

**Before the  
Surface Transportation Board  
Washington, D.C.**

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Motor Carrier Bureaus –	)	Ex Parte No. 656
Periodic Review Proceeding	)	
	)	

**Rebuttal Comments of the  
United States Department of Transportation**

Introduction

The United States Department of Transportation (“Department” or “DOT”) wishes to comment on a number of arguments advanced by supporters of the agreements at issue. None of those comments alters the fact that the public interest is best served by fully allowing motor carrier pricing and commodity classification to be established in the marketplace and without antitrust immunity. However well-intentioned, regulatory oversight and conditions intended to ameliorate the adverse effects of these immunized agreements do not serve the public interest as well as outright disapproval.

Discussion

Supporters of rate bureau agreements continue to press arguments that are contrary to economic theory, common sense, and precedent. One such is that the “purpose and effect” of collectively set class rates is not “the fixing of prices,” but is in fact only a means “to foster competition and create competitive pricing among the carriers to the public benefit[.]” Reply Comments of Southern Motor Carriers Rate

Conference (“SMC”), Verified Statement of Daniel M. Acker at 1.<sup>1</sup> As the Department of Justice so aptly noted in an earlier review of these agreements, “[t]o rely on discounting from a cartel price -- a price that would not otherwise be set -- to protect consumers is to stand competition policy on its head.”<sup>2</sup> Moreover, collective rate-setting (particularly when immunized from antitrust law) “produces significant benefits for the carriers but is fraught with danger for the public.” Central & Southern Motor Freight Tariff Ass’n. v. United States, 777 F.2d 722, 733 (D.C. Cir. 1985).<sup>3</sup> That is why collective rate-setting is illegal, absent antitrust immunity, regardless of the justification advanced.

Proponents of the classification agreements also scoff at the ability of shippers to participate “objectively” in the classification of commodities that would be detrimental to shippers’ commercial interests. Reply Comments of the National Motor Freight Traffic Association and National Classification Committee at 10, “Argument” at 2, 5. DOT takes no position on the conditions sought by shippers as alternatives to regulatory disapproval. But it is difficult to accept that motor carriers themselves apparently suffer

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<sup>1</sup>/ See also Reply Comments of Rocky Mountain Tariff Bureau at 2-3 (competition is evidenced in the discounting from class rates, and rate bureaus do not reduce this competition); SMC, Verified Statement of Jack E. Middleton at 1.

<sup>2</sup>/ Section 5a Application No. 118 (Amendment No. 1), EC-MAC Motor Carriers Service Ass’n, Comments of the U.S. Department of Justice (filed August 18, 1997) at 7.

<sup>3</sup>/ When commenting upon the benefits of rate bureau membership to motor carriers vis-à-vis the public, the court recognized:

The privilege of operating collectively cloaked with antitrust immunity is obviously of enormous value. Even if one adopts a benign view of rate bureaus and assurances that the bureaus do not use this mantle of antitrust immunity to establish monopolistic prices, the ability to set rates collectively nonetheless permits carrier members to earn larger, or at least more stable, profits than they could in the absence of joint rate-setting.

no similar loss of “objectivity” in the classification process when their own commercial interests are at stake.

The proper application of the law to these agreements is also an issue. Agreement supporters have propounded the notion that Congress has repeatedly authorized or approved collective rate-setting agreements and wishes them to continue. Reply Comments of Middlewest Motor Freight Bureau at 2-3; Pacific-Inland Tariff Bureau at 2-3, 6; SMC, “Argument” at 2-4 (there is a “statutorily-created presumption, mandatory in terms, regarding the continuation of antitrust immunity”). A variant on this theme is that nothing has changed since the STB’s prior review, and therefore approval and antitrust immunity for these agreements must continue. But neither of these contentions is true. In point of fact, Congress has simply authorized the Board and its predecessor to consider such agreements and to approve them if they pass muster under the appropriate standard.<sup>4</sup> Moreover, the Board is free to refine and evolve new positions that differ from previous decisions so long as it provides a reasoned explanation for the change. Household Goods Forwarders Tariff Bureau v. Interstate Commerce Commission, 968 F.2d 81, 84 (D.C. Cir. 1992). It should certainly do so here.<sup>5</sup>

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<sup>4</sup>/ Where, as here, the Board considers agreements under a “public interest” standard that favors competition, the agency has ample authority to discontinue regulatory oversight or approval of agreements when it determines that to be less consistent with the public interest than exposure to competition. See National Small Shipments Traffic Conference v. Civil Aeronautics Board, 618 F.2d 819, 835 (D.C. Cir. 1980). There the agency refused to allow carriers to file agreements, even though that was the only way to obtain regulatory approval and antitrust immunity. See also Central and Southern Motor Freight Tariff Ass’n. v. United States, 757 F.2d 301, 315-16 (D.C. Cir. 1985). In both of these cases the agencies relied upon their exemption authority, which employed public interest and procompetitive policy standards substantially similar to 49 U.S.C. §§ 13101 and 13703. See 49 U.S.C. §1386(b)(1) (1981 Supp.), and 49 U.S.C. §§ 10702(b), 10761(b), and 10762(f) (1982).

<sup>5</sup>/ Rather than detail the same discussion contained in DOT’s comments submitted in the STB’s prior review of these agreements, we refer the Board and interested parties to those comments, which we attach for the convenience of all.

The applicable Congressional standard has its broadest formulation in the “public interest” test, but the elements that give meaningful content to such a facially imprecise term have for the last twenty-five years increasingly emphasized competition and the forces of the marketplace over regulatory oversight. Those elements are reflected in the National Transportation Policy, found in 49 U.S.C. § 13101, and specifically in subsections (a)(1) and (a)(2).<sup>6</sup> The STB must disapprove agreements that it finds to contravene this

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<sup>6/</sup> The content of this provision derives from the Motor Carrier Act of 1980 and continues largely unchanged since then. It is quoted in pertinent part here:

**§13101. Transportation policy**

**(a) In General.**— To ensure the development, coordination, and preservation of a transportation system that meets the transportation needs of the United States, including the United States Postal Service and national defense, it is the policy of the United States Government to oversee the modes of transportation and—

**(1)** in overseeing those modes—

- (A)** to recognize and preserve the inherent advantage of each mode of transportation;
- (B)** to promote safe, adequate, economical, and efficient transportation;
- (C)** to encourage sound economic conditions in transportation, including sound economic conditions among carriers;
- (D)** to encourage the establishment and maintenance of reasonable rates for transportation, without unreasonable discrimination or unfair or destructive competitive practices;
- (E)** to cooperate with each State and the officials of each State on transportation matters; and
- (F)** to encourage fair wages and working conditions in the transportation industry;

**(2)** 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;
- (B)** promote efficiency in the motor carrier transportation system and to require fair and expeditious decisions when required;
- (C)** meet the needs of shippers, receivers, passengers, and consumers;
- (D)** allow a variety of quality and price options to meet changing market demands and the diverse requirements of the shipping and traveling public;
- (E)** allow the most productive use of equipment and energy resources;
- (F)** enable efficient and well-managed carriers to earn adequate profits, attract capital, and maintain fair wages and working conditions;
- (G)** provide and maintain service to small communities and small shippers and intrastate bus services;
- (H)** provide and maintain commuter bus operations;
- (I)** improve and maintain a sound, safe, and competitive privately owned motor carrier system;
- (J)** promote greater participation by minorities in the motor carrier system;
- (K)** promote intermodal transportation;

expression of the public interest, regardless of earlier determinations.

The National Transportation Policy, as here relevant, is thus replete with references to the promotion of “competition,” “efficiency,” and “reasonable rates,” to favoring “the most productive use of equipment and energy resources,” and to enabling “efficient and well-managed carriers to earn adequate profits.” *Id.* The Board and its predecessor have properly found that these elements encourage increased reliance on competitive forces and decreased dependence on regulatory oversight. See American Trucking Ass’ns. v. United States, 642 F.2d 916, 922 (5<sup>th</sup> Cir. 1981)( standards require consideration of benefits of competition); Central and Southern, 757 F.2d at 316-21 (standards reduce regulatory emphasis and promote reliance on competition); Steere Tank Lines v. Interstate Commerce Commission, 724 F.2d 472, 480 (5<sup>th</sup> Cir. 1984); Attachment, *passim*.

That is as it should be. No federal agency can identify better than the marketplace how to “meet the needs of shippers,” what are the “most productive uses” of equipment and resources, which are “efficient and well-managed carriers” and which are not, and so forth. See Steere Tank Lines, 724 F.2d at 480 (“Carriers may come and carriers may go, but the focus of national policy is on the shipping and traveling public and on the industry as a whole.”)

It is common knowledge that the domestic motor carrier industry is competitive by nature. Widespread discounting from collectively set “benchmark” class rates, which do not themselves reflect market levels, is therefore not surprising. That discounting is in fact an indication that the marketplace is chafing against the constraints of the rate bureau agreements. The task at hand in these circumstances is to implement the procompetitive

indicia of the National Transportation Policy in the manner that best serves the public interest.

Introduction of the full array of marketplace forces and the laws that foster them is clearly in the public interest in the case of this obviously competitive industry. The successful application of competition and antitrust law to the operations of every other type of domestic carriage eliminates any realistic concern that the shipping and consuming public will be harmed if the Board takes that course here. Competitive forces will continue to ensure a wide variety of price and service options; carriers and their customers will continue to communicate; procompetitive classification and other standardized systems will retain their value and thus their adherents. See Republic Airlines v. Civil Aeronautics Board, 756 F.2d 1304 (8<sup>th</sup> Cir. 1985) and National Small Traffic Shipments Traffic Conference, *supra*.<sup>7</sup>

By comparison, continuing to shield motor carriers from competitive forces and relying upon conditions constructed to substitute for those forces ill-serves the public interest. Continued approval and immunity requires regulators to continue to oversee an admittedly competitive industry in order to monitor the effectiveness of conditions imposed to make anticompetitive agreements palatable. Far better, and more consistent with the public interest, would be simple disapproval of those agreements.

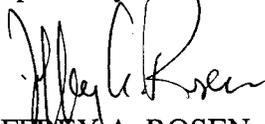
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<sup>7/</sup> The experience of carriers, shippers, and travelers in other portions of the domestic transportation industry offers ample record support for withdrawal of approval in this case. This is particularly so with respect to decisions of a judgmental or predictive nature, like that facing the Board here, where definitive factual support is neither possible nor required. Id.

Conclusion

The National Transportation Policy emphasizes reliance upon competition to produce a broad array of price and service offerings, to encourage efficiency and productivity, and to reward well-managed carriers. The policy has been successfully applied throughout the rest of the domestic transportation industry. Supporters of collective rate-setting agreements have not shown that the public interest is in any respect unique when it comes to the sole remaining domestic transportation sector that countenances this activity. Certainly no one has demonstrated the superiority, from a public interest perspective, of conditions designed to reduce the effects of failing to rely upon competition and antitrust law. The Board should disapprove the instant agreements.

Respectfully submitted,



JEFFREY A. ROSEN  
General Counsel

April 21, 2005

# **ATTACHMENT**

**Before The  
Surface Transportation Board  
Washington, D.C.**

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EC-MAC MOTOR CARRIERS )  
SERVICE ASSOCIATION, INC., ET AL. )

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Sec. 5a Application No. 118  
(Amendment No. 1) et al.

**COMMENTS OF THE  
UNITED STATES DEPARTMENT OF TRANSPORTATION**

Introduction

The Surface Transportation Board ("STB" or "Board") in the above-referenced proceeding has requested comments on issues related to motor carrier rate bureaus, and in particular on whether to renew the antitrust immunity now accorded the underlying intercarrier agreements. Decision served May 20, 1997. This proceeding is prompted chiefly by the statutory expiration of these agreements on December 31, 1998, absent their renewal by the STB. 49 U.S.C. § 13703(d).<sup>1</sup> The United States Department of Transportation ("DOT" or "Department") believes that procompetitive agreements do not need antitrust immunity, and that anticompetitive agreements do not deserve it. For the reasons discussed below, we therefore urge the Board not to renew the rate bureau agreements' antitrust immunity.

Antitrust Immunity for Motor Carrier Agreements Should be Eliminated

The immediately relevant statutory provisions are part of the Interstate Commerce Commission Termination Act of 1995 ("ICCTA"). P.L. No. 104-88, 109 Stat. 803. They represent only the most recent in a series of legislative enactments (beginning with the Motor Carrier Act of 1980 or "MCA") that have continued to reduce federal regulation and increase the role of market forces in

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<sup>1</sup>/ Also pending before the Board are requests for approval of agreements that would expand the geographic areas covered by rate bureaus. Decision at 1-2.

the trucking industry. The MCA eased entry, limited collective ratemaking, and removed restraints on contracting. P.L. No. 96-296, 94 Stat. 793. The benefits of these changes to shippers and consumers were measured years ago in the tens of billions of dollars annually, and they generated repeated calls for further deregulation, expressly including the elimination of antitrust immunity for rate bureau activities such as collective ratemaking and freight classification. See Motor Carrier Ratemaking Study Commission, Collective Ratemaking in the Trucking Industry. A Report to the President and the Congress of the United States, (Washington, June 1, 1983), at ii, xv (the "Study Commission"); Winston, Corsi, Grimm, Evans, The Brookings Institution, Washington, D.C., The Economic Effects of Surface Freight Deregulation (1990), at 27-28, 41, 61 (the "Brookings Study"); Interstate Commerce Commission, Study of the Interstate Commerce Commission Regulatory Responsibilities, Washington, D.C. 1994, at 76 (the "ICC Report"); U.S. Department of Transportation, Report on the Functions of the Interstate Commerce Commission, Washington, D.C. 1995, at 24-29 (the "DOT Report").

Congress responded with the Trucking Industry Regulatory Reform Act of 1994 ("TIRRA"), which basically eliminated tariff filing by motor carriers except for collectively set rates and rates on household goods. P.L. No. 103-311, 108 Stat. 1683. One year later, ICCTA ended tariff filing for these two exceptions and limited STB authority over the reasonableness of rates to those that are collectively set. P.L. No. 104-88, § 103. As noted, ICCTA also terminates approval and immunity for rate bureau agreements after next year unless the STB affirmatively approves those agreements pursuant to a finding that continued immunity is "in the public interest." 49 U.S.C. § 13703(d). The Board should not extend antitrust immunity because an extension is not in the public interest.

The STB correctly identifies collective ratesetting as the "most significant" rate bureau activity insofar as antitrust immunity is concerned. Decision at 2. Indeed it is, for it amounts to horizontal price-fixing, pure and simple. Such conduct in virtually all other industries is a criminal offense, and has long been *per se* illegal. United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940). It is rightly condemned without regard to the rationales advanced in support, because experience has shown it to be universally harmful, tending to support generally higher shipper rates and industry costs as an economic matter while

incurring regulatory burdens as well. *Id.* See also the DOT Report at 24-25, 29; the Study Commission at v-vi; the Brookings Study at 4, 27-28, 59-60. This is true whether the rates set are minimums, maximums, or -- as here -- "baseline." Kiefer-Stewart Co. v. Jos. E. Seagram & Sons, Inc., 340 U.S. 211 (1951); Federal Trade Commission v. Cement Institute, 333 U.S. 638 (1948).<sup>2</sup>

Nor is it likely that the inclusion of shippers in this activity will render it beneficial. DOT is unaware of any precedent holding that expansion of a price-fixing body to include customers as well as sellers removes it from *per se* illegality. It would also seem contrary to the logic of the underlying antitrust principle, for the likely intent and effect of such an expansion would still be to stabilize prices through consensus rather than having them determined through a multitude of dynamic, impersonal market forces. See National Society of Professional Engineers v. United States, 435 U.S. 679, 689 (1978) ("early cases foreclose the argument that because of the special characteristics of a particular industry, monopolistic arrangements will better promote trade and competition").

The rate bureaus' suggestion that antitrust immunity is necessary to maintain a (procompetitive) public pricing system, Decision at 3, has no economic or legal foundation. The dissemination of unilaterally-set pricing information facilitates competitive markets, and industry groups commonly engage in this and other practices, such as standard-setting (e.g., objective freight classification schemes or mileage guides), on a joint basis, without antitrust immunity. See Republic Airlines v. Civil Aeronautics Board, 756 F.2d 1304, 1317 (8th Cir. 1985)(nationwide joint air carrier travel agency program); Central & Southern Motor Freight Tariff Ass'n. v. United States, 757 F.2d 301, 319 (D.C. Cir. 1985) (carriers will distribute rate and service information to shippers without tariffs) National Small Shipments Traffic Conference v. Civil Aeronautics Board, 618 F.2d 819, 830-31 note 27 (D.C. Cir. 1980)(same); the DOT Report at 26-27.

Naturally, there are limits to the degree of detail that should be disclosed, for central "clearing houses" in some circumstances can hinder rather than help aggressive competition. F.M. Scherer & D. Ross, Industrial Market Structures and Economic Performance (3d ed. 1990), at 339-52; United States v. Container Corp. of America, 393 U.S. 333 (1969). Such concerns, however, are better

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<sup>2/</sup> It is therefore immaterial whether there is only "limited use" of general rate changes or class rates. Decision at 3 note 8.

addressed in this industry as they have long been in others -- by the U.S. Department of Justice or other antitrust authorities. Such authorities are able to tailor their inquiries and any necessary remedial action to problematic areas, without interfering with conduct that poses no difficulties.

A related issue posed by the Board, whether the setting of joint rates and divisions requires antitrust immunity, warrants the same response. It is simply not unlawful for commercial concerns to agree upon the terms under which they will conduct business with each other. See Broadcast Music, Inc. v. Columbia Broadcasting, Inc., 441 U.S. 1, 23 (1979); SCFC ILC, Inc. v. VISA USA, Inc., 36 F.3d 958, 963-64 (10th Cir.), *cert. denied*, 115 S.Ct. 2600 (1994).<sup>3</sup> Domestic airlines and other carriers, for example, engage in the joint transportation of traffic and passengers without immunity.

### Conclusion

Sound public policy long ago affirmatively prohibited collective price-setting among competitors in virtually every other domestic industry, and there is no reason affirmatively to find that an exception for motor carriers is "in the public interest." Vague or irrational expressions of concern to the contrary notwithstanding, there is every reason to expect that joint activities that serve legitimate purposes, such as traffic interlining, will continue without antitrust immunity. The Department urges the Board not to extend antitrust immunity for the relevant motor carrier agreements.

Respectfully submitted,



Nancy E. McFadden

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<sup>3</sup>/ The ICC Report indicates that even participants in benign rate bureau activities like this have nevertheless expressed concern about the loss of immunity. ICC Report at 76. That is a common reaction after years of protection. The nation's air carriers offered the same view to DOT when faced with the end of immunity for such agreements as their joint travel agency distribution system. But unease over antitrust exposure is no reason for extending immunity that is truly unnecessary, nor is it realistic to expect antitrust attacks upon procompetitive agreements. Republic Airlines, *supra*. The airlines soon did what other industries have long done: they obtained guidance from the U.S. Department of Justice in the form of a Business Review Letter, and today there are tens of thousands of collectively appointed agents nationwide remitting billions of dollars via uniform procedures, much as before. *Id.* at 1312 Note 5; See December 26, 1984, letter re Business Review Request -- Airlines Reporting Corporation.

## CERTIFICATE OF SERVICE

I hereby certify that I have on this day caused to be mailed a copy of the foregoing Comments of the United States Department of Transportation in Sec. 5A Application No. 118 (Amendment No. 1) et al, on all applicants in this proceeding, as directed by the Surface Transportation Board.

A handwritten signature in cursive script, reading "Paul Samuel Smith", written over a horizontal line.

Paul Samuel Smith

August 15, 1997