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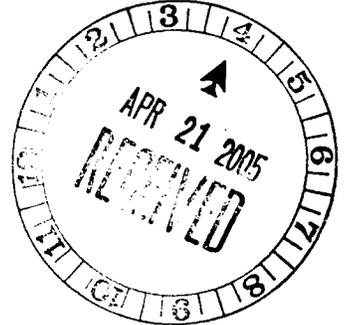
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213841

April 21, 2005



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

**Re: Ex Parte No. 656, Motor Carrier Bureaus Periodic Review Proceeding --
Rebuttal of Rocky Mountain Tariff Bureau, Inc.**

Dear Secretary Williams:

Enclosed please find an original and 10 copies of the Rebuttal of Rocky Mountain Tariff Bureau, Inc.

Respectfully,

A handwritten signature in cursive script, appearing to read 'David H. Coburn'.

David H. Coburn
Attorney for Rocky Mountain Tariff Bureau, Inc.

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21384



**BEFORE THE
SURFACE TRANSPORTATION BOARD**

EX PARTE NO. 656

**MOTOR CARRIER BUREAUS
PERIODIC REVIEW PROCEEDING**

**REBUTTAL OF
ROCKY MOUNTAIN TARIFF BUREAU, INC.**

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Bureau, Inc.

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

**REBUTTAL OF
ROCKY MOUNTAIN TARIFF BUREAU, INC.**



Rocky Mountain Tariff Bureau, Inc. (“RMB”) hereby submits this rebuttal in response to reply comments filed in this proceeding by the U.S. Department of Transportation (“DOT”) and the joint reply comments filed by National Industrial Transportation League and the National Small Shipments Traffic Conference, Inc. (“Associations”).

A. DOT Reply Comments

It should come as no surprise to the Board that DOT has filed comments in opposition to the continuation of antitrust immunity for motor carrier collective ratemaking. DOT has been continuously opposed to such immunity for decades. DOT’s current opposition, like its prior filings, is based on its ideological view of the issues raised by collective ratemaking, not on any hard evidence (or any evidence at all) that collective ratemaking is having an anti-competitive impact on the marketplace or otherwise working to the detriment of shippers or others. The absence of such evidence, as in the case of the Associations’ comments, is notable.

So too is the absence of any evidence that the new conditions fashioned by the STB in 2003 -- to further ensure that shippers are not harmed by collective ratemaking -- are not working. This record contains no such evidence, and that too is notable.

In the absence of evidence, DOT argues that collective ratemaking cannot be justified as a benefit to small and medium sized firms. The fact is that all or most of the RMB membership, and most rate bureau membership generally, is composed of small and medium sized carriers. If these carriers did not believe that there was some value to them from collective ratemaking in terms of their ability to compete with larger carriers, it stands to reason that they would not participate in collective ratemaking. The benefit that they receive, described in the testimony of the RMB carrier witnesses in this proceeding, is that they can efficiently formulate joint rates that they offer to shippers for the transportation of freight from point A served by one carrier to point C served by another via an interchange at intermediate point B. This allows the smaller bureau members to provide a competitive alternative to a larger carrier that might offer single line service directly from point A to point C. See Verified Statements of Robert J. Haney at 4-5 and Tom Fackler at 1-2. Indeed, this is the essence of joint line ratemaking, *i.e.*, the facilitation of the formulation of joint rates and through routes with a minimum of transactional expenses and with limited antitrust immunity. Such joint rates and through routes obviously benefit those shippers whose traffic is transported under them. The statute specifically authorizes immunity for the collective formulation of “through routes and joint rates.” *See* 49 U.S.C. § 13703(a)(1)(A).

DOT argues that carriers could enter arrangements for such joint rates without antitrust immunity. For that proposition, it cites a 1998 decision in the *EC-MAC Proceeding*, in which the Board stated that services provided by bureaus “other than collective ratesetting . . . do not violate the antitrust laws and thus do not require antitrust immunity.”¹ The quotation addresses bureau activities *other than* collective ratemaking and thus offers no support for the proposition

¹ *EC-MAC Proceeding*, served December 18, 1998 at 5, fn. 15.

that carriers could engage in joint line collective ratemaking without immunity, which seems to be the proposition being urged by DOT.

The other citation offered by DOT, *Republic Airlines v. CAB*, 756 F.2d 1304, 1317 (8th Cir. 1985), stands for the proposition that pro-competitive agreements, as to which there is no substantial likelihood of an antitrust challenge, need not be immunized. That case involved airline agreements concerning the marketing of air transportation determined by the Civil Aeronautics Board not to “raise serious antitrust concerns” because the agreements “do not *substantially* reduce competition or would not “raise a risk of antitrust litigation.” 756 F.2d at 1317 (emphasis in original).

Here, the RMB and other rate bureau agreements do not substantially, if at all, reduce competition. Nonetheless, the agreements do provide for discussions among competing motor carriers on price issues. Discussions among competitors about pricing matters could, in the absence of immunity, be argued to constitute a *per se* violation of § 1 of the Sherman Act, 15 U.S.C. § 1. DOT acknowledges this at page 8 of its Reply, observing that pricing discussions are *per se* illegal without regard to justifications that might be advanced. Thus, the very nature of immunized rate bureau discussions could realistically give rise to the risk or at least the threat of antitrust litigation, even though there is in fact no anti-competitive consequence to the formulation of joint rates. In this regard, it is critical to account for the fact that the carriers making joint line rates also compete with one another on single line service on certain routes that each can serve directly. Thus, the RMB carriers are direct competitors of one another on some routes at the same time that they are acting collectively in the formulation of joint rates on other routes to compete with national carriers and better serve their customers. In that setting, their price-focused discussions would provide, in the absence of immunity, an ample opportunity for a

party concerned with collective action to effectively bring the ratemaking process to a halt by filing an antitrust action. The need for immunity is thus clear, and has long been recognized.

DOT states that the motor carrier sector is the only domestic transportation sector that retains immunity. However, the fact is that this Board can and does grant immunity to various railroad agreements and transactions. *See* 49 U.S.C. § 11321; STB Finance Docket No. 27590 (Sub-No. 3); *TTX Company, et al.* — *Application For Approval of Pooling of Car Service With Respect To Flatcars* (served Aug. 31, 2004) (immunizing rail car pooling agreement). In addition, Congress has granted antitrust immunity to domestic airlines in the recent past, and DOT retains statutory authority to approve and immunize agreements among U.S. carriers involving international transportation. *See* § 116, Aviation and Transportation Security Act, PL 107-71, 115 Stat. 597, 107th Cong., 1st Sess. (Nov. 19, 2001) (providing for immunized discussions among and between U.S. airlines engaged in domestic commerce pursuant to DOT-approved agreements)² and 49 U.S.C. § 41309 (providing for DOT approval and immunization under 49 U.S.C. § 41308 of agreements involving foreign air transportation). Further, ocean carriers have limited antitrust immunity under federal law with respect to certain agreements, including ocean carrier conference agreements, involving international ocean commerce. *See* 46 U.S.C. App. §§ 1703-1706. In addition, the Board provides antitrust immunity in other contexts, specifically, with respect to approved motor passenger carrier pooling agreements and control transactions involving motor passenger carriers. *See* 49 U.S.C. §§ 14302(f), 14303(f) (both providing for immunity from the antitrust laws as necessary to allow parties to carry out an

² This provision was enacted in 2001 and has since expired. Its enactment demonstrates Congressional willingness to provide for immunity where needed to facilitate transportation.

agreement or transaction). The issuance of immunity to transportation entities where such immunity is deemed to serve the public interest is therefore not unusual.

DOT appears to believe that continued immunity for collective ratemaking will translate into reduced competition in the motor carrier industry. That has not been the case. Such competition remains vibrant (as one of the Associations have acknowledged in comments previously filed with this Board) due to significant discounting by motor carriers, which is unimpaired by collectively made benchmark rates.³ The Board found in the *EC-MAC Proceeding* that, with the new conditions it imposed, including the truth-in-rates notice, immunity should be continued, and the Board continues to exercise regulatory oversight over rate bureau activities. DOT has offered no basis for revisiting the *status quo*.

B. Associations Reply

RMB has already responded to the Associations' opening comments. The Associations' reply offers little new and thus requires only brief attention here.

The Associations urge that "features of NCC and rate bureau operations that are actually or potentially anticompetitive should be eliminated or minimized." RMB submits that that was what the *EC-MAC Proceeding* was all about. While RMB does not believe that any anticompetitive features were identified in that case, the Board imposed new conditions designed to address potential anticompetitive features that it perceived. The Associations have not produced any evidence of actual or potential anticompetitive activities and thus no further Board action is required.

³ See May 24, 2004 NASSTRAC Reply Comments filed in Section 5a No. 46 (Sub No. 20), *Southern Motor Carriers Rate Conference, Inc.* (noting that, "Today's industry is characterized by intense competition, generally reasonable rates, generally excellent service, and a level of responsiveness that far exceeds what railroads and water carriers manage to provide.")

The Associations renew arguments made and rejected in the *EC-MAC Proceeding* concerning GRI's -- without any showing that such rate adjustments are, or have been, unreasonable. As RMB previously noted in its Reply statement filed in this proceeding, "It is hard to see how the Associations' could credibly contend that GRI's are a problem for their members when such GRI's do no more than mirror the increases in the competitive marketplace taken by non-bureau carriers, including the largest carriers in the country. ...If shippers believe that any such GRI's are unreasonable, they are not (despite the Associations' suggestion to the contrary) without any remedy. GRI's are in fact subject to protest before the Board if any party believes that the resulting rates are unreasonable. 49 U.S.C. 13701(a)(1)(C)." The Associations' arguments concerning GRI's should be rejected again.

The Associations raise a question about which carriers belong to the various rate bureaus. RMB's member carriers are identified in RMB's Tariff 170, Participating Carrier Tariff. This tariff is available to the Associations and any other party. The Associations fail to offer any adequate explanation of why they need information about the staffs and finances of the rate bureaus. Such information is entirely unrelated to the collective ratemaking agreements at issue.

The Associations discuss the pending proceeding in which one rate bureau is seeking nationwide ratemaking immunity. *Southern Motor Carriers Rate Conference, Inc.*, Section 5a Application No. 46 (Sub No. 20). Noting their opposition to that proposal (which RMB and others also oppose), the Associations observe that that proceeding could result in a "fundamental restructuring of motor carrier collective ratemaking". RMB agrees with that observation. Were SMC allowed nationwide immunity, large carriers that have stayed on the sidelines of the collective ratemaking process for many years might be induced to rejoin, and through their market clout, seek to control the nationwide rate bureau. In that event, the currently benign

impact of collective ratemaking on motor carrier competition would need to be reconsidered.

This prospect, among other reasons articulated by RMB in the *SMC* proceeding, warrant against a broadening of the existing immunity. The territorial limitations on ratemaking do not in any way impede competition among carriers. While one might posit that the territorial limitations impose a restriction on competition between immunized rate bureaus, there is no evidence in the relevant statute, 49 U.S.C. § 13703, that Congress expected that collective ratemaking forums established through approved agreements would “compete” with one another. Such forums are no more than vehicles through which carriers formulate appropriate rates through approved procedures, which vary little from bureau to bureau. Currently, those rates are widely used as a benchmark for discounting. In these circumstances, it is not at all clear that eliminating rate bureau ratemaking territories would enhance carrier competition. More likely, it would result in the eventual consolidation of all bureau participating carriers (and perhaps large national carriers that do not now participate in territorial bureaus) into a single rate bureau since carriers would likely find that more efficient -- hardly a pro-competitive result. In short, territorial ratemaking serves the public interest and should be continued.

Finally, the Associations take issue with the argument that immunity is needed for joint line ratemaking, citing the fact that the railroads make joint rates without immunity. The fundamental difference, of course, is that the railroads involved in formulating joint rates are end-to-end connectors which do *not* also compete with one another. The reasons why such immunity is needed in the different motor carrier competitor/connector circumstances here have been discussed above. Further, comments that RMB offered on these points eight years ago in the *EC-MAC Proceeding* remain accurate and bear repeating here:

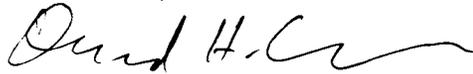
“...RMB rate structures also provide another benefit for member carriers by facilitating the ability of carriers to formulate joint-line rates with other carriers without fear of

antitrust concerns. RMB member carriers are both competitors with one another for traffic and, when joint line rates are offered by them, joint venturers. The matrix of bureau rates facilitates the ability of these carriers to readily offer joint line rates, at agreed discounts, without any concern that the rate discussions that the carriers may have with respect to such joint line services might be construed a prohibited price discussions among competitors. Section 13703(a)(1)(A) recognizes that the extension of immunity is appropriate with respect to "through routes and joint rates." Comments dated August 15, 1997, p. 15.

CONCLUSION

For the reasons offered by RMB in its filings in this proceeding, the Board can and should readily find that no basis has been offered on which it should revisit the *EC-MAC Proceeding* or find other than in favor of the rate bureau immunity that it decided to continue in that proceeding. *See* 49 U.S.C. 13703(c)(2) (immunity to be continued unless the Board determines otherwise). Accordingly, approval of RMB's agreement should be continued subject to the terms of the existing conditions imposed on rate bureaus.

Respectfully submitted,



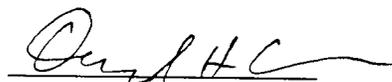
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Attorney for Rocky Mountain Tariff
Bureau, Inc.

April 21, 2005

CERTIFICATE OF SERVICE

I hereby certify that I have this 21st day of April 2005, by first class mail, postage prepaid, served a copy of the foregoing Rebuttal on those parties of record that have filed comments in this proceeding relative to rate bureaus.


David H. Coburn