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SERVICE DATE – JUNE 28, 2007

SURFACE TRANSPORTATION BOARD

DECISION

STB Ex Parte No. 656

MOTOR CARRIER BUREAUS – PERIODIC REVIEW PROCEEDING

STB Ex Parte No. 656 (Sub-No. 1)

INVESTIGATION INTO THE PRACTICES  
OF THE  
NATIONAL CLASSIFICATION COMMITTEE

Section 5a Application No. 46 (Sub-No. 20)<sup>1</sup>

SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC.

Decided: June 27, 2007

The Board is extending the effective date of its decision terminating its approval of motor carrier bureau agreements under 49 U.S.C. 13703(c), from September 4, 2007, until January 1, 2008.

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<sup>1</sup> This decision also embraces EC-MAC Motor Carriers Service Association, Inc., STB Section 5a Application No. 118 (Sub-No. 2); Household Goods Carriers Bureau Committee – Agreement, STB Section 5a Application No. 1 (Sub-No. 10); Machinery Haulers Association, Inc. – Agreement, STB Section 5a Application No. 58 (Sub-No. 4); Middlewest Motor Freight Bureau, Inc. – Renewal of Agreement, STB Section 5a Application No. 34 (Sub-Nos. 8 and 10); Nationwide Bulk Trucking Association, Inc. – Agreement, STB Section 5a Application No. 63 (Sub-No. 4); Application of the National Bus Traffic Association, Inc., for Extended Approval of its Conformed Agreement; STB Section 5a Application No. 9 (Amendment No. 8); National Classification Committee – Agreement, STB Section 5a Application No. 61 (Sub-No. 6); Pacific Inland Tariff Bureau, Inc. – Renewal of Agreement, STB Section 5a Application No. 22 (Sub-Nos. 7 and 8); Rocky Mountain Tariff Bureau, Inc., STB Section 5a Application No. 60 (Sub-Nos. 10 and 11); Southern Motor Carriers Rate Conference, Inc., STB Section 5a Application No. 46 (Sub-No. 21); New England Motor Rate Bureau, Inc., STB Section 5a Application No. 25 Amendment No. 8); North American Transportation Council, Inc., STB Section 5a Application No. 45 (Amendment No. 17); and Western Motor Tariff Bureau, Inc. – Agreement, STB Section 5a Application No. 70 (Sub-No. 12).

## BACKGROUND

By decision served on May 7, 2007,<sup>2</sup> 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 antitrust immunity may be terminated without significant adverse effect on motor carrier efficiency or profitability or other policies favored under 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). To provide time for the industry to adjust to a new environment without antitrust immunity for motor carrier bureau activities, the Board provided that its decision would not become effective until September 4, 2007.

Various parties have filed petitions requesting that the Board extend the effective date of this decision to dates between September 4, 2008, and November 4, 2008.<sup>3</sup> The parties requesting extensions argue that no interests would be harmed and that the process of adjusting to termination of antitrust immunity is very complex, warranting additional time to comply. They contend that they need more time to consult with their carrier members and legal advisors and to pursue business review letters from DOJ. Furthermore, the HGCBC and some of its members, along with the NBTA, have pointed out that the current 4-month implementation period, which they contend would involve substantial changes to the way they do business, runs during their peak business season.

NASSTRAC, Inc. (NASSTRAC) (formerly the National Small Shipments Traffic Conference, Inc.) filed in opposition to virtually all of the extension requests other than those sought on behalf of household goods carriers and bus carriers. The National Industrial Transportation League (NITL) and the National Electrical Manufacturers Association filed in opposition to the extension request of NCC. They argue that no postponement of the already lengthy effective date is warranted and raise concerns about whether the bureaus will engage in

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<sup>2</sup> 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).

<sup>3</sup> The parties requesting the extensions are: Allied Van Lines, Inc., jointly with North American Van Lines, Inc., and Global Van Lines, Inc.; Household Goods Carriers Bureau Committee (HGCBC); Midwest Motor Freight Bureau, Inc., jointly with Pacific Inland Tariff Bureau, Inc.; National Bus Traffic Association, Inc. (NBTA); National Motor Freight Traffic Association and its motor carrier bureau subsidiary, the NCC (NCC); North American Transportation Council, Inc.; Rocky Mountain Tariff Bureau, Inc.; Southern Motor Carriers Rate Conference, Inc.; and Machinery Haulers Association, jointly with Nationwide Bulk Trucking Association.

harmful activities during an extended implementation period. The Board has also received a joint letter filed by eight Members of Congress in support of NCC's extension request.<sup>4</sup>

## DISCUSSION AND CONCLUSIONS

The bureaus and their supporters (hereafter, "the bureaus") have not justified the extraordinarily long extensions that they seek. Such long delays are not necessary for a smooth transition to a motor carrier industry without antitrust immunity. However, the Board is sympathetic to arguments that it may be difficult to commit all of the necessary managerial resources to implementing a revised business model during a peak period in the normal business cycle. While not all bureaus will experience such a peak, in the interest of ensuring an orderly transition across the entire motor carrier industry, the Board will extend the effective date by approximately another 4 months, until January 1, 2008.

We reject arguments that a much longer delay in the effective date is warranted. Some bureaus argue that their very first opportunity to present a revised business model to carrier members will be at regularly scheduled meetings set to take place after the initial effective date. This business-as-usual approach toward what the bureaus describe as a major industry development is surprising and cannot justify further delay. Most bureaus did not provide specifics regarding their planned transition efforts or valid reasons why the process cannot begin earlier. And citing to the length of time the Board took to consider and reach its decision simply has no relevance to how long it will take the bureaus and member carriers to adjust their business models to comply with the antitrust laws.

Although we support bureau efforts to seek business review letters from DOJ, it is not appropriate to tie the effective date of the Board's decision to the completion of that process. No bureau is under any obligation to seek a business review letter and many (or all) may choose not to do so. The DOJ business review process is but one avenue by which the bureaus can inform themselves about the boundaries of permissible behavior. The bureaus must, as all other trade associations subject to the antitrust laws do, familiarize themselves with the law regarding communications and collaborations between competitors, review existing publications by the antitrust enforcement agencies, and, as necessary, consult legal advisors with expertise in this area. Not all of the activities of the bureaus will require detailed analysis as to whether they can continue in their present form. For those activities that do require more detailed scrutiny, it is incumbent upon the bureaus themselves to undertake the work of reform and make informed decisions about modifications to their business practices.

We also believe that the new effective date, which provides an 8-month implementation period, is more than sufficient to review and, if necessary, revise the classification system. While it is true that, when the Board's decision becomes effective, the NCC will be under some risk of antitrust liability, the risk of its behavior being found violative of the antitrust laws is really no different than that of any other association performing a similar function. As the

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<sup>4</sup> The letter was submitted by Congressmen Nick J. Rahall II, John L. Mica, Bart Gordon, John J. Duncan, Jr., Thomas M. Reynolds, Jim Cooper, Brian Higgins, and Michael T. McCaul.

Antitrust Modernization Committee recently recommended to Congress and the President, a need for certainty as to antitrust exposure is not an appropriate justification for continued immunity from the antitrust laws. See Antitrust Modernization Commission, Report and Recommendations, April 2007 at 350-51 (cautioning that “no immunity should be granted to create increased certainty in the form of freedom from antitrust compliance and litigation risk” as such risks are among costs of doing business that all American companies must manage). Even if it takes slightly longer than the effective date to complete any reforms to classification, we do not see why individual motor carriers cannot efficiently price their services as a new system is being devised, relying upon their own cost models, individual consultation with NCC staff, or other means.

We are sensitive to the shipper organizations’ concern regarding whether bureaus will engage in intentionally anticompetitive behavior during a longer implementation period. Of course, that is no different than the risk that existed during the initial 120-day period. In any event, we believe that it would hardly be in the bureaus’ self-interest to engage in such behavior just as they begin to work with an antitrust enforcement agency to reform their processes. In the meantime, collective actions taken by the bureaus remain subject to challenge before the Board.

When Congress mandated periodic Board review of existing motor carrier bureau agreements under a public interest standard, the bureaus were effectively put on notice that continued Board approval of bureau agreements was not guaranteed. And the Board’s decisions in 1998 and 2003, questioning the proffered justifications for continued approval and conditioning approval upon increasingly stringent conditions, suggested a growing skepticism of the public benefits of the current rate bureau system. Under these circumstances, the bureaus should have at least considered the possibility that Board approval would terminate one day and considered appropriate contingency plans. To the extent the bureaus failed to do so, their inaction should not serve as a basis for further delay, and shippers should not be denied the full benefits of free market competition beyond an appropriate implementation period.

We will give all bureaus until January 1, 2008, to prepare for the loss of antitrust immunity and to ensure an orderly transition. This additional approximate 4 months will provide more time for the bureaus to evaluate and revise their practices to comply with the antitrust laws, and will remove the risk of any significant business cycle hardship resulting from the service date of our recent decision. However, we caution the bureaus that they should not expect further delay and that they should proceed expeditiously toward reform.

It is ordered:

1. The effective date of the decision served May 7, 2007, in this proceeding is extended until January 1, 2008.

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