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SERVICE DATE – OCTOBER 25, 2007

SURFACE TRANSPORTATION BOARD

DECISION

STB Ex Parte No. 656

MOTOR CARRIER BUREAUS – PERIODIC REVIEW PROCEEDING

Decided: October 24, 2007

The Board is denying the petition of the Household Goods Carriers' Bureau Committee ("HGCBC" or "the Bureau") for clarification of the agency's decision terminating its approval of motor carrier bureau agreements under 49 U.S.C. 13703(c).

BACKGROUND

By decision served on May 7, 2007,¹ the Board terminated its approval of all outstanding motor carrier bureau agreements under 49 U.S.C. 13703(c) – the agreements of 11 motor carrier rate bureaus and the agreement of the National Classification Committee (NCC). The Board concluded under section 13703(c)(1) that termination of these agreements was necessary to protect the public interest, particularly the public's interest in reasonable rates for shippers. The agency also found that terminating antitrust immunity would not have an adverse effect on motor carrier efficiency or profitability or other objectives of the motor carrier transportation policy set forth in 49 U.S.C. 13101(a). The agency stated that it would now be incumbent upon the bureaus to determine the extent to which their present activities comply with the antitrust laws or would need to be reformed. To the extent the bureaus are uncertain about their exposure to antitrust liability, the Board encouraged them to consult advisors regarding the bounds of permissible activity and to take advantage of the business review procedure administered by the Antitrust Division of the United States Department of Justice (DOJ).

By petition filed on July 17, 2007, HGCBC requests that the Board clarify its decision to provide that HGCBC carriers may adopt, on an individual basis, tariffs that were established collectively by the HGCBC before termination of Board approval of its bureau agreement. HGCBC would have the Board state that it sees no potential antitrust problems with such actions. HGCBC further requests that the Board clarify its decision specifically to permit individual HGCBC carriers to use the Bureau as a publishing agent to establish individual tariffs going forward.

On August 8, 2007, a reply in opposition to the Bureau's petition was filed by NASSTRAC, Inc. (NASSTRAC).

¹ Motor Carrier Bureaus – Periodic Review Proceeding, STB Ex Parte No. 656, et al. (STB served May 7, 2007) (Periodic Review Proceeding), corrected (STB served May 16, 2007).

DISCUSSION AND CONCLUSIONS

While we appreciate the challenges to HGCBC and its member carriers in transitioning from collective to individual pricing, we decline to grant HGCBC's clarification request. As explained in Periodic Review Proceeding, the time has come to complete this final step of making the motor carrier industry fully competitive, with all the attendant public benefits, by terminating our approval of the bureau agreements and the antitrust immunity conferred by that approval. We decline to make the requested clarification, because doing so could provide a partial shield over behavior that the Board concluded should be fully subject to the antitrust laws, in particular the Sherman Act's prohibition of unreasonable restraints of trade. While the Board is guided by both the Sherman Act and the Clayton Act in administering the Interstate Commerce Act and can address horizontal pricing issues in certain circumstances,² the Board has not been delegated the authority to directly enforce the Sherman Act.³ Rather, the authority to interpret the Sherman Act primarily resides in DOJ and the federal courts.

In support of its request, HGCBC cites two decisions by our predecessor agency, the Interstate Commerce Commission (ICC), in which the ICC dealt with the issue of transition by stating that individual members of the rate bureaus involved in those decisions could continue to use tariffs that had been collectively established before the bureaus that established them lost antitrust immunity.⁴ In each of those prior cases, the bureaus were given relatively short periods of time in which to adapt to the loss of immunity.⁵ In this proceeding, however, we are taking a different approach in dealing with transitional issues by providing an extended period of time before our termination becomes effective so that bureaus and their member carriers may take advantage of the business review procedure administered by DOJ's Antitrust Division or consult other experts regarding how to transition under the antitrust laws. As noted by NASSTRAC, our

² See DHX, Inc. v. STB, Civ. Action No. 05-74592 (9th Cir. Aug. 30, 2007) (noting that the Board had "ample statutory authority" to address oligopoly pricing issues with regard to water carrier non-contiguous domestic trade).

³ McLean Trucking Co. v. United States, 321 U.S. 67, 79 (1944).

⁴ See Household Goods Forwarders Tariff Bureau – Agreement, Section 5a Application No. 106 (1991 WL 120330) (ICC), at *6, aff'd, Household Goods Forwarders Tariff Bureau v. ICC, 968 F.2d 81 (D.C. Cir. 1982) (Freight forwarder bureau losing antitrust immunity was allowed to amend its collective rate tariffs to make them apply to individual forwarders in order "to smooth the transition to competitive individual forwarder ratemaking."); and Rail General Exemption Authority – Fresh Fruits and Vegetables, 361 I.C.C. 374, 376 (1979) (Concerning rate quotations by railroads losing antitrust immunity due to the exemption of commodity, the ICC stated, "[w]e see no potential antitrust problems with referring to tariffs in existence prior to the effective date of the exemption.") (Fresh Fruits).

⁵ There were 2 months between the decision and the effective date in the case of the Household Goods Forwarders Tariff Bureau. In Fresh Fruits, the decision denying a request that the ICC confer antitrust immunity for the purpose of tariff reference appears to have been effective on the date of the issuance.

approach is consistent with other recent government action involving antitrust and transportation.⁶

Our denial of HGCBC's petition should not be read as a suggestion by the Board that the activities that are subject to the clarification request would in fact violate the Sherman Act. While we appreciate that some uncertainty may continue to exist, we emphasize that the boundary between permissible pricing behavior and pricing that may violate the Sherman Act is best drawn by the antitrust enforcement agencies and the federal courts. As the ICC stated in Fresh Fruits, "[v]iolation of the antitrust laws is a risk inherent in operating in a deregulated environment and one which presumably [parties] will weigh in electing an appropriate method of [quoting rates]."⁷ Accordingly, we decline to issue further clarification as sought by HGCBC.

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

It is ordered:

1. HGCBC's petition for clarification is denied.
2. This decision is effective on its date of service.

By the Board, Chairman Nottingham, Vice Chairman Buttrey, and Commissioner Mulvey.

Vernon A. Williams
Secretary

⁶ See the Final Order issued March 30, 2007, by the Office of the Secretary of Transportation in Docket No. OST-2006-25307, terminating the antitrust immunity of International Air Transport Association as to air passenger and cargo service between the United States and Europe.

⁷ See Fresh Fruits at 376.