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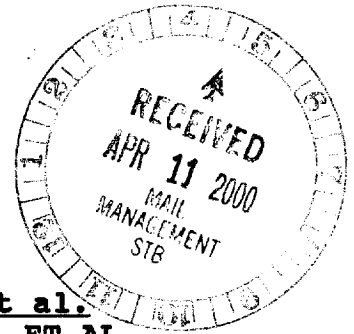
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BEFORE THE

SURFACE TRANSPORTATION BOARD



SECTION 5a APPLICATION NO. 118 (Sub-No. 2), et al.
EC-MAC MOTOR CARRIERS SERVICE ASSOCIATION, INC., ET AL.

OPENING COMMENTS OF
NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC.
AND THE HEALTH AND PERSONAL CARE DISTRIBUTION
CONFERENCE, INC.

National Small Shipments
Traffic Conference, Inc.

The Health and Personal Care
Distribution Conference, Inc.

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Dated: April 11, 2000

**OPENING COMMENTS OF
NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC.
AND THE HEALTH AND PERSONAL CARE DISTRIBUTION
CONFERENCE, INC.**

The National Small Shipments Traffic Conference, Inc. ("NASSTRAC") and The Health and Personal Care Distribution Conference, Inc. ("H&PCDC") (collectively, the "Shipper Conferences") hereby submit their opening comments in this phase of this proceeding.

I. INTEREST OF THE SHIPPER CONFERENCES

NASSTRAC is an association whose primary focus is the transportation of many different types of commodities in less-than-truckload and package volumes. Its regular membership consists of several hundred shippers of freight. H&PCDC is similar to NASSTRAC in its primary focus, but smaller, because its members are all shippers of pharmaceuticals, cosmetics and related commodities.

Both of the Shipper Conferences have participated actively in past phases of this proceeding, as well as in prior proceedings involving ICC and STB oversight of the rate bureaus, class rates, and general rate increases.

**II. FREIGHT CLASSIFICATION, RATEMAKING AND
ANTITRUST IMMUNITY**

The shipper members of the Conferences are vitally interested in this proceeding because of the central role of class rates in motor carrier ratemaking. Freight rates determined by market forces are important not just to these and other shippers, but to

the economy as a whole, and any distortion or avoidance of those market forces must be minimized.

The carrier practices under consideration in this proceeding and in the STB's companion proceeding on reform of the National Classification Committee,^{1/} in which the Shipper Conferences are also active participants, are so antithetical to market-based ratemaking as to be conducted behind the shield of antitrust immunity. These practices are the last remnants of the late and unlamented era of pervasive regulation.

ICC regulation of the motor carrier industry was the product of the Motor Carrier Act of 1935. Unlike the railroad industry, which was regulated in the original Interstate Commerce Act primarily to rein in abuses of rail monopoly power, trucking companies have never been classic monopolies. On the contrary, motor carriers were regulated during the depths of the Great Depression in order to protect the carriers from excessive competition, and to reduce the resulting corner cutting, fly-by-night operations, and carrier failures.

Between 1935 and 1980, licensed motor carriers operated with the characteristics of regional cartels. Attempts by new companies to commence trucking operations, or by existing companies to extend operations, were vigorously resisted. Rates were largely agreed upon among competitors and raised through collective action by the carrier members of regional rate bureaus.

^{1/} Section 5a Application No. 61 (Sub-No. 6), National Classification Committee -- Agreement.

Many of these practices were clearly anticompetitive, and would have been violations of the antitrust laws if they had not taken place under agreements entered and approved by the ICC pursuant to Section 5a of the Act, a predecessor of current 49 U.S.C. Section 13703. However, carrier actions that are strictly in accordance with such agreements, as approved and conditioned by the ICC or the STB, receive immunity from the antitrust laws.

Under the system of motor carrier ratemaking that developed during the era of pervasive regulation, almost all trucking companies were members of regional rate bureaus, which set class rates collectively. Although it was possible to charge rates other than class rates, this was far more rare than it is today. In addition, the principal means of raising motor carrier freight rates was through periodic general rate increase filings, accompanied by lengthy justification statements analyzing cost increases experienced by the trucking industry. Shippers, including these Shipper Conferences, would frequently file challenges to the rate bureaus' general increase filings through protests and complaints.

The Shipper Conferences discuss in their opening comments in National Classification Committee -- Agreement how the freight classification system works and how the categorization of freight into a small number of Classes permits the trucking industry to establish class rates between any two points for a limited number of Classes rather than for thousands of individual commodities.

This process has indisputably simplified motor carrier ratemaking. However, in the years preceding 1980, it also facilitated lock-step pricing by carriers, who generally charged identical rates and took identical rate increases, thus depriving shippers of the benefit of price competition among carriers. Contract carriage in those days was uncommon and hard to use because of extensive restrictions on carrier authority and on the ability of contract carriers to serve shippers.

Because of their antitrust immunity, the motor carrier members of the NCC and the rate bureaus have been allowed to agree on commodity classifications and agree on rates for the classes without fear of prosecution for price fixing. Rather, their activities were made subject to regulation by the ICC, and now the STB, before which shippers and shipper representatives like the Conferences could and did file complaints and protests.

In 1980, Congress enacted the deregulatory Motor Carrier Act of 1980. Among other changes, this Act reduced or eliminated barriers to entry into the trucking industry. As a result, existing carriers obtained nationwide operating authority, and thousands of new trucking companies entered the industry, competing for shippers' freight with lower rates and better service. Competition largely replaced regulation as the driving force in motor carrier ratemaking, and contract carriage became a major factor in trucking as carriers gained dual authority. Congress adopted "an approach emphasizing market discipline, in contrast to public utility-style ratemaking, as the principal regulator of

motor carriers." Central & Southern Motor Freight Tariff Assn. v. United States, 757 F.2d 301, 311 (D.C. Cir.), cert. denied, 474 U.S. 1019 (1985). The result revolutionized the trucking industry.

The trucking industry prior to 1980 was dominated by cartels that resisted competition and the service improvements that competition brings. Today's trucking industry is characterized by intense competition, generally reasonable rates, generally excellent service, and a level of responsiveness to customers that is far in excess of what railroads and water carriers manage to provide. In the 20 years since 1980, more efficient carriers and more efficient shippers, working together, have produced a more efficient distribution system benefiting the entire American economy.

There is an obvious inconsistency between the new policy of deregulation and competition in the trucking industry resulting from the Motor Carrier Act of 1980, and collective freight classification and rate setting with antitrust immunity by the NCC and the rate bureaus. As stated in the legislative history of the Act:

No issue has received more attention during the debate before the Committee than whether this immunity should be allowed to continue. The debate centered on whether there continues to be a reasonable public quo in return for the collective ratemaking quid of the Reed-Bulwinkle Act.^{2/}

^{2/} House Report No. 96-1069, reprinted in 1980 U.S. Code Cong. & Ad. News 2283, 2309.

Though Congress decided to preserve antitrust immunity for the NCC and rate bureaus, it also required changes. Rate bureaus would no longer be allowed to consider or discuss individual carriers' single line rates, and the right of independent action of member carriers was enhanced, in order to get away from uniform, noncompetitive ratemaking.

Compliance with the new strictures against collective action influencing individual carriers' single-line rates was not immediate or ungrudging. See, e.g., Clark & Reid Company v. United States, 851 F.2d 1468 (D.C. Cir. 1988), and Niagara Frontier Tariff Bureau, Inc. v. United States, 780 F.2d 109 (D.C. Cir. 1986). Nevertheless, many trucking companies gradually learned to set their own rates in the new competitive marketplace.

However, this generally did not involve abandoning the old system of class rates tied to commodity classifications. The trucking industry preserved the NMFC and NCC classification determinations as well as rate bureau class rates (although some carriers adopted their own, individually determined class rates). Competitive pricing took the form of a system of discounting off the class rates. For an extended discussion and analysis of this development, see Investigation of Motor Carrier Collective Ratemaking and Related Practices and Procedures, 7 I.C.C. 2d 388 (1991).

The system of class rates and discount rates had its defenders, who argued that these arrangements simplified ratemaking, and permitted shippers to compare rate quotations

easily. If Carrier A and Carrier B offer discounts of 50% and 45% off the same baseline set of class rates, it can be assumed that Carrier A's services will be less expensive than Carrier B's, other things (such as service and ancillary charges) being equal.

However, this system also demonstrated drawbacks. Chief among them was that the system of class rate tariffs and separate discount rate tariffs, coupled with the filed rate doctrine, led to the undercharge epidemic. Bankrupt carriers (or carriers that had gone out of business and no longer valued the goodwill of their shipper customers) frequently sought to deny, challenge or repudiate the discount rates they were forced to charge to attract shippers' business in the competitive marketplace, in hopes of retroactively substituting the much higher class rates.

Another drawback of this system is that it has preserved the incentive of the NCC and the rate bureaus to take advantage of their antitrust immunity to increase carrier revenues by increasing Class ratings in the NMFC, and class rates in the rate bureaus' tariffs.

When Carrier A, in the example above, obtains a shipper's business based on a quoted 50% discount, it may be difficult for the carrier to persuade the shipper to accept a 45% discount when Carrier A wants to raise its rates. A direct rate increase is unnecessary, however, if the class rates underlying the 50% discount rates are increased by the rate bureau that publishes those class rates. The shipper's rates may go up indirectly and without actual notice. And if the shipper does notice the

increase, Carrier A can claim that the increase resulted from rate bureau action for which it is not responsible.

Similarly, if a shipper's principal cargo is reclassified from Class 100 to Class 125 by the NCC, the class rates for those shipments will go up by 25%. Discounts may temper the increase reflected on individual carrier freight bills, but the result remains a rate increase. And any inquiries by a shipper who notices the change may be met with the explanation that the increase was not Carrier A's idea; it resulted from modification of the NMFC by "objective" trucking industry classification specialists.

Knowledgeable shippers often try to protect themselves against these "stealth" rate increases with contracts that lock in agreed rates, and they try to avoid increases based on commodity reclassifications through the use of freight-all-kinds or "FAK" classifications. However, the effectiveness of such protections is generally temporary. Sooner or later (normally, at least annually), contracts or contract rates are renegotiated. When they are, increases in class rates and reclassifications of commodities to higher class ratings will almost invariably be cited as grounds for a rate increase, if the increase has not been implemented already through the discounted class rate pricing system.

Periodically, of course, the prices of service providers, like the prices of wholesalers or retailers of goods, need to be raised, to cover cost increases or to enhance profits. The trucking industry is certainly not unique in wanting to make more money.

Nor is it necessarily unique in sometimes raising rates indirectly, or claiming the rate increase results from decisions made by others, or circumstances beyond the carriers' control.

What is unique about the trucking industry is its ability to raise rates through commodity reclassifications and/or class rate increases with antitrust immunity. The purpose of these proceedings, which the Shipper Conferences support, is to determine whether the public interest requires the imposition of additional conditions on the rate bureaus and the NCC, in order to eliminate or minimize any exercise of the trucking industry's extraordinary collective rate-making authority that is not justified in today's deregulated marketplace.

**III. IN CONSIDERING THE ISSUES PRESENTED, THE BOARD SHOULD
EMPHASIZE THE NEED TO DETER ABUSES OF CARRIER
ANTITRUST IMMUNITY**

Antitrust immunity with respect to pricing is rare in American law, and is narrowly construed when it exists. See, e.g., Federal Maritime Commission v. Seatrain Lines, Inc., 411 U.S. 726, 733 (1973). Traditionally, antitrust immunity has existed only where, and to the extent, that the need for implementation of antitrust policies has been displaced by effective regulation. E.g., Keogh v. Chicago & N.W. Ry. Co., 260 U.S. 156 (1922).

Since enactment of the Motor Carrier Act of 1980, there has been relatively little regulation of motor carrier rates and terms of service, including freight classification matters, by the ICC and STB. The presumption has been that free market remedies --

i.e., shippers' ability to use different carriers -- would be adequate to resolve most problems.

Prior to 1994, when the Trucking Industry Regulatory Reform Act,^{3/} and 1996, when the ICC Termination Act of 1995^{4/} took effect, recourse to the ICC and the Board to challenge the reasonableness of carriers' filed rates, including individual carriers' rates, was available. Today, however, with the general demise of filed rates, STB jurisdiction over the reasonableness of carrier rates is more restricted. In fact, there is no recourse to the Board as to many motor carrier rates, according to the holding in a recent undercharge case, Miller v. WD-40 Co., 29 F. Supp. 2d 1040 (D. Minn. 1998).

The logic underlying exemptions from the antitrust laws -- that they are warranted to the extent that they are supplanted by regulatory remedies -- is highly relevant to this proceeding. The end result of many actions by NCC and the rate bureaus is individual carrier rate increases based on class rate increases published by rate bureaus, or class rate increases by rate bureaus based on NCC commodity classification increases. And if regulatory recourse as to such rate increases is limited or nonexistent, the antitrust immunity under which these actions are taken requires reexamination.

In the past, the Shipper Conferences have called for termination of antitrust immunity for the rate bureaus. We

^{3/} Pub. L. No. 103-311, § 201 et seq., 108 Stat. 1683 (1994).

^{4/} Pub. L. No. 104-88 (1995), 49 U.S.C. § 10101, et. seq.

continue to believe that immunity is no longer needed for the rate bureaus. At a minimum, however, it is imperative that antitrust immunity be withdrawn or curtailed to the extent that rate bureau actions affect the rate structure of the motor carrier industry in ways that are anticompetitive.

There are, of course, disputes between shipper and carrier interests about where to draw the line between beneficial and anticompetitive activities by the rate bureaus. An alternative to engaging in such line-drawing would be to terminate immunity, and let the boundaries of lawful collective action be defined through litigation. However, the Shipper Conferences recognize that the Board has expressed a preference for conditioning rather than eliminating the antitrust immunity of the rate bureaus. However, if antitrust immunity is to be preserved, it must be conditioned in such a way as to insure that the carrier members of the rate bureaus cannot "game" the system.

There is nothing unfair about real reform of NCC and the rate bureaus. On the contrary, in this era of less shipper recourse to regulatory remedies, the absence of real reform can put shippers in an untenable position. Collective carrier decisions to raise rates or reduce service quality (or both) made with antitrust immunity, can become motor carrier "norms" that find their way into tariffs and contracts throughout the industry.

The downside of real reform for carriers, in contrast, is almost nonexistent. If motor carriers are unwilling to accept the conditions the Board adopts in these proceedings, they have two

alternatives. First, they can act collectively without antitrust immunity. Second, they can act individually, since individual decisions about prices and terms of service in a competitive marketplace rarely run afoul of the antitrust laws.

IV. PROBLEMS WITH RATE BUREAU ACTIONS UNDER CURRENT PROCEDURES AND RECOMMENDED CHANGES

A. Class Rates and Discount Rates

If shippers, carriers and the Board were addressing the issues presented in these companion proceedings in the first instance, and attempting to structure a system that best preserves the benefits of reasonable freight classification and reasonable carrier ratemaking while minimizing the danger of abuse of carrier antitrust immunity, there would be many reasons to abolish class rates entirely. This would break the direct connection between freight classification and class rates, under which an increase in the former automatically increases the latter. It might permit less extensive reform of the NCC and its procedures. Such an arrangement would also presumably avoid any significant recurrence of the undercharge epidemic by eliminating the dual rate system of inherently unreasonable class rates and discount rates reflecting market forces.

On the other hand, a unitary rate structure also has its drawbacks. If established collectively, many carriers might be tempted not to deviate from it in their own rate quotations, on the theory that each rate bureau's market based rate structure already reflected prevailing rates. The class rates could turn into price

leaders rather than baselines for individual carriers' discounting. If each carrier established its own unitary rate structure, the comparability of competing carriers' rate quotations might be compromised. It is easier for a shipper to compare two carriers' discount percentage bids off the same class rates than to compare two carriers' 500 page rate tariffs, in which each may have some rates that are higher and some rates that are lower than competitors' rates.

There are ways to deal with these problems, but another important factor for purposes of this proceeding is that we are not writing on a clean slate. Much time and effort have gone into adjusting to the status quo. Many deals have been struck, and contracts executed, in the context of motor carrier ratemaking based on discounting off class rates. Simply reducing class rates could necessitate amendments to thousands of contracts to address pricing impacts that were unanticipated by one or both parties. These considerations have influenced the Shipper Conferences' position on rate bureau reform.

It remains necessary to insure that no shipper is ever forced to pay full undiscounted class rates. These rates are the product of collective ratemaking -- pure price fixing by competitors that would be a per se violation of the antitrust laws but for the antitrust immunity conferred by 49 U.S.C. § 13703. Moreover, no party has suggested that undiscounted class rates are constrained in any way by market forces.

At best, rate bureau class rates are "constrained" by the need for rate bureau class rates to preserve some reasonable relationship to the class rates published by major individual motor carriers. However, individual carriers are not subject to the prohibition in 49 U.S.C. § 13703(a)(1)(G) against adjustments (i.e., general rate increases) that exceed industry average increases in costs. In other words, individual carriers may increase their class rates to recover cost increases and to enhance their profits. Rate bureaus, in contrast, are allowed to increase the bureau class rates only to recover cost increases. Rate increases designed to enhance profits must be implemented by individual rate bureau member carriers acting without antitrust immunity.

In addition, rate bureau class rates are simply far too high to be reasonable under any economic standard short of "whatever the market will bear." It is reportedly not uncommon for carriers to offer discounts ranging from 60% to more than 70% off class rates, in order to attract the business of major shippers. Some carriers are said to have offered their discounts off two or three year old class rate tariffs in order to avoid the need to quote deeper and deeper discount percentages. These pricing trends show how unreasonable undiscounted class rates, swollen over the years by general rate increases, have become.

In Investigation of Motor Carrier Collective Ratemaking and Related Practices and Procedures, supra, the ICC found that discounting was "widespread" or "pervasive" ten years ago (7 I.C.C.

2d. at 413), but that "unless it results in competitive practices that have or will ultimately hurt the shipping public, discounting in the motor carrier industry advances the Congressional intent" (id. at 411).

The Commission also considered the extent of discounting and found that the average discount nationwide was approximately 40%. See 7 I.C.C. 2d at 450, and see Addendum E for the trends in discounting between 1985 and 1991 for several major rate bureaus. The Shipper Conferences have not attempted to compile data for the years since 1990, but we doubt anyone would contend that the intervening years have not seen further general rate increases and deeper average discounts, rendering undiscounted class rates even higher and more in excess of competitively set rates than they were in 1990.

The ICC was not able, at that time, to determine how many shippers pay undiscounted rates. However, in their January 17, 1999 Petition for Reconsideration in this proceeding, EC-MAC and three other rate bureaus took the inconsistent positions that (1) there are essentially no shippers paying undiscounted class rates, or that such shippers are "hypothetical", and (2) shippers who are paying such high rates deserve what they get, because they should have shopped harder or smarter for transportation services.

The Shipper Conferences are of the view, as stated in their February 16, 1999 Reply in Opposition to the rate bureaus' Petition for Reconsideration, that some shippers are forced to pay undiscounted class rates, but that they are not to blame, because

they are small or ignorant, or face an emergency, or are forced to pay freight charges to a carrier they did not choose (e.g., on inbound freight from vendors, or on customer returns). Such rates are, by definition, not set by competition, even if they exist in the marketplace.

No carrier that attempted to charge undiscounted class rates across the board could survive for a week. And while the Board may be powerless to help a shipper that is victimized through the imposition of full class rates by an individual carrier, it can and should prevent rate bureaus from facilitating such gouging through collective action with antitrust immunity.

Economic and policy considerations aside, the major rate bureaus have already demonstrated their willingness to forego the collection of undiscounted class rates. On September 17, 1999, the Shipper Conferences filed protests against general rate increase proposals by EC-MAC Motor Carriers Service Association, Inc., Rocky Mountain Motor Tariff Bureau, Inc., North American Transportation Council, Inc., and Middlewest Motor Freight Bureau, Inc. In its Decision served September 30, 1999 in STB Docket No. ISM 35006, the Board granted the Conferences' protests and suspended the rate bureaus' general rate increases.

In their protests, the Conferences explained that they were not protesting the general rate increase proposals of two other rate bureaus, Pacific Inland Tariff Bureau and SMC, because those bureaus had tempered their increases by providing for discounts of 35% and 20%, respectively, for shippers with no other discount

program.^{5/} Subsequently, EC-MAC, et al. adopted similar 35% discount programs, which the Shipper Conferences did not protest. Thus, for six major rate bureaus, no shipper should pay full undiscounted class rates under normal circumstances.

In a letter filed with the Board in this proceeding on December 15, 1999, several rate bureaus argued that their adoption of these 35% discounts obviated the need for this reform proceeding. In its February 11, 2000 Decision, the Board rejected the claim that this proceeding had been rendered moot, but raised the possibility of a resolution of the problem of excessively high class rates that utilizes discount arrangements. The Board said (Decision at 7):

An automatic minimum discount to a level deemed to reflect market rates might be one way to address the concerns raised in the 1998 Decision, although it does not appear to us that the discount provisions published in connection with the recent GRIs are in fact automatic minimum discounts. In any event, the bureaus are free to make a formal proposal in this regard, to which other parties may respond, but we are not prepared to find, without further proceedings, that any bureau has satisfied our concerns to date.

In the footnotes to the foregoing passage (which the Shipper Conference have omitted), the Board observed that such discounts could minimize disruption, but that the discount arrangements already adopted by the bureaus appear to be insufficient because

^{5/} Although SMC's discount of 20% was smaller than PITB's, SMC's general increase of 3.57% was also lower than PITB's 5.5% general increase.

they may be too small, because they may not be automatic (i.e., a shipper persuaded to accept a 3% discount would pay 3% discount rates rather than 35% discount rates), and because they might be forfeited under the late-pay loss of discount penalty arrangements that many carriers employ.

After careful consideration, and after informal discussions between representatives of the Shipper Conferences and several rate bureaus, the Conferences have concluded that discount arrangements, modified to reflect the Board's concerns (which the Conferences share) represent a reasonable solution to a difficult problem. Focusing now on the problem of excessively high class rates (and addressing GRIs and late-pay penalties in subsequent sections of these Comments), the Shipper Conferences submit that continued rate bureau antitrust immunity should be conditioned on the adoption by all rate bureaus of automatic minimum discounts that are sufficient to reflect the impact of competition on motor carrier rates.

The Shipper Conferences lack the data needed to assess the appropriate minimum discount level. However, the ICC's finding that 40% discounts were the national average in 1990 suggests strongly that a 35% automatic minimum discount is too small today.

It would be interesting to learn what the range and distribution of discounts is among shippers with discount programs. Of course, any such analysis should not include the number of shippers or volume of freight with no discount, since the goal is adoption of automatic minimum discounts that reflect competition, and not the absence of competition. The Shipper Conferences expect

that the appropriate discount level would be at least 45%, and possibly 50%.

It is also necessary for any automatic minimum discount that is adopted to be adjusted periodically to prevent shrinkage as rate bureaus publish GRIs. It would be anomalous for any automatic minimum discounts adopted in this proceeding to dwindle (in relative terms) if competition and continued GRIs lead to deeper discounts in the marketplace.

B. General Rate Increases

In its 1999 decision granting the Shipper Conferences' protests, the Board noted failure of the rate bureaus to address the policy changes reflected in its December 18, 1998 decision in this proceeding, but it also found that the rate bureaus had failed to demonstrate that their GRIs were based on actual cost increases, as required by the statute.

It is not the Shipper Conferences' desire to return to the days of voluminous justification statements for all general rate increase proposals. On the other hand, reforms designed to prevent shippers from paying undiscounted class rates through the use of automatic minimum discounts could be undermined, if not evaded, if there are no constraints on the rate bureaus' ability to publish GRIs. In any event, collective action by carriers to raise their rates with antitrust immunity cannot be unfettered. And yet, frequent shipper protests are not desirable from the perspective of shippers, carriers or the Board.

Another concern for the Shipper Conferences in analyzing the 1999 GRIs was the lack of notice of the increases, and the lack of information about the need for rate increase of 5% or any other amount. Telephone calls by Conference members to the rate bureau offices produced little, if any information, only a couple of rate bureaus filed notices of their proposals with the STB, and the websites of the rate bureaus which have them were generally unhelpful. (Evidently, EC-MAC and PITB do not have websites, and the Shipper Conferences have even less familiarity with the rate bureaus included in this proceeding that have not (to our knowledge) published GRIs recently: New England Motor Rate Bureau, Inc.; Machinery Haulers Association, Inc.; Nationwide Bulk Trucking Association, Inc.; Western Motor Tariff Bureau, Inc.; and Willamette Tariff Bureau, Inc.).

The importance of cost-based GRIs has increased in importance in light of recent increases in fuel costs. Many, if not most, members of the Shipper Conferences are currently paying fuel surcharges to many carriers. There is a real danger of double recovery if rate bureau class rates are also increased collectively, based on increases in the price of diesel fuel.

At a minimum, the rate bureaus should be required to disclose, either on their websites or upon request by shippers or shipper representatives, the cost increases on which their GRIs are based. This requirement should not be burdensome, inasmuch as the rate bureaus will necessarily have gathered and analyzed data in the course of deciding what increases to take. The rate bureaus

should also be responsive to reasonable requests by shippers or shipper representatives for additional information, and possibly workpapers, to prevent situations in which only conclusory information is disclosed on websites on the ground that rate bureau members found conclusory information ample justification for a GRI.

The Shipper Conferences do not expect to request such information from all rate bureaus or as to all GRIs. As is true today, many rate bureau actions may be uncontroversial. However, reasonable shipper rights to information underlying rate bureau GRIs should be a condition of continued antitrust immunity for rate bureau members.

C. Late-Pay Penalties

As the Board has recognized, one of the problems caused by the inflated level of rate bureau class rates today is that shippers may be confronted with extremely harsh penalties under tariff provisions calling for the penalties for late payment in the form of forfeiture of discounts. These features are common in individual carrier tariffs and may also be prevalent in rate bureau rules tariffs.

In fact, many tariff provisions reviewed by the Shipper Conferences contain multiple late-pay penalties, such as forfeiture of discount and a 25% surcharge and attorneys fees if the carrier goes to court. Such provisions appear to violate the ICC credit regulations now located at 49 C.F.R. § 377.203(g). See also Regulations for Payment of Rates and Charges -- Penalty Charges for Nonpayment, 4 I.C.C. 2d 340, 343 (1988):

The three alternative methods -- (1) straight liquidated damages by tariff; (2) loss of discount as liquidated damages, and (3) bill of lading provisions -- will be however, mutually exclusive. Overlapping use of more than one method would be unreasonable and could unjustly enrich a carrier.

Actions that are unlawful and unreasonable when taken by an individual carrier are even more objectionable when taken by many carriers collectively, antitrust immunity notwithstanding. Moreover, many carriers base their late pay penalty provisions, or their entire rules tariffs, on rate bureau rules tariffs, on the theory that this is an area of bureau expertise.

Members of the Shipper Conferences, and many other shippers, learned first-hand how severe the consequences are of losing the benefits of 50% (or more) discount rates due to alleged late payments in the course of the undercharge campaign conducted in 1997-98 by Humboldt Express, Inc.

The ICC had held in a decision in 1989, almost ten years earlier than the Humboldt cases, that loss of a 35% discount was an unreasonably severe penalty that was disproportionate to the carrier's collection cost or cost of credit. See Delta Traffic Service, Inc. v. Mennen Co., 730 F. Supp. 1309, 1313 (D. N.J. 1990). Nevertheless, the bankruptcy court brushed aside shippers' unreasonableness objections in Humboldt, as well as shippers' complaints that the carrier had violated the ICC credit regulations and that the issues should be referred to the Board under the doctrine of primary jurisdiction. To make matters worse, the lateness in question was often only a few days, there was no

reliable evidence that Humboldt had rebilled shippers for the penalties (or at all), and Humboldt had made no attempt to collect penalties prior to its bankruptcy.

On appeal, the Fourth Circuit reversed many of the lower court rulings. Humboldt Express, Inc. v. The Wise Company, 190 F.3d 624 (4th Cir. 1999). However, one holding the court of appeals upheld is that the unreasonable practice remedies of the Negotiated Rates Act of 1993 (now at 49 U.S.C. § 13709) are inapplicable to carriers' late pay penalty claims.

An automatic minimum discount of 45% or more will do nothing to address the inequity of loss of discount penalties for late payment in today's environment of 50%, 60% and 70% discounts. Such severe penalties are inherently unreasonable, doubling or more than doubling actual freight charges whenever payment is as little as one day late, so long as the carrier rebills promptly for past due payments.

This arrangement leads to situations in which carriers may be able to make more money by suing their former customers than by carrying their freight, creating an incentive for litigation. Nor can shippers rely on the protection of the courts, as the Humboldt cases illustrate. The Fourth Circuit decision was helpful, but it was not issued until after Humboldt had extracted settlements from virtually all defendants based on erroneous rulings by the bankruptcy court.

The Shipper Conferences do not support late payment of freight charges. Some Conference members have adopted automatic payment

arrangements under which carriers are paid early, based on the shipper's ability to calculate the amount due without the need to receive a freight bill. The Conferences agree that carriers should have a mechanism available to encourage prompt payments by shippers. However, as the ICC recognized long ago, late pay penalties should have some reasonable relationship to collection and credit costs. A reasonable arrangement would be monthly interest similar to that charged by credit card companies, e.g., 1.5% per month.

In this proceeding, the STB can and should require rate bureaus to adopt in their rules tariffs, as a condition to continued antitrust immunity and preservation of the class rate system, credit rules with late pay penalties based on interest charges rather than loss of discounts. The Board should also direct the rate bureaus to insure that their credit provisions also comply with other requirements, including the prohibition against multiple penalties.

Though helpful, this step will not reach individual rate bureau members that impose loss of discount penalties based on excessively high (and rising) rate bureau class rates. To address this problem, the Board should require the rate bureaus to adopt rules declaring that class rates are not appropriate for use in late payment penalty arrangements, because the result will be excessive and unreasonable penalties.

The Shipper Conferences recognize that individual carriers that publish their own class rates will not be prevented from

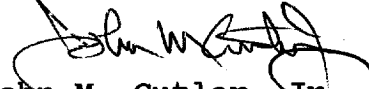
charging class rate-based penalties for late payments. However, Board action condemning such arrangements for rate bureaus in this proceeding would in all likelihood lead individual carriers to adopt more moderate and reasonable late pay penalties that would avoid inequitable results while preserving the carrier's ability to deter late payments.

V. CONCLUSION

If rate bureau antitrust immunity is to be preserved, immunity should be conditioned on adoption of the reforms discussed above. None of these reforms is unduly burdensome. Few rates should change as a result of automatic minimum discounts, and the disruption of settled relationships feared by the bureaus will be avoided. The requirement that bureau general rate increase proposals be based on costs is in the statute, and the requirement of information disclosure to establish compliance with the Act is not objectionable. And it is past time for reform of the late payment penalty system, which has become distorted and inequitable

as a result of continual increases in bureau class rates to ever more unreasonable levels.

Respectfully submitted,



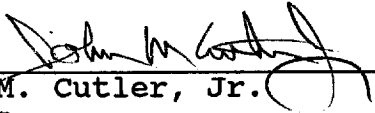
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Dated: April 11, 2000

CERTIFICATE OF SERVICE

I hereby certify that I have this 11th day of April, 2000 caused copies of the foregoing document to be served on all parties of record by first class mail, postage prepaid.



John M. Cutler, Jr.