No. 10-36165

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: HAWAIIAN & GUAMANIAN CABOTAGE ANTITRUST LITIGATION

ACUTRON, INC., et al.,

Plaintiffs-Appellants,

v.

MATSON NAVIGATION CO. INC., et al.,

Defendants-Appellees

Appeal from the United States District Court for the
Western District of Washington, No. 2:08-md-01972 TSZ

BRIEF FOR THE AMERICAN ANTITRUST INSTITUTE AS AMICUS CURIAE IN SUPPORT OF APPELLANTS AND REVERSAL OF THE DISTRICT COURT'S DECISION

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, the American Antitrust Institute states that it is a nonprofit corporation and, as such, no entity has any ownership interest in it.

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STATUTES AND REGULATIONS

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INTEREST OF *AMICUS CURIAE*

All parties consent to the filing of this brief. The American Antitrust Institute ("AAI") is an independent non-profit educational, research, and advocacy organization devoted to advancing the role of competition in the economy, protecting consumers, and sustaining the vitality of the antitrust laws. AAI is managed by its Board of Directors, with the guidance of an Advisory Board that consists of more than 115 prominent antitrust lawyers, law professors, economists, and business leaders.[1] *See* http://www.antitrustinstitute.org. AAI frequently appears as *amicus curiae* in cases raising important antitrust issues, including, for example, in *Shames v. Cal. Travel & Tourism Comm'n,* 626 F.3d 1079 (9th Cir. 2010), in which it supported the position adopted by this Court on rehearing, and in *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.,* 555 U.S. 438 (2009), in which it participated in oral argument before the Supreme Court. AAI is particularly concerned that the decision below applied the filed rate rule in such an expansive manner, unmoored to its original purposes, that it leaves a gap in which neither the antitrust laws nor regulation effectively constrains price fixing, the most abusive of all antitrust violations.

[1] The AAI's Board of Directors alone has approved the filing of this brief. The individual views of members of the Advisory Board may differ from AAI's positions.

FED. R. APP. P. 29(c)(5) STATEMENT

No counsel for a party has authored this brief in whole or in part, and no party, party's counsel, or any other person or entity – other than the AAI or its counsel – has contributed money that was intended to fund preparing or submitting this brief. Certain members of AAI's Advisory Board or their firms represent plaintiffs in some of the consolidated cases below, but played no role in drafting or funding the brief, nor participated in the AAI Board of Directors' deliberations over the brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The core of the order below was the court's view that agency "jurisdiction over . . . rates is itself sufficient to trigger the filed rate doctrine, even assuming that the STB does not engage in antecedent review or post-filing approval of tariffs . . . ." *In re Hawaiian & Guamanian Cabotage Antitrust Litig.*, ___ F. Supp. 2d ___, 2010 WL 4996730, at * 4 (W.D. Wash. 2010).

This result and the reasoning on which it was based reflect the worst features of this disfavored doctrine. The ruling radically expands the filed rate doctrine to preclude antitrust damages claims wherever an agency has "jurisdiction" over rates, even of the very narrow, post hoc, and unused kind at issue here, and when tariffs are not even filed. Indeed, it expands the filed

rate doctrine to rates over which the STB (Surface Transportation Board) has no jurisdiction: private carriage arrangements and rates within a "zone of reasonableness." The result is that a criminal price fixing conspiracy among carriers, as alleged here, is subject neither to private antitrust damages nor administrative reparations as long as the conspirators do not raise rates more than 7.5 percent per year or insofar as they have private contracts with shippers.

The district court's extraordinary expansion of the filed rate rule did not rest on any analysis of its desirability or consequences, but merely on transposition of abstract judicial language from one regulatory context to a meaningfully different one. In several respects the decision was contrary to specific holdings of this Court and the Supreme Court. It also disregarded this Court's admonition that the filed rate doctrine is to be respected but not extended, given its weak foundations. *See Cost Mgt. Servs., Inc. v. Wash. Natural Gas Co.*, 99 F.3d 937, 945 (9th Cir. 1996) (holding that because the Supreme Court's continued "endorsement of [the doctrine] was only lukewarm," the courts should not "extend" it).

The AAI urges reversal on two principal grounds. First, nearly the precise question raised here was already resolved contrary to defendants' view in *Carnation Co. v. Pac. Westbound Conf.,* 383 U.S. 213 (1966).

There, the Court considered the rate-regulatory regime for ocean shipping, and held that rates actually filed under that regime were open to private antitrust challenge, notwithstanding that they might, in the alternative, face administrative challenge for "reasonableness." The regulation of cabotage (domestic ocean shipping) in 1966 was substantially similar to the international shipping oversight considered in *Carnation,* and it was the same system of regulation that would be transferred to the STB in 1995. The substantial relaxation of cabotage regulation since *Carnation* only renders filed rate treatment less appropriate than it was in 1966.

Second, the district court disregarded specific rulings of this Court. The court disregarded a salutary and straightforward Ninth Circuit requirement that a mere tariff filing, which is shown to have received no "meaningful review," cannot enjoy filed rate protection. The court also disobeyed Ninth Circuit authority that filed rate protection cannot apply to rates that have not actually been filed. Strikingly, these results were partly based not on factual distinction of this Court's case law, but criticism of it. The district court found it not to control because it was "devoid of analysis" and lacked "meaningful discussion." Other federal courts have already noticed this anomaly. *See Rivera-Muñiz v. Horizon Lines, Inc.*, 737 F. Supp. 2d 57, 63 n.5 (D.P.R. 2010) (noting that the filed-rate rulings of the court

below "appear[] to conflict with the controlling precedent in its circuit"). Moreover, this Court's cases involving "market based" rates under a deregulatory program of the Federal Energy Regulatory Commission (FERC), relied on by the court below, are distinguishable. It was incorrect as a matter of law to apply those cases to cabotage regulation by the STB.

In *Square D*, the Supreme Court refused to overrule the filed rate rule it had created because the "developments in the six decades since *Keogh* was decided [we]re insufficient" at that time to convince the Court to depart from *stare decisis*. *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 424 (1986). Whether the Supreme Court would reach the same result today, given the deregulatory developments in the last three decades and the Court's greater willingness to overturn outmoded antitrust precedents, is an open question. But lower courts remain free to apply the filed rate rule prudently and with restraint, and in this Circuit they have been directed to do so. *See Cost Mgt. Servs.,* 99 F.3d at 945; HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY § 19.6, at 725 (3d ed. 2005) ("a doctrine as indefensible [as the filed rate rule] should be narrowly construed").

ARGUMENT

I. LIMITATIONS ON THE SCOPE OF ANTITRUST ARE DISFAVORED, AND THE FILED-RATE DOCTRINE IN PARTICULAR HAS BEEN EXTENSIVELY CRITICIZED

A. All Limits on the Scope of Antitrust Are Disfavored

Defendants of every variety have argued, since the beginning of federal antitrust, that under their special circumstances they deserve relief from the ordinary marketplace rules that govern everyone else. The Supreme Court has generally been unimpressed. "Language more comprehensive" than that in the antitrust statutes, the Court has said, "is difficult to conceive," *United States v. Southeastern Underwriters Ass'n,* 322 U.S. 533, 553 (1944), and accordingly it indicates that Congress "intended to strike as broadly as it could . . . ." *Goldfarb v. Va. State Bar,* 421 U.S. 773, 787 (1975). Nearly one century of the Court's precedent has established that "'[r]epeals of [antitrust] by implication . . . are strongly disfavored'" because "antitrust . . . [is] a fundamental national economic policy . . . ." *Carnation,* 383 U.S. at 217-18 (quoting *United States v. Phila. Nat'l Bank,* 374 U.S. 321, 350-51 (1963)).

And so it is not surprising that if there is consensus in antitrust about any one issue, it is that exemptions, immunities, and other limitations on its scope are rarely justified. Every one of the many official, blue-ribbon

antitrust study panels set up during the past several decades, by Republican and Democratic Presidents and by Congress, have called for their repeal or restriction.[2] The enforcement agencies have agreed, whether under control of either party,[3] and the leading professional organizations do so as well,

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[2] In particular, the so-called "Shenefield Report" of 1979 contained seven full chapters comprehensively analyzing statutory and judicial antitrust limitations, and calling for their drastic limitation or repeal. *See* 1 NAT'L COMM'N FOR THE REVEW OF ANTITRUST LAW AND PROCEDURES, REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL 177-316 (1979). Every other official antitrust study commission has made similar recommendations. *See* ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 338 (2007) ("When the government decides to adopt economic regulation, antitrust law should continue to apply to the maximum extent possible . . . [and] should apply wherever regulation relies on the presence of competition . . . to achieve competitive goals."); REPORT OF THE TASK FORCE ON PRODUCTIVITY AND COMPETITION, *reprinted at* 115 CONG. REC. 15933, 15934 (June 16, 1969) (the "Stigler Report") (broadly calling for policy change favoring competition in all regulated industries); *id.* at 15937 (calling for repeal of the Webb-Pomerene Act, an explicit antitrust exemption); REPORT OF THE WHITE HOUSE TASK FORCE ON ANTITRUST POLICY, *reprinted at* 115 CONG. REC. 13890, 13897 (May 27, 1969) (the "Neal Report") (decrying the "bias" in "the regulated sector of the economy . . . against competition," and calling for "study of . . . the extent to which . . . the competitive standards of the antitrust laws can be substituted for at least some aspects of regulation"); ATTORNEY GENERAL'S COMMITTEE TO STUDY THE ANTITRUST LAWS, REPORT 269 (1955) ("This Committee . . . endorses competition as the major rule in our private enterprise economy. . . . [W]e urge that moves toward regulation be taken only with full recognition of the effects of . . . exceptions to the policy favoring competition").

[3] *Compare* Christine A. Varney, Asst. Atty. Gen., *Antitrust Immunities*, Remarks as Prepared for the American Antitrust Institute's 11th Annual Conference 14 (June 24, 2010), *available at* http://www.justice.gov/atr/public/speeches/262745.htm ("exemptions for regulated industries should be kept narrow, recognizing that antitrust and regulation are complements, *not* substitutes") *with* Charles A. James, Asst.

see, e.g., SECTION OF ANTITRUST LAW, AM. BAR ASS'N, FEDERAL STATUTORY EXEMPTIONS FROM ANTITRUST LAW 291-315 (2007). The courts also agree. Even when Congress provides explicit exemptions, the courts disfavor them and read them narrowly. *See Union Labor Life Ins. Co. v. Pireno,* 458 U.S. 119, 126 (1982) ("our precedents consistently hold that exemptions from the antitrust laws must be construed narrowly"). *A fortiori*, judicially created limits merely inferred from inexplicit language, such as the filed rate doctrine, must also be narrowly construed.

B. The Filed Rate Rule is Especially Disfavored, Particularly in an Age of Deregulation

The filed rate doctrine is among the most criticized and controversial of these limitations. *See County of Stanislaus v. Pac. Gas & Elec. Co.*, 114 F.3d 858, 862 (9th Cir. 1997) (doctrine has been "the target of criticism since its inception"). For example, Judge Friendly provided a trenchant critique, in effect calling on the Supreme Court to overrule the *Keogh* case which created it, *see Square D. Co. v. Niagara Frontier Tariff Bureau, Inc.,* 760 F.2d 1347, 1352-55 (2d Cir. 1985) (Friendly, J.), as did President Reagan's Justice Department, *see* Br. for the United States as Amicus Curiae

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Atty. Gen., *Statement Before the Committee on the Judiciary of the U.S. House of Representatives Concerning H.R. 1253, The Free Market Antitrust Immunity Reform Act of 2001* (June 5, 2002), *available at* http://www.justice.gov/atr/public/testimony/11244.htm (urging repeal of remaining immunity for international ocean shipping).

Supporting Petitioners, *Square D,* 476 U.S. 409 (No. 85-21), 1985 WL 670055. The Court's preservation of the doctrine, only in deference to precedent, recognized its deep flaws. *Square D,* 476 U.S. at 417-24 (calling Judge Friendly's critique "thoughtful and incisive"; acknowledging that doctrine might be "unwise as a matter of policy" and that subsequent "developments [might] cast [*Keogh*] . . . in a different light"; and preserving doctrine solely because "it is more important [for law to] be settled than [to] be settled right") (internal quotation marks omitted).

Since then, Judge Boudin, a former Deputy Assistant Attorney General for antitrust, found "the law on the filed rate doctrine [to be] extremely creaky." *Town of Norwood v. FERC*, 202 F.3d 408, 420 (1st Cir. 2000) (Boudin, J.). Other judges agree. *See Arroyo-Melecio v. Puerto Rican Am. Ins. Co*., 398 F.3d 56, 72 (1st Cir. 2005) (Lynch, J.) (describing doctrine as "a famously complex and sometimes criticized set of rules"); *Capital Freight Serv., Inc. v. Trailer Marine Transp. Corp.*, 704 F. Supp. 1190, 1195 (S.D.N.Y. 1988) (Leval, J.) (*Square D* "represent[ed] simply an unwillingness to deliver a coupe de grace to a weak and forcefully criticized doctrine because that function might be more appropriately carried out by Congress.").

Leading commentators continue to criticize the doctrine. *See*, *e.g.,*

HOVENKAMP, *supra*, at 724 ("None of the[] arguments [in *Keogh*] had much to be said for them at the time they were originally made, and they are even less sensible today"); Jim Rossi, *Lowering the Filed Tariff Shield: Judicial Enforcement for a Deregulatory Era,* 56 VAND. L. REV. 1591, 1596 (2003) (calling for abolition of doctrine as it "can result in a type of radical de-regulation of markets absent common law and antitrust protections"); *see also* ANTITRUST MODERNIZATION COMM'N, *supra*, at 340-41 (urging Congress to consider repealing doctrine, particularly "where the regulatory agency no longer specifically reviews proposed rates").

The rationale for the filed rate doctrine is particularly weak when Congress has deregulated or begun to deregulate a given sector. "In deregulated markets," this Court has observed, "compliance with [generally applicable] law is the norm rather than the exception." *Ting v. AT&T*, 319 F.3d 1126, 1143 (9th Cir. 2003); *see also* Herbert Hovenkamp, *Antitrust and the Regulatory Enterprise*, 2004 COLUM. BUS. L. REV. 335, 341 ("The natural result of deregulation is an increased role for the antitrust laws."). Accordingly, where Congress removes some rate-setting function from a regulator's authority, and fails explicitly to exempt the deregulated rates from antitrust, then Congress has expressed its intent that they be subject to antitrust. *See E. & J. Gallo Winery v. Encana Corp.,* 503 F.3d 1027, 1046

(9th Cir. 2007). As *Gallo* explained, in an opinion much relied on by defendants and the court below, a congressional withdrawal of rate-setting authority implies an intent "that normal market forces, including the tug and pull of private lawsuits, will hold sway." *Id.* That being the case, filed rate protection should also give way, because "antitrust . . . laws complement rather than undermine [Congress's deregulatory] goal, [in that] they . . . support Congress' determination that the supply, the demand, and the price of [deregulated goods] be determined by market forces." *Id.* (internal quotation marks omitted). Indeed, *Gallo* took this as its reason to permit federal antitrust claims to proceed against deregulated "first sales" rates, even though they had been previously regulated and protected by the filed rate rule. *Id.*

For these reasons, this Court should heed its own prior advice and continue to apply the rule as narrowly as possible. *Cost Mgt. Servs.,* 99 F.3d at 945.

II. THE SUPREME COURT HAS FOUND FILED RATE PROTECTION INAPPLICABLE TO THE PRIOR, MORE INTRUSIVE REGULATORY REGIME GOVERNING OCEAN SHIPPING

Carnation Co. v. Pac. Westbound Conf., 383 U.S. 213 (1966), held that ocean shipping regulation by the Federal Maritime Commission

("FMC"),[4] as it existed in 1966, did not trigger filed rate protection, even though the rates at issue were subject to filing and to administrative challenge for reasonableness. In *Carnation*, plaintiff shipper alleged a secret price-fixing agreement among carrier conferences, and the Court permitted plaintiff to pursue a treble damages antitrust remedy against them. While that agreement had not been filed with the FMC, the FMC's organic statute at that time required the rates themselves be filed in tariffs. *See* 46 U.S.C. § 817(b)(1) (1964); *Carnation*, 383 U.S. at 215 (applying "Shipping Act of 1916 . . . as amended" in 1961). And rates that plaintiff challenged had in fact been filed. *See Square D*, 760 F.2d at 1361 (discussing *Carnation*); *In re Ocean Shipping Antitrust Litig.,* 500 F. Supp. 1235, 1240 (S.D.N.Y. 1980) (rejecting *Keogh* treatment under the Shipping Act because *Carnation* had done so, and noting that defendants' activities in *Carnation* apparently continued after tariff filing became mandatory in 1961). The statute's filing requirement was a restrictive one – filed rates and amendments thereto could take effect only 30 days after filing, 46 U.S.C. § 817(b)(2) (1964), and were the subject of an elaborate non-discrimination policy, *id.* at §§ 812-13, 815-

[4] The FMC is the successor to an agency first known as the U.S. Shipping Board, later renamed the U.S. Maritime Commission, then the Federal Maritime Board, and finally the Federal Maritime Commission. Hereinafter, the FMC and its predecessors will be referred to as "FMC."

16. The statute also permitted a reparations claim for unreasonable rates before the agency. *Id.* at § 821.

Among other bases for its holding, the Court rejected defendants' argument that "treble-damages actions w[ould] frustrate" this statute's non-discrimination policy, holding that "Congress was concerned with assuring equality of treatment by [carriers], not with equality of treatment by juries in collateral proceedings. There is no reason to believe that Congress would want to deprive all shippers of their right to treble damages merely to assure that some shippers do not obtain more generous awards than others." *Carnation*, 383 U.S. at 219 n.3.[5] Notably, *Carnation* examined the legislative history of the FMC's powers, and found nothing to "indicate a . . . rule of construction" different from other statutes, under which "[r]epeals of the antitrust laws by implication from a regulatory statute are strongly disfavored . . . ." *Id.* at 217-18.

Carnation controls this case. While the commerce at issue was not cabotage – it was international ocean shipping to the Philippines – the same

[5] The Court did not explicitly identify the *Keogh* case or the filed tariff rule by name, but the policy of non-discrimination it rejected was the core principle of *Keogh* and its doctrine. The *Carnation* defendants urged the Court that *Keogh* required this policy of non-discrimination under the Shipping Act and that money damages actions were therefore barred. *See* Br. of Resp. Pac. Westbound Conf. 47, *Carnation*, 383 U.S. 213 (No. 20), 1965 WL 115685; Br. for Resps. Far East Conf. 44-45, *Carnation*, 383 U.S. 213 (No. 20), 1965 WL 130094.

regulatory scheme applied to both international shipping and to cabotage in 1966, and it was that scheme that Congress would transfer to the STB in the Interstate Commerce Commission Termination Act thirty years later. Pub. L. 104-88, § 103, 109 Stat. 803, 865 (1995), adding new 49 U.S.C. § 13521. That scheme, as it existed at the time of *Carnation*, treated "common carriers by water in foreign commerce" and "common carriers by water in interstate commerce"[6] similarly. They were both subject to tariff-filing requirements, *compare* 46 U.S.C § 817(b)(1) (1964) *with* 46 U.S.C. § 845b (1964),[7] reasonable rate requirements, 46 U.S.C. §§ 817(a), (b)(1)(5) (1964), stringent non-discrimination requirements, *id.* at §§ 812-13, 815, administrative remedies by the FMC, *id.* at §§ 813, 815, reparations actions for unreasonable rates by aggrieved shippers, *id.* at § 821, and antitrust exemptions for rate agreements filed and approved by the FMC, *id.* at § 814.

[6] After Congress transferred jurisdiction over inland water carriage from the FMC to the ICC in 1940, the term "common carrier by water in interstate commerce" in the Shipping Act referred only to cabotage. *See* Transportation Act of 1940, Pub. L. No. 76-785, title 2, § 320, 54 Stat. 898, 950 (1940).

[7] Cabotage carriers were subject to tariff filing long before international carriers were. The requirement was first imposed in 1933 as to cabotage carriage through the Panama Canal, ch. 199, 47 Stat. 1425 (1933), and extended to all cabotage in 1938, ch. 600, § 43(a), 52 Stat. 953, 964 (1938), codified at 46 U.S.C. § 845b (1964).

Accordingly, *Carnation*'s holding that antitrust damages claims were not precluded by the Shipping Act is equally applicable to cabotage regulation.

While Congress and the agencies have made changes in this regulatory scheme since *Carnation,* they render filed rate protection even less appropriate. As this Court recently recognized, in an opinion much relied upon by defendants and the court below, Congress has significantly deregulated U.S. cabotage. *DHX, Inc. v. STB,* 503 F.3d 1080, 1083, 1085-86 (9th Cir. 2007) (rejecting rate discrimination claim because deregulation demonstrates congressional preference for competition). Critically, Congress completely repealed what had been a substantial non-discrimination rule, *see DHX,* 503 F.3d at 1083, and it exempted individually negotiated cabotage contracts from any filing requirement. 49 U.S.C. § 14101(b)(1). Therefore, Congress no longer has any concern for discrimination, and intends cabotage rates to be left almost exclusively to market forces. *Cf. Square D*, 476 U.S. at 417 (rationale for filed rate rule is that "'otherwise the paramount purpose of Congress – prevention of unjust discrimination – might be defeated'") (quoting *Keogh v. Chicago & Nw. R. Co*., 260 U.S. 156, 163 (1922)). Congress also repealed the ability of the regulatory agency to exempt from the antitrust laws price fixing agreements among cabotage carriers, *compare* 49 U.S.C. § 13703 (permitting price

fixing only among motor carriers for carriage of household goods), further demonstrating its design that normal market rules should apply.

Moreover, Congress included a new declaration of its intent as to cabotage regulation starkly at odds with the anachronistic rate-regulatory philosophy envisioned by defendants and the court below. Congress's sole purpose was "to encourage and promote service and price competition in the noncontiguous domestic trade," 49 U.S.C. § 13101(a)(4), in sharp contrast with its design for the STB's oversight of the other transport modes within its jurisdiction.[8] Changes made by the responsible agency are even more stark. As plaintiffs allege, the FMC formerly required cabotage carriers to file revenue and other information in support of their filings, but during the entire history of its oversight of cabotage the STB has never done so. SAC ¶ 109. In short, the changes since *Carnation* only reinforce the point that the

[8] In all statements of its transportation policy, Congress stated some commitment to competition values. However, in all other trades still subject to STB oversight, Congress demanded elaborate consideration for revenue adequacy, reasonable and non-discriminatory rates, and a variety of other policy goals that may be in tension with unregulated competition. *See* 49 U.S.C. §§ 10101(3), (6), (11) (as to rail carriers: revenue adequacy, reasonable rates, and labor protections); 49 U.S.C. §§ 13101(a)(2)(A), (F), (G) (as to motor carriers: "fair" competition and reasonable rates, revenue adequacy, labor protections, and preservation of motor carrier service in underserved areas); *see also* 49 U.S.C. § 13101(a)(3) (special federalism concerns in motor carrier regulation).

filed rate doctrine does not apply to the limited regulatory scheme for cabotage.

While it is true that defendants in the present matter remain subject to a limited post-filing administrative challenge, *Carnation* held that the availability of such administrative relief and reparations was no bar to, nor a substitute for, private antitrust actions for treble damages. *Carnation*, 383 U.S. at 222 ("The award of treble damages . . . would certainly not interfere with any future action by the Commission."); *see also Phonetele, Inc. v. AT&T Co.*, 664 F.2d 716, 734 n.46 (9th Cir. 1981) (Kennedy, J.) ("The freedom of a party injured by anticompetitive conduct to elect between an administrative . . . remedy and a judicial cause of action under the Clayton Act is quite acceptable; the latter need not derogate or interfere with the former[.]").

III. NINTH CIRCUIT LAW REJECTS FILED-RATE PROTECTION WHERE THE RATES WERE NOT SUBJECT TO MEANINGFUL REVIEW

Even if *Carnation* did not control this case, the order below was contrary to Ninth Circuit law because the rates at issue were not subject to meaningful review. It was error for the court to give filed rate treatment where the STB's authority with respect rates is narrowly limited to entertain post-filing rate challenges and, in fact, has never been used as to any of the

rates here in issue. Plaintiffs elaborately allege that the STB provides no review of any rates filed by Jones Act carriers, and has not yet even established a methodology for doing so. SAC at ¶ 109-110. Indeed, the one complaint that the STB has acted on took over eight years for the board to determine how it would proceed, and was apparently abandoned by the complainant. *See Guam v. Sea-Land Serivce, Inc.*, STB WCC-101, 2007 WL 295310.

On the district court's view, in disregard of (and in one case open disagreement with) Ninth Circuit law, none of this matters. The court held that the only thing that matters is whether an agency *has* statutory authority to review rates, which it could use if it wanted to. Even unexplained and total disuse of that power would be irrelevant. That view is incorrect.

A. The District Court's Explicit Refusal to Follow Ninth Circuit Law Is Clear Error

Fundamental to this case is the district court's failure to apply an established rule of this Circuit: Where

> rates [a]re the product of unlawful activity prior to their being filed and were not subjected to meaningful review by the [agency], then the fact that they were filed does not render them immune from challenge.

Brown v. Ticor Title Ins. Co., 982 F.2d 386, 394 (9th Cir. 1992). Accordingly, even where rates have in fact been filed, "[t]he mere fact of

failure to disapprove . . . does not legitimize otherwise anticompetitive conduct." *Wileman Bros. & Elliott, Inc. v. Giannini*, 909 F.2d 332, 337-38 (9th Cir. 1990).

Because filed rate protection is appropriate only when an agency is "doing enough regulation to justify [it]," *Pub. Util. Dist. No. 1 of Snohomish County v. Dynegy Power Mtg., Inc.,* 384 F.3d 756, 760 (9th Cir. 2004), it does not apply if the agency "effectively abdicate[s] its rate-making authority," *Gallo,* 503 F.3d at 1040. It is only "to the extent Congress has given [an agency] authority to set rates . . . *and [the agency] has exercised that authority*" that private antitrust remedies are limited. *Id.* at 1035 (emphasis added).

If ever there could be a case contemplated by this rule, it is the present one. First, the STB is not even empowered to engage in any pre-effectiveness review nor is its approval required for rates to go into effect. Rates are filed electronically and are effective on filing. SAC ¶¶ 107-08. And while the STB, in principle, can entertain post-filing rate challenges, it can do so only where the rates are outside a generous "zone of reasonableness." 49 U.S.C. § 13701(d); *see Guam v. Sea-Land Service, Inc.*, STB WCC-101, 2007 WL 2457445 ("Under the ZOR, . . . the carrier would have . . . an absolute right to increase the lawful rate levels by 7.5%

annually"). Second, the STB has failed ever to use its powers to reject filed rates in the entire history of its oversight of the rates in question. *See* SAC ¶¶ 109-10.

In a related context, the Supreme Court has made clear that antitrust is not repealed by the mere existence of unused regulatory power. In a leading decision under the so-called "state action" immunity, the Court said that state governments cannot immunize price-fixing from antitrust merely by appointing a state agency that, in principle, could review the price-fixing if it wanted to. *FTC v. Ticor Title Ins. Co.,* 504 U.S. 621, 638 (1992). Critically, the Court held that state action immunity would be unavailable where private conduct was overseen only by an agency with unused "negative option" powers—an agency that, like the STB here, could engage in post-effectiveness review of rates, but that never used that power. *Id.*

Ticor supports this Court's holdings in *Brown* and *Wileman*. The basic question in both the filed-rate and state action contexts is similar: did Congress mean for antitrust to apply or not?[9] The lesson of *Ticor* is that the federal courts should not presume a Congressional design to repeal antitrust

[9] Other courts have relied on the state action case law as authority that the filed rate doctrine should not apply where a federally filed rate receives no review. *See Ocean Shipping,* 500 F. Supp. at 1241 (citing *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), for the rule that "the [mere] filing of a tariff is not a sufficient basis for implying [antitrust] exemption").

remedies where the purported alternative protection of the public interest is a phantasm.

Moreover, it is not coincidental that *Ticor* denied state-action immunity to precisely the same regulatory scheme—title insurance rate-setting in Arizona and Wisconsin—that was denied filed rate treatment in this Court's *Brown* decision, nor was it coincidental that the reasoning was the same. The lesson of both decisions is that government can displace antitrust by creating an alternative scheme of regulation, *if that alternative is actually employed.*

Without explanation, the court below placed heavy emphasis on a district court opinion from another circuit that sharply criticized and explicitly rejected controlling precedent from this Court. The district court rejected the *Brown* decision by citing an opinion of the Northern District of Ohio, which found *Brown* to be "nearly devoid of analysis" and lacking "meaningful discussion." 2010 WL 4996730, at *3 (quoting and discussing *In re Title Ins. Antitrust Litig.,* 702 F. Supp. 2d 840, 853-55 (N.D. Ohio 2010)). While the district court for the Northern District of Ohio is entitled to disagree with this Court's precedent, the court below was not.[10]

[10] This Circuit, like others, requires that panel decisions are binding until reversed en banc, barring narrow exceptions not applicable here. *See Miller v. Gammie*, 335 F.3d 889, 899-900 (9th Cir. 2003) (en banc).

The district court also relied on an opinion of the Eastern District of California, *Carlin v. Dairy America, Inc.,* 690 F. Supp. 2d 1128 (E.D. Cal. 2010), which purported to distinguish *Brown* and *Wileman,* but its analysis is incorrect and this Court should reject it. *Carlin* thought that the "meaningful review" cases depended on "the existence of some feature of the regulatory system itself that prevents review of those rates." *Id.* at 1136. That is incorrect. The Wisconsin and Arizona title insurance schemes in *Brown* were admittedly "file-and-use" statutes, but they also explicitly empowered state agencies to disapprove defendants' rates. *See Ticor Title Ins.,* 504 U.S. at 630 (analyzing in detail the same Arizona and Wisconsin statutes at issue in *Brown*).

Likewise, the *Carlin* court seemed to suggest that "meaningful review" could be lacking only where an agency's power was limited to "non-disapproval." 690 F. Supp. 2d at 1136. The court borrowed this phrase from *Wileman,* and did not much explain what it understood the phrase to mean, but it apparently was meant to be analogous to "file-and-use." That is, a regulatory scheme would be a "non-disapproval" scheme if filed rates became effective in the absence of the agency's disapproval of them. But as an explanation of *Brown* and *Wileman,* the "non-disapproval" concept makes no sense. (1) It is at odds with the court's own reasoning. A "non-

disapproval" regime is not one in which "the regulatory system itself . . . prevents review of th[e] rates." By definition, an agency in such a system can reject rates on their merits. (2) While *Wileman* used the phrase "non-disapproval," nowhere did that court say or imply that it meant to create some special, limited exception from filed rate treatment. It described the USDA produce regulation there as a "non-disapproval" scheme in order to explain why the limited review in that case could not justify antitrust exemption. (3) It is at best a distinction without a difference. Why should failure to review in a file-and-use or non-disapproval system somehow differ from failure to review in any other system? In any such case, as the *Wileman* court elaborately explained, the problem is that private relief is displaced without any meaningful alternative to protect the public interest.

B. This Court's FERC Cases Involving "Market Based" Rates Are Inapt

The district court relied in part on a series filed rate cases involving "market based rates" regulated by the Federal Energy Regulatory Commission ("FERC"), which are distinguishable. The AAI agrees with Judge Fletcher that those cases, even as they apply to FERC itself, should be taken with "a note of concern and caution," *Gallo*, 503 F.3d at 1049 (B. Fletcher, J., concurring). They have already stretched the filed rate rule well beyond its original foundations, and they have found little favor with

commentators. *See, e.g.,* Darren Bush, *Mission Creep: Antitrust Exemptions and Immunities as Applied to Deregulated Industries,* 2006 UTAH L. REV. 613, 649. But whatever their merits, those cases have no application here.

Those opinions involved a FERC deregulatory program employed during the California energy crisis of 2000-2001. Unlike the STB and the agencies in the "meaningful review" decisions discussed above, which did nothing to review the rates in question, FERC's deregulatory program was different. And it was precisely those differences on which this Court has held that FERC's "market based" system for wholesale energy pricing enjoys filed rate treatment.

As early as the late 1970s, Congress and FERC began deregulating both natural gas and electricity markets, which for many years had been subject to FERC's broad rate-setting power. As one step in that process, FERC created a system under which individual energy wholesalers could be allowed to charge "market based" rates without agency pre-approval. FERC devised this plan in connection with an unprecedented and *sui generis* transformation by the California state legislature of California's energy sector. That plan, however poorly it performed in practice, included detailed consideration by both California and FERC of the needed market institutions

and how the public interest should be protected.

Critically, FERC resolved as a part of this program that it could prospectively approve "market based" rates under its enabling legislation because, so long as it could ensure that the "market" in question was an acceptably competitive one, then those rates would by definition be "reasonable." Moreover, to ensure that this reasoning was defensible in individual cases, FERC required that before any regulated entity charged "market based" rates it first receive a FERC determination that it lacked market power or had mitigated any market power it held. Finally, in adopting this policy FERC made clear that it would continue to use its rate-review powers even as to "market based" rates and would find them "unreasonable" where appropriate. *See, e.g., Enron Power Mktg.,* Inc., 103 F.E.R.C. ¶ 61,343 (2003) (revoking Enron's authority to sell natural gas at market rates). The entire rationale of FERC's deregulatory program, in other words, was that the deregulated rates were "reasonable" as a matter of law, a formal and individualized finding made by FERC in its official capacity. *See Gallo,* 503 F.3d at 1036-39 (explaining history of FERC deregulation of wholesale natural gas); *Snohomish,* 384 F.3d at 758-61 (explaining history of FERC deregulation of wholesale electricity).

This Court's filed rate treatment of FERC's deregulatory program

unequivocally depended on FERC's scheme of individualized "reasonableness" determinations, and the agency's elaborate, formal determinations concerning California's reformed energy markets. This Court explicitly identified these specific steps by FERC as necessary to its holding that these rates were effectively "filed" ones, even though they were not strictly "filed" in the traditional sense. *See Gallo,* 503 F.3d at 1039-41; *Snohomish,* 384 F.3d at 760-61; *Pub. Util. Dist No. 1 of Grays Harbor Co. v. Idacorp Inc.,* 379 F.3d 641, 649 (9th Cir. 2004). Central to these opinions was this Court's view that, because of these specific steps, FERC had in fact "*approved* tariffs that governed the California wholesale electric markets." *Snohomish,* 384 F.3d at 762 (emphasis added); *see also Gallo,* 503 F.3d at 1040-41 (discussing *Grays Harbor* and *Snohomish,* and emphasizing that they would have rejected filed rate treatment had there been "a failure by FERC to exercise its statutory authority to approve rates").

None of this characterizes STB cabotage regulation at all. That the STB has given cabotage markets no meaningful oversight has nothing to do with any conscious and detailed plan of partial deregulation. At best it reflects the agency's view that Congress directed it to withdraw government intervention. At worst it reflects the agency's lack of interest or wherewithal to regulate this market.

IV. THE FILED RATE DOCTRINE DOES NOT APPLY TO RATES THAT ARE NOT ACTUALLY FILED

Plaintiffs allege that many of the rates they challenge are exempt from filing, either because they were reached through individually negotiated contracts with shippers under 49 U.S.C. § 14101(b), or because they concerned bulk cargo items exempted under 49 U.S.C. § 13702(a)(1). The district court found this fact irrelevant, again on its erroneous view that filed rate protection requires only some authority that in principle could be called "rate regulation."

First, the court was quite wrong that "only one court has explicitly held that an exemption from tariff-filing requirements renders the filed rate doctrine inapplicable." *See* 2010 WL 4996730, at *11 (identifying district court from Louisiana). Quite the contrary is true. This Court has held as a matter of law on several occasions that rates that are not actually filed enjoy no protection under the filed rate rule.[11]

[11] *See Ting*, 319 F.3d at 1139 (where Congress explicitly authorized "detariffing," and Federal Communications Commission implemented detariffing through regulatory action, requiring instead that carriers make contracts directly with consumers, no filed rate protection: "The preemptive effect of the filed rate doctrine, as its name plainly implies, rest[s] entirely on the filing requirement."); *Cost Mgt. Servs.*, 99 F.3d at 945 n.9 (observing that "*Keogh* only precludes claims based specifically on rates approved by the relevant regulatory agency," and holding therefore that those of plaintiff's claims not based on tariffs actually filed were unaffected by filed rate rule).

Second, the court erroneously relied on *Gallo* to reject plaintiffs' argument. 2010 WL 4996730, at *1 n.2, *9. However, *Gallo* and the FERC cases that preceded it did not hold that actual filing is irrelevant. Rather, as explained above, they held that where an agency undertakes a scheme of individualized determinations finding that a firm's rates are determined by healthy competition, and that market-based rates are therefore "reasonable" as a matter of law, the purposes of the filed rate doctrine are arguably served even without a traditional filing and pre-approval regime.

Third, the exemption for individually negotiated rates indisputably places such contracts beyond the jurisdiction of the STB, and while shippers are surely free to waive their regulatory rights as provided by 49 U.S.C. § 14101(b), nothing in the ICCTA alters the general rule that a prospective waiver of antitrust rights is unenforceable. *See, e.g., Kristian v. Comcast Corp.*, 446 F.3d 25, 48 (1st Cir. 2006).

Finally, the court's analysis of the bulk cargo exemption in §13702(a)(1), which was meant to show why exempted cargo should still enjoy filed rate protection, persuasively shows quite the opposite. The district court's historical analysis of this provision is very thorough, and AAI has no quarrel with its view of the exemption's purpose. Since 1961 Congress has exempted bulk shipping from tariff filing on its view that bulk

cargo carriers, unlike common carriers, need not maintain regularly scheduled liner service open to all shippers on equal terms. They can therefore operate more flexibly and at lower cost, and so are better able to perform competitively. As the district court notes, the exemption for the other products mentioned in that section were added in 1984 only so that shippers of recycled materials would not be disadvantaged by bulk shippers' filing exemption.

But that proves precisely the plaintiffs' point. Congress determined that these carriers could behave more competitively than common carriers, *and therefore it required them to compete.* To borrow again from *Gallo,* where Congress deregulates a rate previously subject to filing, an inference follows that Congress meant for it to be subject to private antitrust actions and to the other rules that govern ordinary, competitive markets.

CONCLUSION

For the foregoing reasons, the order below should be reversed and the matter remanded for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 32(a)(7)(B) as it contains 6716 words, excluding the parts of the brief exempted by the rule. It complies with the type face requirements as it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman type style.

/s Richard M. Brunell

April 8, 2011

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 8, 2011.

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§ 801. Definitions.

When used in this chapter:

The term "common carrier by water in foreign commerce" means a common carrier, except ferryboats running on regular routes, engaged in the transportation by water of passengers or property between the United States or any of its Districts, Territories, or possessions and a foreign country,

whether in the import or export trade: Provided, That a cargo boat commonly called an ocean tramp shall not be deemed such "common carrier by water In foreign commerce."

The term "common carrier by water in interstate commerce" means a common carrier engaged in the transportation by water of passengers or property on the high seas or the Great Lakes on regular routes from port to port between one State, Territory, District, or possession of the United States and any other State, Territory, District, or possession of the United States, or between places in the same Territory, District, or possession.

The term "common carrier by water" means a common carrier by water in foreign commerce or a common carrier by water in interstate commerce on the high seas or the Great Lakes on regular routes from port to port.

The term "other person subject to this chapter" means any person not included in the term "common carrier by water," carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water.

The term "person" includes corporations, partnerships, and associations, existing under or authorized by the laws of the United States, or any State, Territory, District, or possession thereof, or of any foreign country.

The term "vessel" includes all water craft and other artificial contrivances of whatever description and at whatever stage of construction, whether on the stocks or launched, which are used or are capable of being or are intended to be used as a means of transportation on water.

The term "documented under the laws of the United States," means "registered, enrolled, or licensed under the laws of the United States."

The term "carrying on the business of forwarding" means the dispatching of

shipments by any person on behalf of others, by oceangoing common carriers in commerce from the United States, its Territories, or possessions to foreign countries, or between the United States and its Territories or possessions, or between such Territories and possessions, and handling the formalities incident to such shipments.

An "independent ocean freight forwarder" is a person carrying on the business of forwarding for a consideration who is not a shipper or consignee or a seller or purchaser of shipments to foreign countries, nor has any beneficial interest therein, nor directly or indirectly controls or is controlled by such shipper or consignee or by any person having such a beneficial interest.

§ 812. Rebates and discriminations by carriers by water prohibited; use of "fighting ship."

No common carrier by water shall, directly or indirectly, in respect to the transportation by water of passengers or property between a port of a State, Territory, District, or possession of the United States and any other such port or a port of a foreign country-

First. Pay or allow, or enter into any combination, agreement, or understanding, express or implied, to pay or allow a deferred rebate to any shipper. The term "deferred rebate" in this chapter means a return of any portion of the freight money by a carrier to any shipper as a consideration for the giving of all or any portion of his shipments to the same or any other carrier, or for any other purpose, the payment of which is deferred beyond the completion of the service for which it is paid, and is made only if, during both the period for which computed and the period of deferment, the shipper has complied with the terms of the rebate agreement or arrangement.

Second. Use a fighting ship either separately or in conjunction with any other carrier, through agreement or otherwise. The term "fighting ship" in this chapter means a vessel used in a particular trade by a carrier or group of carriers for the purpose of excluding, preventing, or reducing competition by driving another carrier out of said trade.

Third. Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason.

Fourth. Make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or unfairly treat or unjustly discriminate against any. shipper in the matter of (a) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage; (b) the loading and landing of freight in proper condition; or (c) the adjustment and settlement of claims.

Any carrier who violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $25,000 for each offense. *Provided,* That nothing in this section or elsewhere in this chapter, shall be construed or applied to forbid or make unlawful any dual rate contract arrangement in use by the members of a conference on May 19, 1958, which conference is organized under an agreement approved under section 814 of this title by the regulatory body administering this chapter unless and until such regulatory body disapproves, cancels, or modifies such arrangement in accordance with the standards set forth in section 814 of this title. The term "dual rate contract arrangement" as used herein means a practice whereby a conference establishes tariffs of rates at two levels the lower of which will be charged to merchants who agree to ship their cargoes on vessels of members of the conference only and the higher of which shall be charged to merchants who do not so agree.

§ 813. Determination by Board as to violations.

The Federal Maritime Board upon its own initiative may, or upon complaint shall, after due notice to all parties in interest and hearing, determine whether any person, not a citizen of the United States and engaged in transportation by water of passengers or property-

(1) Has violated any provision of section 812 of this title, or

(2) Is a party to any combination, agreement, or understanding, express or implied, that involves in respect to transportation of passengers or property between foreign ports, deferred rebates or any other unfair practice designated in section 812 of this title, and that excludes from admission upon equal terms with all other parties thereto, a common carrier by water which is a citizen of the United States and which has applied for such admission.

If the Board determines that any such person has violated any such provision or is a party to any such combination, agreement, or understanding, the Board shall thereupon certify such fact to the Commissioner of Customs.

The Commissioner of Customs shall thereafter refuse such person the right of entry for any ship owned or operated by him or by any carrier directly or indirectly controlled by him, into any port of the United States, or any Territory, District, or possession thereof, until the Board certifies that the violation has ceased or such combination, agreement, or understanding has been terminated.

§ 813a. Dual rate contracts used by carriers in foreign commerce; subjection to public interest; fairness; provisions; termination of notice; permission of Commission required for lawfulness.

Notwithstanding any other provisions of this chapter, on application the Federal Maritime Commission (hereinafter "Commission"), shall, after notice, and hearing, by order, permit the use by any common carrier or conference of such carriers in foreign commerce of any contract, amendment, or modification thereof, which is available to all shippers and consignees on equal terms and conditions, which provides lower rates to a shipper or consignee who agrees to give all or any fixed portion of his patronage to such carrier or conference of carriers unless the Commission finds that the contract, amendment, or modification thereof will be detrimental to the commerce of the United States or contrary to the public interest, or unjustly discriminatory or unfair as between shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, and provided the contract, amendment, or modification thereof, expressly (1) permits prompt release of the contract shipper from the contract with respect to any shipment or shipments for which the contracting carrier or conference of carriers cannot provide as much space as the contract shipper shall require on reasonable notice; (2) provides that whenever a tariff rate for the carriage of goods under the contract becomes effective, insofar as it is under the control of the carrier or conference of carriers, it shall not be increased before a reasonable period, but in no case less than ninety days; (3) covers only those goods of the contract shipper as to the shipment of which he has the legal right at the time of shipment to select the carrier: *Provided, however,* That it shall be deemed a breach of the contract if, before the time of shipment and with the intent to avoid his obligation under the contract, the contract shipper divests himself, or with the same intent permits himself to be divested, of the legal right to select the carrier and the shipment is carried by a carrier which is not a party to the contract; (4) does not require the contract shipper to divert shipment of goods from natural routings not served by the carrier or conference of

carriers where direct carriage is available; (5) limits damages recoverable for breach by either party to actual damages to be determined after breach in accordancewith the principles of contract law: *Provided, however,* That the contract may specify that in the case of a breach by a contract shipper the damages may be an amount not exceeding the freight charges computed at the contract rate on the particular shipment, less the cost of handling; (6) permits the contract shipper to terminate at any time without penalty upon ninety days' notice; (7) provides for a spread between ordinary rates and rates charged contract shippers which the Commission finds to be reasonable in all the circumstances but which spread shall in no event be more than 15 per centum of the ordinary rates; (8) excludes cargo of the contract shippers which is loaded and carried in bulk without mark or count except liquid bulk cargoes, other than chemicals, in less than full shipload lots: *Provided, however,* That upon finding that economic factors so warrant, the Commission may exclude from the contract any commodity subject to the foregoing exception; and (9) contains such other provisions not inconsistent herewith as the Commission shall require or permit. The Commission shall withdraw permission which it has granted under the authority contained in this section for the use of any contract if it finds, after notice and hearing, that the use of such contract is detrimental to the commerce of the United States or contrary to the public interest, or is unjustly discriminatory or unfair as between shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors.

The carrier or conference of carriers may on ninety days' notice terminate without penalty the contract rate system herein authorized, in whole or with respect to any commodity: *Provided, however,* That after such termination the carrier or conference of carriers may not reinstitute such contract rate system or part thereof so terminated without prior permission by the Commission in accordance with the provisions of this section. Any contract, amendment, or modification of any contract not permitted by the Commission shall be unlawful, and contracts, amendments, and modifications shall be lawful only when and as long as permitted by the Commission; before permission is granted or after permission is withdrawn it shall be unlawful to carry out in whole or in part, directly or indirectly, any such contract, amendment, or modification.

As used in this section, the term "contract shipper" means a person other than a carrier or conference of carriers who is a party to a contract the use of which may be permitted under this section.

§ 814. Contracts between carriers filed with Commission; definition of "agreement"; approval, disapproval, etc. by Commission; unlawful execution of agreements; conference agreements and antitrust laws exemptions; civil actions for penalties; terminal leases exemption.

Every common carrier by water, or other person subject to this chapter, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which It may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement.

The term "agreement" in this section includes understandings, conferences, and other arrangements.

The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that It finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations. No such agreement shall be approved, nor shall continued approval be permitted for any agreement (1) between carriers not members of the same conference or conferences of carriers serving different trades that would otherwise be naturally competitive, unless in the case of agreements between carriers, each carrier, or in the case of agreement between conferences, each conference, retains the right of independent action, or (2) in respect to any conference agreement, which fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership of other qualified carriers In the trade, or fails to provide that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal.

The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it, or of failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints. Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation; except that tariff rates fares, and charges, and classifications, rules, and regulations explanatory thereof (including changes in special rates and charges covered by section 813a of this title which do not involve a change in the spread between such rates and charges and the rates and charges applicable to noncontract shippers) agreed upon by approved conferences, and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval upon compliance with the publication and filing requirements of section 817 (b) of this title and with the provisions of any regulations the Commission may adopt.

Every agreement, modification, or cancellation lawful under this section, or permitted under section 813a of this title, shall be excepted from the provisions of sections 1-11 and 15 of Title 15, and amendments and Acts supplementary thereto.

Whoever violates any provision of this section or of section 813a of this title shall be liable to a penalty of not more than $1,000 for each day such violation continues, to be recovered by the United States in a civil action. *Provided, however,* That the penalty provisions of this section shall not apply to leases, licenses, assignments, or other agreements of similar character for the use of terminal property or facilities which were entered into before the date of enactment of this Act, and, if continued in effect beyond said date, submitted to the Federal Maritime Commission for approval prior to or within ninety days after the enactment of this Act, unless such leases, licenses, assignments, or other agreements for the use of terminal facilities are disapproved, modified, or canceled by the Commission and are continued in operation without regard to the Commission's action thereon. The Commission shall promptly approve, disapprove, cancel, or modify each such agreement in accordance with the provisions of this section.

§ 815. Discriminatory acts prohibited.

It shall be unlawful for any shipper, consignor, consignee, forwarder, broker, or other person, or any officer, agent, or employee thereof, knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable. It shall be unlawful for any common carrier by water, or other person subject to this chapter, either alone or in conjunction with any other person. directly or indirectly-

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided,* That within thirty days after enactment of this Act, or within thirty days after the effective date or the filing with the Commission, whichever Is later, of any conference freight rate, rule, or regulation in the foreign commerce of the United States, the Governor of any State, Commonwealth, or possession of the United States may file a protest with the Commission upon the ground that the rate, rule, or regulation unjustly discriminates against that State, Commonwealth, or possession of the United States, in which case the Commission shall issue an order to the conference to show cause why the rate, rule, or regulation should not be set aside. Within one hundred and eighty days from the date of the issuance of such order, the Commission shall determine whether or not such rate, rule, or regulation is unjustly discriminatory and issue a final order either dismissing the protest, or setting aside the rate, rule, or regulation.

Second. To allow any person to obtain transportation for property at less than the regular rates or charges then established and enforced on the line of such carrier by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means.

Third. To induce, persuade, or otherwise influence any marine Insurance company or underwriter, or agent thereof, not to give a competing carrier by water as favorable a rate of insurance on vessel or cargo, having due regard to the class of vessel or cargo, as is granted to such carrier or other person subject to this chapter.

Whoever violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $5,000 for each offense.

§ 816. Discriminatory rates prohibited; supervision by Board.

No common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. Whenever the Federal Maritime Board finds that any such rate, fare, or charge is demanded, charged, or collected it may alter the same to the extent necessary to correct such unjust discrimination or prejudice and make an order that the carrier shall discontinue demanding, charging, or collecting any such unjustly discriminatory or prejudicial rate, fare, or charge.

Every such carrier and every other person subject to this chapter shal establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the Board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice.

§ 817. Carriers in interstate commerce to establish, observe, and enforce reasonable rates and regulations; carriers in foreign commerce to file tariffs of rates and charges.

(a) Every common carrier by water in interstatecommerce shall establish, observe, and enforce just and reasonable rates, fares, charges, classifications, and tariffs, and just and reasonable regulations and practices relating thereto and to the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the carrying of personal, sample, and excess baggage, the facilities for transportation, and all other matters relating to or conhected with the receiving, handling, transporting, storing, or delivering ofproperty.

Every such carrier shall file with the Commission and keep open to public inspection, in the form and manner and within the time prescribed by the Commission, the maximum rates, fares, and charges for or in connection with transportation between points on its own route; and if a through route has been established, the maximum rates, fares, andcharges for or in connection with transportationbetween points on its own route and points on the route of any other carrier by water.

No such carrier shall demand, charge, or collect a greater compensation for such transportation than the rates, fares, and charges filed in compliance with this section, except with the approval of the Commission and after ten days' public notice in the form and manner prescribed by the Commission, stating the increase proposed to be made; but the Commission for good cause shown may waive such notice.

Whenever the Commission finds that any rate, fare, charge, classification, tariff, regulation, or practice, demanded, charged, collected, or observed by such carrier Is unjust or unreasonable, it may determine, prescribe, and order enforced a just and reasonable maximum rate, fare, or charge, or a just and reasonable classification, tariff, regulation, or practice.

(b) (1) From and after ninety days following October 3, 1961, every common carrier by water in foreign commerce and every conference of such carriers shall file with the Commission and keep open to public inspection tariffs showing all the rates and charges of such carrier or conference of carriers for transportation to and from United States ports and foreign ports between all points on its own route and on any through route which has been established. Such tariffs shall plainly show the places between which freight will be carried, and shall contain the classification of freight in force, and shall also state separately such terminal or other charge, privilege, or facility under the control of the carrier or conference of carriers which is granted or allowed, and any rules or regulations which In anywise change, affect, or determine any part or the aggregate of such aforesaid rates, or charges, and shall include specimens of any bill of lading, contract of affreightment, or other document evidencing the transportation agreement. Copies of such tariffs shall be made available to any person and a reasonable charge may be made therefor.

The requirements of this section shall not be applicable to cargo loaded and carried in bulk without mark or count, "or to cargo which is lumber. As used in this paragraph, the term "lumber" means lumber not further manufactured than passing lengthwise through a standard planing machine and crosscut to length, logs, poles, piling, and ties, including such articles preservatively treated, or bored, or framed, but not including plywood or finished articles knocked down or set up.

(2) No change shall be made in rates, charges, classifications, rules or regulations, which results in an increase in cost to the shipper, nor shall any new or initial rate of any common carrier by water in foreign commerce or conference of such carriers be instituted, except by the publication, and

filing, as aforesaid, of a new tariff or tariffs which shall become effective not earlier than thirty days after the date of publication and filing thereof with the Commission, and each such tariff or tariffs shall plainly show the changes proposed to be made in the tariff or tariffs then in force and the time when the rates, charges, classifications, rules or regulations as changed are to become effective: *Provided, however,* That the Commission may, in its discretion and for good cause, allow such changes and such new or initial rates to become effective upon less than the period of thirty days herein specified.

Any change in the rates, charges, or classifications, rules or regulations which results in a decreased cost to the shipper may become effective upon the publication and filing with the Commission. The term "tariff" as used in this paragraph shall include any amendment, supplement or reissue.

(3) No common carrier by water in foreign commerce or conference of such carriers shall charge or demand or collect or receive a greater or less or different compensation for the transportation of property or for any service in connection therewith than the rates and charges which are specified in its tariffs on file with the Commission and duly published and in effect at the time; nor shall any such carrier rebate, refund, or remit in any manner or by any device any portion of the rates or charges so specified, nor extend or deny to any person any privilege or facility, except in accordance with such tariffs.

(4) The Commission shall by regulations prescribe the form and manner in which the tariffs required by this section shall be published and filed; and the Commission is authorized to reject any tariff filed with it which is not in conformity with this section and with such regulations. Upon rejection by the Commission, a tariff shall be void and its use unlawful.

(5) The Commission shall disapprove any rate or charge filed by a common carrier by water in the foreign commerce of the United States or conference of carriers which, after hearing, it finds to be so unreasonably high or low as to be detrimental to the commerce of the United States.

(6) Whoever violates any provision of this section shall be liable to a penalty of not more than $1,000 for each day such violation continues, to be recovered by the United States in a civil action.

§821. Complaints to Board and investigations.

Any person may file with the Federal Maritime Board a sworn complaint

setting forth any violation of this chapter by a common carrier by water, or other person subject to this chapter, and asking reparation for the injury, if any, caused thereby.

The Board shall furnish a copy of the complaint to such carrier or other person, who shall, within a reasonable time specified by the Board, satisfy the complaint or answer it in writing. If the complaint is not satisfied the Board shall, except as otherwise provided in this chapter, investigate it in such manner and by such means, and make such order as it deems proper.

The Board, if the complaint is filed within two years after the cause of action accrued, may direct the payment, on or before a day named, of full reparation to the complainant for the injury caused by such violation.

The Board, upon its own motion, may in like manner and, except as .to orders for the payment of money, with the same powers, investigate any violation of this chapter.

Excerpt from the Intercoastal Shipping Act of 1933, as Amended
46 U.S.C. (1964)

§ 845b. Application to common carrier by water in interstate commerce.

The provisions of this chapter are extended and shall apply to every common carrier by water in interstate commerce, as defined in section 801 of this title.

Excerpts from the ICC Termination Act of 1995
49 U.S.C. (2006)

§ 10101. Rail transportation policy

In regulating the railroad industry, it is the policy of the United States Government--

(1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;

(2) to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory

decisions when regulation is required;

(3) to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Board;

(4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense;

(5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes;

(6) to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital;

(7) to reduce regulatory barriers to entry into and exit from the industry;

(8) to operate transportation facilities and equipment without detriment to the public health and safety;

(9) to encourage honest and efficient management of railroads;

(10) to require rail carriers, to the maximum extent practicable, to rely on individual rate increases, and to limit the use of increases of general applicability;

(11) to encourage fair wages and safe and suitable working conditions in the railroad industry;

(12) to prohibit predatory pricing and practices, to avoid undue concentrations of market power, and to prohibit unlawful discrimination;

(13) to ensure the availability of accurate cost information in regulatory proceedings, while minimizing the burden on rail carriers of developing and maintaining the capability of providing such information

(14) to encourage and promote energy conservation; anf

(15) to provide for the expeditious handling and resolution of all proceedings required or permitted to be brought under this part.

§ 13101. Transportation policy

(a) In general.--To ensure the development, coordination, and preservation of a transportation system that meets the transportation needs of the United States, including the United States Postal Service and national defense, it is

the policy of the United States Government to oversee the modes of transportation and--

(1) in overseeing those modes--

(A) to recognize and preserve the inherent advantage of each mode of transportation;

(B) to promote safe, adequate, economical, and efficient transportation;

(C) to encourage sound economic conditions in transportation, including sound economic conditions among carriers;

(D) to encourage the establishment and maintenance of reasonable rates for transportation, without unreasonable discrimination or unfair or destructive competitive practices;

(E) to cooperate with each State and the officials of each State on transportation matters; and

(F) to encourage fair wages and working conditions in the transportation industry;

(2) in overseeing transportation by motor carrier, to promote competitive and efficient transportation services in order to--

(A) encourage fair competition, and reasonable rates for transportation by motor carriers of property;

(B) promote efficiency in the motor carrier transportation system and to require fair and expeditious decisions when required;

(C) meet the needs of shippers, receivers, passengers, and consumers;

(D) allow a variety of quality and price options to meet changing market demands and the diverse requirements of the shipping and traveling public;

(E) allow the most productive use of equipment and energy resources;

(F) enable efficient and well-managed carriers to earn adequate profits, attract capital, and maintain fair wages and working conditions;

(G) provide and maintain service to small communities and small shippers and intrastate bus services;

(H) provide and maintain commuter bus operations;

(I) improve and maintain a sound, safe, and competitive privately owned motor carrier system;

(J) promote greater participation by minorities in the motor carrier system;

(K) promote intermodal transportation;

(3) in overseeing transportation by motor carrier of passengers--

(A) to cooperate with the States on transportation matters for the purpose of encouraging the States to exercise intrastate regulatory jurisdiction in accordance with the objectives of this part;

(B) to provide Federal procedures which ensure that intrastate regulation is exercised in accordance with this part; and

(C) to ensure that Federal reform initiatives enacted by section 31138 and the Bus Regulatory Reform Act of 1982 are not nullified by State regulatory actions; and

(4) in overseeing transportation by water carrier, to encourage and promote service and price competition in the noncontiguous domestic trade.

(b) Administration to carry out policy.--This part shall be administered and enforced to carry out the policy of this section and to promote the public interest.

§ 13701. Requirements for reasonable rates, classifications, through routes, rules, and practices for certain transportation

(a) Reasonableness.--

(1) Certain household goods transportation; joint rates involving water transportation.--A rate, classification, rule, or practice related to transportation or service provided by a carrier subject to jurisdiction under chapter 135 for transportation or service involving--

(A) a movement of household goods,

(B) a rate for a movement by or with a water carrier in noncontiguous domestic trade, or

(C) rates, rules, and classifications made collectively by motor carriers under agreements approved pursuant to section 13703,

must be reasonable.

(2) Through routes and divisions of joint rates.--Through routes and divisions of joint rates for such transportation or service must be reasonable.

(b) Prescription by Board for violations.--When the Board finds it necessary to stop or prevent a violation of subsection (a), the Board shall prescribe the rate, classification, rule, practice, through route, or division of joint rates to

be applied for such transportation or service.

(c) Filing of complaint.--A complaint that a rate, classification, rule, or practice in noncontiguous domestic trade violates subsection (a) may be filed with the Board.

(d) Zone of reasonableness.--

(1) In general.--For purposes of this section, a rate or division of a motor carrier for service in noncontiguous domestic trade or water carrier for port-to-port service in that trade is reasonable if the aggregate of increases and decreases in any such rate or division is not more than 7.5 percent above, or more than 10 percent below, the rate or division in effect 1 year before the effective date of the proposed rate or division.

(2) Adjustments to the zone.--The percentage specified in paragraph (1) shall be increased or decreased, as the case may be, by the percentage change in the Producers Price Index, as published by the Department of Labor, that has occurred during the most recent 1-year period before the date the rate or division in question first took effect.

(3) Determinations after complaint.--The Board shall determine whether any rate or division of a carrier or service in noncontiguous domestic trade which is not within the range described in paragraph (1) is reasonable if a complaint is filed under subsection (c) or section 13702(b)(6).

(4) Reparations.--Upon a finding of violation of subsection (a), the Board shall award reparations to the complaining shipper or shippers in an amount equal to all sums assessed and collected that exceed the determined reasonable rate, division, rate structure, or tariff. Upon complaint from any governmental agency or authority and upon a finding or violation of subsection (a), the Board shall make such orders as are just and shall require the carrier to return, to the extent practicable, to shippers all amounts plus interest, which the Board finds to have been assessed and collected in violation of subsection (a).

§ 13702. Tariff requirement for certain transportation

(a) In general.--Except when providing transportation for charitable purposes without charge, a carrier subject to jurisdiction under chapter 135 may provide transportation or service that is--

(1) in noncontiguous domestic trade, except with regard to bulk cargo, forest products, recycled metal scrap, waste paper, and paper waste; or

(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.

(b) Tariff requirements for noncontiguous domestic trade.--

(1) Filing.--A carrier providing transportation or service described in subsection (a)(1) shall publish and file with the Board tariffs containing the rates established for such transportation or service. The carriers shall keep such tariffs available for public inspection. The Board shall prescribe the form and manner of publishing, filing, and keeping tariffs available for public inspection under this subsection.

(2) Contents.--The Board may prescribe any specific information and charges to be identified in a tariff, but at a minimum tariffs must identify plainly--

(A) the carriers that are parties to it;

(B) the places between which property will be transported;

(C) terminal charges if a carrier provides transportation or service subject to jurisdiction under subchapter III of chapter 135;

(D) privileges given and facilities allowed; and

(E) any rules that change, affect, or determine any part of the published rate.

(3) Inland divisions.--A carrier providing transportation or service described in subsection (a)(1) under a joint rate for a through movement shall not be required to state separately or otherwise reveal in tariff filings the inland divisions of that through rate.

(4) Time-volume rates.--Rates in tariffs filed under this subsection may vary with the volume of cargo offered over a specified period of time.

(5) Changes.--The Board may permit carriers to change rates, classifications, rules, and practices without filing complete tariffs under this subsection that cover matter that is not being changed when the Board finds that action to be consistent with the public interest. Those carriers may either--

(A) publish new tariffs that incorporate changes, or

(B) plainly indicate the proposed changes in the tariffs then in effect and make the tariffs as changed available for public inspection.

(6) Complaints.--A complaint that a rate or related rule or practice maintained in a tariff under this subsection violates section 13701(a) may be submitted to the Board for resolution.

(c) Tariff requirements for household goods carriers.--

(1) In general.--A carrier providing transportation described in subsection (a)(2) shall maintain rates and related rules and practices in a published tariff. The tariff must be available for inspection by the Board and be made available for inspection by shippers upon reasonable request.

(2) Notice of availability.--A carrier that maintains a tariff under this subsection may not enforce the provisions of the tariff unless the carrier has given notice that the tariff is available for inspection in its bill of lading or by other actual notice to individuals whose shipments are subject to the tariff.

(3) Requirements.--A carrier that maintains a tariff under this subsection is bound by the tariff except as otherwise provided in this part. A tariff that does not comply with this subsection may not be enforced against any individual shipper.

(4) Incorporation by reference.--A carrier may incorporate by reference the rates, terms, and other conditions of a tariff in agreements covering the transportation of household goods.

(5) Complaints.--A complaint that a rate or related rule or practice maintained in a tariff under this subsection violates section 13701(a) may be submitted to the Board for resolution.

(d) Invalidation.--The Board may invalidate a tariff prepared by a carrier or carriers under this section if that tariff violates this section or a regulation of the Board carrying out this section.

§ 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.

(3) Conditions.--The Board may require compliance with reasonable conditions consistent with this part to assure that the agreement furthers the transportation policy set forth in section 13101.

(4) Independently established rates.--Any carrier which is a party to an agreement under paragraph (1) is not, and may not be, precluded from independently establishing its own rates, classification, and mileages or from adopting and using a noncollectively made classification or mileage guide.

(5) Investigations.--

(A) Reasonableness.--The Board may suspend and investigate the reasonableness of any rate, rule, classification, or rate adjustment of general application made pursuant to an agreement under this section.

(B) Actions not in the public interest.--The Board may investigate any action taken pursuant to an agreement approved under this section. If the Board finds that the action is not in the public interest, the Board may take such measures as may be necessary to protect the public interest with regard to the action, including issuing an order directing the parties to cease and desist or modify the action.

(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 under 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.

(b) Records.--The Board may require an organization established or continued under an agreement approved under this section to maintain records and submit reports. The Board, or its delegate, may inspect a record maintained under this section, or monitor any organization's compliance with this section.

(c) Review

(1) In general.--The Board may review an agreement approved under this section, on its own initiative or on request, and shall change the conditions of approval or terminate it when necessary to protect the public interest. Action of the Board under this section--

(A) approving an agreement,

(B) denying, ending, or changing approval,

(C) prescribing the conditions on which approval is granted, or

(D) changing those conditions,

has effect only as related to application of the antitrust laws referred to in subsection (a).

(2) Periodic review of approvals.--Subject to this section, in the 5-year period beginning on the date of the enactment of this paragraph and in each 5-year period thereafter, the Board shall initiate a proceeding to review any agreement approved pursuant to this section. Any such agreement shall be continued unless the Board determines otherwise.

(d) Existing agreements

(1) Agreements existing as of December 31, 1995.--Agreements approved under former section 10706(b) and in effect on December 31, 1995, shall be treated for purposes of this section as approved by the Board under this section beginning on January 1, 1996.

(2) Cases pending as of date of the enactment.--Nothing in section 227 (other than subsection (b)) of the Motor Carrier Safety Improvement Act of 1999, including the amendments made by such section, shall be construed to affect any case brought under this section that is pending before the Board as of the date of the enactment of this paragraph.

(e) Limitations on statutory construction.-

(1) Undercharge claims.--Nothing in this section shall serve as a basis for

any undercharge claim.

(2) Obligation of shipper.--Nothing in this title, the ICC Termination Act of 1995, or any amendments or repeals made by such Act shall be construed as creating any obligation for a shipper based solely on a classification that was on file with the Interstate Commerce Commission or elsewhere on December 31, 1995.

(f) Industry standard guides.--

(1) In general.--

(A) Public availability.--Routes, rates, classifications, mileage guides, and rules established under agreements approved under this section shall be published and made available for public inspection upon request.

(B) Participation of carriers.--

(i) In general.--A motor carrier of property whose routes, rates, classifications, mileage guides, rules, or packaging are determined or governed by publications established under agreements approved under this section must participate in the determining or governing publication for such provisions to apply.

(ii) Power of attorney.--The motor carrier of property shall issue a power of attorney to the publishing agent and, upon its acceptance, the agent shall issue a written certification to the motor carrier affirming its participation in the governing publication, and the certification shall be made available for public inspection.

(2) Mileage limitation.--No carrier subject to jurisdiction under subchapter I or III of chapter 135 may enforce collection of its mileage rates unless such carrier--

(A) is a participant in a publication of mileages formulated under an agreement approved under this section; or

(B) uses a publication of mileage (other than a publication described in subparagraph (A)) that can be examined by any interested person upon reasonable request.

(g) Single line rate defined.--In this section, the term “single line rate” means a rate, charge, or allowance proposed by a single motor carrier that is applicable only over its line and for which the transportation can be provided by that carrier.

§ 14101. Providing transportation and service

(a) On reasonable request.--A carrier providing transportation or service subject to jurisdiction under chapter 135 shall provide the transportation or service on reasonable request. In addition, a motor carrier shall provide safe and adequate service, equipment, and facilities.

(b) Contracts with shippers.--

(1) In general.--A carrier providing transportation or service subject to jurisdiction under chapter 135 may enter into a contract with a shipper, other than for the movement of household goods described in section 13102(10)(A), to provide specified services under specified rates and conditions. If the shipper and carrier, in writing, expressly waive any or all rights and remedies under this part for the transportation covered by the contract, the transportation provided under the contract shall not be subject to the waived rights and remedies and may not be subsequently challenged on the ground that it violates the waived rights and remedies. The parties may not waive the provisions governing registration, insurance, or safety fitness.

(2) Remedy for breach of contract.--The exclusive remedy for any alleged breach of a contract entered into under this subsection shall be an action in an appropriate State court or United States district court, unless the parties otherwise agree.

Excerpt from the Transportation Act of 1940

Pub. L. No. 76-785, Tit. 2, § 320

§ 320.

(a) The Shipping Act, 1916, as amended, and the Intercoastal Shipping Act, 1933, as amended, are hereby repealed insofar as they are inconsistent with any provision of this part and insofar as they provide for the regulation of, or the making of agreements relating to, transportation of persons or property by water in commerce which is within the jurisdiction of the Commission under the provisions of this part; and any other provisions of law are hereby repealed insofar as they are inconsistent with any provision of this part.

(b) Nothing in subsection (a) shall be construed to repeal-

(1) section 205 of the Merchant Marine Act, 1936, as amended, or any

provision of law providing penalties for violations of such section 205;

(2) the third sentence of section 2 of the Intercoastal Shipping Act, 1933, as amended, as extended by section 5 of such Act, or any provision of law providing penalties for violations of such section 2;

(3) the provisions of the Shipping Act, 1916, as amended, insofar as such Act provides for the regulation of persons included within the term 'other person subject to this Act', as defined in such Act;

(4) sections 27 and 28 of the Merchant Marine Act, 1920, as amended.

(c) Nothing in subsection (a) shall be construed to affect the provisions of section 15 of the Shipping Act, 1916, so as to prevent any water carrier subject to the provisions of this part from entering into any agreement under the provisions of such section 15 with respect to transportation not subject to the provisions of this part in which such carrier may be engaged.

(d) Nothing in this part shall be construed to affect any law of navigation, the admiralty jurisdiction of the courts of the United States, liabilities of vessels and their owners for loss or damage, or laws respecting seamen, or any other maritime law, regulation, or custom not in conflict with the provisions of this part.

(e) Subsection (e) of section 3 of the Inland Waterways Corporation Act of June 7, 1924, as amended (U. S. C., title 49, sec. 153 (e)), is hereby repealed as of October 1, 1940: *Provided, however,* That (1) any certificate of public convenience and necessity granted to any carrier pursuant to the provisions of such subsection (e) shall continue in effect as though issued under the provisions of section 309 of the Interstate Commerce Act, as amended; and (2) through routes and joint rates, and rules, regulations, and practices relating thereto, put into effect pursuant to the provisions of such subsection (e) shall, after the repeal of such subsection (e), be held and considered to have been put into effect pursuant to the provisions of the Interstate Commerce Act, as amended.