

Rates. The DRCs may adopt any existing local Rock Island rates or may establish new through or local rates, other than transit rates, on not less than one day's notice to the Commission and the public. Transit rates may be established on not less than one day's notice, provided that tariffs are appropriately modified requiring (1) that the further movement from transit points be from transit points not located on the line over which service is being directed, unless the further movement (a) takes place during the directed service period, or (b) takes place over another carrier's lines if the directed service period has expired, (2) that it moves no later than sixty days after the end of the directed service period, and (3) that connecting railroads which agree to these tariff changes have no recourse against the United States should the directed carrier fail to settle a transit claim filed after the end of the directed service period.

Operational Difficulties.—Any operational or other difficulties associated with the authorized operations shall be resolved by the DRC and any other affected party through negotiated agreement or, failing agreement, by the Commission's Railroad Service Board.

Reporting Requirements.—The DRCs shall submit to the Commission, on a monthly basis, reports on the directed service operations. These reports shall include summaries of the traffic handled, the revenues collected, and the expenses incurred in the directed service operations, in a form to be specified by the Commission's Bureau of Accounts. Revenue, expenses, and statistics resulting from directed service operations shall be internally maintained separate from the DRC's usual railroad operations.

We find: 1. The Secretary of Transportation has made a directed service certification to the Commission, pursuant to a section 104 of Pub. L. 96-254, with respect to Rock Island's lines described in the appendix.

2. The designated DRCs are capable of performing directed service over the lines certified by the Secretary.

3. This decision will not significantly affect either the quality of the human environment or the conservation of energy resources. See 49 CFR Parts 1106, 1108, (1978).

It is ordered:

§ 1033.1482 Directed service order No. 1482.

(1) **Various railroads—directed service.**—Chicago, Rock Island & Pacific Railroad Company, Debtor (William M. Gibbons, Trustee). Entry—Each DRC is

directed to enter upon and operate RI's lines described in the appendix pursuant to this directed service order under and section 104 of Pub. L. 96-254. Entry, by each DRC, respectively, shall occur and continue in accordance with the terms set forth in the appendix. Each DRC shall notify the Commission of its entry on the property immediately after such entry takes place.

(2) **Other Matters.**—Operations under this order shall conform with the directions prescribed above and the directed service certification of the Secretary of Transportation.

(3) **Commission Filings.**—All submissions filed in this proceeding should refer to "DSO No. 1482" and be sent to the following Commission offices in the Commission's Headquarters at 12th and Constitution Avenue, NW., Washington, DC 20423:

(i) Office of the Secretary (Room 2215) (original)

(ii) Section of Finance (Room 5417) Office of Proceedings (3 copies)

(iii) Section of Rail Service Planning (Room 7375) Office of Policy and Analysis (3 copies)

(iv) Railroad Service Board (Room 7115) (3 copies)

(4) **Applicability.**—The provisions of this decision shall apply to intrastate, interstate, and foreign commerce.

(5) **Modifications.**—The Commission retains jurisdiction to modify, supplement or reconsider this order at any time.

(6) **Initial and Interim finding.**—All correspondence to the Commission containing requests for initial and interim funding shall be addressed to: Ronald S. Young, Director, Bureau of Accounts, Interstate Commerce Commission, Room 6133, 12th and Constitution Avenue NW., Washington, DC 20423.

Envelopes containing such requests shall have the notation "Rock Island-DS" typed on the lower left corner.

(7) **Costs and revenues.**—The DRC shall record the costs and revenues attributable to directed service in the manner prescribed in this decision and in 49 CFR 1126, 44 FR 6156, 8879 (1979), subject to the limitations set forth in the directed service certification of the Secretary of Transportation.

(8) **Service on Parties.**—This decision shall be served on all parties. This decision shall also be served upon the American Short Line Railroad Association and upon the Association of American Railroads, Car Service Division (as agent of the railroads subscribing to the car service and car hire agreement under the terms of that agreement).

(9) **Notice to General Public.**—Notice of this decision shall be given to the general public by: (a) depositing a copy in the Office of the Secretary, Interstate Commerce Commission, Washington, DC; and (b) filing a copy with the Director, Office of the Federal Register.

(10) **Effective Date.**—This decision and order shall be effective at 12:01 a.m. (central time) on the first day after this decision's service date.

(11) **Expiration Date.**—Unless otherwise modified by the Commission, this decision and order will expire with respect to the various DRCs in accordance with the terms set forth in the appendix.

Decided: October 9, 1980.

By the Commission. Chairman Gaskins, Vice Chairman Gresham, Commissioners Clapp, Trantum, Alexis, and Gilliam. Vice Chairman Gresham not participating. Commissioner Trantum dissenting.

Agatha L. Mergenovich,
Secretary.

Appendix

Rock Island Lines Certified for Directed Service Under Rock Island Railroad Transition & Employee Assistance Act—Pub. L. 96-254 (May 30, 1980)

1. A. *Carrier.* Wabash Valley Railroad Company, a wholly owned subsidiary of Morrison-Knudsen Company, Inc.
- B. *Certification Date.* August 8, 1980.
- C. *Description of Lines.*

(1) Subdivision 7, mainline track extending eastward from Phillipsburg, KS, milepost 283.9 to Mahaska, KS, milepost 170.3; and
(2) Subdivision 20-B, branchline track extending southeast from Belleville, KS, milepost 226.1 to Manhattan, KS, milepost 143.3.

D. *Service Period.* Beginning on or about September 1, 1980, and continuing for ninety days, dates inclusive.

E. *Frequency of Service.* Not less than two trains per week.

F. *Reimbursement.* In no event shall the aggregate of compensation paid or payable by the United States exceed \$1,000,000 for the total directed service period.

2. A. *Carrier.* The Atchison, Topeka and Santa Fe Railway Company.

B. *Certification Date.* September 4, 1980.

C. *Description of Lines.*

(1) Subdivision 25-C, branchline track in Alva, Oklahoma, (milepost 101.0 to 103.5).

D. *Service Period.* Beginning on or about October 1, 1980, and continuing for ninety days, dates inclusive.

E. *Frequency of Service.* Service to be provided on an as needed basis.

F. *Reimbursement.* The aggregate compensation paid or payable by the United States should not exceed \$170,140 for the total directed service period.

[FR Doc. 80-32402 Filed 10-16-80; 8:45 am]

BILLING CODE 7035-01-M

49 CFR Part 1045**[Ex Parte No. MC-96 (Sub-3)]****Property Broker Practices****AGENCY:** Interstate Commerce Commission.**ACTION:** Final rule.

SUMMARY: The Commission is adopting rules which govern the operational practices of property brokers. The Commission proposed these rules at 45 F.R. 31140, May 12, 1980. The rules adopted are identical to those proposed, except for minor corrections.

The adopted rules eliminate unnecessary governmental interference with the business dealings between brokers, shippers and carriers, reduce recordkeeping requirements, and clarify the language of the rules.

EFFECTIVE DATE: These rules become effective November 17, 1980.

FOR FURTHER INFORMATION CONTACT: Peter Metrinko, 202-275-7805 or Edward E. Guthrie, 202-275-7691.

SUPPLEMENTARY INFORMATION: These rules deal with the operational practices of property brokers. Following a notice issued last March announcing our intention to conduct a thorough examination of the regulation of brokers, and the receipt of comments in response to that announcement, we issued a set of proposed regulations last May. As we noted there, our fundamental goal in regulating transactions among brokers, carriers and shippers is to remove unnecessary restrictions which might impede the free operation of the marketplace.

Comments were received from only a small number of parties, but significant views are represented. Comments were received from, among others, the National Customs Brokers and Forwarders Association of America, Inc., and the Property Brokers Association of America, Inc., in support of the proposed rule. Several motor carriers, the American Movers Conference and the Household Goods Carrier's Bureau oppose the revisions contemplated to 49 CFR 1045.9, the rebating and compensation rule. Where no public comment has been received on a separate paragraph or section of the proposed rules, we will not address the matter further.

W.S. Hatch Co., argues that the broker is in a predominant position. Once it gets the freight, there is no bargaining. Hatch's experience with brokers, however, has apparently been largely with brokers of exempt commodities, where the brokers are not licensed, and often cannot be precisely located. In

addition, the nature of originating traffic is entirely different in the exempt agricultural area. In the regulated transportation area, points of distribution or manufacture are precisely located. If a carrier wishes to bypass the broker and offer the shipper a better deal, the shipper can easily be found.

In addition, I.C.C. brokers are licensed and bonded. Failure to pay transportation bills is guarded against through the Commission's requirement of a surety bond. If the bond is revoked, a broker may not continue to operate until a valid bond is obtained. See 49 U.S.C. 10927(b). The licensed broker is also required to designate service of process agents in States where it writes contracts of has offices. An aggrieved party may thus readily bring suit against an unscrupulous broker.

Yellow Freight System, Inc., argues that the brokerage services performed are generally on behalf of the shipper, and that the carrier should not be placed in the position where it is forced to accede to the request for a commission. This subject was addressed in the notice of proposed rulemaking. We wish to emphasize, however, that the carrier and shipper are free to deal directly with each other. The carrier may, for example, convince the shipper that it will get all the necessary services from the carrier at a cheaper price. Only where the shipper finds that it can get better service from the broker will it stay with the broker. In short, we believe the carrier has it within its power to market its service in a way that will make it attractive for the shipper to deal directly with the carrier.

We nonetheless recognize that brokerage services are performed for the benefit of both the carrier and the shipper and we do not want to compromise the opportunities for the use of brokerage where that arrangement is beneficial to all parties. We disagree with the contentions of Yellow that benefits flow only to the shipper. Where a shipper requests that a broker find suitable motor carrier service, the broker, in contacting the carrier for the shipper, is performing similar functions to that which the carrier's sales or traffic departments would normally be performing. The broker has opened up a flow of business that would perhaps never have been tapped. Were we to preclude commissions from carriers entirely, the carrier would be obtaining free sales and traffic service. If the carrier chooses to do business with the broker on a continuing basis, it is conceivable that it might reduce its own sales operations.

Finally, the carrier is never required to pay a commission. It will do so only if it determines that the tendered traffic will benefit its operations.

The American Movers Conference and Household Goods Carriers' Bureau (AMC) jointly oppose the modification of 49 CFR 1045.9, especially insofar as it would apply to property brokers of household goods. They also contend that the services of household goods brokers are not mutually beneficial to shippers and carriers. Further, household goods brokers perform services for the shipper which they contend must be paid for by the shipper because payment by the carrier would be an illegal rebate under 49 U.S.C. 10761. They argue that when a person is vested with control of a shipper's traffic because of a non-transportation relationship with the shipper, the payment of a commission by a carrier for the tendering of a shipment is an unlawful rebate, even though the person receiving the payment does not own the goods shipped or pay the transportation charges.

AMC also points to prior Commission decisions, such as *Jacobs Broker Application*, 30 M.C.C. 51, 53 (1941), which state that permitting a carrier to pay for services which benefit only the shipper is unlawful, and that allowing a broker to render free valuable services to a shipper contributes to undesirable control of the traffic, defeating freedom of negotiations.

Further, AMC argues that household goods brokers should be treated differently, since the Commission in the past has stated that these brokers offer little or no benefit to shippers or carriers.

We do not accept the overly strict interpretations of the rebate provisions of the Interstate Commerce Act by the AMC. It is clear that the Motor Carrier Act of 1980 (Act) has substantially changed the way those provisions should be interpreted. Moreover, the philosophy of the new Act gives encouragement to greater individual bargaining. While the Congress has, in certain instances, given the Commission specific direction in implementing transportation policy, it has also clearly given us a general mandate to open up the bargaining process between shippers and carriers. Amendments to the National Transportation Policy, the establishment of a zone of rate freedom accompanied by the eventual elimination of antitrust immunity for single-line rates, and the liberalization of entry for motor carriage of property are all designed to spur individual initiative in service and pricing. It is in

this context that the arguments presented by AMC must be evaluated.

It should be made clear at the outset that payment of a commission by the carrier to the broker was not completely proscribed even under present rule 49 CFR 1045.9. The prohibition extended only to payment of a commission for "brokerage" services. "Non-brokerage" services performed for the carrier, even where there was prior affiliation with the shipper, could have resulted in compensation being paid by the carrier to the broker. Thus, payment of a commission was not an illegal rebate *per se*.

The Commission's policy was partly grounded in the concept, which we now believe is incorrect, that when a broker contacts a carrier on behalf of a shipper that benefits flow only to the shipper. We reject that contention explicitly.

Let us take an example from another industry where brokers play an important part in the transaction, the real estate brokerage industry. While commission payment arrangements differ within that industry, one common arrangement is as follows. A potential seller lists a home with the broker for an agreed upon commission. The seller realizes that if it wishes to receive a certain amount of money from the transaction (hopefully, a profit) it must set the selling price at a level that takes the commission into account. A potential buyer also contacts a broker, which for simplicity we will assume here is the listing broker. The buyer agrees to sign a contract knowing that while technically the commission will come from the seller, the price of the house includes the commission to the broker. The seller agrees to the commission because the broker has found it a buyer. The willing buyer accedes to the arrangement because it knows that it is merely helping to pay the broker's commission for a service the buyer has also received—finding a suitable home. Thus, both buyer and seller have received benefits and both contribute to the broker's payment. The situation in the motor carrier industry is similar—both are receiving a benefit. We will examine some examples in the household goods broker industry.

The broker of household goods may be serving two general types of customers. First, there is the corporate customer. The broker may be hired on a long term basis to handle the household moves of the employees of an entire corporation or other large organization.

While the carrier may attempt to bargain directly with the shipper, it may prefer to allow the broker to handle preliminary details. The broker will have to coordinate schedules and

handle paperwork. The broker may have to set up permanent liaison with the corporation, or may be required to learn details about the corporation in order to plan the moves most effectively. Whatever services are provided, however, also benefit the carrier. Undoubtedly the carrier would have to upgrade its own staff were it to undertake all the preliminary services necessary and incident to the actual transportation. And, obviously, the broker has benefitted the carrier by finding traffic for it.

The broker may not be able to bargain directly with the other general type of customer,¹ the individual shipper of household goods, but the fact remains that benefits still flow to the carrier. If the carrier has not prevailed in this bargaining process, it now has a choice. If it wants the traffic the broker has attracted, it can bargain with the broker. Retrieving this business should be worth something to the carrier. If it sees a benefit, the carrier should be willing to pay an appropriate commission. However, the carrier enjoys another benefit. As with the corporate customer, the broker's initial dealings with the shipper will have substituted for those that would be performed by the carrier. While the cost savings to a carrier may not be discernible in individual cases, in the long run the carrier will achieve savings by having to rely less on its own clerical or sales staff. It must be remembered that even the handling of public inquiries constitutes a real cost to an organization, although this is often not apparent on its face. The carrier may even wish to expand its reliance on the sale, paperwork and information dissemination expertise of the broker.

We thus believe that the Commission's early interpretations of the concept of lack of benefit to the carrier, as in *Jacobs, supra*, were incorrect, and that line of cases cited by AMC is overruled. As the implementation of the new Act makes the trucking industry more competitive, carriers may fully discover the advantages in having brokers find suitable shipments which their own traffic and sales departments have not located.

Finally, the Act impels us to make the compensation rule more flexible

¹ Once the broker has attracted the individual's business, the carrier will not normally know the identity of the shipper. By then the individual may have contracted with the broker, and probably the broker would not willingly disclose the name of the shipper until near the loading date. To counteract this tendency, the carrier will have to step up its salesmanship when contacted by the general public by offering competitive price and service options.

because of what we see as an increased future need for property brokers. The Act, in broad terms, makes entry into the industry easier. In specific terms, it dramatically opens up entry in the transportation of foodstuffs and other commodities by owner-operators, under the provisions of 49 U.S.C. 10922(b)(4)(E). These individuals will require assistance by property brokers in finding loads since they will not have sophisticated, or perhaps any, communications systems or sales personnel. There will be greater incentive for brokers to seek out the clientele of these owner-operators if they know they can lawfully obtain a commission for matching the needs of the owner-operators with the brokers' shipper clients.

Finally, we find little relevance in the argument that household goods brokers should be treated differently since the Commission in the past has frequently found their services to be of little benefit. We are here talking about licensed brokers whose proposed services have already been found to be in the public interest.

We should point out that in the future, household goods broker applications will be decided under an Act which favors negotiation and provides the means, e.g., rate freedoms, to bring real benefits to individual shippers of household goods.

Accordingly, we adopt the rules proposed in the prior Federal Register notice, as set forth in the appendix to this notice.

This action does not significantly affect the quality of the human environment or the conservation of energy resources.

This action is taken under the authority of 49 U.S.C. 10321 and 5 U.S.C. 553.

Decided: September 29, 1980.

By the Commission, Chairman Gaskins, Vice-Chairman Gresham, Commissioners Clapp, Trantum, Alexis, and Gilliam.

Agatha L. Mergenovich,
Secretary.

Appendix

49 CFR 1045 is revised by making the following changes:

1. Revise § 1045.2 to read as follows:

§ 1045.2 Definitions.

(a) "Broker" means a person who, for compensation, arranges, or offers to arrange, the transportation of property by an authorized motor carrier. Motor carriers, or persons who are employees or bona fide agents of carriers, are not brokers within the meaning of this section when they arrange or offer to arrange the transportation of shipments

which they are authorized to transport and which they have accepted and legally bound themselves to transport.

(b) "Bona fide agents" are persons who are part of the normal organization of a motor carrier and perform duties under the carrier's directions pursuant to a preexisting agreement which provides for a continuing relationship, precluding the exercise of discretion on the part of the agent in allocating traffic between the carrier and others.

(c) "Brokerage" or "brokerage service" is the arranging of transportation or the physical movement of a motor vehicle or of property. It can be performed on behalf of a motor carrier, consignor, or consignee.

(d) "Non-brokerage service" is all other service performed by a broker on behalf of a motor carrier, consignor, or consignee.

2. Revise § 1045.3 to read as follows:

§ 1045.3 Records to be kept by brokers.

(a) A broker shall keep a record of each transaction. The record shall show:

- (1) The name and address of the consignor;
- (2) The name, address, and lead MC-number of the originating motor carrier;
- (3) The bill of lading or freight bill number;
- (4) The amount of compensation received by the broker for the brokerage service performed and the name of the payer;
- (5) A description of any non-brokerage service performed in connection with each shipment or other activity, the amount of compensation received for the service, and the name of the payer; and
- (6) The amount of any freight charges collected by the broker and the date of payment to the carrier.

For purposes of this subsection, brokers may keep master lists of consignors and the address and lead docket number of the carrier, rather than repeating this information for each transaction.

(b) Brokers shall keep the records required by this section for a period of three years.

(c) Each party to a brokered transaction has the right to review the record of the transaction required to be kept by these rules.

3. Delete present §§ 1045.4, 1045.5, and 1045.6 and reserve them for future use.

§ 1045.4 [Reserved]

§ 1045.5 [Reserved]

§ 1045.6 [Reserved]

4. Revise § 1045.7 to read as follows:

§ 1045.7 Misrepresentation.

(a) A broker shall not perform or offer to perform any brokerage service (including advertising), in any name other than that in which its license is issued.

(b) A broker shall not, directly or indirectly, represent its operations to be that of a carrier. Any advertising shall show the broker status of the operation.

5. Delete present § 1045.8 and reserve it for future use.

§ 1045.8 [Reserved]

6. Revise § 1045.9 to read as follows:

§ 1045.9 Rebating and compensation.

(a) A broker shall not charge or receive compensation from a motor carrier for brokerage service where:

- (1) The broker owns or has a material beneficial interest in the shipment or
- (2) The broker is able to exercise control over the shipment because the broker owns the shipper, the shipper owns the broker, or there is common ownership of the two.

(b) A broker shall not give or offer to give anything of value to any shipper, consignor or consignee (or their officers or employees) except inexpensive advertising items given for promotional purposes.

7. Revise § 1045.10 to read as follows:

§ 1045.10 Duties and obligations of brokers.

Where the broker acts on behalf of a person bound by law or a Commission regulation as to the transmittal of bills or payments, the broker must also abide by the law or regulations which apply to that person.

8. Revise § 1045.11 to read as follows:

§ 1045.11 Transfer of property broker licenses; change in control of corporations and associations holding broker licenses; petitions for reconsideration.

(a) In order to transfer a property broker license, a transferee must file with the Commission an application for approval of the transfer. The application must contain proof that the transferee is fit, willing, and able to perform the duties of a broker and that the transfer will not be contrary to the public interest.

(b) If there is a change in the control of a corporation or association which holds a broker license, an application must be filed with the Commission describing the change and offering proof that the change is not contrary to the public interest.

(c) The rules that govern the form and manner of filing of applications, the notice that must be given to the public, and the manner of filing protests are the

same as those which apply to the transfer of operating rights (see 49 C.F.R. 1100.225).

(d) Rules governing petitions for reconsideration of a decision under this subsection will be governed by the rules contained in 49 C.F.R. 1132.4 and 1100.225.

9. Delete § 1045.12 and reserve it for future use.

§ 1045.12 [Reserved]

10. Revise § 1045.13 to read as follows:

§ 1045.13 Accounting.

Each broker who engages in any other business shall maintain accounts so that the revenues and expenses relating to the brokerage portion of its business are segregated from its other activities. Expenses that are common shall be allocated on an equitable basis; however, the broker must be prepared to explain the basis for the allocation.

[FR Doc. 80-32409 Filed 10-16-80; 8:45 am]

BILLING CODE 7035-01-M

49 CFR Part 1100

[Ex Parte 367]

Tariff Integrity Board

AGENCY: Interstate Commerce Commission.

ACTION: Final rule.

SUMMARY: Upon reconsideration, 49 CFR 1100.22a(e)(4) is being revised to provide for automatic stays of Tariff Integrity Board decisions when administrative appeals of the decisions are timely filed. The final rules adopted in this proceeding on October 10, 1979 (see 44 FR 58511), did not allow such stays. This action is being taken in response to a petition filed by Southern and Eastern Territory railroads to reopen this proceeding for reconsideration. Except for the revision of 49 CFR 1100.22a(e)(4) the petition is denied.

EFFECTIVE DATE: The revision is effective October 17, 1980.

FOR FURTHER INFORMATION CONTACT: Martin E. Foley, (202) 275-7348.

SUPPLEMENTARY INFORMATION: Southern and Eastern Territory railroads (or petitioners) filed a petition for the reopening of this proceeding for reconsideration of our decision served on October 5, 1979, and published in the Federal Register on October 10, 1979, at 44 FR 58511. In that decision we adopted rules which allow tariff users a simplified and expedited procedure for challenging recently filed tariff publications believed to have been established in violation of: the

Commission's tariff regulations; provisions of the Interstate Commerce Act; and orders of the Commission or the courts. The challenges can result in the striking of the complained of tariff publications.

Background

Over the years, the Commission's tariff examination program has contemplated the thorough examination of all tariff matter filed with the Commission. That examination process provided a significant service to tariff users (the shipping/receiving community) since it worked to ensure tariff compliance with the Act, Commission and court orders, and our tariff publishing requirements. Tariffs filed in violation of those authorities were subject to rejection. That examination process also served tariffmakers since deficiencies in filed tariffs were brought to the attention of responsible tariff officials either for corrective action or for future guidance.

In recent years, however, the Commission has been faced with budgetary and personnel constraints. Therefore, beginning with fiscal year 1980, the Commission adjusted its tariff examination program in order to contend with the constraints. Initially, a random sampling examination program was implemented. The sampling program has since been discontinued, and a more limited program of title page examination has been adopted for not yet effective tariffs. Under the title page examination program, only the title pages of tariff filings are reviewed for violations of our tariff publishing requirements. The remaining pages of the tariff publications are not normally reviewed prior to publications' effective dates.

The Commission, however, believes it would be wholly inappropriate to abandon the services and safeguards it formerly offered to tariff users under its complete tariff examination program. In this regard, the Tariff Integrity Board (or T.I. Board) was established as an alternate methodology to protect the public from tariff deficiencies not detected under limited examination programs. In brief, upon complaint of tariff users, tariff matter judged by the Tariff Integrity Board to be so severely flawed as to be deemed unlawfully established may be ordered stricken. Thus, tariff users can continue to rely on the Commission to assure that tariffmakers meet their lawful obligations when constructing and filing tariffs.

The rules under which the T.I. Board operates became effective on October 10, 1979, upon publication in the *Federal Register*. The present petition seeks to

reopen this proceeding for the purpose of amending the adopted rules to reflect the petitioners' views or to adopt a new set of rules previously proposed by the petitioners in their comments submitted in the rulemaking proceeding.

Discussion and Conclusions

Basically, the petitioners feel that the scope and powers of the T. I. Board are too broad. Specifically, petitioners hold that the Board's interests should "cover only inadvertent tariff publishing errors and not violations of the Act, court or Commission orders or other areas of substantive content." Taking petitioners literally, the Board would need to be endowed with clairvoyance to discern "inadvertent" publishing errors from those not "inadvertent." Further, to deny the T. I. Board the right to rectify violations of the Act, or Commission or court orders, would be tantamount to stripping the Commission of current powers whereby tariffs are rejected for such violations. For example, as a result of a Commission decision and order,¹ current regulations require the timely transmission of tariffs to subscribers. Moreover, tariff-makers are required to certify their compliance with this requirement. Under the former full tariff examination program, the observed absence of such certification could have resulted in the rejection of the filed publication. Under our limited examination, the absence of such certification might not be detected; and neither will the tariff users be aware of non-receipt of tariffs in a timely fashion. Under petitioners' plan, tariff subscribers would have no prompt remedy should they fail timely to receive a tariff filing containing matter contrary to their best interests; consequently, those tariff users would effectively be denied their right to protest new or changed tariff provisions. We cannot countenance such a voiding of our obligation to the tariff users. It is proper that the T. I. Board act on complaints concerning noncompliance with Commission and court decisions. This power is merely an amplification of the recognized right² of the Commission to reject tariffs filed in violation of an order of the courts or the Commission, whether or not the order is codified in regulations.

Neither can we subscribe to petitioners' plan that the T. I. Board not entertain complaints based on alleged violations of the Act. Under limited examination, tariffs filed on less than 30

days' notice (without Commission approval) could go undetected. Such publications would violate the statutory requirement of the Act that filings give not less than 30 days' notice. Again, absent the power of the T. I. Board, tariff users could be deprived of their right to protest. Again, we do not feel that we can relinquish our obligation to protect tariff users through assurance of compliance with statutory mandates.

Petitioners also express anxiety that the T. I. Board will consider the striking of challenged tariff filings on substantive grounds. We believe such anxiety is misplaced since the parameters of the Board's power to strike are identical to the parameters of the Commission's right to reject, namely—our tariff regulations, court or Commission orders and the Act itself. To the extent that challenged matter will be measured or interpreted against those authorities, the Board will deal with substantive issues. However, this process is no different than was formerly exercised when consideration was being given to rejection of tariffs under the former program of complete tariff examination of all filings to the Commission. Additionally, under the processes of the T. I. Board, tariffmakers are given a protection not previously enjoyed under rejection processes. Under the T. I. Board, tariffmakers have the right to respond to challenges against their tariffs. Thus, any invalid grounds relied on in support of possible strike action can be refuted by the tariff framers. The right to respond prior to rejection was never established under former processes. In summary, the authorities delegated to the T. I. Board in consideration of strike action do not exceed the long-standing authorities formerly relied on in consideration of rejection.

Petitioners contend that the power of the T. I. Board to strike tariffs *ex post facto* is a departure from past Commission policy and practice. We acknowledge this point in our prior decision served October 5, 1979. Thus, petitioners' real concern appears to run more against our right to adopt new or revised policy and practice than against our rationale for doing so.

It has been held that the Commission is free to make changes to accommodate its needs and those of the transportation community. In *American Trucking Associations v. Atchison, T. & S. F. Ry. Co.*, 387 U.S. 397 (1967), the following is stated at page 416:

... the Commission, faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past administrative rulings and practice ... In fact, although we make no judgment

¹ *Regulations For The Transmission Of Tariffs And Schedules To Subscribers And Other Interested Parties*, 349 I.C.C. 119 (1975).

² 49 CFR 1300.14(e)(1); 49 CFR 1310.1(i)(3).

as to the policy aspects of the Commission's action, this kind of flexibility and adaptability to changing needs and patterns of transportation is an essential part of the office of a regulatory agency. Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy. They are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday.

The strike authority of the T. I. Board is patterned after the rejection authority presently delegated to certain employees of the Commission's Bureau of Traffic. The delegation calls for the rejection of publications filed with the Bureau which fail to comply with the law and applicable rules and regulations. The rejections take place prior to effective dates. The delegation of authority to the T. I. Board allows it to strike tariff matter which it finds to have been unlawfully established. Such strike decisions—as has been true of rejection decisions—are appealable to a division of the Commission. Complaints which the T. I. Board finds to be highly controversial will likely be referred to the Commission's formal docket.

Past rejections which have been made subsequent to published effective dates have been the result of formal cases wherein tariff publishers and/or carriers have been unable to "show cause" why a particular tariff filing or portions of filings should not be rejected and stricken from the Commission's files. An example of this type of rejection/strike action is contained in *Acme Fast Freight, Inc., Common Carrier Application*, 17 MCC 549 (1939), sustained 30 F. Supp 968 (1940), affirmed 309 U.S. 638 (1940).

The following language is contained in the Commission's decision at pages 556 and 557:

Section 217 further provides:
* * * and the Commission is authorized to reject any tariff filed with it which is not a consonance with this section and with such regulations. Any tariff so rejected by the Commission shall be void and its use shall be unlawful.

Under this provision we may "reject" any tariff filed with us which is not in consonance with Section 217 and with our regulations thereunder. We may refuse to accept such a tariff at the time it is first transmitted to us for filing, and we think the provision is reasonably interpreted as granting us implied authority later to strike such a tariff from our files if and when it is determined that it is not in consonance with the section or the regulations thereunder. In several instances we have ordered tariffs stricken from our files. *Wharfage, Handling and Storage Charges*, 59 ICC 488, *Mercer Valley R. Co. v.*

Pennsylvania R. Co., 69 ICC 233, *Express Merchandise from Cincinnati, Ohio, to South*, 210 ICC 89, and *Pollard, Receiver v. Fort Benning R. Co.*, 206 ICC 362; compare *Powell v. United States*, 300 U.S. 276, 285. If tariffs are unlawful, as in *Express Merchandise from Cincinnati, Ohio, to South*, *supra*, they may not lawfully be used, have no proper place in our files, and may be expunged. If they are not required by statute to be filed, we are not bound to accept them, and if we should accept them upon misapprehension, or inadvertently without examination or without determination as to whether they are proper subjects for filing, we may later reject them and strike them from our files.

A recent example of the Commission's rejection/strike action in Docket No. 36870, *National Association of Specialized Carriers, Inc., Agent-Show Cause and Strike Order*, not printed (1978). In this particular case, the Commission rejected and struck from its files a tariff which was found to have been unlawfully established as a result of non-compliance with the Commission's regulations on the transmission of tariff publications published at 49 CFR 1310.31. The Commission held that since the tariff never had been lawfully established, it was invalid and therefore never applicable. Thus, the strike decision applied retroactively to the stricken tariff's effective date. This action is representative of that which has now been delegated to the T. I. Board.

The petitioners express a concern that tariffs will be stricken for the slightest of infractions. This certainly is not the case. Tariffs have been stricken in the past only for significant publishing or compliance errors. The T. I. Board will continue this practice. However, each case submitted to the T. I. Board will be considered on its own merits. What may be cause for a strike decision in one case may not necessarily be cause for a strike decision in another case.

The retroactive application of the T. I. Board's decisions and resulting overcharges or undercharges were matters of great criticism in the comments we received in this proceeding. This criticism was addressed in our earlier decision. However, the petitioners have again raised this issue and hold that the T. I. Board's decisions may not apply retroactively. Thus, overcharges and undercharges would not exist. The retroactive application of a strike decision is not something new. As pointed out earlier, such an application was used recently by a division of the Commission in Docket No. 36870. Further, an entire Commission made the following statement in *H. J. Baker & Bros., Inc.-Statute of Limitations*, 357 ICC 640 (1978), at page 644:

The tariffs on file, although unlawful, specified the applicable rate which shippers were bound to pay, pursuant to the act. The act requires strict observance of the tariff regardless of the inherent unlawfulness of the rates specified. However, when and if the rates are shown to be unlawful for any reason, shippers are entitled to recover the difference between what they paid under the applicable tariff, and what is subsequently determined to be the lawful rate. Since the applicable rate cannot be deemed the lawful rate merely by virtue of being on file with the Commission, the argument of the Canadian railroads that the rates assessed were the lawful rates is without merit.

The amounts carriers or shippers may be liable for as a result of the T. I. Board's strike decisions are separate issues which would be dependent on the facts of each case. The T. I. Board does not resolve these issues, which may be resolved through the informal or formal complaint processes or through the courts.

Under the random sampling tariff examination program we expected that a certain number of unlawfully established tariffs would become effective. The substitution of our title page examination program in lieu of the more comprehensive random sampling program will undoubtedly lead to more such tariffs. Without the simplified and expedited complaint procedure of the T. I. Board, tariff users would be forced to file formal complaints with the Commission concerning alleged unlawfully established publications. We feel that the formal complaint alternative would be a needless burden upon complainants and this Commission's already crowded formal docket. The T. I. Board and its authority to strike unlawfully established tariff matter are needed in view of our changed regulatory approach and the need for a deterrent for those who might become careless or devious in their tariff publishing practices.

The petitioners feel that the filing of an exception to a decision of the T. I. Board should automatically stay the effectiveness of the decision. In our notice of final rules in this proceeding, we stated that the decisions of the T. I. Board will become effective when served. We believe that petitioners are correct and that T. I. Board decisions should be automatically stayed upon the filing of an appeal.

Section 10322 of the Act states that, in non-rail cases, if review is sought of an initial decision by a board or an employee, the decision is stayed or postponed pending final determination of the matter. Section 10327(f)(2) contains similar language for rail proceedings. Rule 98(b)(6) of the Commission's General Rules of Practice

(49 CFR 1100.98(b)(6)), as revised in Ex Parte No. 55 (Sub-No. 45), *Appellate Procedures*, decided July 2, 1980, provides for automatic stays of employee board decisions.

Although we believe the effectiveness of rejection decisions should not be unreasonably delayed and do not expect frequent appeals from such decisions, we see no compelling reasons not to provide the same automatic stay of rejection decisions as our General Rules of Practice provide when other employee decisions are appealed. Accordingly, Rule 22a(e)(4) (49 CFR 1100.22a(e)(4)) is revised to read as follows:

PART 1100—GENERAL RULES OF PRACTICE

§ 1100.22a Special procedures for dealing with unlawfully established tariffs or rates.

(e) Processing of complaints

(1) * * *

(2) * * *

(3) * * *

(4) An administrative appeal of the Tariff Integrity Board's decision may be taken, as appropriate, pursuant to Rules 96 and 98 of the rules of practice (49 CFR 1100.96 and 98). In accordance with rule 98(b)(6) of the rules of practice (49 CFR 1100.98(b)(6)), the Board's decision will be stayed automatically pending the Commission's action on appeal.

This action will not significantly affect either the quality of the human environment or conservation of energy resources.

It is ordered:

The petition for reopening and reconsideration filed by Southern & Eastern Territory railroads in this proceeding is granted to the extent that it seeks a rule revision to allow automatic stays of Tariff Integrity Board decisions upon the timely filing of administrative appeals. In all other respects the petition is denied.

(49 U.S.C. 10321, 10762, 10304, and 10305, 5 U.S.C. 553 and 559)

Decided: September 25, 1980.

By the Commission, Chairman Gaskins, Vice Chairman Gresham, Commissioners Stafford, Clapp, Trantum, Alexis, and Gilliam. Commissioner Gilliam dissenting with a separate expression.

Agatha L. Mergenovich,
Secretary.

Commissioner Gilliam, dissenting:

I would grant the petitioners' request for reopening and reconsideration based on material error. While I am not opposed to the concept of the Tariff Integrity Board, I believe that the delegation of authority is overly broad.

Specifically, I am concerned that delegating the power to reject tariffs which are already in effect, will lead to a proliferation of this type of situation which was formerly a rare occurrence. I question whether the practice of tariff rejection after the fact is even legally or practically defensible.

First, there is the problem of ascertaining what was the legal rate in effect during the period of time the rejected tariff was on file with the Commission. If that uncertainty can be resolved, there is the question of remedy. It seems logical that if we are to find that a tariff was "invalid and therefore never applicable", then the carrier would have the burden of reimbursing all amounts collected under the rejected tariff. However, without a keep account order or even knowledge by the carrier of the identity of non-complaining shippers this becomes an impossible task. What makes it even more onerous is the fact that the tariff provision may be perfectly lawful but nevertheless rejected because it was technically filed incorrectly.

If the Commission even has the power to retroactively reject tariffs, which is debatable, I would retain it and exercise it with extreme caution.

[FR Doc. 80-32394 Filed 10-16-80; 8:45 am]

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 32

Hunting; National Wildlife Refuges in Alabama, Louisiana, and Mississippi

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Special regulations.

SUMMARY: The Director has determined that the opening to hunting of certain national wildlife refuges in Alabama, Louisiana, and Mississippi is compatible with the objectives for which the areas were established, will utilize a renewable natural resource, and will provide additional recreational opportunity to the public. In addition, managed big game hunts are designed to keep population levels compatible with habitat capabilities. This document establishes special regulations effective for the upcoming hunting seasons for certain migratory birds, upland game, and big game species.

DATES: Period covered—October 20, 1980 to May 30, 1981. See state regulations for waterfowl seasons.

FOR FURTHER INFORMATION CONTACT:

The Area Manager or appropriate refuge manager at the address or telephone number listed below:

Gary L. Hickman, Area Manager, 200 E. Pascagoula St., Suite 300, Jackson, Mississippi 39201, Telephone (601) 960-4900.

Acting Refuge Manager, Eufaula National Wildlife Refuge, Route 2, Box 97-B, Eufaula, Alabama 36027, Telephone 205/687-4065.

Refuge Manager, Delta National Wildlife Refuge, Venice, Louisiana 70091, Telephone: Pilottown 3-3232.

Refuge Manager, Morgan Brake National Wildlife Refuge, P.O. Box 107, Yazoo City, Mississippi 39194, Telephone: 601/746-8511.

SUPPLEMENTARY INFORMATION: Alton Dunaway is the primary author of these special regulations.

General Conditions

1. Hunting is permitted on national wildlife refuges indicated below in accordance with 50 CFR Part 32, all applicable state regulations, the general conditions, and the following special regulations:

The Refuge Recreation Act of 1962 (16 U.S.C. 460k) authorizes the Secretary of the Interior to administer such areas for public recreation as an appropriate incidental or secondary use only to the extent that it is practicable and not inconsistent with the primary objectives for which the area was established. In addition, the Refuge Recreation Act requires: (a) that any recreational use permitted will not interfere with the primary purpose for which the area was established; and (b) that funds are available for the development, operation, and maintenance of the permitted forms of recreation.

The recreational use authorized by these regulations will not interfere with the primary purposes for which these refuges were established. This determination is based upon consideration of, among other things, the Service's Final Environmental Statement on the Operation of the National Wildlife Refuge System published in November, 1976. Funds are available for the administration of the recreational activities permitted by these regulations.

2. A list of special conditions applying to individual refuge hunts and a map of the hunt area(s) are available at each refuge headquarters. Portions of refuges which are closed to hunting are designated by signs and/or delineated on maps.

3. Access points on certain refuges are limited to designated roads or other specified areas. Vehicle use on all refuge areas is restricted to designated roads and lanes.