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BEFORE THE
SURFACE TRANSPORTATION BOARD

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SECTION 5a APPLICATION NO. 46 (SUB NO. 20)
SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC.

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OPPOSITION OF
THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE
TO PETITION TO REOPEN AND RECONSIDER THIS PROCEEDING

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Dated: December 15, 2003

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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**SECTION 5a APPLICATION NO. 46 (SUB NO. 20)
SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC.**

**OPPOSITION OF
THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE
TO PETITION TO REOPEN AND RECONSIDER THIS PROCEEDING**

The National Industrial Transportation League (the "League") hereby files this Reply in opposition to the Petition of Southern Motor Carriers Rate Conference Inc. ("SMC") requesting the Board to reopen this proceeding and reconsider its application for nationwide collective ratemaking authority. SMC is asking the Board to reconsider its application based on the record previously established in this proceeding or, alternatively, based on new evidence to be submitted by interested parties pursuant to a procedural schedule to be issued by the Board. SMC asserts that a statutory change removing the limitation on the Board's authority to grant nationwide collective ratemaking authority to rate bureaus justifies a granting of its petition.

The League strongly opposes SMC's application for nationwide collective ratemaking authority. First, as a policy matter, the Board should not expand rate bureau antitrust immunity to permit collective ratemaking by motor carriers on a much broader national level absent clear and convincing evidence that such an expansion would result in meaningful public benefits. The existing record does not support such a finding. Neither does the League believe that receiving new evidence on the matter would lead to a different result.

Second, awarding SMC nationwide collective ratemaking would have an anticompetitive impact on motor carrier pricing, rather than a pro-competitive impact as SMC claims. A

granting of the petition can realistically be expected to cause harmful structural changes, potentially resulting in SMC becoming the sole national bureau that controls the entire collective ratemaking process and the only class rate tariff. This would establish a dangerous precedent that might entice the very largest LTL carriers who currently are not rate bureau members to reconsider their participation in collective rate setting with an aim of raising class rates even higher and/or otherwise attempting to influence the price of motor carrier service that should be established by the competitive market.

Third, SMC has not justified an expansion of antitrust immunity by demonstrating a compelling public need that would be served by the granting of nationwide collective ratemaking authority. In fact, expanding antitrust immunity is not necessary for SMC to continue to compile class rates applicable on a national basis.

Fourth, the statutory change eliminating the prohibition against granting nationwide collective ratemaking authority does not equate to a sanctioning of such conduct by Congress. Congress has not provided any specific guidance or direction to the Board that would require the Board to expand antitrust immunity for rate bureaus.

Accordingly, the Board should not reopen this proceeding in order to reconsider SMC's application for nationwide collective ratemaking authority.

I.

IDENTITY AND INTEREST OF THE LEAGUE

The League is one of the oldest and largest national associations representing companies engaged in the transportation of goods in both domestic and international commerce. The League was founded in 1907, and currently has over 600 company members. These company members range from some of the largest users of the nation's and the world's transportation system, to smaller companies engaged in the shipment and receipt of goods.

For many years, League membership was open only to shippers and receivers of goods. However, last year, the League broadened its membership to permit carriers and all other persons engaged and interested in the transportation of goods to become members. Thus, the League's members now include not only classic shippers and receivers of goods, but also include carriers, as well as third party intermediaries, logistics companies, and the like. Members of the League are engaged in all forms of transportation, including rail, motor, ocean and air carriage. Members of the League ship huge quantities of goods both domestically and in international commerce.

Since its founding, the League has sought a competitive, efficient, and safe transportation system. Toward that end, the League has participated actively in federal regulatory proceedings and legislative matters dealing with national and international commerce.

II.

THE BOARD SHOULD NOT REOPEN THIS PROCEEDING TO AWARD SMC NATIONWIDE COLLECTIVE RATEMAKING AUTHORITY

A. As a Matter of Public Policy, the Board Should Not Expand Rate Bureau Antitrust Immunity

It has been the long-standing view of the League that a competitive market is the best means of determining the economics of motor carrier pricing. When the Board most recently considered the question of whether to expand the territorial reach of the rate bureaus ratemaking authority in the Section 5a Application No. 118 (Amendment No. 1) proceeding, the League filed comments opposing both the continuation and/or expansion of antitrust immunity for rate bureaus. Based upon the highly competitive dynamics of the motor carrier industry, the League stated back in 1997 that "no rational basis exists for treating motor carriers differently from other U.S. industries" and "there simply is no sound or valid evidence that collective rate setting *better* serves the consumers of transportation services than the individual establishment of rates within

the confines of the competitive marketplace.” Comments of the League dated Aug. 18, 1997, Sec. 5a Application No. 118 (Amend. No. 1) et al., p.8.

The League’s view has not changed. Immunity from the antitrust laws is not favored under the law absent a compelling public interest that justifies the granting of this extraordinary privilege. In this proceeding, SMC has not demonstrated that the public interest would be better served if it were authorized to engage in collective ratemaking on a national scale. It is without question that the motor carrier industry is vibrant and vigorously competitive. Competition among carriers, rather than collective discussion of carrier costs, revenue and other economic factors, should be the driving force behind motor carrier pricing activities. Like other competitive private industries, LTL carriers are perfectly capable of establishing competitive prices for shipping between any two points in the United States based upon the actual cost of performing the transportation service. They do not need to rely on super-inflated class rates set collective by a rate bureau to serve their customers in the free market.

Moreover, expanding antitrust immunity for SMC, or any rate bureau, directly contradicts the national transportation policy set forth in the Interstate Commerce Act, as amended, which requires the Board “in overseeing transportation by motor carrier, to promote *competitive* and efficient transportation services in order to—(A) encourage fair competition, and reasonable rates for transportation by motor carriers of property” 49 U.S.C. 13101(2)(A) (emphasis added). Broadening SMC’s antitrust immunity would not satisfy this significant policy objective. In fact it would undermine this objective by inhibiting competition and promoting the establishment of unreasonably high class rates.

Simply stated, neither current market conditions or the National Transportation Policy warrant an expansion of antitrust immunity for SMC.

B. Granting SMC Nationwide Collective Ratemaking Authority Would Have Anticompetitive and Other Harmful Impacts

Although SMC claims that granting its application would lead to the establishment of “truly competitive rates” (Petition, p.2), the League believes that lifting the territorial restriction on collective ratemaking would have anticompetitive consequences. Broadening antitrust immunity in order to expand the bureau members’ collective pricing activities to cover the entire United States is on its face anticompetitive. As the Board has already recognized, rate bureau antitrust immunity leads to the establishment of unreasonably high class rates that bear no relationship to competitive rate levels. *Sec. 5a Application No. 118 (Amendment No. 1) et al., EC-MAC Motor Carriers Service Association, Inc., et al., served Dec. 18, 1998, at 5 (“1998 Decision”)*. Furthermore, even with discounting from class rates, there probably remains a number of shippers who are paying more and, in some cases, substantially more than the price that would have been established in a true free market. *1998 Decision at 4.*

The League is also very concerned that authorizing SMC to engage in collective ratemaking on a national scale would likely lead to the elimination and/or consolidation of other rate bureaus, resulting in SMC becoming the sole dominant rate bureau that controls the entire collective rate setting process and the only class rate tariff. The financial stability of several other rate bureaus has already been called into question. By granting SMC nationwide collective ratemaking authority, who admittedly is one of, if not the most, stable of all the bureaus, the relevancy and need for other rate bureaus is less than certain. A reduction in the number of rate bureaus down to one or two would seem inevitable if SMC’s application were granted.

Should SMC become the largest and most dominant rate bureau, if not the only rate bureau, as a result of obtaining expanded collective ratemaking authority, the League is also concerned that some of the largest LTL carriers who today do not participate in rate bureaus

would be lured back into participating in collective rate setting. The attraction of having the ability to discuss costs and other economic factors with their direct competitors is not likely to be ignored by even the most sophisticated carriers. This concern is shared by others, including other shipper organizations, other rate bureaus, and the U.S. Department of Justice.¹

In other words, the League is extremely concerned that approval of a nationwide rate bureau could well lead to a structural change in the market for motor carrier services, one which could lead to a significantly less competitive industry. An expansion of market power for SMC could result in a stronger concerted effort by its motor carrier members to charge non-competitive class rates, or even much lower discounts from class rates, on a broader level than they are able to achieve today.

If SMC becomes the largest or only rate bureau in the nation with expanded market power, and succeeds in attracting the biggest LTL carriers into its ranks, it can only be expected that already inflated class rates will be driven further upward in an attempt to extract even greater revenues from the most unwary of shippers. The anticipated consequences of expanding rate bureau antitrust immunity simply do not comport with the Board's prior findings that—

- Allowing the rate bureaus to set collective rates under an umbrella of antitrust immunity lends the government's imprimatur to inflated rates, and can lead uninformed shippers to believe such "unrealistically high list price[s]" are government-sanctioned, reasonable rates. 1998 Decision at 4-5.
- Over the years, rate bureau carriers have simultaneously offered steeper discounts and have increased collective rates by taking general rate increases ("GRIs"), which suggests they are using GRIs to "increase revenues from more vulnerable shippers. . . ." *Id.* at 4.

Furthermore, if SMC were to control the only existing class rate tariff, shippers could expect to pay more simply to have access to the class rate information. There is no telling how

¹ See Reply of the National Small Shipments Traffic Conference filed in this proceeding on Nov. 25, 2003 and Comments of the United States Department of Justice filed in Section 5a Application No. 118 (Amendment No. 1), *EC-MAC Motor Carriers Service Assn. Inc.*, Aug. 19, 1997. The League further understands that other rate bureaus will be expressing similar concerns to the Board in comments to be filed on December 15, 2003 in this proceeding.

damaging the influence of a single dominant rate bureau would be on the marketplace. The risks are very real and, thus, the Board should deny SMC's petition.

C. SMC Has Not Demonstrated a Compelling Public Interest that Justifies an Expansion of Collective Ratemaking

SMC alleges that nationwide collective ratemaking authority is needed so that its members could establish a more realistic baseline of class rates that reflects the nationwide operations of many of the carriers (Petition, p. 2). It further alleges that the establishment of a nationwide baseline would better serve the pricing needs of carriers and shippers. (Petition, p. 5). However, SMC has not shown how the elimination of the territorial limits on collective pricing that have been in place for decades would in fact lead to more vigorous price competition between carriers. This is because it cannot. Indeed, granting SMC's application would be more likely to result in anticompetitive collective ratemaking that would raise class rates across the nation and/or result in actions to make supra-competitive class rates "stick" as actual prices to a much larger segment of the nation's shippers.

Under the existing rate bureau scheme, carriers are already able to establish joint line rates serving any origin or destination in the United States. Moreover, SMC's CZAR-Lite program today offers a nationwide baseline of rates based upon a compilation of the regional class rate scales published by itself and other bureaus. SMC Application, p. 4. In its prior filings in the related proceedings, SMC itself has conceded that antitrust immunity is not needed for the continuation of the CZAR-Lite program in its current form. Reply of Southern Motor Carriers Rate Conference Inc. to Petition for Clarification of EC-MAC Motor Carriers Service Association, Inc., Feb. 7, 1997, at 8. Accordingly, the Board should not grant SMC's petition when there are lesser anticompetitive means available to achieving the benefits claimed by SMC.

To the extent that shippers and carriers find SMC's CZAR-Lite program useful, these benefits can continue without an expansion of antitrust immunity. The primary benefit of the CZAR-Lite program appears to be the efficiencies derived from pricing LTL services using the class rates as the baseline from which discounts are offered by individual carriers when pricing their services. Granting SMC nationwide collective ratemaking authority is not required for these benefits to be achieved. Even if further efficiencies could be gained by allowing SMC to establish and "update"—in reality to increase—baseline class rates on a national scale, these incremental benefits are insufficient to justify an expansion of antitrust immunity, given the substantial risks related to such activity.

SMC alleges that the financial instability of other bureaus threatens its ability to continue to market the CZAR-Lite product. What appears to be more at stake are the financial benefits obtained from the marketing and sale of the CZAR-Lite software. However, it is not the role of the Government to protect the commercial interests of SMC, particularly since this tool is not essential to motor carrier pricing. The carriers can simply rely on the existing baseline rates—which are already well above market levels—or they could resort to an evaluation of actual costs to price their services.

D. Congress Has Not Sanctioned Nationwide Collective Ratemaking

The primary justification asserted by SMC to support reconsideration of its application is that Congress removed the statutory prohibition that prevented the Board from granting such authority in the Omnibus Appropriations Act for Fiscal Year 2003.² SMC further argues that this change frees the Board to implement its previous intention to approve nationwide collective ratemaking as expressed in its initial decision issued on December 18, 1998:

² Sec. 354 of the Omnibus Appropriations Act FY 2003, Pub. L. No. 108-7, 117 Stat. 11 (H.J. Res. 2) (Feb. 20, 2003).

[W]e recognize the increasingly globalized nature of the transportation system and the anachronistic nature of restrictions limiting bureaus to geographic territories. In our view, provided the bureaus reduce their class rate scales appropriately, they should be permitted to lift such territorial restrictions. Absent a clear expression from Congress to the contrary, we intend to allow bureaus whose agreements are approved after December 31, 1999, to lift the territorial restrictions on the scope of their agreements. 1998 Decision at 9-10.

Subsequent to the Board's 1998 Decision, Congress adopted a statute directly prohibiting the Board from expanding the territorial reach of rates bureaus. *See Motor Carrier Safety Improvement Act of 1999, Sec. 22, Pub. L. No. 106-159, 113 Stat. 1748 (Dec. 9, 1999)*. Thus, in response to the clear directive of Congress, the Board declined to act on the request of SMC and other rate bureaus for nationwide collective ratemaking authority in its decision denying the rate bureaus petitions for reconsideration of the 1998 Decision. *See Sec. 5a Application No. 118 (Amendment No. 1) et al., EC-MAC Motor Carriers Service Association, Inc. et al., (Feb. 11, 2000)*.

The fact that Congress removed the restriction on the Board's authority to permit rate bureaus to engage in nationwide collective ratemaking—standing alone and without more—does not equate to any kind of approval or sanctioning by Congress of the activity. The manner in which the statutory change was effected cannot be overlooked. There were no hearings or debate over the issue. There was no involvement by the appropriate transportation committees in either chamber of Congress that enabled interested parties to be heard. There is no report or other legislative history that provides any indication that Congress supports an expansion of rate bureau antitrust immunity. The change was accomplished by the insertion of a single sentence in an appropriations bill, although this issue has nothing to do with appropriations of funds. Given the limited process involved with the change and lack of any direction from Congress for the

Board to take specific action as a result of the change, it would be improper for the Board to infer that Congress favors an expansion of collective ratemaking by motor carriers.

Finally, this is not a case in which the expression in the Board's 1998 Decision can simply be revived now. In the 1998 Decision, the Board expressed its intention to lift the territorial restrictions on the scope of collective ratemaking by rate bureaus on the condition that "the bureaus would reduce their class rate scales appropriately. . . ." to market levels 1998 Decision at 9-10. Several years later, when the Board ultimately concluded the merits of this proceeding, it abandoned its prior finding that the rate bureaus must reduce their class rate scales and instead required the bureaus to provide a "truth-in-rates" notice to the shipping public when rate quotes referencing a collectively set class rate are offered. Section 5a Application No. 118 (Sub-No. 2) et al., *EC-MAC Motor Carriers Service Association, Inc.*, et al. Thus, the condition that had to be met under the 1998 Decision in order for the territorial limitations to be lifted does not exist. Thus, there is no basis for the Board to grant SMC's application based on the issuance of the 1998 Decision. It is not at all clear that the agency, in December 1998, would have tentatively permitted the lifting of territorial restrictions if this much lesser remedy was contemplated at the time.

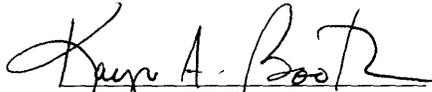
III.

CONCLUSION

For the foregoing reasons, the Board should deny SMC's petition seeking approval of its application for nationwide collective ratemaking authority based on the record established in Section 5a Application No. 46 (Sub-No. 20), or to reopen the proceeding for the purpose of

allowing interested parties to submit additional evidence.

Respectfully submitted,

A handwritten signature in black ink that reads "Karyn A. Booth". The signature is written in a cursive style with a large, stylized initial "K".

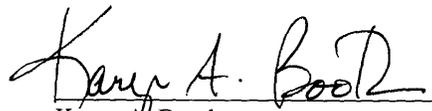
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Attorneys for
THE NATIONAL INDUSTRIAL
TRANSPORTATION LEAGUE

Dated: December 15, 2003

CERTIFICATE OF SERVICE

I hereby certify that I have on this 15th day of December, 2003, served a copy of the foregoing Opposition of The National Industrial Transportation League to Petition to Reopen and Reconsider this Proceeding on all parties of record, by first class mail, postage pre-paid.


Karyn A. Booth