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December 15, 2003

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The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W., Room 711
Washington, DC 20423-0001

**Re: Section 5a Application No. 46 (Sub No. 20), Southern Motor Carriers
Rate Conference, Inc.**

Dear Secretary Williams:

Enclosed for filing please find an original and 10 copies of the Opposition of Rate Bureaus (EC-MAC Motor Carriers Assn, Inc. and Rocky Mountain Tariff Bureau, Inc.) to the Petition of Southern Motor Rate Conference, Inc. To Reopen and Reconsider.

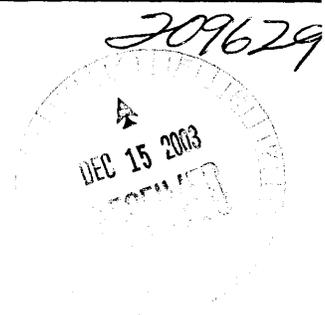
Respectfully,

David H. Coburn
Attorney for EC-MAC Motor Carriers
Service Association, Inc. and Rocky
Mountain Tariff Bureau, Inc.

Enclosure

cc: All parties of Record

BEFORE THE
SURFACE TRANSPORTATION BOARD



SECTION 5A APPLICATION NO. 46 (Sub No. 20)

SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC.

**OPPOSITION OF RATE BUREAUS
TO PETITION OF SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC. TO
REOPEN AND RECONSIDER THE PROCEEDING ON THE PRESENT RECORD, OR
ALTERNATIVELY, FOR A FURTHER HEARING AND THE
SETTING OF A PROCEDURAL SCHEDULE FOR THE SUBMISSION OF ADDITIONAL
EVIDENCE**

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EVIDENCE**

EC-MAC Motor Carrier Services Assn. ("EC-MAC") and Rocky Mountain Tariff Bureau, Inc. ("RMB") (jointly, "Rate Bureaus") hereby file this reply in opposition to the November 5, 2003 Petition for the Southern Motor Carriers Rate Conference, Inc. ("SMC") to reopen and reconsider the Board's 1998 disposition of SMC's request for expanded, nationwide antitrust immunity or for a further hearing on that request.¹ Rate Bureaus do not believe that there is any reasonable policy justification that can be offered for SMC's request for an expansion of antitrust immunity, and thus there is no basis for granting the relief SMC seeks. Further, in the event that the Board decided to entertain the important question of whether SMC's request for broadened immunity from the antitrust laws to allow nationwide collective ratemaking, Rate Bureaus submit that the present record does not support SMC's request.

¹ The 1998 decision as to which SMC seeks reopening and reconsideration was issued in *Section 5a Application No. 118 (Amendment No. 1), et al., EC-MAC Motor Carriers Service Association, Inc., et al.* (served December 18, 1998) ("1998 EC-MAC Decision").

If it opts to consider the question raised by SMC at all, the Board should not devote scarce resources to this issue at this time, particularly given that the Board is statutorily required to consider the operation of rate bureau agreements in 2004, consistent with the five year review obligation imposed by the Motor Carrier Safety Improvement Act of 1999. *See* 49 U.S.C. 13703(c)(2). Thus, the Board should either deny the SMC Petition or defer action on it until it initiates the further bureau review proceedings that are mandated by the statute.

A. BACKGROUND

By virtue of the provisions of 49 U.S.C. § 13703 (formerly Section 5a of the Interstate Commerce Act), motor carriers that operate in interstate commerce are permitted to submit to the Board for approval agreements that provide for certain types of collective ratemaking, i.e., the collective formulation of joint rates and the general adjustment of class rates. The approval of such agreements confers antitrust immunity for the implementation of the agreement.

The benefits to carriers of collective ratemaking are not at issue in this proceeding, although some parties may use this proceeding to raise questions that have long been raised and answered. A chief benefit is the ability of carriers that compete with one another for certain traffic to efficiently formulate a network of joint rates for traffic requiring more than one carrier, using a common set of class rates to do so. Another benefit is the ability of carriers that share common operating circumstances to make general rate adjustments based on cost considerations. These benefits are particularly important for the smaller carriers that compose the majority of bureau members.

There are several so-called rate bureaus that operate under approved, immunized agreements. In the less-than-truckload (“LTL”) sector of the trucking industry, these bureaus have, since the time immunized collective ratemaking was first permitted, in 1948, been

organized on a regional basis. Thus, the approved EC-MAC agreement provides for collective ratemaking within certain defined Middle Atlantic states and between those Middle Atlantic states and certain Midwestern and other states; the approved RMB agreement provides for collective ratemaking within Western states and between those states and other states; and the SMC agreement provides for collective ratemaking within certain Southern states and between those Southern states and certain other states. Not surprisingly, the carriers actively engaged in collective ratemaking in each of these and other bureaus consist largely of carriers that center their operations in the particular region in which the rate bureau operates.

Each rate bureau publishes a set of collectively made class rates applicable in its particular ratemaking territory. In the highly competitive motor carrier industry, these class rates serve as a benchmark for discounts quoted by a particular carrier on traffic that it seeks to transport. Thus, most motor carrier rates are quoted as a percentage discount off of some benchmark rate. That benchmark could be a collectively made class rate or it could be a class rate formulated by some individual carrier.²

By its Petition, SMC now seeks to transform the regional collective ratemaking system into a national system. It thus seeks broader antitrust immunity than the Board or its predecessor has ever granted to a group of motor carriers. Further, by seeking nationwide immunity, SMC clearly hopes to become the exclusive forum for the formulation and distribution of collectively made rates throughout the nation. As shown below, SMC has not met its burden of showing that there is a public interest need for the relief it seeks. To the contrary, there is no need for expanded ratemaking immunity and SMC's Petition should be denied.

² The largest carriers function outside the collective ratemaking system and thus publish their own class rates which serve as a basis for their discounts.

B. AS A MATTER OF POLICY, THE BOARD SHOULD NOT BROADEN ANTITRUST IMMUNITY AS REQUESTED BY SMC

1. SMC Must Meet a Substantial Burden

The Board may only approve a collective ratemaking agreement, or an amendment to an agreement, submitted to it by a group of motor carriers if it finds that the agreement or amendment “is in the public interest.” 49 U.S.C. § 13703(a)(2). SMC’s proposed amendment fails to meet that public interest standard and accordingly should be denied.

As noted, Board approval of a ratemaking agreement results in antitrust immunity for the carriers party to that agreement as to the matters set forth in the agreement. *See* 49 U.S.C. 13703(a)(6). The SMC carriers, whose ratemaking agreement and immunity are now constrained by territorial boundaries defined in that agreement, are thus seeking expanded immunity to the extent that they seek to eliminate those boundaries. It is a fundamental tenet of the antitrust laws that immunity from such laws should be granted only where there is a clear public interest and that any immunity should be no broader than necessary to fulfill the public need sought to be achieved. *See Group Life and Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205, 231 (1979) (“It is well settled that exemptions from the antitrust laws are to be narrowly construed . . . This doctrine is not limited to implicit exemptions from the antitrust laws but applies with equal force to express statutory exemptions.”) Thus, the burden is on SMC to demonstrate that its agreement satisfies the public interest, notwithstanding a well-settled public policy that disfavors broadened antitrust exemptions.

SMC’s burden is heightened even further by the fact that the special benefit it seeks in the form of broadened immunity from the antitrust laws would be unprecedented in the LTL motor carrier industry, the sector in which its members focus their operations. As noted above, the Board and its predecessor Interstate Commerce Commission (“ICC”) have for decades

consistently approved agreements that allow the LTL motor carriers that comprise the membership of each of the LTL bureaus to engage in collective ratemaking on a regional basis, subject to the territorial boundaries set forth in the ratemaking agreements approved by the ICC and the STB. Such territorial boundaries on collective ratemaking existed at a time when carriers were traditionally granted narrowly-framed operating authority by the ICC. However, these limits have continued since the motor carrier industry was largely deregulated beginning in the late 1970's, at which time carriers were granted (as they consistently have been for over 20 years) nationwide operating rights by the ICC and its successor agencies. The regional boundaries have facilitated the ability of carriers in different parts of the United States to establish class rates that best reflect the operating characteristics of the area. Further, the regional system allows smaller carriers that compose the bulk of rate bureau membership a more active role in the process than would be the case in the event that the small number of national carriers were to dominate the process.

SMC's burden is thus to show not only that the relief that it seeks is in the public interest (even though the public interest disfavors broadened immunity), but to show that a territorial-based collective ratemaking system that has functioned without problem for decades now needs to be revamped in a manner that is likely to a single nationwide scale of collectively-made rates. SMC has not come close to meeting that burden.

2. SMC Has Not Met its Burden

SMC has at various times offered several reasons, each insufficient, as to why it seeks an expansion of its antitrust immunity to allow its members to engage in collective ratemaking on a nationwide basis. In its latest Petition, it offers one primary reason, i.e., that in early 2003 Congress repealed the 1999 prohibition against the Board granting an application for nationwide

ratemaking.³ It is of course true that Congress did so, although it bears noting that Congress acted through the back door of a massive omnibus appropriations measure, without the benefit of any consideration of this matter by the Congressional committees in the House or Senate with jurisdiction and expertise over transportation matters. (By contrast, the 1999 amendment adding the nationwide ratemaking prohibition in section 13703(d) was undertaken as part of the Motor Carrier Safety Improvement Act of 1999 and achieved the approval of the House and Senate Committees with jurisdiction over motor carrier transportation.) For SMC to call the 1999 amendment “stealth legislation” in its Petition (at page 3) is thus rather remarkable since the legislation that SMC engineered through the appropriations process is a textbook example of keeping the ball from the relevant Congressional committees.

The legislation by appropriations on which SMC relies is not supported by any legislative history or other stated rationale for its enactment, and in fact there is none. The fact that Congress removed the nationwide prohibition, moreover, does not and should not dictate the outcome of this proceeding. Rather, the statutory change does no more than allow the Board to address the issue of nationwide ratemaking; it does not mandate a result in this proceeding. The policy scrutiny that this issue did not receive in Congress underscores the need for such scrutiny by the Board. Indeed, the Board can only grant SMC’s request if it makes a finding based on record evidence that expanded immunity meets the statutory public interest test.

Hoping perhaps to avoid a substantive review of the extraordinary relief it seeks, SMC also argues in its Petition that the Board has already signaled a result in its favor in its *1998 EC-*

³ See Section 354 of the Omnibus Appropriations Act for FY 2003, Pub. L. No. 108-7 (Feb. 20, 2003).

MAC Decision.⁴ SMC, however, has misread the Board's prior action. In the 1998 Decision, the Board suggested that it was prepared to lift territorial restrictions, but only "provided the bureaus reduce their class rate scales appropriately . . ." *1998 EC-MAC Decision* at 10. At the time, the Board had in mind that it would require class rates to be rolled back, and it directly tied nationwide immunity to such a rollback.⁵

Subsequent events, however, caused the Board to reconsider the rollback approach and determine, quite rightly, that such a rollback was not feasible.⁶ Ultimately, the Board switched direction and imposed the "truth in rates" notice requirement on rate bureau members in lieu of a class rate rollback.⁷ Thus, the class rate rollback action to which the Board had expressly tied its 1998 expression on nationwide ratemaking was never implemented. The Board cannot therefore be said (as SMC argues) to have already effectively approved, in a decision issued over five years ago, the nationwide immunity SMC now seeks.

SMC offers little else in its Petition in support of the substantial expansion of immunized ratemaking that it seeks. In other words, apart from (a) noting that the Board is not legally disabled from granting nationwide immunity and (b) asserting incorrectly that the Board has

⁴ The Board did not implement any action concerning nationwide ratemaking in that 1998 Decision since some key Congressmen asked the Board to defer any such action pending further Congressional review. The now-repealed statutory prohibition on nationwide ratemaking was subsequently enacted.

⁵ The specific views offered by the Board in its *1998 EC-MAC Decision* are addressed below.

⁶ See *EC-MAC*, served November 20, 2001 at 7 ("Because we are aware of no suitable and readily available methodology, and because of the disruption that a broad class rate reduction order could produce, we will not require broad rollbacks of collectively set rates at this time.")

⁷ *Id* at 9. Under this notice requirement, carriers are obligated to advise shippers of the availability of discounts when they quote rates based on collectively made levels.

previously decided to do so, SMC does not explain in any detail why nationwide ratemaking is required or why it now should be allowed. Rather, SMC offers only the following anemic justification for the relief it seeks:

With [nationwide] authority the member motor carriers could establish a nationwide baseline of class rates reflecting their costs and revenue needs, and thereby be in a position to offer truly competitive rates to their transportation customers.

SMC's "justification" does not come close to meeting its difficult burden. First, each member of SMC that seeks to establish a "nationwide baseline of class rates" is free to do so today by simply establishing its own baseline of class rates. Numerous carriers, some of which participate in collective ratemaking and some of which do not, today publish their own nationwide class rates which those carriers use as a baseline for their competitive discounting. Further, to the extent that any carrier chooses not to publish its own nationwide base rates, it is free to use a tool such as the SMC-published Czar-Lite, which compiles in one place a set of nationwide rates collectively made by a series of territorial LTL rate bureaus. It is also free to participate in each of the territorial bureaus and use the class rates published by each as its own baseline. No motor carrier needs a nationwide rate bureau to readily and efficiently quote any competitive rate that it wants for traffic moving between any two points.

SMC claims that nationwide immunity will allow for the publication of a baseline of rates that "reflects the costs and revenue needs" of the SMC carriers. Of course, to the extent that each SMC member carrier wants to use a baseline of rates that best reflects its costs and revenue needs, again it is free to publish its own baseline of rates geared to its own costs and needs. Further, to the extent that the SMC carriers engaged in collective ratemaking in that bureau operate primarily in the Southern territory, it is questionable that they could somehow formulate a more useful or accurate level of class rates than do the carriers that operate primarily in other

territories, where costs are different. What the SMC carriers are really saying is that they want to *control* collectively made rates nationwide since they know that it is highly unlikely that more than one set of collectively made nationwide rates would exist if nationwide immunity were allowed.

The last point that SMC's Petition lamely offers in support of the relief it seeks seems to be that with a nationwide set of class rates formulated collectively by the SMC carriers, SMC members will be able to "offer truly competitive rates to their transportation customers." Putting aside the fact that those customers would undoubtedly be surprised by any implication that the rates that they are being offered today are anything but "truly competitive," there is no merit whatever to the assertion that expanding antitrust immunity to allow collective ratemaking to occur on a nationwide basis will somehow *enhance* competition. There is no question that the motor carrier industry is today highly competitive. That competition is manifest in the substantial discounts that carriers offer on a competitive basis from whatever benchmark rates they are using. Carriers base these discounts on their assessment of the competition, their individual revenue needs and their negotiations with their customers. The benchmark offers an understandable (to all parties) point of departure for the discounted rates that shippers are charged, but does not drive the discounts. Thus, there is simply no basis on which to suggest that a different benchmark, i.e., one created by collective action undertaken through SMC, would lead to *more* competition or to lower rates.

And, the Board (as well as shippers) should be suspicious of the proposition that the SMC carriers had lower rates in mind when they filed their Petition. That notion flies in the face of logic. Carriers will price their services based on market forces and negotiations with their customers. To reiterate, the use of one benchmark versus another should have no bearing on the

bottom line rate charged to an individual shipper. In short, by using benchmark rates already available (including those published in Czar-Lite) SMC member carriers are fully capable today of offering competitive rates on any traffic regardless of its origin or destination point.

SMC claims in its Petition that its nationwide application was supported by numerous shippers and carriers. It merits note, however, that the nation's largest shipper group (the NIT League) has been a consistent opponent of nationwide immunity and that the National Small Shipments Traffic Conference has recently voiced substantial doubts.⁸ SMC's claim is presumably a reference to a submission it made in this proceeding seven years ago, in 1996, consisting of purported letters of support for its then nationwide ratemaking application. In fact, the submissions that it references consist of no more than letters in support for the Czar-Lite rate compilation product that SMC has offered for many years, and continues to offer. Letter after letter touts the benefits of this commercial product, but no sustainable explanation is offered as to why nationwide immunity is needed for SMC to offer this product. The fact that SMC has successfully marketed the product for years undermines the 1996 claims of SMC that expanded immunity for SMC is somehow tied to the perceived benefits of the Czar-Lite product.

In fact, the Board subsequently found that no antitrust immunity at all is needed for this product, thereby underscoring that SMC cannot rely on any need tied to Czar-Lite to support the expanded immunity it now seeks. *See EC-MAC*, served May 20, 1997 at 3-4 (finding that no immunity is needed for the publication of Czar-Lite and rejecting SMC's request that its territorial expansion proposal be handled separately on the basis of Czar-Lite considerations). The Board thus has explicitly, and correctly, found that Czar-Lite is not a basis for expanding the

⁸ So too, the Department of Justice strongly opposed nationwide immunity when the issue was last raised.

scope of antitrust immunity.⁹ The public interest finding needed to sustain approval of an agreement and consequent grant of antitrust immunity certainly cannot be predicated on the commercial value to a rate bureau or others of a particular product. Indeed, it would be a gross perversion of the antitrust laws to grant immunity so that some parties can use it for the purported benefit of a commercial product. To the extent that SMC were once again to argue that it should have nationwide immunity in order to somehow benefit its Czar-Lite product, such arguments merit summary rejection.

SMC thus offers no credible basis on which to grant a petition for expanded nationwide ratemaking. Respectfully, Rate Bureaus submit that the *1998 EC-MAC Decision* also offers no sustainable reason for granting SMC's Petition. There, the STB cited in support of nationwide immunity (and, as noted above, subject to the unmet condition of a class rates rollback) the "increasingly globalized nature of the transportation system and the anachronistic nature of restrictions limiting bureaus to geographic territories."¹⁰ Rate Bureaus of course do not challenge the proposition that transportation systems can be global in nature. That has been the case for decades. In terms of collective ratemaking, however, territorial restrictions obviously have not been, and are not today, an impediment to the growth of global transportation. As noted above, any motor carrier can today offer any rate between any two points it wants. Further, it can use the rates published by some rate bureau for these purposes if it wishes. The territorial limits on the bureaus do not limit its ability to do so.

Further, with only a handful of exceptions (composed of the small number of very large carriers), motor carriers do not generally operate nationally or beyond the particular region in

⁹ See *EC-MAC*, served May 20, 1997 at 3-4

¹⁰ *1998 EC-MAC Decision* at 9-10.

which they are based. While virtually all carriers have held nationwide operating authority since the 1980's since that is all that is granted by federal regulators as a practical matter, the vast majority of these carriers use only a small portion of their authority. Thus, the notion that carriers need collective ratemaking commensurate with their operating authorities does not withstand scrutiny.

As to the claim that territorial limits are "anachronistic," Rate Bureaus submit that these boundaries remain viable. The membership of bureaus is composed of carriers that still tend to focus their operations in a particular territory. To the extent that the territorial limits have served to prevent a single nationwide bureau from forming and dominating collective ratemaking, Rate Bureaus submit that the limits continue to serve a viable function that is consistent with the proposition that antitrust immunity should not be broader than needed.

Finally, were a nationwide bureau to emerge, the few mega-carriers (UPS, Federal Express, Yellow/Roadway), which now do not participate in collective ratemaking might find the opportunity to discuss general rate adjustments attractive. Would this be a public benefit? Rate Bureaus question whether the Board wants to promote the likelihood of such a situation emerging. It can avoid doing so by retaining the status quo and denying SMC's request for expanded immunity.

C. THE BOARD NEED NOT CONSIDER SMC'S PETITION AT THIS TIME OR, ALTERNATIVELY, SHOULD SET THIS MATTER FOR PUBLIC COMMENT AND FURTHER FACT-FINDING

Rate Bureaus urge the Board to deny SMC's Petition for all of the reasons stated above. Should the Board wish to further consider the issue, however, it should defer such consideration to a later date.

Pursuant to the requirements of 49 U.S.C. 13703(c)(2), the Board is obligated to initiate a proceeding prior to the end of 2004 to review those ratemaking agreements that have been approved. The Board has already signaled its intention to initiate a new rate bureau proceeding pursuant to this requirement. *See EC-MAC*, served March 27, 2003 at 12. In the interest of economy of the Board's resources and those of other parties, Rate Bureaus submit that it would be efficient and reasonable for the Board to defer the nationwide issue for these new proceedings.

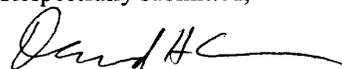
In addition, should the Board opt to further consider this issue at all, it should not grant SMC's Petition without compiling an updated record on the important question raised by the SMC Petition. The record on this matter is several years old and thus of limited benefit to the Board. Thus, while the Board should deny SMC's Petition on policy grounds, if it decides not to do so now, it should notice the SMC Petition -- which was served on only a small group of parties -- for initial and reply comments so that a more complete and updated record can be built.¹¹

¹¹ Rate Bureaus thus concur with the views on that issue expressed in the November 25 Reply of National Small Shipments Traffic Conference.

CONCLUSION

For all of the reasons stated above, the Board should deny SMC's Petition or, alternatively, grant the other relief described above.

Respectfully submitted,



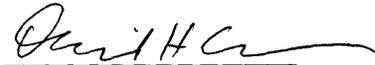
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Attorney for EC-MAC Motor Carriers
Service Association, Inc. and Rocky
Mountain Tariff Bureau, Inc.

December 15, 2003

CERTIFICATE OF SERVICE

I hereby certify that I have this 15th day of December 2003 served a copy of the foregoing
Opposition of Rate Bureaus upon all parties to this proceeding by first class mail, postage
prepaid.



David H. Coburn