

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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STB DOCKET NO. EX PARTE NO. 656  
MOTOR CARRIER BUREAUS – PERIODIC REVIEW PROCEEDINGS

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REPLY OF NASSTRAC, INC. TO PETITION FOR CLARIFICATION

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NASSTRAC, Inc. hereby replies in opposition to the Petition for Clarification of Decision filed July 17, 2007 in this proceeding by the Household Goods Carriers' Bureau Committee ("HGCB"). NASSTRAC is concerned that the relief requested in HGCB's Petition, if granted, would effectively neutralize the STB's May 7, 2007 Decision in this proceeding terminating the antitrust immunity of HGCB and other motor carrier rate bureaus.

Throughout these proceedings, NASSTRAC has been most concerned about the NCC and the rate bureaus of motor carriers of cargo rather than household goods. However, NASSTRAC members are also affected by collective ratemaking by household goods carriers. Many NASSTRAC members have corporate relocation programs and pay or reimburse employees for the rates and charges of moving company members of HGCB.

NASSTRAC is also concerned that, if the Board were to approve the approach suggested in HGCBC's Petition, similar petitions by NCC and the other rate bureaus would follow, and the Board might feel compelled to approve similar relief for other rate bureaus. If this were to happen, the Board's goal of increased competition among motor carriers in a fully deregulated transportation marketplace would be compromised, at best.

In its Petition, HGCBC asks the Board to approve the adoption by some 2000 household goods carriers of current collectively-made HGCBC tariffs, which cover rates, charges and terms and conditions of service. The Board is also asked to find that mass adoption by an entire industry of a single set of collectively-made tariffs presents no potential antitrust problems.

Although styled a petition for "clarification" of the Board's Decision (possibly to avoid the 20 day deadline in 49 C.F.R. § 1110.1 for petitions for reconsideration), the effect of HGCBC's request would be for reconsideration and reversal of the Decision to terminate antitrust immunity. The approach for which HGCBC seeks Board approval would be contrary to the public interest and is not necessary to serve any legitimate interest of HGCBC members. Accordingly, the Petition should be denied.

In its Decision in this proceeding, the Board held, as a general matter, that the competition which characterizes the rest of the U.S. economy is preferable to collective action by motor carriers as a way of setting rates, charges and terms. The Board noted that collective carrier ratemaking is a vestige of an earlier era of extensive regulation (Decision at 5), and stated (at 12):

Continued antitrust immunity for collective rate-related activities can only hinder the full operation of the competitive forces unleashed by deregulation – forces that should in-

duce firms to operate more efficiently and pass savings on to consumers.

In reaching this conclusion, which was supported by the U.S. Departments of Justice and Transportation, the Board's Decision is consistent with other recent actions in the areas of antitrust and transportation. See, e.g., the Final Order issued March 30, 2007 by the Office of the Secretary of Transportation in Docket OST-2006-25307, terminating the antitrust immunity of International Air Transport Association as to air passenger and cargo service between the U.S. and Europe. See also, more generally, the April 2, 2007 Report and Recommendations of the Antitrust Modernization Commission.

As the Board has recognized, the statutory, regulatory, policy and commercial environment of 2007 is different from the environment in the past, when the trucking industry operated largely as a cartel. Twenty-seven years subsequent to the Motor Carrier Act of 1980, it is time for the trucking industry to operate in a fully competitive manner.

For this reason, HGCBC's attempt to rely on an STB decision from 1991 involving household goods forwarders, and an ICC decision from 1979 dealing with rail transportation of exempt agricultural products, is unavailing. Whether or not it was appropriate more than 15 years ago for forwarders to be given special consideration in competing with carriers charging collectively-set rates, it is not appropriate for the Board today to approve collective action to preserve the status quo by all household goods carriers, or by all motor carriers under the precedent of the HGCBC Petition.

In its Decision in this proceeding, the Board also considered, with specific reference to household goods carriers, other arguments HGCBC now reiterates in support of the requested "clarification." The Board has already rejected the claim that 49 U.S.C. §§ 13701(a) and 13702(c) adequately protect shippers. Decision at 19-20. The Board also

correctly observed that the “potential for the market to set more competitive rates is as great or greater for household goods as for general freight,” and that

termination of approval of the HGCBC agreement and resulting removal of antitrust immunity for setting rates will infuse more competition into the system and remove any potential for household goods carriers to use that system to charge artificially high rates.

NASSTRAC does not deny that household goods carriers, like general freight carriers, may engage in some degree of competition through discounting. However, this fact does not legitimize industry-wide adoption of collectively-set HGCBC baseline tariff rates, any more than negotiating actual sale prices at car dealers would justify an agreement among car makers to fix manufacturers’ suggested retail prices. Continuing the automotive analogy, if car manufacturers had enjoyed immunity as to MSRPs and if that immunity were terminated to promote competition, it would be counterproductive to announce that all dealers would be welcome to price all cars at the old MSRPs in order to avoid having to decide for themselves what to charge. And yet that is what HGCBC asks the Board to approve.

The Supreme Court’s June 28, 2007 decision in Leegin Creative Leather Products v. PSKS, Inc., No. 06-480, is not to the contrary. That decision did not involve price fixing among horizontal competitors like HGCBC’s members.

In another decision of potential relevance, Bell Atlantic Corp. v. Twombly, No. 05-1126, decided May 21, 2007, the Supreme Court held that conscious parallelism without more is not a violation of the antitrust laws. But that decision cannot be read to support the relief HGCBC is requesting, where the national association of household goods

carriers urges the wholesale, as opposed to individual, adoption of rate bureau tariffs found by the Board to be inconsistent with competition and the public interest.

Even if the decision to adopt the national tariffs is claimed to be “individual,” that claim is not credible in a situation like this, where the carriers are required to abandon collective ratemaking, but their organization issues a call for mass adoption of agreed rates. As the Supreme Court has explained:

Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act.

Interstate Circuit, Inc. v. United States, 306 U.S. 208, 237 (1939).

Here, the reasonableness of inferring conspiracy is even more compelling because there was a “previous agreement” – the carriers are members of a rate bureau whose purpose for many years has been to fix prices. Nor is this a case of “price leadership.” The body that developed the rates and charges at issue was a group of competitors. In addition, it does no good for a carrier to go along with this plan unless most or all competing carriers also go along.

It is not clear what authority the Board has to issue a blanket statement that mass carrier action outside the context of a Section 13703 agreement creates no potential future antitrust problems, or what the significance of such a statement would be or how carriers would benefit. What is clear is that such an action would muddy the waters as to the May 7 Decision’s clean break between the past and the future.

Under the circumstances, there is no good reason for the Board to involve itself in the issue on behalf of household goods carriers. For it to go further and provide its im-

primatur for mass collective carrier adoption of current rates, tariffs and terms in the guise of independent action would turn its May 7 Decision upside down. Instead of replacing collective ratemaking with individual ratemaking, the Board would be perpetuating the trucking industry's anachronistic practice of agreeing on base rates, charges and terms, and competing only through such discounting as some shippers may be able to negotiate.

As the foregoing discussion shows, HGCBC's Petition raises difficult issues and is inconsistent with fundamental antitrust law and policy even aside from its potential as a precedent for other motor carriers. The Petition also raises issues of reasonableness. One benefit of the Board's Decision terminating antitrust immunity is that it avoids the need for consideration of the details of collectively-set rates, charges and terms of service. If the Board were to retreat from its decision to let competition and bilateral shipper-carrier negotiations control these issues, it would have to stand ready to take up disputes over specific collective tariff provisions. The public interest is better served by denying HGCBC's motion and letting the marketplace (bolstered by the antitrust laws) control household goods rates, charges and terms.

NASSTRAC submits that, in extending the effective date of its decision terminating antitrust immunity until January 1, 2008, the Board has done enough to enable carrier members of rate bureaus to transition from collective to individual pricing. From now on, carriers should determine for themselves, just as shippers do, how to operate competitively and lawfully.

This may or may not involve reliance on existing tariffs, or on other cost and index factors, such as the producer price index. However, The Board was correct when it

called for such pricing decisions to be made by each carrier acting alone, and for each carrier acting alone to perform its own due diligence concerning what fully competitive pricing means.

There is no shortage of guidance available from the Justice Department and the FTC and from counsel (to which carriers surely have access already) concerning lawful business practices in the competitive marketplace. A petition like HGCBC's represents an end-run around the Board's Decision, threatening to lock in collective pricing long after it should be replaced by truly independent action.

For the foregoing reasons, HGCBC's Petition for Clarification should be denied.

Respectfully submitted



John M. Cutler, Jr.  
McCarthy, Sweeney and Harkaway, P.C.  
Suite 600  
2175 K Street, N.W.  
Washington, DC 20037  
(202) 775-5560

Attorney for  
NASSTRAC, Inc.

CERTIFICATE OF SERVICE

I hereby certify that I have this 6<sup>th</sup> ay of August, 2007, caused copies of the foregoing document to be served on all parties of record.



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John M. Cutler, Jr.