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April 21, 2005

213831

Vernon A. Williams  
Secretary  
Surface Transportation Board  
The Mercury Building  
1925 K Street, NW #700  
Washington, DC 20423



Re: STB Ex Parte No. 656  
Motor Carrier Bureaus—Periodic Review Proceeding

Dear Secretary Williams:

Enclosed please find the original and ten copies of the Rebuttal Comments of Southern Motor Carriers Rate Conference, Inc. (SMC) provided for in the Surface Transportation Board's Decision served in the above-styled proceeding on December 13, 2004. Also enclosed is an IBM-compatible CD in Microsoft Word.

SMC is the applicant in Section 5a Application No. 46.

Thank you for your assistance in this matter.

Sincerely,

John R. Bagileo  
Counsel for Southern Motor Carriers  
Rate Conference, Inc.

Enclosures

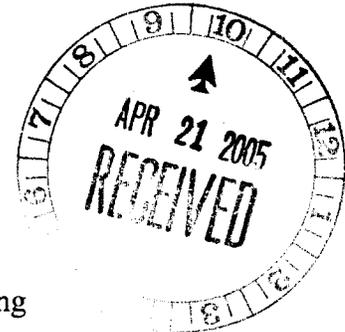
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Surface Transportation Board

ORIGINAL



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STB Ex Parte No. 656  
Motor Carrier Bureaus—Periodic Review Proceeding

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Rebuttal Comments  
Of  
Southern Motor Carriers Rate Conference, Inc.  
Section 5a Application No. 46

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Due and Dated: April 21, 2005

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I.  
Rebuttal Statement  
Of  
Jack E. Middleton  
President and CEO of  
Southern Motor Carriers Rate Conference, Inc.

I.  
Rebuttal Statement  
Of  
Jack E. Middleton  
President and CEO of  
Southern Motor Carriers Rate Conference, Inc.

I am the same Jack E. Middleton who previously submitted comments on behalf of Southern Motor Carriers Rate Conference, Inc. (SMC) in this proceeding. This statement is in rebuttal of various comments made in the joint reply submitted by the National Small Shipments Traffic Conference, Inc. (NASSTRAC) and the National Industrial Transportation League (NITL) (Shipper Associations), the reply of the US Department of Transportation (DOT), and the American Lighting Association (ALA).

The Shipper Associations again misstate SMC's position concerning the continued approval of its Section 5a Agreement. They incorrectly allege that "the rate bureaus have essentially argued that their antitrust immunity should be continued because they are operating in compliance with the terms of their agreements as approved by the STB in the . . . rate bureau reform proceedings." (SA Reply, p.1) SMC's position is that this review has revealed nothing which requires further agency action "necessary to protect the public interest." Opposition to antitrust immunity by the involved Shipper Associations is nothing new. Nor has that statutory protection provided by Congress to collective ratemaking activities ever been deemed contrary to the public interest. The focus of the Shipper Associations on antitrust immunity is misplaced in this proceeding.

The Shipper Associations then generally proceed to identify the grounds that they believe contribute to the basis for the "termination or modification of antitrust immunity for carrier collective action . . ." (SA Reply, p.2) Once again it is pointed out that this proceeding is not centered on whether antitrust immunity should be attendant to

collective ratemaking activities. Congress has determined that such immunity is provided as a matter of law to approved Section 5a Agreements. To infer that antitrust immunity should be the basis for terminating or modifying recently approved SMC's Section 5a Agreement, which was found to be in the public interest, would stand the statute on its head.

Before turning to the concerns of the Shipper Associations about collective ratemaking, I would point out that it is important to understand that those allegations are made by individuals who have never attended an SMC General Rate Committee meeting, although personally invited to do so on numerous occasions. How then can they accurately criticize a process with which they are unfamiliar? The first criticism, a purported lack of transparency, has no validity.

Through the modifications that were made in the collective ratemaking process commencing with the Motor Carrier Act of 1980, and the proceedings concluded in October, 2003 which created the truth-in-rates notice, SMC's collective ratemaking process is completely transparent. Its General Rate Committee meetings are open to the public and the views of any shipper or shipper association can be made at that time. Even though not required, at those meetings all participants have access to the data upon which the carrier members will base their collective action. Shortly after any action is taken on a docketed proposal, SMC sends out to some 5,000 companies and representatives a White Paper explaining the factors which led to the establishment of the carriers' general rate increase. That process is fully transparent to any interested person.

The Shipper Associations generally complain that shippers are subjected to "disparate burdens, with the result that higher class rates . . . predominate." (SA Reply,

p. 2) What those alleged burdens on shippers are under SMC's collective process are not identified. As indicated, if they choose to attend as they are encouraged to, they are provided the same data as the carrier members at the open meetings at which general rate increase proposals are docketed and, subsequently, acted upon. No burden is placed upon shippers with respect to that data.

Contrary to the Shipper Association's contention, there are no "standards that favor shippers over carriers" in SMC's collective ratemaking procedures. (See SA Reply, p. 2) Any SMC general rate action is predicated on the industry average of costs of its carrier members and the revenue need created by those expenses. How the recapturing of those costs, coupled with the goal of sustaining a 93 percent operating ratio necessary to maintain a viable carrier operation, "favors" carriers over shippers is not explained.

The allegation that "general rate increases may overstate cost increases" has absolutely no foundation on this record. (See SA Reply, p. 2) It is a self-serving assertion made without any first-hand experience with SMC's collective ratemaking process, or the interplay of the Carrier Cost Index and the National Traffic Database in the SMC carriers' collective ratemaking process. That serious allegation is not shown to have any basis in fact. The Shipper Associations do not, and cannot, point to any of the cost elements which are the components of the Carrier Cost Index, and establish that they are not valid or are overstated.

Perhaps the most disingenuous contention is that there is "no prohibition against



was indicated in the Reply Comments of Daniel M. Acker, SMC's Vice President of Operations, historically rate regulation has always recognized the element of the recovery of a reasonable profit as a component of a general rate increase. (SMC Reply, Acker Statement, pp. 4-5) The restraint on any collective action in recovering costs and achieving a profit is the statutory requirement that such general rate increase must be reasonable, and is subject to regulatory oversight. There is no prohibition on the recovery of a reasonable profit by the carriers, and the statute does not contemplate or require any such limitation.

The assertion that SMC carrier customers have received "smaller discounts than [the] shippers were led to expect" is not true. (SA Reply, p. 2) Initially, the Board has not required any bureau to maintain a minimum discount for shippers. Therefore, there is no expectation as to any particular discount level for any shipper group. All discounts are the product of arms-length bargaining between the carriers and their shippers. In view of the truth-in-rates notice there is no reason why any shipper should be unaware of the availability of a wide range of discounts off the collectively-made class rates. Notwithstanding those factors, as documented by the range-of-discount information provided to the Board for 2003 and 2004, the 20 percent automatic minimum discount from SMC's class rates continues to be applied by SMC's carriers. No "expectation" of the SMC shipper customers has been disappointed.

The Shipper Associations further complain that shippers have "a limited voice, and not voting representation." (SA Reply, p. 2) Neither contention is valid. Certainly, shippers are not limited in their participation in the open meetings conducted by SMC's member carriers in their collective ratemaking activities. There simply is no substance to

that allegation, particularly, as indicated, when those Shipper Associations have not even attended these meetings or viewed the process in operation.

The statutory provisions governing collective ratemaking activities are confined to agreements between carriers for the establishment of "rate adjustments of general application based on the industry average costs" and "through rates and joint rates." (49 USC S 13703(a) (1)) Shippers are not identified as persons qualified to be parties to such agreements, and to enable them to vote on carrier general rate actions would impair the statutory duty and right of motor carriers to establish their general rate increases and joint rates. It cannot seriously be suggested that, in view of the opposition to collective action voiced by NASSTRAC and NITL, that shippers could or would be impartial in voting on general rate actions which could affect their transportation budgets, irrespective of carrier need for those increases. Plainly, Congress did not believe that shippers should have that authority and, notwithstanding numerous rewrites of the provision governing Section 5a Agreements, has never included that condition. It would be totally unrealistic and unfair to place the establishment of reasonable class rates covering carrier increased costs and revenue needs in the hands of the shipper customer.

On the issue of what individual shippers truly want, I would respectfully request that the Board take official notice of the several hundred shipper, shipper association, and transportation intermediary statements filed in support of SMC's request for nationwide collective ratemaking authority, which proceeding is presently pending before the agency. Those companies voiced both support for the continuation of a nationwide baseline of class rates, and expressed unqualified confidence in the reasonableness and fairness of the procedures employed by SMC in establishing the class rates applicable in

its present ratemaking territory. A significant number of those supporting statements were from NASSTRAC and NITL shippers and associate carrier members. Absent from this record is a single shipper or carrier statement supporting the position of NASSTRAC and NITL. That important absence should be given great weight in assessing the probative value of the self-serving and unsupported contentions made by those organizations in this proceeding.

The Shipper Associations contradict themselves with respect to their unsubstantiated allegations regarding the competitive impact of collective ratemaking. On the one hand they assert that since 1980 “competition in the trucking industry has intensified as Congress intended.” Yet in the very next sentence they allege that “there remain incentives for the motor carrier members . . . of the rate bureau to use their antitrust immunity in anticompetitive ways, and these incentives may increase as competition in the marketplace increases.” (SA Reply, p. 3) They cannot have it both or all ways. Collective ratemaking with antitrust immunity has been in place almost six decades. As conceded by the Shipper Associations competition, as Congress intended, has flourished in the presence of that collective ratemaking authority. What rational basis exists for the Shipper Associations asserting that may not be the case in the future? How much more intense can competition get in the marketplace, and why would a baseline of class rates from which competitive rates can be more easily and identifiably negotiated not aid rather than impair marketplace competition? That is precisely the impact of the competitive benefit which has occurred under that pricing mechanism – a fact actually attested to by those Shipper Associations.

Daniel M. Acker will respond to the Shipper Association baseless generalizations regarding the accuracy of the Carrier Cost Index, the relationship of productivity gains to that index, and to yet another reaffirmation that fuel charges are not a part of SMC's carrier cost analysis. (SA Reply, pp. 3-4) I will respond to their contention that rate bureaus should be required to report their membership list and financial statements to the Board.

Over the past 8 ½ years while SMC has been pursuing its nationwide application, and at each initial stage of the ongoing rate bureau investigations, SMC has identified its some 130 carrier members. Also, it has identified its some 1200 shipper, transportation intermediary and carrier associate members – a shipper community probably larger than the membership of NASSTRAC or NITL. Why SMC's financial information is needed is not explained. Certainly, the Shipper Associations cannot be questioning the financial stability of SMC. Plainly, they have not pointed to any requirement in Section 13703 of 49 USC, or elsewhere, why such information is needed or required

The Shipper Associations repeat their complaint that shippers may not vote on SMC collective rate actions. (SA Reply, p. 4) That contention is addressed earlier in this statement. Nevertheless, it bears repeating that Congress did not design Section 13703 (a) to include shippers, but limited that provision to carriers, and in all subsequent legislative rewrites of that provision have continued to restrict collective ratemaking agreements to motor carriers. Also, it is irrational to assume that shippers would vote to facilitate the implementation of necessary general rate increases for motor carriers when any resulting rate increases would be paid by their companies.

Further, the Shipper Associations allege that the prospect of antitrust problems for joint line rates is "extremely remote." (SA Reply, p. 5) That comment fails to recognize the manner in which interline operations are conducted today. In the past, when operating authorities were restricted, joint-line service normally involved end-to-end operations by motor carriers not in direct competition with each other in those connected territories. Presently, with virtually all motor carriers holding nationwide authority, that relationship has changed. Motor carriers, now direct competitors with each other, use each others' services to reach markets, which for economical or operational considerations, they do not wish to or cannot provide service. Those collective activities plainly require antitrust immunity, and Congress has continued to provide that protection in the current legislation.

Finally, the Shipper Associations argue that motor carrier rates and rate increases should be set through competition and negotiation. (SA Reply, p. 5) That is precisely how the market works today through the use of the collectively-made class rate baseline. In the SMC nationwide proceeding shippers, transportation intermediaries and carriers, who understand, participate and rely on the collective process, have attested to the benefit of that pricing mechanism in the negotiation and identification of competitive rates. Not a single shipper, transportation intermediary or carrier has contested the correctness of that benefit in this proceeding. The so-called deregulated market which the Shipper Associations tout, gave rise to considerable confusion because of the proliferation of literally thousands of motor carrier rates. Shippers have recognized the necessity for utilizing an established, reasonable and acceptable class rate baseline for motor carrier pricing. The collectively-made class rates have met that need.

The US Department of Transportation (DOT) engages in a series of inaccurate and outdated contentions to resurrect its long-standing request for the termination of antitrust immunity. Congress long has rejected that request, and DOT improperly has interjected that argument into this proceeding.

DOT is well aware of the outpouring of shipper support that SMC received for its pending nationwide collective ratemaking application inasmuch as that Department participated in that proceeding. Therefore, its contention that “shippers and shipper associations uniformly oppose continued approval and immunity,” is in error because no individual shipper has contested renewal of SMC’s Section 5a Agreement here. (DOT Reply, p. 1)

DOT has misstated the legal standard involved in this proceeding. It argues that “the supporters of the agreements at issue have not satisfied the statutory standard,” i.e. to demonstrate to the Board that immunity is in the public interest. (DOT reply, pp. 5-6) DOT contradicts itself in this regard by properly identifying earlier in its comment that the purpose here is to determine whether further changes or termination is “necessary to protect the public interest.” (DOT Reply, p. 5) In October, 2003 the Board determined that, as modified, SMC’s Section 5a Agreement serves the public interest. Therefore, that burden has been met. It is submitted that nothing has been introduced in this proceeding which evidences any further need to change the Agreement to protect the public interest. SMC has already met its burden and it is the burden of others to demonstrate a legitimate public interest need for additional modifications. That is the plain focus of this periodic review – according to the standard of review in Section 13703 (c) (1) of 49 USC.

DOT then argues that antitrust immunity denies the shipping public the full benefit of market forces. (DOT Reply, p. 6) As demonstrated in the SMC nationwide proceeding, the transportation community disagrees with that assessment. Because of the collectively-established baseline of class rates shippers have been able to better assess and negotiate competitive motor carrier rates. That pricing mechanism was adopted by a large segment of shippers and carriers because the proliferation of carrier rates, which DOT praises as a boon to a competitive market, actually proved to be a handicap in enabling shippers to make rational pricing decisions and carriers to make competitive bid offerings.

DOT, in addition to having no jurisdiction over motor carrier rates and no authority in antitrust matters, is in no position to advise the industry that antitrust immunity is “not necessary for . . . joint service offerings, nor any other pro-competitive collective arrangements.” (DOT Reply, p. 6) It is devoid of any true understanding of today’s joint-line arrangements which involve direct competitors, or of the collectively-established class rate baseline which drives the negotiation of competitive motor carrier class rates in the marketplace.

DOT’s arguments against benchmark rates are confusing and contradictory at best. SMC does not contend, as DOT argues, that the class rate baseline is intended to “ensure shippers pay only market based rates.” (DOT Reply, pp. 7-8) No system of ratemaking or pricing can “ensure” that result. Rather, the baseline of class rates ensures that all parties to the transportation arrangement have a common pricing mechanism, if they choose to use it, and know precisely what the bottom line rates are which have been quoted by the carriers or negotiated between the parties. There is no rate-setting by SMC

as that is the function of the marketplace and the parties. Additionally, the Board's prior finding that some small, unsophisticated shippers could pay above-market rates even with the availability of discounting was fully addressed by the truth-in-rates notice requirement implemented by SMC almost two years ago. DOT's attempted use of that finding here and now has no validity. Moreover, what DOT ignores, or is unaware of, because it also has been absent from any General Rate Committee Meeting, is that no shipper pays an undiscounted SMC class rate. All shippers having no discount or a lesser discount are entitled to an automatic 20 percent discount from SMC's collectively-established class rates.

DOT's constant representation that "all participating shippers" in this proceeding oppose the current system is misleading. Not surprisingly, DOT, as noted, has chosen to ignore the numerous statements of record in SMC's nationwide application supporting the collective process, and attempts to draft on the unsubstantiated allegations of NASSTRAC and NITL, many of whose own shippers and associate members have stated positions to the contrary of those advanced by those organizations here. Indeed, no individual shipper or associate member of NASSTRAC or NITL has supported the opposition expressed by those associations.

While DOT attempts to rely on the purported shipper opposition to collective ratemaking in postulating that those activities impair competition and the availability of market-based rates (DOT Reply, p. 9), it must be pointed out that those outdated assertions are contradicted by former representations of NASSTRAC. As I pointed out in my Reply statement, in its January 22, 2002 Reply to Rate Bureau Petitions for

Reconsideration in Section 5a Application No. 118 (Sub-No. 1), et. al, EC-MAC Motor

Carriers Service Association, Inc., Et Al., NASSTRAC stated that:

NASSTRAC has acknowledged that there can be pro-competitive aspects of motor carrier ratemaking based on discounts off class rates, especially in today's environment of widespread contracting. (NASSTRAC Reply, p. 3)

Moreover, in its May 24, 2004 Reply Comments in Section 5a No. 46 (Sub-No. 20),

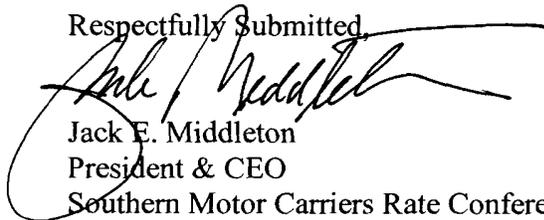
Southern Motor Carriers Rate Conference, Inc., it stated that:

Today's industry is characterized by intense competition, generally reasonable rates, generally excellent service, and a level of responsiveness to customers that far exceed what railroads and water carriers manage to provide. Since 1980, more efficient motor carriers and more efficient shippers working together, have produced a more efficient distribution system benefiting the entire American economy. (NASSTRAC Reply, p. 3)

While probably well intentioned, DOT's comments are out of touch with the transportation environment which now exists, as attested to by NASSTRAC.

Competition has not only been preserved under the collective activities of motor carriers, but also has been advanced through the wide variety of price and service options aided by the class rate-baseline pricing mechanism available through the collective ratemaking process.

Respectfully Submitted,



Jack E. Middleton  
President & CEO  
Southern Motor Carriers Rate Conference, Inc.

II.  
Rebuttal Statement  
Of  
Daniel M. Acker  
Vice President of Operations of  
Southern Motor Carriers Rate Conference, Inc.

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Rebuttal Statement  
Of  
Daniel M. Acker  
Vice President of Operations of  
Southern Motor Carriers Rate Conference, Inc.

I am the same Daniel M. Acker who filed a statement on behalf of Southern Motor Carriers Rate conference, Inc. (SMC) in its opening and reply comments. This statement is submitted in rebuttal of contentions made in the joint comments of the National Small Shipments Traffic Conference, Inc. and the National Industrial Transportation League (Shipper Associations).

The Shipper Associations on page 3 of their joint reply state:

“SMC’s comments include an extensive discussion of its ‘Carrier Cost Index,’ and the reasons SMC believes it to be superior to the Consumer Price Index and Producer Price Index issued by the Bureau of Labor Statistics. Assuming the CCI is tailored more closely to the cost experience of motor carriers than is the CPI or PPI, it does not follow that the CCI should be presumed accurate.”

The Shipper Associations have correctly acknowledged that an index, such as the CCI, that is “tailored more closely to the cost experience of motor carriers than is the CPI or PPI.” is acceptable. Their contention, however, raising a question without any foundation regarding the accuracy of the CCI is incorrect.

Let me explain precisely what motor carrier expenses the CCI encompasses.

Labor expenses:  
Salaries and wages  
    Salaries officers and supervisors  
    Drivers and helpers  
    Owner operator drivers  
    Vehicle repair and service  
    Cargo handlers  
    Clerical and administrative  
    Other labor  
Fringe benefits

Pension and retirement plans  
Health welfare and pension  
Other fringe benefits

Non-labor expenses:

Vehicle parts  
Vehicle maintenance and outside repair  
Tires and tubes  
Other operating supplies and expense  
General supplies and expense  
Operating taxes and licenses (OTHER THAN FUEL)  
Public liability and property damage insurance  
Cargo loss and damage  
Other insurance  
Utilities  
Building and structure depreciation  
Revenue equipment depreciation  
Other equipment and property depreciation  
Amortization  
Vehicle rents  
Purchased transportation from other carriers  
Equipment rents - credit  
Building and office equipment rents  
Disposition of operating assets - net  
Miscellaneous expense

On page 4 of their filing, the Shipper Associations do correctly state, "SMC has asserted that its CCI does not include a component for fuel cost increases...", in addition, as indicated above, SMC does not include State and Federal fuel taxes that are associated with those increased fuel expenses.

Labor expenses are updated by use of a special labor survey that is completed by SMC carriers reflecting the actual and planned experience of the carriers in their labor expenses. Increases in Insurance and Security are also updated based on special surveys completed by the SMC carriers. Other categories of non-labor expenses are updated based on specific indexes within the CPI or PPI. The use of specific indexes is a well understood and accepted ratemaking concept.

The motor carrier industry when it was under the purview of the Interstate Commerce Commission (ICC) was required to file extensive materials in justification of general rate increases. The motor carriers maintained their books and account of records in accordance with the ICC Uniform System of Accounts. There were then questions as to the updating of expenses. To develop an index of the changes in the price level of motor carrier expenses other than those which are labor related, meetings began in December of 1978 between members of the motor carrier industry and staff members of the ICC headed by Mr. Kenneth R. Tyree of the office of Policy and Analysis. Subsequently, representatives of shipper interests were asked to, and did, participate in the meetings.

The result of those meetings, which were successfully completed in September of 1979, was an assignment of appropriate indices to the principal non-labor expense accounts of the general commodity motor carriers. Subsequently, in September 1980, the same group met to achieve a more complete coverage of the list of expense accounts. The assignments were revised and used in many subsequent general rate increases reviewed and approved by the ICC.

In 1988 those assignments were further modified because of the changes in the ICC reporting requirements. These prescribed indexes, as before, relied on the indexes produced by the Bureau of Labor Statistics. Once again this procedure for updating non-labor expenses was used in general rate increases reviewed and approved by the ICC until its closure in 1996. Those same indexes are included in the CCI. The accuracy of the CCI, incorporating the above identified motor carrier sources and indexing methodology is not validly open to question.

The Shipper Associations, referencing the Railroad Cost Recovery Procedures (RCAF), comment that “with respect to its RCAF, indices that track input prices may overstate costs if they are not adjusted for productivity gains”, (Joint Reply, PP 3-4). It is not totally clear how the Shipper Associations perceive that the Railroad Cost Recovery Procedures apply to motor carrier class rates. It appears that they maintain that if costs are not adjusted for productivity gains they may be overstated. The flip side of this argument is that if costs are not adjusted for declines in productivity the costs may be understated. The increases and decreases in productivity may be the results of broad economic conditions and not the result of bad, poor or improper management by a railroad or the railroad industry.

The Interstate Commerce Commission (ICC) created the Rail Cost Finding Section and the Motor Carrier Cost Finding Section due to the considerable cost differences between those modes of transportation. Recognizing those disparate costs, the agency created two different formulas for determination of modal cost. Rail Form A was designed to address the nuances of railroad transportation, while Highway Form A was likewise designed to address the different nuances of motor carrier transportation. Inferences to the effect that adjustments suitable to rail costing valid as to motor carrier costs, may on the surface seem plausible. However, that analysis is like a proverbial comparison of apples and oranges, it just doesn't apply.

The motor carrier industry is cyclical in nature and is subject to seasonal swings in business, as well as the normal ups and downs in the economy, not to mention the fierce competition within the industry.

The operating ratio, the ratio of total operating expense to total operating revenue, before interest and taxes, is the primary indicator of the industry of a motor carrier's well being. The beauty of the operating ratio is that it is a current, up to date, ratio of expenses to revenue. During times of cyclical or seasonal increases in volume, revenue increases, as well as do expenses which typically increase at a lower rate than revenue due to the fixed nature of some motor carrier expenses. Thus, the operating ratio decreases reflecting the sum total of all shifts in revenue and expense including any changes in productivity. The reverse is also true in a time of reduced volume when the operating ratio will increase. Since no one can predict the future the carriers must, in a general rate increase, use the best information they have at hand to determine what the future will hold. The operating ratio accurately reflects the sum total of all economic factors, as well as the accuracy of any projected expense increases, and is available on a quarterly basis.

On page 5, of its comments, the US Department of Transportation (DOT) states: "If the STB is not disposed to disapprove the agreements outright, shipper parties urge the imposition of additional conditions. These conditions would directly restrain the use of benchmark rates (by mandating automatic discounts from those rates or by limiting collective ratemaking to the recovery of carrier costs)...".

Two important points must be made here. First, while the STB has opted not to prescribe rate levels it has allowed the SMC carriers to voluntarily place an automatic discount on their benchmark rates. DOT's comments infer that there is a problem with benchmark rates. In my own experience in the motor carrier industry I can attest to the fact that benchmark rates have been in place for decades. Typically these benchmark rates were the individual rates of carriers that already handled the freight. Competitors would merely sell their services at a higher discount to the shipper using the incumbent carriers' rates as the benchmark. Benchmark rates allow the shipper and the carrier to

quickly evaluate service proposals from a shipper or a carrier as the case might be, by comparing the discount level in conjunction with other service offerings such as one day service or other negotiated services or charges. The more freight a shipper has the more difficult it is for the shipper to evaluate the service offerings of multiple carriers using their own individual rate scales and applicable rules. If however they are all using the same baseline rate scale the shipper can evaluate its options much more quickly with a considerable savings in labor. Labor expense is reduced for the shipper but competition between the carriers is not reduced.

Secondly, DOT states that the bureaus should be: "limiting collective ratemaking to the recovery of carrier costs". Even after the enactment of the Motor Carrier Act of 1980, the ICC exercised economic regulation of motor carrier rates until that agency's termination in 1996. That economic regulation was encompassed in Ex Parte No. MC – 82, which specifically allowed the carriers to recover their increased costs and a reasonable profit for the purpose of continued operations. The DOT's unrealistic view of motor carrier costing ultimately would lead to the demise of the carriers to the direct detriment of the shippers. In fact, its approach of only allowing the pass through of expenses would lead to the demise of any company subjected to this mistaken economic view of business in the real world. DOT apparently does not recognize that the motor carrier Operating Ratio reflects the Revenue and Expense of the carriers before interest and taxes. In the short run it may appear sound that the carriers only recover their costs, but the carriers, as well as the members of the Shipper Associations, would pay a ruinous price because carriers cannot finance their continued operations on a portion of their expenses. A simple example will illustrate my point.

	Revenue	Expense	Operating Ratio
Year 1	\$10,000,000	\$9,500,000	95.00%
Increased Expense of 5%	475,000	475,000	
Year 2	10,475,000	9,975,000	95.23%
Increased Expense of 5%	498,750	498,750	
Year 3	10,973,750	10,473,750	95.44%

With this example it is easy to see that the mere pass through of expense increases will cause erosion of the operating ratio in each year that it occurs eventually leading to bankruptcy. By ignoring the fact that the mere pass through of expenses will lead to carrier bankruptcy the DOT is asking the STB to cause the demise of the very industry that provides the transportation services critical to the economy of the United States. The DOT either does not understand basic economics or the concept of an on-going business when they propose such a remedy as a workable solution to recover increases in motor carrier expenses.

The long-term health of any industry, including the motor carrier industry, is predicated on the ability of that industry to attain an adequate return on its investment. Short sighted, ill-conceived "adjustments" provide the false sense of a gain to some; unfortunately, they actually contribute to the ultimate deterioration of the very motor carrier service that the shipping public and the U.S. economy need to survive.

Respectfully submitted,



Daniel M. Acker  
Vice President of Operations  
Southern Motor Carriers Rate Conference, Inc.

III.  
Argument

III.  
Argument  
Sanction by Statute

A. Antitrust Immunity, for Approved Section 5a Agreements, Is Not The Issue in This Proceeding

Both the Shipper Associations and the Department of Transportation (DOT) attempt to elevate their institutional opposition to antitrust immunity to grounds for additional modification or termination of motor carrier collective ratemaking agreements. (See, e.g., DOT Reply, p. 6) That contention is unrelated to the issue before the Board in this proceeding.

As noted, under Section 13703(a)(6) of 49 U.S.C., upon Board approval or renewal of an agreement, the making and carrying out of the agreement by the motor carrier parties under the terms and conditions required by the Board is exempt from the antitrust laws. Throughout the almost six decades of the existence of that exemption, and all the legislative enactments which have extensively reregulated the motor carrier industry since 1980, opposition to the continuation of antitrust immunity for approved collective ratemaking activities has been voiced by certain parties. Yet, Congress, in its wisdom and in fulfillment of its legislative responsibilities, unequivocally has continued the application of that statutory protection for collective ratemaking. Indeed, notwithstanding substantial revisions to the provisions applicable to Section 5a Agreements in the Interstate Commerce Commission Termination Act of 1995 and the Motor Carrier Safety Improvement Act of 1999, antitrust immunity was preserved. Important to this proceeding, in Section 13703(c) of 49 U.S.C., Congress made clear that the review of an approved Section 5a Agreement is to result in modification or

termination only if such action is “necessary to protect the public interest.” That is the standard to be applied by the Board here.

The statutory provisions applicable to Section 5a Agreements would be rendered meaningless if, as the Shipper Associations and DOT argue, the antitrust immunity conferred by Congress in the conduct of approved collective ratemaking procedures was antithetical to the public interest. The outcome of such circular reasoning would be the inability of the Board to approve or renew any agreement, even though the collective process otherwise served the public interest, or such failure to renew was not necessary to protect the public interest. That plainly is not the intent of the statute.

B. There Has Been No Showing That the Public Interest Requires Protection Because of Any Deficiencies in the Current SMC Collective Ratemaking Procedures.

It is settled that the public interest test is met when the goals of the National Transportation Policy (NTP) are served. In its Opening Comments, SMC identified specific objectives of the NTP which are met and fostered by its collective ratemaking activities. (See, SMC Comments, Argument, pp. 1-5) Other than arguing, without any substantiation, that antitrust immunity is somehow anticompetitive, issue is not taken by DOT or the Shipper Associations with the consistency of SMC’s collective actions in implementing the NTP goals. In fact, as noted in the Rebuttal Statement of Jack E. Middleton, that contention is contradicted by NASSTRAC’s comments submitted to the Board in May 2004, which characterized the transportation industry “as characterized by intense competition, generally reasonable rates, generally excellent service, and a level of responsiveness to customers that far exceed what railroads and water carriers manage to

provide.” Those are the hallmarks of a market that is working well and not impaired by anticompetitive influences.

Additionally, the Rebuttal Statements of SMC’s Jack E. Middleton and Daniel M. Acker demonstrate that the generalized concerns of the Shipper Associations purportedly calling for the termination or modification of antitrust immunity for carrier collective action are erroneous, or have absolutely no validity with respect to SMC’s collective ratemaking procedures. It is submitted that the opponents of the renewal of an approved collective ratemaking agreement rightfully bear a heavy burden by having to show that Board action is necessary to protect the public interest. That burden has not been met here by the revival of institutional objections to antitrust immunity for approved collective ratemaking agreements long rejected by Congress; the repetition of past arguments rejected by the Board in prior proceedings without any cause being shown to justify a departure from the agency’s recent findings on those matters; or generalized, unsubstantiated and incorrect assertions regarding purported concerns about SMC’s collective ratemaking procedures which have not been participated in by those parties and are, nevertheless, totally incorrect.

C. Shippers Cannot Rationally Be Authorized to Approve or Disapprove of SMC Member Carrier Collective Ratemaking Decisions.

Section 13703(a) unquestionably vests in motor carriers, subject to Board approval if consistent with the public interest, the capacity to enter into agreements with other motor carriers to engage in certain collective ratemaking practices. In accord with Section 13701(a)(1)(c) any such collective actions must be reasonable. Also, as provided in Section 13703(a)(2), only motor carriers are identified as parties to collective ratemaking agreements, and only a motor carrier is identified as the party authorized to

submit such agreement to the Board for approval. The Shipper Associations' complaint that shippers cannot vote on collective actions taken by motor carriers under their Section 5a Agreements, a position without any corroboration by individual shippers, is not rational and is not contemplated in the law.

It bears note that the Shipper Associations' proposal on shipper voting has been rejected as illogical by another shipper organization, the Transportation Consumer Protection Council, Inc. (TCPC), in its April 2000 comments in Section 5a Application No. 61 (Sub-No. 6), National Classification Committee—Agreement. TCPC stated:

[T]he Council does not believe there is any practical or workable means by which shippers can participate. The concept of shippers participating in a carrier ratemaking function is just as illogical as having carriers participate in shippers' manufacturers' pricing decisions. (See TCPC Comments, p. 2)

In addition, the language in Section 13703 clearly indicates that it was and is the intent of Congress that the contemplated collective ratemaking activities are to be conducted by motor carries under approved procedures pursuant to agreements between motor carriers. It would make no sense to place in the hands of shippers the managerial discretion to determine what collective rate actions should be taken by motor carriers in response to their costs and revenue needs. That irrational result is underscored by the fact that the self-interest of shippers in avoiding rate increases, irrespective if those general rate actions are reasonable and needed by the carriers to meet their revenue needs, also would undermine the baseline rate structure a large segment of the transportation community relies upon in pricing motor carrier services. Shippers are welcome and encouraged to participate in SMC's collective procedures in determining the appropriate action to be taken on a general rate proposal. However, that participation cannot involve

shippers determining for carriers what general rate or joint rate actions can be taken.

Motor carriers clearly are provided antitrust immunity under the statute. The same cannot be said of shippers who would not and could not be parties to the agreements attendant to which antitrust immunity is conferred, and who, in a real sense, would be fixing the pricing under which motor carriers market their services.

D. Regulatory Oversight Was and Is Designed to Enhance Competition in the Marketplace.

DOT incorrectly portrays regulatory oversight as impairing competition. It states that:

In the past, the public interest dictated that all carriers—motor, rail, air, and water—should be subject to close regulatory oversight rather than competition and the laws designed to ensure that competition remains robust. (DOT Reply, p. 9)

That contention is wrong on any number of levels.

DOT's description of the objective of the public interest as dictating regulatory oversight rather than competition misses the mark. The public interest has long been identified with the goals of the National Transportation Policy. As provided in Section 13101(a)(2) of 49 U.S.C., the transportation policy regarding motor carriers is to promote competitive and efficient transportation services. Among the goals identified in that provision are encouraging fair competition and reasonable rates; meeting the needs of shippers, receivers and consumers; allowing a variety of quality and price options to meet changing market demands and the diverse requirements of the shipping public; providing and maintaining service to small communities and small shippers; and improving and maintaining a sound, safe and competitive privately-owned motor carrier system. Nowhere in the Nation's transportation policy is the public interest envisioned as

supplanting competition with regulation as DOT states. Rather, competition to the benefit of the transportation community is the lodestar of those guidelines.

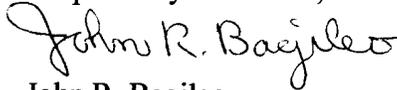
Furthermore, the regulatory oversight which DOT mistakenly describes as being in the past continues today. Now, as then, that jurisdiction authorizes the Board to ensure that collective rate actions are reasonable, and if a violation occurs, to prescribe what the rate, division or joint rate should be. (49 U.S.C. § 13701) The thrust of that regulation is not and never was to impair competition, but is designed to ensure that reasonable rates are available in the marketplace to facilitate the transportation of goods by motor carriage. DOT's efforts to paint the regulatory scheme and the public interest objectives of the statute as anticompetitive are wrong.

IV.  
Conclusion

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It is respectfully submitted that nothing in the comments submitted establishes that the imposition of further conditions is necessary to protect the public interest. SMC's collective ratemaking activities are conducted in strict compliance with the motor carrier association's approved Section 5a procedures, and nothing has been shown that as administered by SMC's member motor carriers, shippers and other interested persons do not have access to the collective ratemaking process. Moreover, no grounds have been presented which justify the termination of SMC's Section 5a Agreement. Opposition to antitrust immunity cannot and does not constitute a valid reason to further condition or revoke a motor carrier association's collective ratemaking authority. Congress has vested STB-approved Section 5a activities with that safeguard, and Congress' continual renewal of that protection evidences it does not deem antitrust immunity to be contrary to the public interest in the motor carrier industry. Accordingly, SMC requests that its current Section 5a Agreement be continued.

Respectfully submitted,



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