

BEFORE THE
SURFACE TRANSPORTATION BOARD

EX PARTE NO. 656

MOTOR CARRIER BUREAUS – PERIODIC REVIEW PROCEEDING

SECTION 5a APPLICATION NO. 46 (SUB-NO. 20)

SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC.

REPLY OF NASSTRAC, INC. IN OPPOSITION TO REQUEST
FOR EXTENSION OF EFFECTIVE DATE

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May 31, 2007

NASSTRAC, Inc. hereby replies in opposition to the Petition for Extension of Effective Date (hereafter, "Extension Petition") filed May 25, 2007 by Southern Motor Carriers Rate Conference, Inc. ("SMC"). The requested extension would more than triple the 120-day period during which SMC and its members would continue to enjoy antitrust immunity under the Board's Decision served May 7, 2007 in this proceeding. That 120-day period is already far more generous than normal for STB decisions, most of which take effect when served or within 30 days thereafter.

NASSTRAC is not unsympathetic to the challenges facing SMC as a result of the Board's recent decision. Moreover, NASSTRAC expects that SMC will survive the loss of antitrust immunity, given the quality of its leadership and staff.¹ However, it does not follow that the public interest or sound legal or policy considerations support granting SMC's Extension Petition. On the contrary, allowing SMC to operate collectively with antitrust immunity beyond the current September 4, 2007 effective date in the Board's Decision is neither necessary nor defensible.

Let us be clear. The only reason SMC would need continued antitrust immunity for the next year is so that it may safely engage in acts that would otherwise violate the antitrust laws. It is hard to know what those actions might be. It is even harder to see why the STB, which has already found antitrust immunity for collective ratemaking to be contrary to the public interest, should grant SMC's Extension Petition.

¹ It is less likely that other rate bureaus will continue to operate. Several rate bureaus had folded or were struggling even before the Board's Decision terminating their antitrust immunity. NASSTRAC also notes that only six "Truth in Rates" status reports had been filed as of May 30, 2007 (by SMC, Rocky Mountain Tariff Bureau, Middlewest Motor Freight Bureau, Pacific Inland Tariff Bureau, National Bulk Trucking Association and Machinery Haulers Association) in compliance with the Board's last Periodic Review decision. See Rate Bureau Agreements, EC-MAC Motor Carriers Service Ass'n., Inc., 5 S.T.B. 1065 (2001) and Section 5a Application No. 118 (Sub-No. 2) (STB served March 27, 2003 (EC-MAC II) and October 16, 2003).

The Board faces a straightforward choice. If its Extension Petition is denied, SMC will be able to act with antitrust immunity for 120 days. After September 4, 2007, SMC may continue to operate, but any actions it takes that violate the antitrust laws will be at its own risk. If SMC's Extension Petition is granted, antitrust violations may continue with governmental immunity for the next 15 months. Understood this way, the right choice is not difficult to see.

SMC's arguments for an extended period of antitrust immunity are not persuasive. SMC's main function is to publish its base rate tariffs, and to consider and adopt annual General Rate Increases or GRI's, based on its analysis of various cost factors (excluding fuel costs). According to a publication on SMC's website entitled "SMC's 2007 General Rate Increase: Benchmark Pricing for a Proactive LTL Marketplace," SMC has already approved its GRI for this year, with an effective date of April 2, 2007.

Presumably, then, SMC would not normally publish another General Rate Increase until early 2008. Pricing by SMC member carriers would presumably be handled individually for the rest of 2007, through trucking company "tariffs" or rate quotations and through bilateral rate negotiations with shippers and intermediaries, even if there were no extension of the current September 4, 2007 effective date of the STB's Decision.

This is, of course, the manner of doing business that applies for all other modes of transportation (and other commercial enterprises) in the U.S. It is also the manner of doing business that should become the rule for the trucking industry once the STB's Decision in this proceeding takes effect.

Member carrier pricing of transportation services therefore appears unlikely to be disrupted, at least for the rest of this year, and therefore appears not to warrant SMC's

requested extension. While the Extension Petition would apparently permit SMC to process its next General Rate Increase in early 2008, the Board has decided that collective general rate increases are anticompetitive and not in the public interest. See the Board's Decision at 13: "Further, by serving as a focal point for pricing decisions, use of a collectively-set general rate increase (GRI) promotes a higher market price than would otherwise result." Therefore, SMC's desire for business as usual to permit a 2008 GRI does not constitute valid grounds for an extension of the current effective date of September 4, 2007.

In addition, the foregoing scenario assumes that SMC does not change its operations with respect to collective ratemaking during the pendency of its requested extension. In fact, changes in operations by SMC are a virtual certainty whether or not its Extension Petition is granted, and NASSTRAC sees no assurance that a full year of continued immunity would result in no harm to shippers. If its Extension Petition is granted, SMC might take advantage of its final chance at acting collectively with antitrust immunity to increase baseline rates even higher, or even more frequently, than it has done in the past.

According to SMC's recently filed status report, the highest discounts by its members have already reached 86%. To what extent would higher rates for the least sophisticated shippers, and higher discounts for the most sophisticated, be the outcome if SMC's Extension Petition were granted? We have no way of knowing, but it is not clear why such risks to shippers are warranted. Absent the requested extension, SMC's current baseline rates will not go out of existence, and carriers and shippers will remain free to

negotiate pricing and service combinations with reference to those rates, so long as they do so individually and without collective action among competitors.

In its Extension Petition at pp. 5-6, SMC refers to one of its specialized baseline rate products, known as “CzarLite,” and argues that the need to protect CzarLite warrants the requested extension. SMC also quotes from two prior filings by NASSTRAC in support of its claim that “Granting SMC the requested extension plainly will not have adverse effects on the shipping public.”

SMC’s reference to CzarLite is odd in light of a press release appearing on SMC’s website (www.smc3.com) entitled “SMC³ Responds to STB Collective Ratemaking Decision.” That press release states, in relevant part:

“CzarLite is not a ‘collectively made’ product within the purview of the STB’s decisions, commented [SMC³ Senior Vice President Danny] Slaton. “Shippers, carriers and 3PLs using CzarLite as the basis of their agreements can continue to do so seamlessly. License agreements with SMC³ will also not be affected.”

In any event, SMC’s Extension Petition quotes selectively from NASSTRAC’s May 24, 2004 filing in Section 5a Application No. 46 (Sub-No. 20), Southern Motor Carriers Rate Conference, Inc., the proceeding in which SMC sought nationwide authority. While it is true that a number of NASSTRAC members (and other shippers) use CzarLite, NASSTRAC expressed numerous concerns about CzarLite at pp. 15-18 of its May 24, 2004 Reply Comments.

These concerns included that CzarLite might become the dominant baseline rate tariff in the U.S., that SMC’s pricing, particularly to brokers and intermediaries working with numerous shippers and carriers, had raised questions, and that other competing rate bureaus might fold. As NASSTRAC explained:

It is also fair to ask how things might change if SMC operates nationwide and the result is reduced competition among rate bureaus, and the emergence of CzarLite and SMC's other software and e-commerce packages as essential but sole-source items. SMC would end up with a monopoly on a highly valuable suite of ratemaking materials. Questions concerning monopoly pricing, discrimination, tying arrangements, all potentially unregulated and immunized from the antitrust laws, naturally arise.

NASSTRAC Reply Comments at 17, emphasis in original. Nor was NASSTRAC alone in expressing concerns. See also the May 24, 2004 Reply Comments filed by DOT, the National Industrial Transportation League, and Rocky Mountain Tariff Bureau, Inc., a rival rate bureau.

It appears that SMC is trying to have it both ways. If CzarLite is not the product of collective ratemaking and is unaffected by the Board's Decision terminating SMC's antitrust immunity and mooted its application for nationwide authority, then SMC's desire to continue to market CzarLite and the desire of some shippers to use it cannot justify SMC's Extension Petition. If, on the other hand, the future of CzarLite, along with other SMC products and services, will be affected by the Board's decision, SMC cannot credibly argue that granting its Extension Petition cannot adversely affect shippers or the public interest in competitive motor carrier ratemaking.

The only other argument made by SMC in support of its requested extension is that it plans to work with the Department of Justice, through the DOJ Business Review Letter process and by engaging antitrust counsel, to restructure SMC operations in order to avoid violating the antitrust laws. NASSTRAC notes SMC's stated desire to avoid "the confusion and unnecessary disruption that will be created in the marketplace should SMC not be able to pursue alternative means, within the ambit of the antitrust laws, to

assist its customer base in their pricing mechanisms.” Extension Petition at 5, emphasis added. However, SMC does not need and should not enjoy immunity from the antitrust laws while it reinvents itself, particularly if it recognizes the need to comply with those laws.

Business Review Letters are routinely obtained by associations that do not enjoy antitrust immunity, and have been obtained by NASSTRAC, the Health & Personal Care Logistics Conference, Inc., and the American Trucking Associations. SMC can do the same, and may enjoy a degree of immunity under the Noerr Pennington doctrine.²

More fundamentally, SMC does not need continued antitrust immunity while it is learning how to operate without antitrust immunity. The key is to refrain from collective ratemaking and other agreements in restraint of trade. Its new antitrust counsel (Extension Petition at 4) can advise SMC within the next 120 days on how to operate in compliance with the antitrust laws.³ This is done routinely and daily by thousands of trade associations and businesses across America.

To the extent that SMC is worried about litigation risk, its concerns are illegitimate. In this regard, NASSTRAC would ask the Board to take official notice of the Report and Recommendations issued April 2, 2007 by the Antitrust Modernization Commission, and especially Chapter IV, Government Exceptions to Free-Market Competition, and pp. 332-366. See, in particular, pp. 350-351 (footnotes omitted):

The Commission finds two arguments in favor of antitrust exemptions particularly unpersuasive, however.

² See Eastern Railroad Presidents Conference v. Noerr Motor Freight, 365 U.S. 127 (1967), United Mine Workers & Pennington, 381 U.S. 657 (1965), and their progeny.

³ SMC, NCC and the other rate bureaus have known since these proceedings began that their antitrust immunity might be terminated or restricted. It is also noteworthy that when DOT terminated the antitrust immunity of the International Air Transport Association, it did so on less than 90 days notice to IATA. See DOT’s Final Order in Docket No. OST-2006-25307, served March 30, 2007.

First, no immunity should be granted to create increased certainty in the form of freedom from antitrust compliance and litigation risk. Antitrust compliance and litigation risks are costs of doing business that hundreds of thousands of American businesses manage every day. No particular companies or industries should be specially entitled to avoid these costs; if the costs are unreasonable, broader reform applicable to all businesses is the proper remedy. Second, no immunity should be granted to stabilize prices in order to provide an industry with certainty and predictability for purposes of investment or solvency. This too is a benefit that all industries would appreciate, but that none should be singled out to receive. The costs of price “stability” typically flow to consumers and result in inflexibility that undermines economic growth.

In any event, SMC does not need an extension of the September 4, 2007 effective date to avoid exposure to liability because a simpler and better alternative is available. SMC can simply suspend action on collective ratemaking that carries a risk of impropriety, while it is analyzing its future options. This approach would preserve the present benefits of the status quo and effectuate the Decision of the Board in this proceeding. As the Board held in that Decision (at 11):

Our termination of approval of bureau agreements should not adversely affect any beneficial bureau activities that may promote the flow of commerce without harming competition – it will merely subject the bureaus to the same antitrust rules that govern the vast majority of industries in the private sector of our economy.

Finally, as with the extension request filed by the NCC, NASSTRAC is concerned that SMC is seeking such a lengthy extension that its Extension Petition resembles a motion for a stay pending judicial review, without being styled as such or addressing the relevant standards. SMC has not ruled out a court challenge to the Board’s Decision, or a stay request.

NASSTRAC submits that SMC is unlikely to succeed in any challenge to the Board's decision, which is supported by DOJ, DOT, NASSTRAC and NITL and other commenting parties, and is consistent with current trends in antitrust law.

SMC has not claimed or established that it would be irreparably harmed absent the requested extension, and it has the ability to operate even after September 4, 2007 so long as it avoids activities that expose it or its members to antitrust liability. In contrast, if its Extension Petition were granted, SMC could continue for a year to engage in collective ratemaking and other activities that, but for immunity, could be illegal, and detrimental to the interests of shippers and the public.

CONCLUSION

SMC has failed to show how it will be harmed if the antitrust laws apply to its activities after September 4, 2007. It has also failed to demonstrate that continuation of its antitrust immunity until September 4, 2008 will not harm the interests of shippers and the public. Accordingly, SMC's Extension Petition should be denied.

Respectfully submitted,



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Dated: May 31, 2007

CERTIFICATE OF SERVICE

I hereby certify that I have this 31st day of May, 2007, caused copies of the foregoing document to be served by first-class mail on all parties of record.

A handwritten signature in black ink, appearing to read "John M. Cutler, Jr.", written over a horizontal line.

John M. Cutler, Jr.

s:\mcd\NASSTRAC Ex Parte 656 Reply