

UNITED STATES OF AMERICA

In the Matter of )  
)

KENTUCKY HOUSEHOLD )  
)

Docket No. 9309 )  
)

ASSOCIATION, INC., )  
)

a corporation. )  
)

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# I. INTRODUCTION

The Complaint in this matter charges the Kentucky Household Goods Carriers

(KHC) with unlawfully fixing the price of interstate moving in

*Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

illegal if its actions are not covered by the state action defense: "In order to prevail in this

data. they take no procedural steps to assure public input on rate levels, and they do not conduct a

substantive review of the rates in the tariffs. Thus, the state fails to actively supervise the

Kentucky Association, which defeats Respondent's claim that the actions of the Kentucky Association are protected by the state action defense.

**A. Kentucky Household Goods Carriers Association**

The Kentucky Household Goods Carriers Association, founded in 1957, represents



Pack" costs \$14.60 regular time and \$20.40 on overtime. Packing a wardrobe carton cost \$3.60

packing a bed \$4.05 overtime. CCS ¶ 8. Moving an automobile is \$124.70 and moving int

skis costs \$84.15. CCS ¶ 18, 19.

Respondent regularly institutes collective increases in the rates contained in the tariff.

carefully track changes in the rates and any possible variation in those rates sought by member

Since 1984-21-24 And the evidence shows that Respondent has applied pressure to keep

mover from making a change in the price terms of the tariff. In early 1996, Boyd Movers sought an exception to the tariff whereby the firm would compensate the consumer more for damage done in a move. The head of the Kentucky Association's Tariff Committee (Mr. Mirus) called Mr. Buddy Boyd of Boyd Movers and urged him not to file his exemption. Mr. Mirus took detailed notes of his conversation with Mr. Boyd. First, Mr. Mirus told him that his proposed

for such transportation service, without unjust discriminations, undue preferences or advantages,  
or unfair or destructive competitive practices.” KY. REV. STAT. ANN. § 281.590; CCS ¶ 30.

Similarly, KY. REV. STAT. ANN. § 281.590 declares that it is state policy to have rates that

ministerial tasks associated with maintaining the tariff, the KTC has undertaken no formal  
procedural steps to review or evaluate the tariff and that the KTC officials do no serious

compliance, and thus has little time to review tariff rates. The bulk of his time is spent working on non-rate household goods matters. Fully 20% of his 100 hours is spent driving to the offices of regulated firms to conduct limited reviews of the firms' records. These reviews are done to make sure movers are not offering discounts to consumers. In addition, Mr. Debord spends time investigating unlicensed movers, conducting seminars, updating powers of attorney forms, and handling inquiries from the public. CCS ¶ 39.

Mr. Debord does not get any guidance from his supervisor about tariff issues. He has authority over such matters, and has not reported to anyone in that regard since 1979. CCS ¶ 40.

## **2. The KTC Does Not Receive Reliable Data**

hiring a consultant to prepare information for the KTC because, "It was decided that due to the amount of information which maybe required by D.M.T., it would be feasible and probably more

typical to call in an outside contractor firm." The expert under consideration had many years

experience at the Interstate Commerce Commission, where he supervised "between 30 and 40

the determination of rail rates

section. For instance, many forms simply say "Increase in operating costs" or contain a simple

statement that the company wishes to raise its rates. CCS ¶ 17

circulation in the area of his situs which shall give notice of the proposed increase, the old rates and charges, the proposed rates and charges and which shall state that any interested party may

protest said increase by filing a protest with the Transportation Cabinet in accordance with its

11:13-72:6. Respondent's Memo at 27. Ms. Debord testified in

response to a leading question by Respondent's counsel that the KTC enforced 601 KAR 1:070.

CX 116 (Debord Tr., I) 71:13-72:6. However, there is no evidence that any such notices have

been published in newspapers and Respondent has cited to no documents in support of its



1. 25. 2014. Mr. Debedee could not recall several statements made to justify this rate

increase. Nevertheless, the rate increase was allowed to go into effect. CCS ¶ 54.

2. 26. 2014. Defendant filed Supplemental G1 seeking a 10% increase in

than the highest intrastate rates in the tariff. Both of these firms operate in the same geographic

area. Mr. DeLong does not remember the justification for these very substantial price

#### IV. LEGAL DISCUSSION

##### A. Agreement on Price

Agreements among competitors to fix or set prices have been historically condemned as *per se* illegal. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940).<sup>5</sup> Because the anticompetitive effects of horizontal price fixing are presumed, courts are not required to ~~conduct an elaborate analysis into the precise harm caused by the restraint on the business~~

association or its members have not fixed a uniform price to consumers because  
movers are free to select one of 10 rate schedules, or alternatively may file

317 U.S. 341 (1943) which held that in a dual system of government states are sovereigns and

entitled to direct their own affairs according to their own laws, subject only to constitutional

limitations. Congress would not have intended that the Sherman Act restrain state

private parties. The State neither establishes prices nor reviews the reasonableness of the price schedules.

445 U.S. at 105.<sup>6</sup> Thus, unless an antitrust defendant can show that it meets both prongs of the standard, it will not be entitled to the defense provided under *Parker v. Brown*.

The issue in this case is whether Respondent has demonstrated compliance with prong

two, under which it is the Respondent's burden to substantiate the claim that the state actively supervised the tariff filed by Respondent. The threshold issue under prong two is whether the

state has demonstrated that state action is a necessary condition. As the Court has

11. ... that the State is responsible for the ...

sanctioned and undertaken to control." *Ticor*, 504 U.S. at 636.

... that the Supreme Court has made very clear that the

developing a factual record to do so, the Court found that this level of supervision alone is not

adequate to constitute active supervision. *Id.* at 627-28. Rather, the Court insisted that state



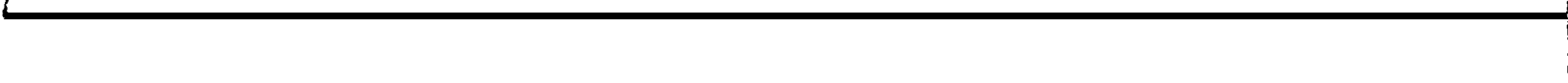
*Southern Motor Carriers*, 467 F. Supp. at 477. Where the state does not require review of all possible data, courts have looked to see if the state engaged in sound sampling techniques to

~~1. The 1.4. Al. ... financial records constituted active~~



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determination of active supervision. In *Southern Motor Carriers*, the government conceded that

1961. The District Court found that "although the submitted notes

112 F.T.C. at 267, 279 (*Comm. Op.*). Isolated or infrequent instances of review are not sufficient. *Ticor*, 112 F.T.C. at 428 (*Comm. Op.*).<sup>11</sup> Nor, as noted above, can a state allow

to operate at all without meaningful review. *Ticor*, 112 F.T.C. at 429

335, 344, n. 6 (1987) (a statute specifying the margin between wholesale and retail prices may satisfy the active supervision requirement).

504 U.S. at 640. In *Southern Motor Carriers*, the court also took note that state officials used industry data to arrive at their own figure for an operating ratio to submit as evidence at the state  
1. *Id.* 467 F. Supp. at 477. The Commission has also looked at whether states review industry

on specific rates for additional tasks such as hauling a car or moving jet skis. The members, through Respondent's efforts, collectively agree to institute rate increases. At least once every year for many years, Respondent has filed a tariff supplement raising the rates that members must

pay. Respondent has increased rates from approximately five to ten percent per year.

Respondent has also increased rates for specific services and has agreed to

self-serving statements that, because of his experience, he can judge whether rates are reasonable

1. [REDACTED] discussed with [REDACTED] and his review of general industry information

2. [REDACTED]

review of general information such as the *Wall Street Journal*. Respondent cites no case where such an informal and minimalistic level of state activity has been held to constitute active.

to collect information on that it can make sure that measures to improve revenues and costs are



consider the collective rates in Defendant's tariff and Defendant has never had consumers

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

conduct *Patrick v Burget*, 486 U.S. at 101. As Respondent correctly cites in the instant motion.

details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among private parties.” *Ticor*, 504 U.S. at 634-35; Respondent’s Memo

of [redacted] Respondent correctly cites *Ticor*’s requirement that “the party claiming the

is still in effect in some states such as Oregon. *Id.* However, sometime in the 1990s

suppression. Complaint Counsel are unaware of any statements in the Analyses that conflict with