immunity. Defendants do not argue for complete immunity for data errors. On the contrary, Defendants have consistently argued that the STB has considerable powers to investigate unreasonable rates and order substantial remedies.

Applying the relevant, and well-settled, principles governing antitrust immunity provisions to the terms of the Agreement at issue here, Defendants' adoption of Tariff 400-N's fuel surcharge is immune from Plaintiffs' antitrust challenge by virtue of 49 U.S.C. § 13703(a)(6). Defendants indisputably complied with the terms of their ratemaking Agreement, requiring that their "discussion" of rates be "limited to industry average carrier costs." That phrase refers to the aggregate nature of the cost data and does not impose any substantive requirement regarding the data's accuracy.

Because of the harsh consequences of losing antitrust immunity, parties engaging in collective ratemaking need clearly observable rules regarding what they can, and cannot, do. Requiring that Defendants limit discussions to aggregate data achieves that goal. Thus, in resolving the antitrust immunity issue, the

antitrust court's role is only to assess whether Defendants stayed within clearly-defined limits and followed applicable procedures: not whether their work was error-free.

Plaintiffs' interpretation that the Agreement requires some unspecified degree of precision in the data is thus wrong as a matter of law. Requiring Defendants to avoid errors in data, calculations, and methodologies violates the basic tenets of antitrust immunity. As Plaintiffs concede, there is considerable room for second-guessing ratemaking choices, as illustrated by the complex disputes in cost-based regulatory ratemaking proceedings.

Keogh Doctrine Applies. The doctrine established in *Keogh v. Chicago & Northwestern Railway Co.*, 260 U.S. 156 (1922), and repeatedly reaffirmed for decades, independently bars Plaintiffs' antitrust claim. Plaintiffs' sole challenge is to the fuel surcharge published in Item 16 of Tariff 400-N. But Item 16 stipulated in exact terms if and when the surcharge would apply and how it would be calculated for all shippers. Plaintiffs' effort to defeat the doctrine's application by labeling the fuel surcharge as "indefinite" because Defendant carriers independently, and pro-competitively, discount base transportation rates ignores instructive precedent to the contrary. Also, Plaintiffs' reasoning paradoxically means Defendants would have enjoyed protection from private damages actions under *Keogh* had they exercised their legal right to charge considerably more.

The Interstate Commerce Commission Termination Act ("ICCTA") did not abolish the *Keogh*, also known as the "filed rate," doctrine for household goods carriers. That the ICCTA preserved the doctrine is reinforced by the Act's affirmative continuation of extensive regulatory oversight over household goods carriers. This regulation is embodied in the STB's policing powers over carrier ratemaking and practices.

Primary Jurisdiction Applies. Because Congress gave the STB primary responsibility for determining the validity of tariffs and the reasonableness of household goods rates, the District Court erred in giving primacy to its own views of the validity of Defendant carriers' discounting tariffs. And it likewise erred in not seeing this case for what it is: a dispute about the reasonableness of Defendants' fuel surcharge, subject to the STB's jurisdiction.

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

A. The Fuel Surcharge Complies With Defendants' STB-Approved Agreement.

Defendants' conduct is immune under § 13703(a)(6) if the fuel surcharge was adopted in compliance with the Agreement. The only ground on which Plaintiffs contest such compliance is that the Agreement supposedly imposes a precision requirement, which the data error failed. The Agreement, however, imposes no such requirement. Rather, it imposes only a data aggregation

requirement, which Plaintiffs do not argue, and the District Court did not find, was violated.

1. The Agreement does not impose a precision requirement.

The Agreement expressly permits collective ratemaking, including rate adjustments, "provided *discussion* of such increases or decreases is limited to industry average carrier costs." (JA 74, emphasis added.) The Agreement's plain language does not prohibit rate increases that "exceed" industry average carrier costs. (*Pls. Br.* 8.) Instead, by restricting only the permissible scope of discussion, the Agreement limits the *types* of data that Defendants may discuss. It does not set a standard for the accuracy of that data.

While Plaintiffs ignore the Agreement's sole focus on "discussion," and its significance, cases applying this language make clear that "discussion" must be accorded its plain meaning. *See Cent. & S. Motor Freight Tariff Ass'n, Inc. v. United States*, 843 F.2d 886, 897 (6th Cir. 1988) (interpreting provision identical to Agreement's language: immunity was unwarranted where "carriers *discuss* any costs other than industry average carrier costs or *discuss* individual markets or particular single-line rates, regardless of whether the resulting rate is or is not based on any such prohibited *discussion*," without regard to accuracy of data) (emphasis added).

The absence of a precision requirement follows not only from the Agreement's focus on what may be discussed, but also from the inherent need for clear, observable standards separating the permissible from the impermissible. Normally, competitors cannot collectively set rates without facing treble damages for price-fixing. Parties would eschew statutorily permitted and encouraged ratemaking if the data they used, or the calculations or methodologies applied to that data, were vulnerable to second-guessing years later by antitrust plaintiffs. The statutory scheme would be self-defeating.

The Supreme Court has warned against interpretations of antitrust immunity that would raise a "serious legal line-drawing problem." *Credit Suisse Secs. (USA) LLC v. Billing*, 551 U.S. 264, 279 (2007). Immunity cannot rest on an interpretation that makes it difficult "to distinguish what is forbidden from what is allowed." *Id*. at 280. This problem is especially acute, moreover, where the immunity involves "joint conduct." *Id*. at 282. Once Congress has decided to allow such joint conduct through antitrust immunity, courts should not define the scope of that immunity in ways that permit second-guessing over what is reasonable. Second-guessing "would have a 'chilling effect' on lawful joint activities … of tremendous importance to the economy." *Id*. at 283 (quotation and citation omitted).

Thus, the fact that an otherwise immune action may have been ill-advised, or even arguably outside the scope of granted authority, does not forfeit antitrust immunity. For example, in *Boone v. Redevelopment Agency of San Jose*, 841 F.2d 886, 892 (9th Cir. 1988) the court considered the state action antitrust immunity doctrine in the context of a statute that limited certain urban renewal to "blighted" areas. Given the inherently debatable question whether some area is, in fact, "blighted," the court held that officials were immune even if the area was not actually "blighted." *Id*. As here, "[a] contrary rule would tempt aggrieved parties to forego available [] corrective processes in hopes of obtaining the treble damages remedy conferred by the Sherman Act." *Id.* at 891 (citation omitted). Parties "do not forfeit their immunity merely because their execution of the powers granted to them … may have been imperfect in operation." *Id*. at 892.

Similarly, in *Llewellyn v. Crothers*, 765 F.2d 769 (9th Cir. 1984) plaintiffs argued that a state medical director conspired with doctors to limit reimbursement of chiropractic services under Oregon's workers' compensation law. Without questioning that the reimbursement limits were unreasonable, the court held that "[e]rrors of fact, law or judgment" do not forfeit antitrust immunity. *Id*. at 774 (quotation omitted). In other words, the court rejected precisely the analysis Plaintiffs urge here – it declined to find that a challenge to the reasonableness or amount of charges provided a basis for stripping antitrust immunity.

Likewise, Defendants are entitled to antitrust immunity, regardless of the reasonableness or amount of the fuel surcharges, so long as they discussed only aggregate data (a fact undisputed in this case). This aggregation requirement provides an observable, unambiguous standard: data is either aggregated or it is not.

By contrast, Plaintiffs' precision requirement flunks this test. Given the myriad ways litigants could second-guess the precision of data and its application to future shipments, no reasonable economic actor would risk treble damages under such conditions. To collectively make rates, as affirmatively encouraged by statute, carriers must be able to discuss a variety of industry-wide data. Plaintiffs do not dispute this. Indeed, they offer grounds for challenging a rate as imperfectly matching the underlying data, such as the inherent imprecision of a forward-looking fuel surcharge in relation to the historical cost and other data upon which it is based. (*Pls. Br.* 25.)

Plaintiffs' only attempt to cure the lack of clear guidance and the second-guessing inherent in a precision requirement is by arguing that the data error here was large and the Agreement (and the statute) implicitly exempts minor errors. (*Id.*) But, nothing in the Agreement's language offers a benchmark for defining permissibly small errors. It would require much judge-made law to define the magnitude of allowable errors. When courts engage in such line-drawing in the

immunity context without applying a clear objective standard, they "are likely to make unusually serious mistakes." *Credit Suisse*, 551 U.S. at 282. Thus, Plaintiffs' interpretation would still leave participants vulnerable to second-guessing as to the error's magnitude.

Because there is no statutory basis for creating and defining such a safe harbor, Plaintiffs' precision interpretation fails to provide an unambiguous observable standard, which is essential to antitrust immunity. The aggregation requirement is not only faithful to the Agreement's text, but also provides a clear standard.

2. The District Court did not find that Defendants violated the Agreement's aggregation requirement.

Plaintiffs erroneously argue that the District Court made factual findings that preclude this appeal. (*Pls. Br.* 8.) In the relevant passage, the District Court rejected Defendants' argument regarding the Agreement because "[d]iscussion of the rates necessarily precedes a decision to change them." (*Slip Op*. 11, JA 441.)

Plaintiffs do not identify the finding of "fact" that underlies this passage. If Plaintiffs are referring to a finding that Defendants discussed "rates," then they (and the District Court) are wrong as a matter of law. The Agreement does not forbid discussing "rates," nor could it. Collective ratemaking requires a discussion of rates. If Plaintiffs are referring to the data error itself as the factual finding underlying the District Court's statement in this passage, then they are merely

returning to the antecedent legal question of whether the Agreement imposes a precision requirement in the first place.

B. The Agreement's Compliance With 49 U.S.C. § 13703(a)(1) Is Not A Precondition To Antitrust Immunity.

Section 13703(a)(6) conditions antitrust immunity solely upon compliance with an STB-approved agreement. It does not condition immunity upon a judicial determination that the agreement complies with a provision of § 13703(a)(1).

As Defendants explained, without response from Plaintiffs, immunity turns on whether the Agreement was approved, not whether it should have been approved. *Cf. Nat'l Ass'n of Recycling Indus. ("NARI") v. Am. Mail Line, Ltd.*, 720 F.2d 618, 619 (9th Cir. 1983). Otherwise, carriers could, as here, face potentially ruinous liability for collective ratemaking pursuant to an agency-approved agreement if a court later held the approval was unwarranted.[1] Allowing a challenge to "conduct authorized under [regulator-approved agreements] would … diminish, if not destroy, the ability of carriers to enjoy the antitrust immunity envisaged in the Act." *Dreisbach v. Murphy*, 658 F.2d 720, 728-29 (9th Cir. 1981). Moreover, the statute treats agreements approved prior to the ICCTA's

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[1] A court may review the STB's approval of the Agreement pursuant to a proper challenge, but, the review would have prospective effect only. Section (a)(6) provides antitrust immunity for actions undertaken when the Agreement had STB approval.

effective date as approved by the STB without further requiring that they comply with § (a)(1). (*See Defs. Br.* 23-24.)

Plaintiffs take an inconsistent approach to this issue. They state that they are not attacking the Agreement. (*Pls. Br.* 22-23.) Yet, they also argue that an agreement that fails to comply with § (a)(1) "is ineligible for agency approval and consequent antitrust immunity." (*Id.* 20.) By arguing that the Agreement is ineligible for agency approval, Plaintiffs directly attack the Agreement.

As the District Court held, Plaintiffs did not argue below that the Agreement was ineligible for agency approval. (*Slip Op*. 11, JA 441.) They cannot argue it for the first time on appeal.

Plaintiffs' approval argument, moreover, is wrong. Section (a)(6) only asks whether the Agreement was approved, not whether it should have been approved. Retroactively denying immunity on the ground that an agreement should not have been approved would severely penalize carriers who justifiably relied upon their agreement's approval status. *See NARI*, 720 F.2d at 620. It also usurps the agency's statutory responsibility for determining whether to approve an agreement. Plaintiffs themselves highlight the STB's role in approving or rejecting agreements, (*Pls. Br.* 20), but then ignore the settled law requiring parties challenging an administrative determination to first exhaust administrative

remedies. (*Defs. Br.* 24-25.) Plaintiffs never challenged the Agreement before the STB.

Accordingly, whether the Agreement complied with a provision of § (a)(1) is not properly before an antitrust court. The only issue for antitrust immunity is whether Defendants' adoption of the fuel surcharge complied with the Agreement. The possibility that the Agreement allows conduct beyond the scope of § (a)(1) is an issue for the STB in the first instance.

C. Even If Antitrust Immunity Requires A Judicial Determination Of Compliance With 49 U.S.C. § 13703(a)(1), The Fuel Surcharge Is Proper.

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

Section (a)(1)(G), which Plaintiffs incorrectly assert applies, allows carriers to agree to rate adjustments on joint and single-line rates, so long as they do not discuss certain topics, including "particular single-line rates."[2] That is, the limited right to collectively adjust single-line rates cannot be used to defeat the prohibition on making single-line rates; otherwise, the "exception to the prohibition [would] swallow the prohibition." *Cent. & S. Motor Freight Tariff Ass'n*, 843 F.2d at 899.

However, unlike non-household goods carriers who may collectively set only "joint rates," *see* § (a)(1)(A), household goods carriers are permitted under §

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[2] A rate for transportation from point A to point B on one carrier is a single-line rate. 49 U.S.C. § 13703(g). If the shipment is switched to a second carrier at some intermediate point, the rate from A to B is a joint rate.

(a)(1)(B) to collectively set all rates, including single-line rates. Given this ability, it makes no sense to prohibit household goods carriers from discussing adjustments to those same rates.[3]

Moreover, even assuming arguendo that § (a)(1)(G) applies to household goods carriers, an agreement need only comply with one subsection. Thus, satisfying § (a)(1)(B) is sufficient even if § (a)(1)(G) also applies. "The use of the word 'or' in [§ (a)(1)] operates to provide alternatives," and Defendants "need not satisfy more than one subsection." *In re Philadelphia Newspapers, LLC*, __ F.3d __, No. 09-4266, 2010 WL 1006647, at *5 (3d Cir. Mar. 22, 2010).

Plaintiffs do not deny that if § (a)(1)(B) applies, Defendants' conduct meets that section's requirements.

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

Even if § (a)(1)(G) governs, the Agreement and the fuel surcharge comply. For largely the same reasons as discussed above regarding the Agreement, that subsection's phrase "based on industry average carrier costs" does not impose a

[3] Plaintiffs mischaracterize Defendants' argument as to § (a)(1)'s other subsections. Defendants do not argue that § (a)(1)(B), and *no other* subsection, applies to them because only § (a)(1)(B) "mentions them specifically." Other subsections can, and do, apply fully to Defendants. Unlike § (a)(1)(G), applying these subsections to household goods carriers is not inconsistent with their authority to collectively set single-line rates because "classifications," "mileage guides," and "rules" are not a subset of rates and do not prohibit household goods carriers from discussing the very same rates that Congress permitted under § (a)(1)(B).

precision requirement but, rather, requires that Defendants consider only aggregate data in adjusting rates. This standard provides the observable guidance that is central to collective ratemaking under antitrust immunity. Here, too, Plaintiffs cannot save their interpretation and its draconian consequences for any real or alleged data errors by saying that there is some safe harbor for lesser errors in § (a)(1)(G). As with the Agreement, interpreting that subsection to contain a safe harbor has no basis in the statutory language. Also as with the Agreement, it requires a court to define the safe harbor entirely with judge-made law, without any guidance from Congress or the STB. In other words, as Plaintiffs abstractly describe it, courts would draw a line between being "not so strict" as to require exactitude and yet "not so lax as to be meaningless." (*Pls. Br.* 36.) This is impermissible under *Credit Suisse*. 559 U.S. at 282 (line-drawing in immunity context is appropriate for agency, not courts).

Plaintiffs' argument for reading a quantitative requirement into § (a)(1)(G) is premised on the meaning of "based on." However, they cite no case holding that "based on" means "equal to" or "approximately equal to" or anything similar. As used here and in common parlance, "based on" means that something serves as the primary input or starting point. It does not necessarily mean that there is some equivalence or very close correspondence between those inputs/starting points and the end product. *See Watson v. FEMA*, No. 06-20651, 2006 U.S. App. LEXIS

29382, at *5 (5th Cir. Sept. 6, 2006) (FEMA may set assistance payments "based on" fair market rents "while still reserving the right to pay some fraction or multiple of the [fair market rent]"). For example, in proceedings to determine a reasonable attorneys' fee, courts often note that the fee is "based on" a lodestar representing the attorneys' hours and hourly rate. *E.g.*, *In re Ameritex Yarn, LLC*, 378 B.R. 107, 116 (M.D.N.C. 2007) ("based on lodestar"). Although the lodestar is the starting point and principal input into the fee calculation, the end result is often a multiple or fraction of that lodestar. *E.g.*, *Hyatt v. Apfel*, 195 F.3d 188, 192 (4th Cir. 1999).

None of Plaintiffs' cited cases support a precision requirement. The court in *Niagara Frontier Tariff Bureau, Inc. v. United States*, 826 F.2d 1186 (2d Cir. 1987) was solely concerned with the statute's requirement that discussion be limited to aggregate industry-wide data. It addressed ratemaking in which "the individual increases at specific [freight] terminals varied widely." *Id*. at 1188. The court held that the aggregation requirement was violated because "the proposal involved a 'discussion of individual markets' and was not limited to average industry costs." *Id*. at 1191. It held that the ICC's "conclusion that collective discussion of the rates in a particular locality is an impermissible discussion of individual markets is amply supported by the legislative history of the Act." *Id*. at 1191-92.

Similarly, the court in *Am. Trucking Ass'n v. United States*, 688 F.2d 1337, 1349 (11th Cir. 1982), *rev'd on other grounds sub nom. I.C.C. v. Am. Trucking Ass'ns*, 467 U.S. 354 (1984) addressed the argument that limiting discussion to industry average costs was "illogical and absurd" because factors other than costs, such as changes in demand, are relevant to setting rates. The court merely upheld the ICC's ban on discussing non-cost factors and said nothing suggesting that the discussion of costs is subject to a precision requirement.

Finally, in *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) the ICC directed household goods carriers to provide a cost justification for proposed fuel-related tariff increases. The fact that the *agencies* considered such cost information lends no support to Plaintiffs' assertion that the failure to precisely match surcharges with increased costs forfeits antitrust immunity. Indeed, it supports Defendants' argument that the ICC and the STB evaluate whether a proposed increase is reasonable in light of cost increases.

In using the phrase "precision requirement," Defendants were not suggesting that Plaintiffs were defining what particular degree of precision the statute requires under their interpretation. To the contrary, Plaintiffs avoid such definition, instead speaking in nebulous terms of "necessar[y] approximations." (*Pls. Br.* 25.) But,

the absence of any criteria for allowable errors or other safe harbor provision confirms that § (a)(1)(G) does not require quantitative precision in the first place. It focuses on the aggregate nature of the data and leaves quantitative assessments to the STB.

D. Antitrust Immunity For Discussions Of Aggregate Data, Combined With Regulatory Remedies For Data Errors, Produces A Reasonable Result.

Plaintiffs argue that Defendants' interpretation leaves Defendants "free to invent a fictitious set of average costs when they discuss rates." (*Pls. Br.* 35.) It does no such thing. The use of fictitious costs would subject Defendants to STB sanctions and its powers to require substantial relief.[4] Immunity from antitrust claims is hardly the same as immunity from all legal challenge. *See NARI*, 720 F.2d at 621 (sufficiency of administrative remedies in lieu of antitrust actions raises an issue for "Congress, not the courts"). The justification for finding a forfeiture of antitrust immunity "is unusually small" where there are adequate administrative remedies. *Credit Suisse*, 551 U.S. at 283.

Plaintiffs' attack on the fuel surcharge falls squarely within the STB's rate reasonableness jurisdiction. Plaintiffs base their Complaint on an STB decision regarding the reasonableness of railroad fuel surcharges. (Compl. ¶¶ 72-73, JA 63-

[4] Submission of a rate knowingly based on false data also might violate 28 U.S.C. § 1001, and likely other laws designed to ensure honest dealings with the Government.

65.) Plaintiffs' contention that they are not attacking the amount of the surcharge—but only an error in methodology (*Pls. Br.* 33-34)—is wrong on two counts. First, an antitrust claim inherently focuses on the injury from inflated prices. *See Windham v. Am. Brands, Inc.*, 565 F.2d 59, 66 (4th Cir. 1977) ("The gravamen of the complaint is not the [price-fixing] conspiracy; the crux of the action is injury…."). Thus, this antitrust claim requires an attack on the amount of the surcharge. Second, Plaintiffs' assertion understates the STB's authority. Every regulatory rate challenge argues that there is some error in the data, calculations, or methodology underlying the actual or proposed rate. The fact that Plaintiffs couch their reasonableness challenge in the guise of an antitrust claim does not strip the STB of jurisdiction.

The importance of barring antitrust actions that second-guess decisions on the basis of a claimed substantive error is especially great where there are administrative processes available to address such errors without triggering the antitrust laws' ponderous litigation and severe penalties. In *Interface Group, Inc. v. Massachusetts Port Authority*, 816 F.2d 9, 13 (1st Cir. 1987) (Breyer, J.), the court held that the fact that an airport authority's action may be "unreasonable" does not mean it "loses its antitrust immunity" under the state action doctrine. It warned against "transformation of state administrative review into a federal antitrust job." *Id.* (citation omitted); *see also Llewellyn*, 765 F.2d at 774 (Antitrust

immunity should not be narrowed so as to "tempt aggrieved parties to forego available [administrative] processes in hopes of obtaining the treble damages remedy conferred by the Sherman Act.").

E. The Factual Record Shows Defendants Complied With The Aggregation Requirement.

Plaintiffs' Motion for Summary Judgment (Doc. No. 144-2) challenged Defendants' statutory immunity defense on a single ground – that the data error forfeited immunity. Plaintiffs never argued that Defendants discussed anything other than aggregate data or that Defendants had failed to prove that their discussions were, in fact, so limited. Plaintiffs cannot raise that argument for the first time on appeal. *Muth v. United States*, 1 F.3d 246, 250 (4th Cir. 1993).

It was not Defendants' burden to anticipate arguments that Plaintiffs might first raise on appeal. To defeat Defendants' immunity defense, Plaintiffs had to show "an absence of evidence to support [an essential element of] the [non-moving party's] case." *FDIC v. Giammettei*, 34 F.3d 51, 54 (2d Cir. 1994) (citation omitted) (alteration in original). Only if Plaintiffs presented such evidence would the burden shift to Defendants to present counter-evidence. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-57 (1986). Plaintiffs did not.

In any event, Defendants introduced uncontroverted evidence that they only used aggregate data. (*See Larch Decl*. ¶ 13 (Doc. No. 144-5) ("[t]he fuel surcharge described in Item 16 of Tariff 400-N was the result of calculations by the

Committee and based on industry-wide data and the national average price of diesel fuel"); *see also Larch Dep*. at 24 (Doc. No. 144-33) ("We never talked about [individual companies'] averages. We talked about industry.").) Had Plaintiffs raised this issue, Defendants would have submitted additional uncontroverted evidence.[5]

F. Plaintiffs Mischaracterize The Data Error.

Although irrelevant to the legal issues, Plaintiffs' serious overstatement of the data error and repeated mischaracterizations of the District Court's decision require a brief response. Plaintiffs assert that "Defendants earned hundreds of millions of dollars in illegal profits" and purposefully "manipulated" the fuel surcharge as a "profit-generating mechanism." (*Pls. Br.* 7, 14, 30.) The District Court made no such findings, and there is no evidence supporting any of these accusations. To the contrary, the *undisputed* evidence affirmatively shows that Defendant carriers passed through 100% of the fuel surcharges to the independent agents and drivers who actually hauled the shipments. (*See Burns Decl.* ¶ 14 (Doc. No. 144-3) ("[a]ll Fuel Surcharge payments made by Wheaton's shippers pursuant to Tariff 400-M and 400-N have been passed 100% to the actual haulers"); *accord*

[5] With respect to Defendants' cross-motion for summary judgment on statutory immunity, if the Court concludes that the above evidence does not suffice, Defendants respectfully request that the Court vacate the denial of Defendants' cross-motion for summary judgment and remand for further proceedings on that cross-motion.

Hoover Decl. ¶ 8 (Doc. No. 144-4) (Atlas); *Larch Decl.* ¶ 14 (Doc. No. 144-5) (Mayflower, United).) Thus there is no evidence to support Plaintiffs' assertions that Defendants received some windfall as a result of the data error.

II. THE *KEOGH* DOCTRINE FURTHER BARS PLAINTIFFS' ANTITRUST CLAIM.

Plaintiffs fare no better in averting the *Keogh* doctrine as a bar to their treble damages claim. They devote little effort to defending the District Court's erroneous legal conclusion that Congress abolished the *Keogh* doctrine through enactment of the ICCTA. Indeed, they urge this Court to by-pass the issue altogether. (*See Pls. Br.* 41 ("This Court Need Not Consider Whether Congress Eliminated the Filed Rate Doctrine ….").) Instead, Plaintiffs' principal argument is that the fuel surcharge percentages in Tariff 400-N are not entitled to *Keogh* protection because Defendants discounted their base transportation rates under allegedly "invalid" tariffs – *i.e.*, Tariff 104, which included the individual carrier's discounts. Plaintiffs are wrong as a matter of law.

A. The Clear And Definite Fuel Surcharge Percentages In Tariff 400-N Do Not Lose *Keogh* Protection Because Of Pro-competitive Discounting.

Plaintiffs do not dispute that (i) the only tariff they challenge is that containing the fuel surcharge percentages in Item 16, which is Tariff 400-N, a tariff that they acknowledge in their Complaint was duly published (Compl. ¶¶ 61, 64, JA 56, 58), (ii) the information in Item 16 enabled shippers to determine if and

when the surcharge would apply, precisely how it would be calculated, and what the exact percentage charge would be, and (iii) Defendants in fact charged shippers the published fuel surcharge percentages. (*See Defs. Br.* 41-42.)

Plaintiffs nevertheless argue that Defendants forfeited *Keogh* protection because—notwithstanding the definiteness of the surcharge percentages in Item 16—the dollar amount of every fuel surcharge was "indefinite" and thus not published where carriers routinely discounted their base transportation rates. (*Pls. Br.* 49-50.) Yet, Plaintiffs challenge the fuel surcharge in Tariff 400-N, not the underlying transportation rates as discounted by Defendant carriers' separate respective 104 tariffs. It is undisputed that the fuel surcharge methodology and criteria in Item 16 are themselves definite and clearly inform shippers in advance of shipment if there would be a fuel surcharge and how it would be calculated. Indeed, the ICC repeatedly approved household goods carriers' calculation of the fuel surcharge as a percentage of the entire transportation charge[6] and

[6] *See* 38 Fed. Reg. 34, 771 (Dec. 18, 1973); 39 Fed. Reg. 5537 (Feb. 13, 1974); *Effect of Modifying Proclamation No. 3249*, 350 I.C.C. 563 (1975); 44 Fed. Reg. 33,230 (June 8, 1979); 44 Fed. Reg. 37,427 (June 26, 1979).

acknowledged carrier discounting[7] without any suggestion that these forfeited *Keogh* protection.

Plaintiffs offer no answer to the cases applying *Keogh* to surcharges and other rates that were specified in percentage as opposed to absolute dollar terms. (*See Defs. Br.* 42 (citing cases).) *See also Evanns v. AT&T Corp.*, 229 F.3d 837, 839-41 (9th Cir. 2000); *Hill v. BellSouth Telecomms. Inc.*, 244 F. Supp. 2d 1323, 1329 (N.D. Ga. 2003), *rev'd on other grounds*, 364 F.3d 1308 (11th Cir. 2004).[8]

Nor can Plaintiffs escape the federal courts' repeated application of *Keogh* to bar antitrust claims in cases where, as here, the tariff did not contain the actual rates charged to customers due to price competition and other market forces. (*See Defs. Br.* 42-43.) The only case Plaintiffs attempt to distinguish is *Public Utility District No. 1 v. Dynegy Power Marketing, Inc.*, 384 F.3d 756 (9th Cir. 2004), but, even there, they miss the mark. Plaintiffs assert that *Dynegy* "hardly holds that [market-based] rates merit filed rate protection." (*Pls. Br.* 51.) But, the Ninth Circuit clearly noted that the rates "were determined by competitive forces," and

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[7] *Motor Carrier Bureaus—Periodic Review Proceeding, STB Ex Parte 656*, 2007 STB LEXIS 215, at *43 (May 4, 2007) (observing that "shippers using [household goods] carriers generally receive discounts off the collectively set rates").

[8] The surcharge percentage matrices protected by the *Keogh* doctrine in *Evanns* and *Hill* were described in *In re Universal Serv. Fund Tel. Billing Practices Litig.*, No. 02-MD-1468-JWL, 2008 U.S. Dist. LEXIS 107727, at **15-23 (D. Kan. June 30, 2008), along with similar matrices protected in *Universal Service*.

could fluctuate widely based on the actual "market clearing price" established on a particular date. 384 F.3d at 758-59. And, contrary to Plaintiffs' assertion, the court explicitly held that the antitrust claims challenging such market-based rates "are barred by the filed rate doctrine." *Id.* at 761.

B. Even if Plaintiffs Are Correct About Tariff 104, The *Keogh* Doctrine Still Would Defeat Their Antitrust Claim.

Plaintiffs' reasoning for eliminating *Keogh* protection for the fuel surcharges goes too far. Under Supreme Court precedent, Plaintiffs' reasoning would compel the conclusion as a matter of law that the operative transportation rates between Defendant carriers and shippers were the *higher* transportation rates published in Tariff 400-N and that these operative, undiscounted rates enjoyed *Keogh* protection.

If Plaintiffs are correct that the discounted rates in Tariff 104 are "invalid" and "illegal" as indefinite (*Pls. Br.* 41, 50), those lower rates would have been void. And the specified maximum transportation rates in Tariff 400-N would, in turn, be the only lawful and operative rates under 49 U.S.C. § 13702(a). *See Am. Trucking*, 467 U.S. at 358 (invalidation of a rate "renders the tariff void *ab initio*. As a result, whatever tariff was in effect prior to the adoption of the rejected rate becomes the applicable tariff for the period during which motor carriers charged

the rejected tariff.") (citation omitted).[9] Accordingly, the *Keogh* doctrine still would apply to both the tariff rates published in Tariff 400-N *and* the fuel surcharge percentages Plaintiffs challenge, and the parties' rights vis-à-vis one another would retroactively be measured based upon these undiscounted rates.

The Supreme Court made that result clear in *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 130 (1990), which held that a motor common carrier in bankruptcy was entitled to recover undercharges on shipments at "privately negotiated rates" that were lower than the carrier's published rates. The Court held that, because the carrier and shipper had privately agreed to unpublished discounted rates, the lawful and operative rates against which to measure the parties' rights *ab initio* were the *higher*, duly published rates. In so holding, the Court rejected the argument—identical to the one necessarily advanced by Plaintiffs here—that the remedy for carriers' failure to adhere to rates duly published in accordance with the statute was to declare the higher, published rates inoperative and invalid for purposes of the *Keogh* doctrine:

> The Commission argues that the carrier should not receive a windfall, i.e., the higher filed rate, from its failure to comply with the statute. But § 10761 *requires* the carrier to collect the filed rate, and we have never accepted the argument that such 'equities' are relevant to the application of § 10761.

Id. at 131-32 (emphasis in original; citations omitted).

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[9] Plaintiffs do not dispute that the maximum tariff rates in Tariff 400-N were definite and known in advance by shippers.

Thus, either way, Plaintiffs lose based upon the *Keogh* doctrine. On the one hand, they lose if this Court follows the case law that accords *Keogh* protection to specified surcharge percentages and market-based rates even though such rates were not specified in the published tariffs. On the other hand, Plaintiffs lose if, as they claim, the discounted rates in Tariff 104 are invalid since, under *Maislin*, the higher definite rates in Tariff 400-N—including its fuel surcharge—would enjoy *Keogh* protection.

C. The ICCTA Did Not Abolish The *Keogh* Doctrine.

Plaintiffs' alternative argument that the ICCTA "rang the death knell for the filed rate doctrine for household goods carriers" (*Pls. Br.* 52) is likewise incorrect. That argument hinges on unsupported speculation about Congressional intent in the ICCTA's requirement that household goods carriers continue to publish their tariffs but no longer file them with the agency. (*Id.* 53-54.)

However, the inference upon which Plaintiffs rely fails to satisfy the Supreme Court's repeated admonitions requiring a clear legislative statement "indicating a specific congressional intention to overturn the longstanding *Keogh* construction." *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 420 (1986); *see also Maislin*, 497 U.S. at 135. That Congress made a point in the ICCTA of maintaining as to household goods carriers the key structural elements underlying the *Keogh* doctrine—(1) agency oversight to ensure

reasonableness of carriers' rates and practices and (2) the binding force of carriers' published rates and practices—makes Congress' preservation of the doctrine all the more apparent. (*See Defs. Br.* 36.)

Nor do Plaintiffs offer any response to the cases from other circuits holding that the *Keogh* doctrine applies even when parties no longer file rates with an administrative agency. (*Defs. Br.* 38.) As those cases highlight, the ICCTA's elimination of filing, while retaining the publication requirement, is plainly "insufficient to overcome the strong presumption of [the *Keogh* doctrine's] continued validity." *Square D*, 476 U.S. at 424.

Plaintiffs' citation to *Ting v. AT&T*, 319 F.3d 1126 (9th Cir. 2003), is misplaced. (*Pls. Br.* 54.) *Ting* is not an antitrust case. Furthermore, the court premised its refusal to apply *Keogh* on "mandatory detariffing," which is entirely distinct from the ICCTA's requirement that household goods carriers publish tariffs. 319 F.3d at 1132. Notably, subsequent Ninth Circuit cases, including *E. & J. Gallo Winery v. EnCana Corp.*, 503 F.3d 1027, 1042 (9th Cir. 2007), have distinguished *Ting*, refusing to follow it or to require the act of literal filing for *Keogh*'s protection of published rates.

Defendants are mindful that, as Plaintiffs point out (*Pls. Br.* 39-40), Mr. Harrison, an employee of Defendant AMSA, made certain statements in 1995 reflecting his opinion regarding the filed rate doctrine's legal viability. However,

these statements were not made by *any* of the carrier defendants, much less all of them, as Plaintiffs assert (*id.* 39), but rather by one employee of the trade association. In any event, as Plaintiffs concede, Mr. Harrison's statements are irrelevant to this purely legal issue. (*Id.*) Indeed, "[r]esolving doubtful questions of law is the distinct and exclusive province" of the court. *United States v. Weitzenhoff*, 35 F.3d 1275, 1287 (9th Cir. 1994) (citation omitted).

III. THE DISTRICT COURT IMPROPERLY DISREGARDED THE STB's PRIMARY JURISDICTION.

If this Court concludes Defendants are not entitled to summary judgment on the basis of statutory immunity or the *Keogh* doctrine, or both, it should remand with instructions that the District Court yield to the primary jurisdiction of the STB. Plaintiffs' brief reinforces that this case, if it continues, properly belongs before the STB.

It is the role of the STB to resolve claims or allegations of tariff invalidity under the ICCTA. *See* 49 U.S.C. § 13702(d). Under 49 C.F.R. § 1310.2(d), the STB (not courts) must decide whether to "invalidate a tariff prepared by or on behalf of a carrier under [49 C.F.R. § 1310] if that tariff violates 49 U.S.C. 13702 or the regulations contained in this part." The District Court therefore abused its discretion by deciding tariff-validity issues and compounded this error by giving primacy to its own interpretation of whether the fuel surcharge satisfied 49 C.F.R. § 1310.3. (*See Defs. Br.* 45-46.) The STB's interpretations of its own rules

deserve "considerable judicial deference." *Am. Trucking*, 467 U.S. at 372. Here, the court below never allowed the STB to perform this function.

Likewise, while Plaintiffs assert that "[t]his case has nothing to do with 'rate reasonableness'" (*Pls. Br.* 11), their brief confirms the exact opposite: this lawsuit, at its core, is inherently a challenge to the reasonableness of Defendants' rates and practices, for which the "[STB] has primary responsibility." *Maislin*, 497 U.S. at 119 (citation omitted); *see also* 49 U.S.C. §§ 13701(a)(1)(C), 13702(c)(5). The gist of Plaintiffs' lawsuit is that, but-for the data error, the surcharge would have been lower. *See In re Hawaiian & Guamanian Cabotage Antitrust Litig.*, 647 F. Supp. 2d 1250, 1270 (W.D. Wa. 2009) (dispute about factors affecting shipment price belongs before the STB).

Even before this Court, Plaintiffs continue to characterize their lawsuit as challenging allegedly "*unreasonable, excessive*, and unlawful fuel surcharges by Defendants." (*Pls. Br.* 2 (emphasis added).) The alleged "unreasonableness" of the fuel surcharge has always been fundamental to Plaintiffs' theory. (*See* Compl. ¶ 60, JA 55 (alleging that "the method by which Defendants" set the fuel surcharge is "unreasonable").)

Plaintiffs only highlight the STB's primacy further when they concede that a fuel surcharge methodology necessarily entails "approximations." (*Pls. Br.* 25.) Inquiries about the appropriateness of Defendants' design and implementation of

cost-based methodologies and associated approximations raise issues squarely within the STB's primary jurisdiction and expertise. *See Matson Navigation Co. v. Fed. Maritime Comm'n*, 959 F.2d 1039, 1043 (D.C. Cir. 1992) (ratemaking is "'an intensely practical affair' requiring the conversion of inexact data into exact rates or limits upon rates," and supports substantial agency deference in recognition of "both the difficulty of the task and the expertise of the agency performing it") (citations omitted).

CONCLUSION

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

Dated: April 12, 2010

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Dated: April 12, 2010

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 12th day of April, 2010, I caused this Reply Brief of Appellants to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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I further certify that on this 12th day of April, 2010, I caused the required number of bound copies of the Reply Brief of Appellants to be hand-filed with the Clerk of the Court.

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