

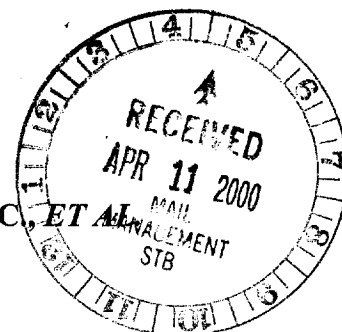
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BEFORE THE
SURFACE TRANSPORTATION BOARD

Section 5a Application No. 118 (Sub-No. 2) *et al.*

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



COMMENTS
of the
THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE
regarding the
ADJUSTMENT OF COLLECTIVE RATE BUREAU RATES
TO REFLECT MARKET BASED RATES

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Dated: April 11, 2000

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The National Industrial Transportation League ("League") is pleased to submit comments in response to the Surface Transportation Board's ("Board") request for suggestions to reduce the collective rates set by rate bureaus to market-based levels. As the League understands it, the Board's objective is to ascertain what, if any, suitable collective rate-making regime can be put into effect to replace the current rate bureau system, which no longer serves the public interest. The rate bureaus currently receive antitrust immunity to set inflated collective rates, which carriers sometimes charge and collect from unsophisticated shippers. In practice, carriers routinely discount the rate bureau rates 50 - 70% to reach the market-based levels demanded by most shippers.

In a decision issued on December 10, 1998 (the "1998 Decision"),¹ the Board concluded that the existing collective rate-making regime not only fails to serve the public interest, but actually "contravenes the public interest." *See* 1998 Decision at 5. In support of its conclusion, the Board made the following findings and observations:

- Individual carriers commonly discount the rate bureau rates 50% or more, and prudent, informed shippers never pay rate bureau rates. *See* 1998 Decision at 4.

¹ Unless otherwise noted, page-number citations to the Board's decisions refer to the versions published in WordPerfect format on the Board's web site at www.stb.dot.gov.

- Allowing the rate bureaus to set collective rates under an umbrella of antitrust immunity lends the government's imprimatur to inflated rates, and can lead uninformed shippers to believe such "unrealistically high list price[s]" are government-sanctioned, reasonable rates. *See* 1998 Decision at 4-5.
- "[I]t is undisputed that some shippers pay undiscounted or minimally discounted class rates" *Id.* at 4. The Board characterized these shippers as "uniformed," "vulnerable" and the "least able to bring a [rate reasonableness] case to the Board." *Id.* at 4-5.
- Over the years, rate bureau carriers have simultaneously offered steeper discounts *and* have increased collective rates by taking general rate increases ("GRIs"), which suggests they are using GRIs to "increase revenues from more vulnerable shippers" *Id.* at 4.

In a decision issued on February 11, 2000 (the "2000 Decision"), the Board reiterated the point that existing rate bureau activities serve no public interest, and provide "no basis for shielding from antitrust scrutiny the existing rate setting process." *See* 2000 Decision at 2. The League agrees with the Board's assessment of the rate bureaus, and urges the Board to take the next logical step of eliminating their antitrust immunity.

Alternatively, and as a practical matter, the League is mindful that providing discounts off the rate bureau rates has evolved into a standard operating procedure of the motor carrier industry. If the rate bureaus propose to leave the basic discounting framework intact by offering "automatic minimum discounts" from their collective rates, the League submits that such proposals should, at a minimum,

- Provide objectively-verifiable automatic discounts of a least 50% from collective rates.
- Ensure that collectively-set discounts are true "automatic minimum discounts" available to all shippers. The Board should prohibit carriers from circumventing automatic minimum discounts by, *inter alia*, withholding them from shippers who receive other discounts, no matter how small. Under a true system of automatic minimum discounts, no shipper should pay more than the automatically-discounted collective rate.

- Prohibit rate bureau members from imposing “loss of discount” penalties on late-paying shippers. The League submits that it would be inequitable for carriers to take away 50% “automatic discounts” as a penalty for late payments. Such draconian arrangements amount to unenforceable penalties under common law contracting principles, and should not be tolerated under a collective rate-making system that receives antitrust immunity.
- Ensure that GRIs reflect real, objectively verifiable, cost increases, and do not cause discounted rates to exceed market levels. GRIs have the potential to elevate discounted rates above market levels if they are not needed to recoup legitimate, objectively-verifiable cost increases. The Board should therefore require the rate bureaus to justify their GRIs *and* their automatic discount levels with real cost and revenue data.

In sum, the League believes that the rate bureaus have outlived their usefulness and should not continue to receive antitrust immunity. At the very least, the rate bureaus should bear the burden of proposing and justifying new rate-making procedures that ensure collective rates remain in parity with market rates and are available to all shippers on fair and equitable terms. If the rate bureaus propose a system of collectively-set discounts, the Board should require the rate bureaus to demonstrate affirmatively that such discounts, at a level of at least 50%, are true automatic minimum discounts that cannot be circumvented by individual carriers. The points and authorities that support the League’s positions are set forth in detail in the sections that follow.

I. The Board Should Eliminate Antitrust Immunity for the Rate Bureaus.

It has been almost three years since the Board initiated this proceeding.² The evidence in the administrative record supplies a myriad of reasons to conclude that collective rate-making is either useless or harmful to the public. Either way, the record supplies no justification for continued antitrust immunity for the rate bureaus.

² See 62 Fed. Reg. 27,653 (May 29, 1997).

At best, the practice of setting unrealistically high list prices and offering discounts amounts to a useless ritual that has no practical impact on transactions between carriers and informed, sophisticated shippers. It is well-established that most shippers never pay the inflated rate bureau rates, which are utterly divorced from commercial reality. In 1991, the ICC investigated the role of rate bureaus in the marketplace and concluded that they had no substantial effect on the rates paid for most traffic. *See Investigation of Motor Carrier Bureau Practices*, 7 I.C.C.2d 388, 464-65 (1991). At that time, the evidence revealed that carriers routinely offered discounts of 40% or more off the rate bureau rates. *Id.* at 450. By 1998, discounts of up to 50% had become commonplace. *See* 1998 Decision at 4. Indeed, the rate bureaus' own petition to reconsider the 1998 Decision revealed that levels of discounting had increased since 1991, and that some carriers were offering discounts approaching 70%. *See* Rate Bureau Petition at 8; Silverman V.S. at 1.

While collective rate-making clearly has no impact on sophisticated shippers, it is clearly prone to abuse at the expense of less sophisticated shippers who lack the means to negotiate arms-length arrangements for transportation at competitive rates. As the Board noted in its 1998 Decision, it is undisputed that some "uninformed," shippers actually pay undiscounted or minimally discounted rate bureau rates. *See* 1998 Decision at 4. Shippers who ship via tariffs are also vulnerable to gouging as a consequence of GRIs taken by rate bureaus, which provide at least a brief rate increase before the competitive market eliminates this advantage in the form of even steeper discounts offered by individual carriers. Such phenomena led the Board to reach the following conclusions regarding the utility of the rate bureau system:

[I]t is . . . likely that collective ratemaking continues to attract motor carriers because the carrier participants believe that enough shippers pay the collective rates, or the collective rates with a only a minimal discount, to warrant their efforts to continue them. Indeed, such a conclusion is supported by the fact that over an extended period of time, GRIs have continued to be taken even as discounting has assertedly become

steeper and more prevalent. If the industry simply needed a baseline [from which to offer discounts], and was not using collective ratemaking as a way to increase revenues from more vulnerable shippers, carriers would have no motivation for seeking GRIs.

Id. The Board acknowledged that its approval of rate bureau activities tends to exacerbate the potential for abuse inherent in the system by leading uninformed shippers to believe excessive rate bureau rates are government-sanctioned reasonable rates. *See* 1998 Decision at 5.

In the final analysis, both the evidentiary record and common sense dictate that collective rate-making is at best useless and at worst harmful to the public. Under the circumstances, the Board should not prolong this proceeding any further, and should eliminate antitrust immunity for the rate bureaus.

II. If it is not prepared to eliminate antitrust immunity at this time, the Board should require at the very least a system of automatic minimum discounts at a level of at least 50% of the collectively-set rates to achieve market-based levels.

In its 2000 Decision, the Board acknowledged that one way to cure the deficiencies of the current rate bureau system might be to replace it with a system that establishes an “automatic minimum discount to a level deemed to reflect market rates” *See* 2000 Decision at 5. In a December 15, 1999 letter to the Board, a number of rate bureaus purported to implement such a system by “establishing 35% discounts for any shipper using otherwise undiscounted rates”

Id. The Board stated that it was not convinced the proposed discounts were “in fact automatic minimum discounts” because individual carriers retained complete discretion to establish alternative smaller discounts for select shippers. *Id.* at 5 and note 17.

The League agrees with the Board that a system of automatic minimum discounts might provide a means to reduce inflated rate bureau rates down to market levels. The League also shares the Board’s skepticism that proposals for collectively-set discounts might contain loopholes that

would allow individual carriers to continue to charge above-market rates. Such proposals would not provide the shipping community with legitimate automatic minimum discounts, and would therefore fail to present suitable alternatives to the current system. In the League's view, any proposal for a system of collectively-set discounts should, at a minimum, (i) reduce collective rates to market levels by establishing objectively-verifiable automatic discounts of at least 50%; (ii) prohibit carriers from circumventing automatic discounts by charging rates based on alternative smaller discounts; (iii) prohibit the use of "loss-of-discount" provisions in tariffs and contracts; and (iv) authorize GRIs only on the basis of objective evidence of legitimate, real cost increases.

A. Collectively-set automatic discounts should be at least 50%, and should be objectively verifiable.

The League does not have access to comprehensive, up-to-date data on the discounted rates actually charged by rate bureau members. It is therefore not in a position to identify the precise discounts that would be needed to bring collective rates into parity with market rates. However, it is reasonable to expect that across-the-board average discounts of at least 50% will be needed in light of the data submitted in this proceeding and in connection with the ICC's 1991 investigation into rate bureau practices. Data reflecting discounting practices in 1998 demonstrates that carriers routinely offered discounts approaching 50%, and occasionally offered discounts approaching 70%. *See* 1998 Decision at 4; Rate Bureau Petition at 8; Silverman V.S. at 1. The ICC's 1991 investigation revealed routinely-available discounts in the 40% range. *See* 7 I.C.C.2d at 450.

The foregoing data indicate that the levels of routinely-available discounts increased approximately 25%, *i.e.*, from 40 to 50% between 1991 and 1998. The League has no reason to believe the trend towards deeper discounts has reversed in the past two years. Under the

circumstances, the League's expectation that a 50% discount will be needed to achieve parity with market rates amounts to a relatively conservative extrapolation from available data.

Whatever exact percentage discounts the rate bureaus might propose, it is imperative that they justify any level with objective data on the revenues generated by the rates their members actually charge. At a minimum, the Board should require the rate bureaus to submit comparisons of the revenues that would result by applying their collective rates to their members' traffic with the revenues that result from the discounted rates actually charged for such traffic, along with evidence of the frequency and range of actual discounts charged by carriers to their universe of shippers. Without such data, the Board will have no objective basis to ascertain whether a proposed level of discount will actually reduce collective rates to market-based levels.

B. The Board should prohibit individual rate bureau members from establishing alternative discounts that are smaller than collective-set discounts.

In its 2000 Decision, the Board correctly observed that a procedure "establishing 35% discounts for any shipper using otherwise undiscounted class rates" does not establish a legitimate automatic minimum discount. *See* 2000 Decision at 5. Such a procedure would allow individual carriers to circumvent collectively-established discounts by providing alternative smaller discounts to unwitting shippers. The League urges the Board to reject any discounting proposal that does not guarantee true "automatic minimum discounts." Under a suitable discounting regime, no shipper would be charged more than the automatically discounted collective rate, which would at all times remain in parity with market-based, competitive rates.

C. **The Board should reject any discounting proposal that allows rate bureau members to impose “loss of discount provisions” on their customers.**

In the absence of special protection, shippers who pay their freight bills late would risk losing collectively-set discounts as a consequence of “loss of discount provisions” inserted into their tariffs or contracts by individual carriers. Loss of discount provisions provide individual carriers a convenient mechanism to circumvent collectively-set discounts and charge above-market rates. For those reasons alone, the Board should reject any discount proposal that tolerates the use of loss of discount provisions by rate bureau members. Such provisions are fundamentally inconsistent with any legitimate “automatic minimum discount” regime.

Moreover, from an equitable standpoint, the loss of a 50% discount would grossly overcompensate carriers for the harm caused by late payments, namely the lost time-value of the amounts owed. Such draconian consequences for late payments amount to unenforceable penalties under basic common law contracting principles, which prohibit non-breaching parties from collecting damages that exceed any reasonable approximation of the actual harm they sustain. Those basic principles dictate that

[T]he parties to a contract are not free to provide a penalty for its breach. The central objective behind the system of contract remedies is compensatory, not punitive. Punishment of a promisor for having broken his promise has no justification on either economic or other grounds and a term providing such a penalty is *unenforceable on grounds of public policy*.

Restatement of Contracts 2d § 356, Comment a (emphasis added). In the League’s view, loss of discount provisions that would be unenforceable at common law should not be tolerated under a government-sanctioned collective rate-making regime.

D. The Board should prohibit rate bureaus from taking GRIs that are not justified by objective evidence of legitimate cost increases.

In the past, rate bureaus have routinely taken GRIs that exceed the real cost increases experienced by their members. This practice enables carriers to gouge shippers by eroding the value of percentage discounts reflected in tariffs. Any new collective rate-making regime should prohibit the rate bureaus from taking GRIs without demonstrating that increases are needed to recoup actual cost increases sustained by their members. In that vein, the League agrees with the Board's position that "if the class rate structure were appropriately modified, any effort to implement GRIs that exceed the relevant rates of inflation would be viewed as conduct that is presumptively adverse to the public interest." *See* 1998 Decision at 5.

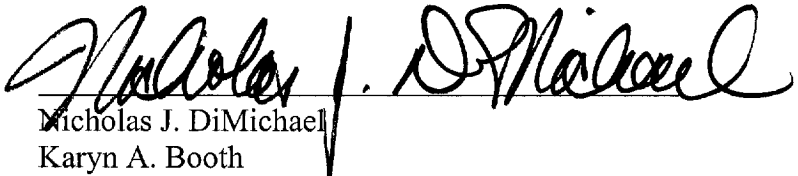
The League encourages the Board to continue to very carefully evaluate GRIs in connection with collective discount proposals submitted by the rate bureaus. Any proposal that gives the rate bureaus substantial latitude to take GRIs should be ruled out as a suitable alternative to the current system.

IV. **Conclusion**

The Board should eliminate antitrust immunity for the rate bureaus. Alternatively, if the rate bureaus propose to implement collectively-established discounts, such proposals should include at a minimum the safeguards described herein, which are necessary to ensure that collective rates reflect market rates and are available to all shippers on fair and equitable terms.

Respectfully submitted,

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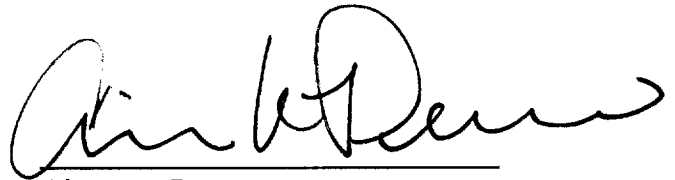
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CERTIFICATE OF SERVICE

I hereby certify that I have this 11th day of April, 2000, served a copy of the foregoing
COMMENTS OF THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE REGARDING THE
ADJUSTMENT OF COLLECTIVE RATE BUREAU RATES TO REFLECT MARKET BASED RATES upon the
following person by first class mail, postage prepaid:

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