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Freight Rates May Discriminate against Recycled Materials

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NOTE

FREIGHT RATES MAY DISCRIMINATE AGAINST RECYCLED MATERIALS

The United States Court of Appeals for the District of Columbia ordered the Interstate Commerce Commission to reconsider its order maintaining present railroad freight charges which the recycling industries claim discriminate against recycled materials. *National Association of Recycling Industries, Inc. v. Interstate Commerce Commission*, 8 ELR 20653 (1978).

For years the railroads have charged higher rates for the transportation of recycled materials than for the transportation of virgin materials.[1] These rate structures have been challenged repeatedly by those industries which buy and sell recyclable materials, such as scrap iron and used paper products.[2] These industries have always claimed that the practice of charging higher freight rates for recyclable materials both discriminates against them and their recycled products and adversely affects the environment by discouraging industrial use of recycled products, thereby contributing to the depletion of the nation's virgin resources.[3] But the recycling industries have never been able to prove these allegations because of the procedure used in the past to determine railroad freight rates.

Under the Interstate Commerce Act,[4] the initiative for ratemaking is vested in the railroads. In other words, it is the railroads who decide when and by how much they want to increase their fares. The proposed higher rates are then presented to the Interstate Commerce Commission (ICC)[5] for approval. Formerly, during such a ratemaking proceeding the ICC focused on the carrier's need for increased revenues and not on whether the increase was just, reasonable, or

1. *See Ex Parte* No. 256, 1967, 329 ICC 854 (1968); *Ex Parte* No. 259, 1969, 337 ICC 436 (1970); *Ex Parte* No. 262, 1969, unpublished; *Ex Parte* No. 265, 1970, 339 ICC 125 (1971); *Ex Parte* No. 267, 1971, 339 ICC 125 (1971); *Ex Parte* No. 295 (Sub-No. 1), 1973, 344 ICC 589 (1973); *Ex Parte* No. 303, 1974, unpublished; *Ex Parte* No. 305, 1974, unpublished; *Ex Parte* No. 313, 1975, unpublished; *Ex Parte* No. 318, 1976, unpublished; *Ex Parte* No. 336, 1977, unpublished.

2. National Association of Recycling Industries, Inc. v. Interstate Commerce Commission, 8 ENVIR. L. REP. (BNA) 20,653, 20,653 (1978).

3. *Id.* at 20,654.

4. Interstate Commerce Act, 49 U.S.C. §1 (1970).

5. The ICC and its responsibilities are established in the Interstate Commerce Act.

nondiscriminatory. Once the ICC had approved the proposed rates, anyone challenging the rates had the burden of proving that the rates were unlawful.[6] The presumption by the ICC that the rates were lawful make it nearly impossible for shippers and representatives of the recycling industries to meet their burden of proof.

The recycling industries' claims during the 60's were similar to the environmental concerns of Congress, as expressed in various legislation passed since that time. The first piece of legislation which dealt explicitly with the recycling of the nation's resources was the National Environmental Policy Act (NEPA).[7] NEPA, among other things, directs federal agencies to promote the "maximum attainable recycling of depletable resources."[8] Similar legislation followed.[9] Finally, concerned over the limited amount of recycling throughout the nation and what it regarded as a transportation barrier to the promotion of industrial recycling, Congress enacted Section 603 of the Regional Rail Reorganization Act (RRRA).[10] This section directed the ICC to "adopt appropriate rules" to "eliminate discrimination against the shipment of recyclable materials in rate structures and in other Commission practices where such discrimination exists."[11] But, apparently, the ICC ignored the congressional intent expressed in Section 603 of the RRRA; soon after it was passed the ICC approved yet another series of rate increases.[12] These increases continued to permit railroads to charge higher rates for the transportation of recycled materials than for virgin material.

Due to the ICC's refusal to investigate the freight rate structures and its approval, once again, of allegedly discriminatory rate increases, the recycling industries lobbied for further legislation. In answer to their plight, Congress enacted the Railroad Revitalization and Recyclatory Reform Act (RRA)[13] on February 5, 1976. Section

6. *See* Atchison, Topeka & Santa Fe R. Co. v. Wichita Board of Trade, 412 U.S. 800, 812-813 (1973).

7. National Environmental Policy Act of 1969, 42 U.S.C. §4321 (1970).

8. *Id.* §4331(b)(6).

9. In 1970, Congress enacted the National Materials Policy Act of 1970, 42 U.S.C. §3251 (1970); followed by the Energy Supply and Environmental Coordination Act of 1974, 42 U.S.C. §1857 (1974); and then the Resource Conservation and Recovery Act of 1976, 42 U.S.C. §6901 (1976).

10. Regional Rail Reorganization Act of 1973, 87 Stat. 9850, §603 (1973).

11. *Id.*

12. The ICC approved seven successive rate increases applicable to recyclable materials totalling approximately 38%. *Ex Parte* No. 295, 344 ICC 589 (1974); and subsequent proceedings *supra* note 1.

13. Railroad Revitalization and Regulatory Reform Act of 1976, 45 U.S.C. §793 (1976).

204 of the RRA requires the ICC to investigate the rate structures for recycled materials and competing virgin resources.[14] It also provides for a public hearing during which the burden of proof is upon the railroads to demonstrate that their rate structures, as they apply to recycled materials, are just, reasonable, and nondiscriminatory.[15] If the railroads fail to meet this burden, the ICC is required to order the removal of any unreasonable or unjustly discriminatory parts from such rate structures.[16]

Section 204 of the RRA expressly reverses the burden of proving whether a railroad freight rate structure is just, reasonable and nondiscriminatory. Before, those challenging the rates had to carry this burden; now the railroads are supposed to carry it. Congress clearly intended this reversal to work for the benefit of the recycling industries. Railroad freight rates for recycled and virgin materials are no longer accorded a presumption of legality.

Pursuant to Section 204 of the RRA, the ICC commenced its investigation of the freight rates charged for transporting recycled and virgin materials. It requested the railroads to submit evidence pertaining to the costs and revenues derived from their movements of certain designated recyclable and virgin resource materials. On February 1, 1977, the ICC issued its final report which incoporated the findings and conclusions of its investigation.[17] From the evidence submitted by the railroads, which was criticized by the ICC as being inadequate both to support their contentions and to meet their burden of proof, the ICC concluded that:

> 1) the freight rates for the designated recyclable materials ranged from one and a half to even three times the rates for virgin resource materials;
> 2) the higher rates did not result in a decrease in the amount of recyclable materials moved by the railroads; and
> 3) several of the recyclable products were found not to compete with their virgin material counterparts.[18]

Thus, other than for a few exceptions, the ICC's final order did not reduce the applicable rates.

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14. *Id.* §204(a)(1).
15. *Id.* §204(a)(2).
16. *Id.* §204(a)(3).
17. *Ex Parte* No. 270 (Sub. No. 6) Investigation of Railroad Freight Rate Structure–Scrap Iron and Steel, 345 ICC 867 (1976).
18. National Association of Recycling Industries, Inc. v. Interstate Commerce Commission, 8 ENVIR. L. REP. (BNA), 20,653, 20,656.

Petitioners[19] filed a petition for review of the ICC's order[20] declining to reduce the freight rates in the United States District Court for the District of Columbia Circuit.[21] In its petition for review, petitoners claimed that the ICC relieved the railroads of their burden of proving the lawfulness of the rate structures as required by Section 204 of the RRA and that the evidence presented by the railroads fails to prove that the railroad freight rate structures are lawful.

In its August 2, 1978, opinion, the court severely criticized the ICC order. The court found the challenged order was not reasonably consistent with the mandate of Section 204 of the RRA.[22] The court declined, as the petitioners requested, to interpret Section 204 as a congressional declaration that recyclable and virgin natural resources are in competition for railroad transportation.[23] The court also rejected the claim made by the United States[24] that this section is a mandate to the ICC to weigh environmental goals more heavily than the traditional transportation policy criteria. After an extensive review of the legislative history of Section 204 of the RRA, the court concluded that Congress had attempted by its passage to conserve virgin natural resources by promoting the recycling industries.[25]

After examining the ICC ruling in terms of the "reasonableness" of the freight rate structures, the court concluded that the ICC was incorrect in refusing to consider the rates to be "unreasonable" unless either the rates had resulted in a diminished volume of traffic of recycled materials or it appeared that the recycling industries could not absorb the current rates.[26] According to the court, the mere fact that recyclable materials withstood rate increases and con-

19. The National Association of Recycling Industries (NARI) and the Institute for Scrap Iron and Steel (ISIS) are national trade association representatives of the recycling industries. NARI challenges the part of the ICC's order related to the rate structures on recyclable nonferous metal, wastepaper, textiles, and rubber. ISIS challenges the ICC's determination with respect to the rate structures on scrap iron and steel.

20. The order was entered in the ICC's proceedings entitled *Ex Parte* No. 319, Investigation of Freight Rates for the Transporation of Recyclable or Recycled Materials, Incorporated in this order is the published report and order of the coordinator in *Ex Parte* No. 270 *supra* note 17.

21. National Association of Recycling Industries Inc. v. Interstate Commerce Commission, 8 ENVIR. L. REP. (BNA).

22. *Id.* at 20,659.

23. *Id.* at 20,657, F. 44.

24. As a statutory respondent, 28 U.S.C. § §2322, 2342 (1970), the United States on behalf of the Environmental Protection Agency and the Federal Energy Administration, challenges the ICC's order in its entirety.

25. 8 ENVIR. L. REP. (BNA) 20,653.

26. *Id.* at 20,659.

tinued to move by rail did not make the rate structures lawful.[27] Also, the fact that the volume of recycled materials shipped following a rate hike did not decrease failed to show that the rate structure did not impede the development of increased recycling.[28]

The discriminatory nature of the freight rates, the court stated, was not governed by the fact that recyclable products had been unable to attain "actual competitive status" with virgin products.[29] Although products made from recycled materials may well have been unable to attain this competitive status precisely because the higher freight rates were reflected in their higher cost, the non-discriminatory nature of the rates, the court held, depended upon whether the railroads could demonstrate that the recyclable materials were neither competing with nor potentially competing for access to transportation.[30] Since the railroads had not demonstrated this, the court stated that the ICC's finding of no competitive injury could not be sustained.

The court of appeals concluded that the ICC had not adhered to its mandate as expressed in Section 204 of the RRA. Therefore, the ICC order was vacated in its entirety and the case remanded for further proceedings consistent with its opinion.[31]

This decision should have many ramifications for the recycling industries if the ICC, finally, begins to comply with its mandate and the intent of Congress. Many commentators believe that the ICC's past performance in this area is the result of the conflict of interest between former railroad executives who now are the regulators and so-called watchdogs of their previous employers. Whatever the reasons, it is obvious that the ICC has not complied with the environmental goals of Congress.

As a result of both the environmental goals of Congress and our nation's dwindling natural resources, recyclables and the recycling industries can only have an expanding place in the world's markets. But the transportation barriers will have to be removed before the recycling industries will ever be able to realistically compete.

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27. *Id.*
28. *Id.*
29. *Id.* at 20,663.
30. *Id.*
31. *Id.*