

213832 ORIGINAL

BEFORE
THE
SURFACE TRANSPORTATION BOARD

EX PARTE NO. 656
MOTOR CARRIER BUREAUS—PERIODIC
REVIEW PROCEEDING



REBUTTAL COMMENTS
OF
MIDDLEWEST MOTOR FREIGHT BUREAU, INC.

BRIAN L. TROIANO
1707 L Street, NW
Washington, DC 20036
202-785-3700

Counsel for Middlewest Motor
Tariff Bureau, Inc.

OF COUNSEL:

REA, CROSS & AUCHINCLOSS
Suite 570
1707 L Street, NW
Washington, DC 20036

Dated: April 21, 2005

ENTERED
Office of Proceedings
APR 21 2005
Public Record

**BEFORE
THE
SURFACE TRANSPORTATION BOARD**

**EX PARTE NO. 656
MOTOR CARRIER BUREAUS—PERIODIC
REVIEW PROCEEDING**

**REBUTTAL COMMENTS
OF
MIDDLEWEST MOTOR FREIGHT BUREAU, INC.**

Middlewest Motor Freight Bureau, Inc. (MWB) files these Rebuttal Comments in response to the Reply Comments submitted by the U.S. Department of Transportation (hereinafter “DOT”) and jointly on behalf of the National Small Shipments Traffic Conference, Inc., and National Industrial Transportation League (hereinafter “NASSTRAC/NITL” or “Associations”). Attached hereto is the Verified Statement of Mr. Jeffrey Michalson responding to the Reply Comments, which are the only replies filed in opposition to continued immunity for motor carrier collective ratemaking. Reply Comments have also been filed by other motor carrier bureaus in support of continued immunity.¹

It bears emphasis at the outset that the Associations and DOT have not attempted to address the one question that the Board put forth in commencing this proceeding, i.e., whether anything affecting the public interest has changed since the prior review cycle? (See Decision served December 13, 2004, p. 2). DOT simply repeats the same

¹ EC-MAC Carriers Service Assoc., Inc., Pacific Inland Tariff Bureau, Inc., National Classification Committee, Rocky Mountain Tariff Bureau, Inc., Southern Motor Carriers Rate Conference, Inc. In addition, all of the existing bureaus filed Opening Comments in support of continued immunity.

institutional opposition to antitrust immunity in general that it has argued for years to no avail. The Associations likewise utter their disagreement over Congress' choice to continue authorizing antitrust immunity for motor carrier collective ratemaking and also add their dissatisfaction with the Board's refusal to adopt their past recommendations.

These arguments, of course, avoid the question at hand as to whether changes have occurred since the last review cycle that warrant imposition of conditions on existing agreements. The failure to address the Board's inquiry leads to the inescapable conclusion that there have been no changes and that the collective ratemaking system is working as the Board envisioned in the last review cycle. Neither DOT's platitudes concerning the benefits of competition nor the Association's efforts seeking reconsideration of arguments previously rejected demonstrate that agreements approved a little over a year ago should now be terminated or restricted.

Unable to convey any changed circumstances that warrant termination or further limitation of immunity, DOT and the Associations attempt to cast on the bureaus the burden to justify continued approval of their agreements. Their argument, however, misreads the statute. Review of approved collective ratemaking agreements is governed specifically by 49 U.S.C. § 13703(c). The statute directs the Board to change the conditions of approval or terminate the agreement "when necessary to protect the public interest". *Id.*, (c)(1). The law further mandates that the agreement "shall be continued unless the Board determines otherwise". *Id.*, (c)(2).

Not surprisingly, the Associations and DOT prefer to ignore this language and instead point to the language in subsection (a)(2) which addresses agreements submitted to the Board for approval. In order to obtain approval, an agreement submitted under that

provision requires a finding by the Board that such agreement is in the public interest. A comparison between subsection (a) and (c) indicates that Congress imposed different standards for approved agreements being reviewed for renewal and initial or amended agreements seeking approval. Contrary to the contentions of the Associations and DOT, Congress expressed a presumption in favor of continued approval unless circumstances demonstrate a necessity to protect the public interest.

The difference in language between (a) and (c) is significant as the ICC recognized long ago in examining a similar distinction in former 49 U.S.C. § 10706(b) (applicable to motor carriers) and (c) (applicable to freight forwarders) and holding that the statutory standards for the two are not the same. Under the former, “. . . the Commission must approve a motor carrier rate bureau’s agreement unless it finds the agreement would be inconsistent with the NTP. A freight forwarder bureau’s agreement, measured by section 10706(c), must further the NTP.” (Emphasis in original). See *Household Goods Forwarders Tariff Bureau, Sec. 5a Application No. 106*, 1991 Fed. Car. Cases ¶ 37,917 (1991). (See also the earlier decision reported at 1991 Fed. Car. Cases ¶ 37,903, note 3.) So too here, the difference in standards must be given effect.

Given the structure of section 13703(c), it is apparent that Congress created a presumption in favor of renewal of approved agreements, unless evidence shows that conditions or termination are necessary to protect the public. Of course, there must be a showing that the public is being subjected to some type of conduct that requires imposition of conditions or outright termination – a showing that has not been made by DOT or the Associations.

Certainly this is not a radical approach. Termination of an agreement is a drastic measure and is not taken lightly. For example, in *Machinery Haulers Association*, 5 I.C.C.2d 808, 812 (1989), termination was justified on the basis of the bureau's consistent noncompliance with the law and the agreement itself:

Our action here [terminating an agreement] is a drastic one. However, we consider it necessary based on MHA's continuing noncompliance with the law, our regulations and the terms of its own agreement. We have an obligation to ensure the integrity of our process. MHA has consistently demonstrated an inability or unwillingness to comply with the law.

No similar evidence exists here. MWB has strictly adhered to the requirements of the statute, ICC and STB orders, and the terms and conditions of its agreement.

Moreover, DOT and the Associations have not identified a single circumstance that has occurred since the last review that would require either the imposition of additional conditions or the draconian measure of termination. Their disagreement with antitrust immunity in general is a matter for Congress, but is plainly insufficient to justify the extreme measures advocated here.

Turning to the substance of the Reply Comments, DOT states that nothing short of disapproval of the agreements will satisfy its concerns. (See Reply, p. 10). This statement reflects a fundamental misunderstanding of the nature of this proceeding. The bureau agreements under review have recently been reviewed and approved. The issue being considered is whether any changes have occurred since the Board's last review that warrant a change in its recent approval. DOT has offered nothing of any relevance in that respect.

The Associations also ignore that question. However, unlike DOT, they would accept continued immunity with additional conditions in lieu of outright termination.

However, they have failed to establish that any additional conditions are necessary for the protection of the public.

The concerns listed at page 2 of their Reply have previously been addressed in our prior comments. More importantly, the Board has previously considered and rejected the Association's requests and no circumstances have been presented to warrant the Board's reconsideration.

The Associations also comment on and pose questions concerning matters considered by carriers in adopting general rate increases. The purpose of this discussion is left unsaid and is certainly not clear in the context of this proceeding. If the Associations believe that any bureau rate actions are not lawful, the Act provides appropriate avenues to raise those issues.

Finally, the Associations suggest that the Board require the bureaus to file financial and membership information. The only reason provided for this request is to allow the Board and the public "to better monitor the activities and financial position of the various bureaus". (Page 5). The responsibility for monitoring the bureaus is that of the Board. 49 U.S.C. § 13703(b). The Board exercises that authority by requiring the bureaus to maintain and retain specific records. 49 C.F.R. Part 1253. MWB, of course, maintains the required records which are available to the Board for inspection. The Associations would make the Board a repository for the additional information, but fail to provide a sound reason for such a requirement, other than a desire to "monitor" the bureaus. However, as noted, the statute imposes monitoring responsibilities on the Board—not shippers.

In conclusion, MWB's agreement was amended to comply with the Board's *EC-MAC* decisions and was approved in a decision served January 21, 2004. No circumstances have been shown to indicate that the shipping public is in need of protection from any collective activities conducted by bureau carriers pursuant to their existing agreements. Accordingly, upon concluding its review, the Board should continue its approval of MWB's agreement.

Respectfully submitted,



Brian L. Troiano
1707 L Street, NW
Washington, DC 20036
202-785-3700

Counsel for Middlewest Motor
Tariff Bureau, Inc.

OF COUNSEL:

REA, CROSS & AUCHINCLOSS
Suite 570
1707 L Street, NW
Washington, DC 20036

Dated: April 21, 2005

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**EX PARTE NO. 656
MOTOR CARRIER BUREAUS –
PERIODIC REVIEW PROCEEDING**

**VERIFIED REBUTTAL STATEMENT
OF
JEFFREY D. MICHALSON**

My name is Jeffrey D. Michalson and I am the same individual who has submitted statements in this proceeding on behalf of Middlewest Motor Freight Bureau, Inc. (Middlewest or MWB). I submit this statement in response to the Reply Comments filed by the U.S. Department of Transportation (DOT) and those filed jointly by the National Small Shipments Traffic Conference and the National Industrial Transportation League (Shipper Associations).

DOT's comments are familiar. Its opposition to immunized collective ratemaking in the motor carrier industry is well known and its arguments are unchanged. Essentially its position is that collective ratemaking by motor carriers pursuant to approved agreements is contrary to the public interest and should be disallowed by the Board. This viewpoint is contrary to the determination made by Congress as reflected in the statute. DOT's contention that immunity is not in the public interest has also been repeatedly rejected by the STB and its predecessor, the ICC. The activities of MWB and its carrier

members are conducted pursuant to the terms and conditions of its approved agreement and subject to the scrutiny of the ICC and STB.

DOT's Reply Comments add nothing new to its time-worn arguments. I would point out, however, that one statement that underpins much of its argument is simply wrong. At page 2, DOT asserts that not all shippers pay discounted rates. Perhaps DOT has not been paying attention, but MWB, like the other bureaus, has had a minimum discount rule in effect since 1999 that guarantees that any shipper without a discount will receive a 35 percent discount. The Board discussed these rules in its EC-MAC decision served Nov. 20, 2001, and the existence of such rules is widely known and understood. Therefore, contrary to DOT's arguments, shippers of Midwest carriers are paying prices set by the market forces of competition.

The Shipper Associations likewise voice their preference for complete elimination of immunity. In the alternative, they suggest that more conditions be imposed on bureau carriers. However, these conditions were either rejected by the Board in the last review cycle or address areas already subject to conditions, e.g., notice of and opportunity to comment at rate meetings, mandatory discounts, burdens in rate challenges, etc. I addressed those contentions in my previous statement. In their Reply, the Shipper Associations dwell on issues that are beyond the Board's expressed area of interest in this proceeding. Having just recently completed an extensive review of bureau agreements, the Board stated that it wanted to know if there have been any changes since the last cycle that affect the public interest. Like DOT, the Associations have not identified any change in circumstances. Their silence confirms our experience that there have not been any relevant changes and that the system is working as intended.

Having nothing to say in response to the Board's inquiry, the Shipper Associations again turn their attention to general rate increases. First, they ask whether the bureaus consider fuel cost increases as part of their general rates increases. Although we continue to believe that this issue is beyond the scope of this proceeding, I will state for the record that Middlewest GRI's do not take the increased cost of fuel into consideration. Carriers' fuel cost increases are addressed by fuel surcharges. Our website so indicates. Consequently, any suggestion that MWB carriers are attempting to recover these increases twice is wrong.

Next the Shipper Associations question the accuracy of SMC's Carrier Cost Index used as a basis for that bureau's general increases and then they assert that the other bureaus are "conspicuously silent" with respect to the basis for their GRI's. (Comments, p. 4.). While the Associations undoubtedly have their own agenda of issues they desire to pursue in this proceeding, we do not understand this to be an issue in this proceeding. For that reason, our comments have addressed only the limited the issues framed by the Board. At this point, it suffices to say that MWB's general increases have always been and continue to be based on traditional cost considerations recognized by the ICC.

The Associations next argue that the bureaus should be required to submit financial and membership reports to the STB so that the Board and the public can better monitor bureau activities. As they note, MWB lists its members on its website. Concerning the suggestion that the shipping public monitor our activities, we would note that the law confers that responsibility only on the Board. To that end, we retain all of the information and records required by the STB's regulations and are available for the

Board's inspection upon request. Of course, the shipping public is welcome to attend our open meetings and monitor activities at that time.

Finally, the Associations contend that continued immunity cannot be justified on the basis of joint line service. (Comments, p.5). We disagree. Congress has already determined that joint line ratemaking potentially involves antitrust liability and therefore has authorized immunity for such activity. The Shipper Associations' belief that chances of an antitrust action are remote is plainly an insufficient reason to terminate approval of our agreement. Furthermore, our agreement authorizes collective activities other than joint line ratemaking and immunity is also required for those activities as well.

The Associations conclude by arguing that motor carrier rates and increases be set through competition and negotiation (Comments, p. 5). They seem to ignore that the wide range and variety of discounts available to every shipper are in fact set through competition and/or negotiation.

VERIFICATION

I, Jeffrey D. Michalson, declare and verify under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further, I certify that I am qualified and authorized to submit this statement.

DATED: 4/20/05


(Signature)