UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of	)	
KENTUCKY HOUSEHOLD GOODS CARRIERS ASSOCIATION, INC., Respondent.	)	Docket No. 9309

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY DECISION

I. PROCEDURAL BACKGROUND

Respondent Kentucky Household Goods Carriers Association, Inc. ("Respondent") filed a Motion for Summary Decision and a memorandum in support thereof ("Motion for Summary Decision") and a Separate Statement of Material Facts as to Which There is No Genuine Dispute ("Respondent's Statement of Facts") on December 19, 2003. Complaint Counsel filed its Opposition to Respondent's Motion for Summary Decision ("Opposition"), its Separate Statement of Material Facts as to Which There is No Genuine Dispute, and its Response to Respondent's Statement of Material Facts ("Complaint Counsel's Response") on January 6, 2004.

By Order dated January 8, 2004, the parties were required to file reply briefs and replies to the statements of material facts. Pursuant to that Order, Respondent filed its Reply Memorandum In Support of Motion for Summary Decision on January 23, 2004. Complaint Counsel filed its Memorandum in Opposition to Respondent's Reply on February 13, 2004.

Respondent, on January 23, 2004, filed a motion for leave to file an amended table of contents and table of authorities to its Motion for Summary Decision. The motion for leave to file is GRANTED.

For the reasons set forth below, Respondent's motion for summary decision is DENIED.

II. POSITIONS OF THE PARTIES AND UNDISPUTED FACTS

A. Summary of Arguments Raised by the Parties

The Complaint in this proceeding alleges that the conduct of Respondent in submitting proposed tariff rates for the transportation of household goods to the Kentucky Transportation Cabinet ("KTC") constitutes unlawful price fixing in violation of Section 5 of the Federal Trade Commission Act. In its motion for summary decision, Respondent asserts that the challenged conduct is immune from liability under the federal antitrust laws pursuant to the state action doctrine established by the U.S. Supreme Court in *Parker v. Brown*, 317 U.S. 341 (1943) and its progeny. Specifically, Respondent asserts that the challenged conduct was undertaken as part of a state initiated and sponsored activity, adopted by the state pursuant to a clearly articulated and affirmatively expressed state policy and was actively supervised by the state. Motion for Summary Decision at 7-8.

In its opposition to the motion for summary decision, Complaint Counsel asserts that "[t]he key issue in this case is whether Respondent can demonstrate compliance with prong two [of the state action doctrine], under which it is Respondent's burden to substantiate the claim that the state actively supervised the tariff filed by Respondent." Opposition at 17. Complaint Counsel urges this "Tribunal" to deny Respondent's motion for summary decision.

Before addressing the legal arguments raised by the parties, the following section sets forth facts that are not disputed by the parties.

B. Undisputed Facts

For purposes of summary decision only, the following facts are undisputed. In advance of trial, the parties are encouraged to stipulate to facts that are not disputed and submit those facts as joint stipulations at the final prehearing conference.

> The Kentucky Association is a non-profit corporation organized and existing under the laws of the Commonwealth of Kentucky that functions as a trade association of the Household Goods Moving & Storage Industry for household goods carriers located in the Commonwealth of Kentucky. Respondent's Statement of Facts ¶ 1; Complaint Counsel's Response ¶ 1.
>
> The Kentucky Association is also in the business of acting as a motor carrier rate bureau for the purpose of publishing and filing tariffs for the intrastate transportation of household goods on behalf of its household goods carrier members. Respondent's Statement of Facts ¶ 2; Complaint Counsel's Response ¶ 2.

The Kentucky Association has one paid employee, who functions as an Executive Director, and one compensated independent contractor, who functions as an Administrative Consultant and serves as Chairman of the Kentucky Association's Tariff Committee. No other person connected with the Kentucky Association is compensated, and it is managed by a voluntary Board of Directors comprised of representatives of member firms elected by the membership. Respondent's Statement of Facts ¶ 3; Complaint Counsel's Response ¶ 3.

Every household goods carrier operating in the Commonwealth of Kentucky is required to file a tariff containing its rates, charges, and rules with the Kentucky Transportation Cabinet. Respondent's Statement of Facts ¶ 4; Complaint Counsel's Response ¶ 4.

Kentucky intrastate household goods transportation rates are required to be open to the public and maintained in a public place in the offices of household goods carriers. Respondent's Statement of Facts ¶ 27; Complaint Counsel's Response ¶ 27.

KTC has collective ratemaking procedures for household goods transportation rates. Respondent's Statement of Facts ¶ 29; Complaint Counsel's Response ¶ 29.

Collective ratemaking means that rates are collectively filed through a joint tariff publishing agency representing rates of more than one carrier or a group of carriers. Respondent's Statement of Facts ¶ 30; Complaint Counsel's Response ¶ 30.

The Kentucky Association files collective rates. Respondent's Statement of Facts ¶ 31; Complaint Counsel's Response ¶ 31.

A carrier cannot charge any more or less than what its tariff says. Respondent's Statement of Facts ¶ 34; Complaint Counsel's Response ¶ 34.

A "tariff" contains a schedule of rates, fares, and charges, and the rules that carriers impose on their transportation processes. Respondent's Statement of Facts ¶ 35; Complaint Counsel's Response ¶ 35.

Information about a proposed tariff change is available for inspection at the KTC. Respondent's Statement of Facts ¶ 37; Complaint Counsel's Response ¶ 37.

KTC conducts audits of household goods carriers from time to time. Respondent's Statement of Facts ¶ 45; Complaint Counsel's Response ¶ 45.

III. SUMMARY DECISION STANDARD

Commission Rule of Practice 3.24(a)(2) provides that summary decision "shall be rendered . . . if the pleadings and any depositions, answers to interrogatories, admissions on file, and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to such decision as a matter of law." 16 C.F.R. § 3.24(a)(2). Commission Rule 3.24(a)(3) provides that once a motion for summary decision is made and adequately supported, "a party opposing the motion may not rest upon the mere allegations or denials of his pleading; his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue of fact for trial." 16 C.F.R. § 3.24(a)(3). These provisions are virtually identical to the provisions governing summary judgment in the federal courts under Rule 56 of the Federal Rules of Civil Procedure; the Commission applies its summary decision rule consistent with case law construing Fed. R. Civ. P. 56. *In re Hearst Corp.*, 80 F.T.C. 1011, 1014 (1972); *In re Kroger Co.*, 98 F.T.C. 639, 726 (1981).

The mere existence of a factual dispute will not in and of itself defeat an otherwise properly supported motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). However, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citation omitted). The party moving for summary judgment bears the initial burden of identifying evidence that demonstrates the absence of any genuine issue of material fact. *Green v. Dalton*, 164 F.3d 671, 675 (D.C. Cir. 1999) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)).

Once the moving party has properly supported its motion for summary judgment, the nonmoving party must "do more than simply show there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586. The nonmoving party may not rest on mere allegations or denials of its pleading but must "come forward with 'specific facts showing that there is a genuine issue for trial.'" *Id.* at 587 (quoting Fed. R. Civ. P. 56(e)). *See also Liberty Lobby*, 477 U.S. at 256. The inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *Matsushita*, 475 U.S. at 587.

Where there are triable issues of fact regarding the availability of the *Parker* state action defense, summary judgment is not appropriate. *Feminist Women's Health Ctr., Inc. v. Mohammad*, 586 F.2d 530, 551 (5th Cir. 1978); *Daniel v. Am. Bd. of Emergency Med.*, 235 F. Supp.2d 194, 206 (W.D.N.Y. 2000) (to obtain state action immunity, defendants must present sufficient evidence demonstrating the lack of any material issue of genuine fact as to whether their participation in program was pursuant to clearly articulated state policy actively supervised by state officials).

IV. RESPONDENT'S MOTION RAISES GENUINE ISSUES OF MATERIAL FACT

The U.S. Supreme Court first announced the state action doctrine in *Parker v. Brown*, where the "state itself exercise[d] its legislative authority in making the [challenged] regulation and in prescribing the conditions of its application." 317 U.S. 341, 352 (1943). In *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), the Supreme Court established a two prong test for determining whether private conduct was immune from antitrust liability under *Parker v. Brown*.

> First, the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy"; second, the policy must be "actively supervised" by the State itself.

Id. at 105 (citations omitted). "[T]he purpose of the active supervision inquiry . . . is to determine whether the State has exercised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among private parties." *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 634 (1992).

Respondent asserts that the conduct challenged in this case meets both prongs of the state action doctrine. First, Respondent asserts that the statutes and regulations of the Commonwealth of Kentucky clearly articulate and affirmatively express state policy in favor of collective ratemaking. Respondent's motion sets forth the statutes and regulations that it asserts are part of the KTC program for the regulation of intrastate household goods carriers. Second, Respondent asserts that the evidence provided by the KTC demonstrates that the private conduct challenged in the Complaint is actively supervised and, thus, satisfies the second prong of the *Midcal* test. In support of this argument, Respondent refers to its Rule 3.24 statement of the facts and the evidence cited therein.

Complaint Counsel does not appear to dispute that the challenged restraint was clearly articulated and affirmatively expressed as state policy. Rather, Complaint Counsel's challenge is to whether Respondent can substantiate its claim that the state actively supervised the tariff filed by Respondent. Complaint Counsel argues that the evidence demonstrates that the activities of the state do not satisfy the requirement of active supervision.[1]

---

[1] In its Opposition, Complaint Counsel cites at least ten times to *In re New England Motor Rate Bureau, Inc.*, 112 F.T.C. 200 (1989), *rev'd*, 908 F.2d 1064 (1st Cir. 1990). Reversed opinions can be given little, if any, weight.

V. CONCLUSION AND ORDER

An analysis of whether the state has played a sufficient role in determining the specifics of the economic policy requires a review of the evidence. Whether or not evidence will show that the policy is actively supervised by the Commonwealth of Kentucky is a genuine issue as to a material fact. Accordingly, Respondent, the moving party, is not entitled to summary decision as a matter of law. Respondent's motion for summary decision is DENIED.

ORDERED:

D. Michael Chappell
Administrative Law Judge

Date: February 26, 2004