

13                   Mr. SMITH: Chairman Nober, Vice Chairman  
14 Mulvey, Commissioner Buttrey, good morning. My name  
15 is Paul Samuel Smith and again it is my privilege  
16 today to represent the United States Department of  
17 Transportation. The Department opposes nationwide  
18 expansion of motor carrier rate bureaus for three  
19 main reasons.

20                   First, because the central activity of  
21 rate bureaus requires your approval, collective rate

1 making is anti-competitive and against the public  
2 interest.

3 Second, it is expanding the geographic  
4 scope of rate bureaus as opposed to improve upon  
5 that activity in various ways if there is no  
6 demonstrable reason to believe that it will.

7 And, third, not only is there no clear  
8 public benefit to be gained from expansion but there  
9 is also reason to be concerned about its effects on  
10 the widespread discounting that characterizes most  
11 motor carrier pricing.

12 The first reason is grounded in classical  
13 economics in anti-trust law. Agreement on price, by  
14 horizontal competitors is always and everywhere  
15 detrimental to the public interest and therefore per  
16 se illegal. This is true regardless of whether that  
17 price is in the first ~~\*(10:39:31)~~ instance a  
18 benchmark or a baseline uses a basis for further  
19 negotiations, Because such benchmarks are  
20 significantly above marketplace levels. To those  
21 who claim that the open price is paid truly reflect  
22 competitive levels or enable competitive pricing, I

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1 offer the Justice Department's earlier and still  
2 very couchant observation. "To rely upon  
3 discounting from a cartel price, a price that would  
4 not otherwise be set to protect consumers is to  
5 stand competition policy on its head".

6 Before I move on to my next point I want  
7 to say a word here about the reliance of motor  
8 carriers and shippers on rate bureaus baselines to  
9 set the stage for price negotiations. There is no  
10 doubt that it is in some sense convenient or  
11 efficient for to parties to have these reference  
12 points. But neither is there any doubt that every  
13 other domestic transportation sector conducts  
14 business without such aids. Air carriers and rail  
15 carriers have been weaned off the anti-trust  
16 immunity that they once thought they could not do  
17 without. Barge and other domestic water carriers  
18 never had this regulatory protection. Individually  
19 and collectively, all these carriers gather and  
20 convey information, arrange complex transport  
21 services and otherwise compete in the marketplace as  
22 they should for the benefit of their customers and

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1 without anti-trust immunity. Motor carriers are not  
2 uniquely incapable of doing the same and we don't  
3 believe the board should be concerned that they are.

4 Second point is that our opposition to the  
5 pending proposal is geographically expansion is  
6 unlikely to do the Southern Motor Carrier Rate  
7 Conference says that it will, which is to improve  
8 the rate setting process but more closely aligning  
9 region costs and synchronizing the effective dates  
10 of rate increases. The improvement is supposed to  
11 be found in better, quicker meeting of so-called  
12 carrier revenue needs and more competitive rates.  
13 But regional cost differences have not been shown to  
14 be a significant component of overall trucking  
15 expenses. Revenue needs are met whenever the market  
16 permits. And finally, collective benchmarks again,  
17 are simply neither competitive nor appropriate basis  
18 for negotiation of competitive prices.

19 Finally, we at DOT oppose nationwide  
20 collective rate setting for the sheer imbalance that  
21 it presents. On the one hand, there is little or no  
22 demonstrable public benefit to be had from extending

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1 this activity, and on the other, there is at best,  
2 uncertainty about its effects on the shipping  
3 public. Specifically, there is some likelihood that  
4 nationwide rate bureaus would attract more carriers  
5 and so become larger and that the number of rate  
6 bureaus might well decrease. If either or both of  
7 these happen, there is no record basis for  
8 confidence that widespread discounting will continue  
9 unabated as before; and this is critical because it  
10 is the existence and vitality of such discounting  
11 from above market benchmarks that gave the board  
12 some basis to renew its approval for the underlying  
13 agreements in the first place. The board has  
14 consistently sought to promote continued discounting  
15 and **reduce reliance**\*~~(10:42:30)~~ upon those benchmarks  
16 through its conditions. The pending request,  
17 however, threatens those efforts and the  
18 effectiveness of those conditions and should,  
19 therefore, be disapproved.

20 That concludes my remarks. I would be  
21 pleased to try and answer any questions that you  
22 have.

1           CHAIRMAN NOBER: Well - thank you. Vice  
2 Chairman Mulvey?

3           VICE CHAIRMAN MULVEY: Thank you. In  
4 DOT's reply comments filed with the board, it  
5 pointed out that in addition to DOT, the Department  
6 of Justice has stressed the inherently anti-  
7 competitive nature of collectively establishing  
8 rates. To your knowledge is this still the position  
9 of the Department of Justice? Because they're not  
10 here today so - -

11           Mr. SMITH: They're not here today. They  
12 have participated in numerous instances in past  
13 iterations of this proceeding. I cannot speak for  
14 the Justice Department but I think it highly  
15 unlikely that it would have reversed or otherwise  
16 materially changed its position beyond that  
17 previously submitted in this - before this board.

18           VICE CHAIRMAN MULVEY: In my opening  
19 statement I mentioned that in the grant of anti-  
20 trust immunity we normally narrowly construe anti-  
21 trust immunity applications. Is it the  
22 administration's position that the petitioners have

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1 not demonstrated that nationwide rate making  
2 authority will promote better service to the public  
3 or economy operation or that it will not  
4 unreasonably restrain competition? In other words,  
5 that they have not met that standard, crossed that  
6 bar?

7 Mr. SMITH: We do not think that they have  
8 met that standard. What they're trying to do is  
9 extend the scope nationwide of what is fundamentally  
10 an anti-competitive activity and by aligning a  
11 certain type of **cost differences**\*~~(10:44:13)~~ which is  
12 of a - must be a relatively minor dimension compared  
13 to labor costs, fuel costs, depreciation costs which  
14 are - have not been shown to differ depending upon  
15 where one operates and in fact, as it has been  
16 earlier pointed out this morning, carriers have to  
17 know their costs in order to stay in business. In  
18 fact, it was ironic to me to hear the point made  
19 earlier that motor carriers don't want to rely upon  
20 somebody else - somebody else's cost and their own.  
21 Well, that's what a rate bureau does. It's  
22 everybody else's cost thrown into the mix. So I

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1 don't - and I don't believe that there's a public  
2 interest in extending that collective activity.  
3 ~~It's, there's - you've just \*(10:45:04) meeting~~  
4 ~~carrier needs and carrier costs.~~ It reflects a  
5 traditional mindset that indeed every other  
6 regulated transportation sector once had given the  
7 legislative and regulatory policies of the times.  
8 But those times and policies are gone for every  
9 other segment of the transport industry.

10 CHAIRMAN NOBER: Okay, Commissioner  
11 Buttrey.

12 COMMISSIONER BUTTREY: Mr. Smith, thank you  
13 for your comments which I found to be eloquent on the  
14 points concerning the existence or non-existence of the  
15 continuation of any anti-trust immunity. But I don't  
16 think that is the issue that's squarely before us today  
17 in this hearing. The issues seem to be completely  
18 different to me. I don't think you would argue that  
19 the rate bureau do not have, currently, anti-trust  
20 immunity. The question clearly before us is; they do,  
21 should they be able to expand their coverage or  
22 territory to customers outside of their traditional

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1 boundaries and I was just wondering, if you take away  
2 the argument about whether they should have anti-trust  
3 immunity, what is the point of them not being able to  
4 operate in all 50 states or 48 states, whichever they  
5 wish to be operating in? If they can operate in the  
6 southeast, why can't they operate wherever they want to  
7 operate in a - basically deregulated environment, if  
8 you will, without regard to the question of whether  
9 they should have anti-trust immunity?

10 Mr. SMITH: Well, I can give you answers that  
11 are both divorced from and not divorced from the core  
12 question which you mentioned is not technically before  
13 the board. But I don't think you can ignore that what  
14 is at base here is an effort to expand an activity that  
15 we and a anti-trust law regard as detrimental to the  
16 public interest. But, aside from that, we don't think  
17 that some kind of matching or closer matching of  
18 regional cost difference of some undetermined quantity  
19 is going to have the Effect that the SMC says that it  
20 will and we are concerned - we do not believe that is  
21 irrelevant, the number of rate bureaus that exist. We  
22 would rather that none of them have anti-trust immunity

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1 but, if they do, we think it, if anything, a benefit to  
2 the public interest that there'd be more than a single  
3 dominant one. Or just as a great many competitors in a  
4 marketplace, as you said Mr. Chairman earlier, produces  
5 better competition for consumers. An oligopoly is  
6 better than monopoly. So we would rather have more  
7 rate bureaus with more baselines if there must be  
8 baselines to provide some check on other baselines that  
9 exist.

10 COMMISSIONER BUTTREY: Well, if you granted  
11 authority to have nationwide authority, wouldn't that  
12 give - stimulate, if you will the other rate bureaus or  
13 give them at least an opportunity anyway to be  
14 nationwide rather than just be limited to one  
15 particular part of the country.

16 Mr. SMITH: It would as a legal matter, yes.  
17 But I - as was also earlier mentioned this morning,  
18 there is a declining number of rate bureaus in the last  
19 10 years or so anyway and I think that reason there are  
20 - is some support, and some opposition among rate  
21 bureaus for this petition that is before you is based  
22 upon the respective use of those rate bureaus for their

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1 future. If they think that they can make a go of it in  
2 the face of either nationwide possible scope ~~or~~  
3 ~~\*(10:49:07)~~ or can't, either they don't think they can  
4 or they're concerned that some other rate bureau such  
5 as SMC would dominate them, then they would oppose it.

6 COMMISSIONER BUTTREY: Thank you.

7 CHAIRMAN NOBER: Okay, well, again I just  
8 want to reiterate the point that I made earlier and  
9 Commissioner Buttrey just made which is, it seems like  
10 we have separate questions. One is: Are rate bureaus  
11 good - good or bad to have in the - and do they help  
12 the marketplace? And, are rate bureaus in the public  
13 interest? We just completed a proceeding on that score  
14 and we're going to start another one in a few months  
15 and I don't want to have a constant proceeding going on  
16 rate bureaus but we do have a opportunity to review  
17 that. And then here, the question is: If we have rate  
18 bureaus, is it in the public interest to have them have  
19 broader scope or narrower scope. And, do you think we  
20 can divorce the two questions and look at them  
21 independently or not?

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1           Mr. SMITH: I think you can, yes. As I tried  
2 to respond to Mr. Buttrey, aside from their necessary  
3 tie to the existence of collective rate setting within  
4 some geographic region, we don't believe that they will  
5 have a beneficial effect on the public interest even  
6 notwithstanding that question.

7           CHAIRMAN NOBER: In the end, isn't a  
8 relatively, I mean, isn't there - there's plenty of  
9 competition in the LTL market, isn't that right?

10          Mr. SMITH: Yes. There are - -

11          CHAIRMAN NOBER: There are tens of thousands  
12 of competitors.

13          Mr. SMITH: Well, not in the LTL market, per  
14 se, I would say there are probably a few hundred  
15 competitors certainly. It's not like a point to point  
16 kind of market because there's different  
17 ~~\*(10:50:46)~~ capital requirements and arrangements to be  
18 set up for terminals and so on and so forth. But there  
19 are - it certainly is competitive.

20          CHAIRMAN NOBER: But the argument has at  
21 least been - always been made to me that the benefit of  
22 rate bureaus, if there is one, is that it allows

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1 smaller competitors to have a national - to look  
2 nationally and be able to price nationally when they  
3 otherwise wouldn't have the sophistication or ability  
4 to do it and that that keeps competitors in the market  
5 with a few large national companies. How do you  
6 respond to that?

7 Mr. SMITH: I would respond to that by saying  
8 that I don't think that the motor carriers use is  
9 unique. Nobody else has that ability to use a  
10 collective immunized group that conducts some activity  
11 or other to stay in business. In fact, in every other  
12 sector they do manage collectively to gather price  
13 information disseminated ~~with\*(10:51:41)~~ immunity -  
14 they go to the Department of Justice for review or the  
15 Fellow Trade Commission, whomever, and they run through  
16 the details of what they can or cannot do under penalty  
17 of facing any trust suit and they continue to function.  
18 And they obviously must be mindful of risks that are  
19 involved and they can do some things and not do other  
20 things. But small companies do enter businesses and  
21 stay in business even in other sectors with much higher  
22 barriers than in the motor carrier industry.

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1           CHAIRMAN NOBER:    Let's say that you were  
2 right and if we granted anti-trust immunity that any  
3 competitive harm would flow from that downstream, which  
4 is not a subject I'd really like to look at.  Would we  
5 have the opportunity to address that later on?  Are  
6 there conditions we could put on that would - or  
7 subsequent review that we do that would let us address  
8 anti-competitive outcomes in the future?

9           Mr. SMITH:    Well, as you said before, our  
10 Congress requires you to look at it no less than every  
11 five years and you have always an on-going opportunity  
12 any time you wish to re-open the quest.  Although as you  
13 also mentioned, you don't want to have continual re-  
14 opening of - -

15           CHAIRMAN NOBER:   It took us over five years  
16 to get the last proceeding done, which is not to our  
17 agency's credit.  But one of my priorities was to get  
18 that resolved, and we did, and to get us back on some  
19 kind of regular schedule here, which, I think, we're  
20 trying to do now.

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1           Mr. SMITH: Sure, but you'll certainly have  
2 ample opportunity to visit core questions or even  
3 secondary questions at any time.

4           CHAIRMAN NOBER: Finally, as I look at it  
5 now, we don't have rate bureaus competing with one  
6 another. We have a series of enforced regional  
7 monopolies, if you will, over rates for the rate  
8 bureaus. So why does maintaining that benefit  
9 competition? Couldn't you argue that letting the rate  
10 bureaus, for whatever it is that they do, compete with  
11 one another, and if they go bankrupt, so be it or not?  
12 Maybe they'll thrive and compete or maybe two will  
13 survive. Who knows what will happen? None of us - if  
14 we could predict the future, we probably wouldn't be  
15 sitting here. We'd be somewhere else (certainly I  
16 would be) and see what happens. Why would that be the  
17 more pro - that would allow two bureaus to compete.  
18 Right now we're protecting two bureaus from competing.

19           Mr. SMITH: If you remove interest immunity  
20 from the equation, I would agree with you.

1           CHAIRMAN NOBER: Okay, we could revisit that  
2 next year. Anyway, it's just a - it's a question. So  
3 you think that it would be - -

4           Mr. SMITH: Even from the extension, removing  
5 this immunity from the extension nationwide as I'm sure  
6 - -

7           CHAIRMAN NOBER: But even right now, just  
8 again to reiterate a point I and Commissioner Buttrey  
9 both made which is, "How is maintaining regionally  
10 enforced monopolies with anti-trust immunity more  
11 competitive than having national enforcement - national  
12 bureaus, if you will, with anti-trust immunity?  
13 "Granted, you don't like anti-trust immunity.

14           Mr. SMITH: We don't see any reason to be  
15 optimistic about expanded rate bureaus not having a  
16 deleterious effect on discounting. There is little or  
17 no upside to us and only the potential for downside for  
18 allowing this extension.

19           CHAIRMAN NOBER: Gotcha. Okay. Does anybody  
20 else have any questions?

21           VICE CHAIRMAN MULVEY: A couple more minor  
22 questions. You admit though that competition has been



1 extremely effective in the truckloading industry since  
2 the Motor Carrier Act and even with collective rate  
3 making, the shippers receive highly competitive rates.  
4 So, collective rate making really has not been  
5 detrimental to those who rely upon truck transport for  
6 moving goods right?

7 Mr. SMITH: Well, as the board said earlier  
8 in this case, if we were - if we the board, that is,  
9 were totally unconcerned that some shippers no - the  
10 shippers wouldn't - no shipper would ever pay the class  
11 rates ~~\*(10:55:32)~~, then there wouldn't be a problem.  
12 It would be less of a problem but there are - if there  
13 are hundreds of LTL firms, there are tens of thousands  
14 or more of shippers and there's - smaller shippers by  
15 definition use less than a truckload and they would be  
16 roughly unsophisticated and those shippers would be at  
17 a disadvantage.

18 VICE CHAIRMAN MULVEY: But it behooves a  
19 shipper to find out - to investigate what the costs of  
20 services are. The shipper buys all kinds of inputs  
21 including the transportation input in getting his  
22 product to market. Isn't it his responsibility to shop

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1 around and try and find the best cost, and Commissioner  
2 Buttrey suggested earlier, firms that don't know their  
3 cost or don't at some point manage their cost probably  
4 shouldn't be in business, even the small shipper. We  
5 have the same argument sometimes for people who ship  
6 household goods and we say that the household goods  
7 shippers, that is you or I moving our personal effects,  
8 don't have any experience. But that's a little  
9 different from somebody who's manufacturing something  
10 and shipping it. They may be small but one would  
11 presume that they're constantly moving things by truck  
12 and would learn something about how to go about  
13 negotiating and getting the best rate, no?

14 Mr. SMITH: To the extent that they - yes,  
15 and the more informed consumer/shipper otherwise is  
16 always going to be better off because they're always  
17 going to be comparing. The difficulty here is that the  
18 major basis for comparison is this baseline rate that  
19 wouldn't be there in the absence of immunity in the  
20 first place. It is an artificial construct that forms  
21 this reference point about which the negotiations  
22 evolve.

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1                   VICE CHAIRMAN MULVEY: But it does strike me  
2 that the shipper has some responsibility to understand  
3 how rates are constructed for what he's moving. You  
4 were talking about how the trucking industry differs  
5 from other industries in that they don't have this  
6 collective rate making ability, but it's also true that  
7 - you talk about small firms, these small firms can be  
8 moving many, many thousands, if not millions, of  
9 different commodities and I say millions of different  
10 commodities. There is immunity to standardize them as  
11 the class system does with regard to the  
12 characteristics of storability, density, liability,  
13 etc., and that these small trucking companies - without  
14 this class system and without the collective rate  
15 making that is tied to it would be at a loss as to what  
16 should be the relevant charge that they should make or  
17 the relevant base charge that they should discount from  
18 without some collective assistance, and some knowledge  
19 of the cost characteristics which are the basis for  
20 these rates nationwide or regional wide. How would you  
21 comment on that?

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1           Mr. SMITH: I would say that small barge  
2 lines, small air cargo carriers, they manage to do it  
3 along with the Federal Express's of the world. It's  
4 there's nothing about being a motor carrier, large or  
5 small, that makes you incapable of doing the same thing  
6 as your counterparts or competitors.

7           VICE CHAIRMAN MULVEY: Thank you.

8           CHAIRMAN NOBER: Okay, in some ways to me,  
9 the pricing in the LTL market is something like buying  
10 a car. There's kind of a sticker price and everybody  
11 discounts off of that. The sticker price is kind of a  
12 baseline that everybody understands and you go and you  
13 try to negotiate your best deal and consumers find that  
14 to be a deeply satisfying consumer experience of any  
15 other. It's not certainly anything to be proud of but  
16 the market does eventually work in that circumstance,  
17 difficult as it may be. The consumers that go on line  
18 and find out the invoice price, do the auto shopping  
19 guides, they manage to get a better price than others.  
20 It depends on how much work they want to put into it.  
21 I know that's not a perfect analogy but at least it's

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1       how, in my own mind, I think I see it. I don't know if  
2       you agree with that.

3               Mr. SMITH: But that Monroney sticker that's  
4       on that car comes from one manufacturer, not the group  
5       of all the manufacturers deciding what they're going to  
6       put on that sticker.

7               CHAIRMAN NOBER: True. But in theory cars  
8       are all different. Okay, well if there's no further  
9       questions, thank you very much for your thoughts on  
10      this and we'll now call up our remaining speakers,  
11      David Coburn on behalf of the Rocky Mountain Tariff  
12      Bureau and EC-MAC Motor Carriers, John Cutler on behalf  
13      of the NASSTRAC, and Jeff Moreno on behalf of the NITL  
14      League. Then again some of you are frequent customers  
15      and others of you are not. But the - I'll tell you  
16      that the - my policy is to start from my left and go to  
17      my right. So, Mr. Coburn draws short straw and he goes  
18      first.

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