

ORIGINAL

198505

BEFORE THE  
SURFACE TRANSPORTATION BOARD

SECTION 5A APPLICATION NO. 118 (SUB-NO. 2), ET AL.,  
EC-MAC MOTOR CARRIERS SERVICE ASSOCIATION, INC., ET AL.



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

ENTERED  
Office of the Secretary

MAY 12 2000

Part of  
Public Record

National Small Shipments  
Traffic Conference, Inc.

The Health and Personal Care  
Distribution Conference, Inc.

John M. Cutler, Jr.  
McCarthy, Sweeney & Harkaway, P.C.  
2175 K Street, N.W., Suite 600  
Washington, DC 20006  
(202) 393-5710

Their Attorney

Dated: May 11, 2000

**REPLY 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 reply in opposition to the opening comments filed in this proceeding by EC-MAC, et al.,<sup>1/</sup> Middlewest Motor Freight Bureau ("Middlewest"), Pacific Inland Tariff Bureau ("PITB"), and Southern Motor Carriers Rate Conference, Inc. ("SMC") (collectively, the "Rate Bureaus").

The Rate Bureaus argue for preservation of the status quo on three basic grounds: (1) that the Board lacks the authority to order the reforms at issue in this proceeding; (2) that reforms are unnecessary because rate bureau class rates are set by competition; and (3) that discounts already established for shippers with no other discount programs adequately address any concerns about shippers paying undiscounted class rates.

The Rate Bureaus' Comments do little more than repeat arguments made in their January 27, 1999 Petitions for Reconsideration in the lead docket. Those arguments were opposed by the Shipper Conferences at that time, and were rejected in the Board's February 11, 2000 decision denying reconsideration. The

---

<sup>1/</sup> EC-MAC, et al. consists of EC-MAC Motor Carriers Service Association, Inc., Niagara Frontier Tariff Bureau, Inc., and Rocky Mountain Tariff Bureau, Inc., which filed joint comments, as well as New England Motor Rate Bureau, which filed a letter aligning itself with the EC-MAC joint comments.

Shipper Conferences incorporate by reference in the record hereof their previous filings in the lead docket, including their reply in opposition to the Rate Bureaus' petitions for reconsideration.

**I. THE BOARD HAS THE LEGAL  
AUTHORITY TO ORDER REFORMS**

The contention that the STB's authority under the Act does not permit it to order changes in rate bureau class rates is surprising, in view of the fact that the Board does exactly that whenever it disallows a general rate increase. The Bureaus' legal arguments focus on the Board's call, in its December 18, 1998 decision in this proceeding, for a reduction in Rate Bureau class rate levels to market-based levels. Even here, however, the Bureaus' arguments are unavailing.

According to the Bureaus, the Board cannot order reductions in the levels of class rates set collectively with antitrust immunity (or any other mitigation of such price-fixing by competitors) through the exercise of its power to disapprove or condition rate bureau agreements under 49 U.S.C. § 13703. According to the Rate Bureaus, the Board can address rate levels only through rate cases. See the Middlewest and PITB Comments at 4-8 and EC-MAC, et al. Comments at 18-20. Notably, the SMC and Western Motor Tariff Bureau Opening Comments do not contend that the Board lacks authority to address these issues, though both of those bureaus argue that further action is unnecessary (a contention the Conferences address in the next section of these Comments).

The suggestion that the STB lacks the authority to take remedial action in this proceeding as to rate bureau class rates is

incorrect, as the Board has held. The Board has the authority to disapprove the Rate Bureaus' agreements under 49 U.S.C. § 13703(a)(2) if it finds the agreements not in the public interest. In its Decision in this proceeding served December 18, 1998, the Board held:

In short, on the basis of the record compiled in this proceeding, we find that collective ratemaking, under present circumstances, contravenes the public interest. . . .

Decision at 7, emphasis added. This finding is a predicate for termination of antitrust immunity, a far harsher result than ordering class rates reduced.

The Board went on in its December 18, 1998 Decision (at 7-8) to hold that:

[E]xisting collective ratemaking agreements ought to be approved as not contrary to the public interest only if all existing class rates are amended to reflect market-based rates.

In calling on the rate bureaus to reduce class rate levels to reflect market forces, the Board was plainly exercising its power under 49 U.S.C. § 13703(a)(3) to "require compliance with reasonable conditions consistent with this part to assure that the agreement furthers the transportation policy set forth in section 13101." See also 49 U.S.C. § 13703(a)(5)(B), which provides as follows:

The Board may investigate any action taken pursuant to an agreement approved under this section. If the Board finds that the action is not in the public interest, the Board may take such measures as may be necessary to protect the public interest with regard to the action, including issuing an order directing

the parties to cease and desist or modify the action.

The Board's authority to require action by rate bureaus is thus extremely broad.<sup>2/</sup> It is limited only by the requirement that any conditions imposed must be consistent with the Act, and designed to further the national transportation policy.

It is clear from other provisions of the Act that collectively set rates -- i.e., full undiscounted class rates -- are required to be reasonable. And it is equally clear that full undiscounted class rates are excessive. Despite the Rate Bureaus' attempts to defend their class rates (discussed in more detail below), it is important to note that the ICC found the average discount to be 40% in 1990 (when class rates were lower than they are today), and that some of the Rate Bureaus themselves have adopted discounts of 20%-35% for shippers with no other discount program.

Nor can there be any doubt that the Board's actions further the transportation policy set forth in 49 U.S.C. § 13101(a)(2). See, e.g., subsections (A) "encourage fair competition and reasonable rates," (C) "meet the needs of shippers, receivers . . . and consumers," (D) "allow a variety of quality and price options to meet changing market demands," and (G) "provide and maintain service to . . . small shippers."

The Rate Bureaus argue that if class rates are to be reduced, this can only be done through protests or complaints under 49

---

<sup>2/</sup> See also 49 U.S.C. § 13703(c).

U.S.C. § 13701(a). This is an odd contention, since it would appear to expose their members to liability for reparations under § 13701(d)(4). In any event, the Rate Bureaus cite no authority for the proposition that the Board must proceed under Section 13701 rather than under Section 13703, and there is none.

The Rate Bureaus' case citations are simply inapposite. Burlington Northern R. Co. v. STB, 75 F.3d 685 (D.C. Cir. 1996), cited in the EC-MAC Comments at 19, had nothing to do with collective action or the Board's power to impose conditions on rate bureaus. A more relevant precedent is National Classification Committee v. United States, 746 F.2d 886 (D.C. Cir. 1984), affirming the ICC's decision to order removal of all rates and charges from the National Motor Freight Classification. If the Board may terminate rate bureau antitrust immunity entirely, or order the elimination of rates and charges from rate bureau tariffs, it can certainly order class rates reduced or modified.

While it is indisputable that agencies must not exercise their authority in a manner inconsistent with the applicable administrative structure, as EC-MAC, et al. argue at page 20 of their Comments, the Board is not violating this axiom of administrative law. The Act gives the Board numerous powers over rate bureaus and there is no inconsistency with the statute in the Board's chosen course here.

If more assurance on this score is needed, it is provided by the Motor Carrier Safety Improvement Act of 1999, Pub.L. No. 106-159 (Dec. 6, 1999). The Rate Bureaus attempt to argue that this

legislation supports inaction for five more years, but their attempt is futile.

Congress was plainly aware of the Board's rate bureau and NCC reform proceedings during its consideration of the new Act. Despite a clear opportunity to terminate or alter the direction of these proceedings, Congress declined to do so. On the contrary, it explicitly provided in Section 227(c)(2) that the new requirement for Board review of rate bureau agreements every five years would be inapplicable to pending proceedings, which can only be a reference to these reform proceedings. See new 49 U.S.C. § 13703(e)(2). In effect, Congress approved the inquiry the Board has undertaken in this proceeding, and its attempts to mitigate the adverse impacts of excessively high class rates.

The Shipper Conferences have reviewed the letter from Chairman Shuster and Congressman Rahall which is quoted at p. 21 of the Comments of EC-MAC, et al. Despite the prominence of these two members of Congress, they cannot speak for the House of Representatives, let alone Congress as a whole, and their call for the status quo to be maintained for five more years is simply inconsistent with the provisions of the new Act.

The Board was correct when it found, in its February 11, 2000 decision denying the Rate Bureaus' petitions for reconsideration, that it has the authority to go forward with this proceeding.

II. THE BOARD SHOULD ORDER REFORMS  
ADDRESSING THE EXCESSIVE LEVELS  
OF RATE BUREAU CLASS RATES

As demonstrated above, the STB has the legal authority to order collectively-set class rates reduced or moderated. The Rate Bureaus argue that even if this is so, the Board should not exercise its authority in this proceeding, but the Bureaus' arguments cannot withstand scrutiny.

Middlewest and PITB challenge the Board's contention that Bureau class rates are objectionable because they exceed market-based levels. According to Middlewest and PITB, the Board cannot apply this test, and they cite FPC and FERC cases in their Comments at 6. The cited decisions are not analogous to this situation, and the argument ignores precedents that are directly on point.

In 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 court of appeals observed that in the Motor Carrier Act of 1980, Congress adopted "an approach emphasizing market discipline, in contrast to public utility-style ratemaking, as the principal regulator of motor carriers." More recently, the ICC's reliance on market-based rates as the principal test of reasonableness in the Georgia-Pacific proceeding was affirmed in Oneida Motor Freight, Inc. v. ICC, 45 F.3d 503 (D.C. Cir. 1995).

EC-MAC, et al. accept the market-based standard of reasonableness, but argue that existing class rates are market-based because they are set by market forces and because they are paid by

willing customers of the trucking companies. Both arguments are wrong.

The contention that Rate Bureau class rates are set by market forces is based on the claim that Bureau class rates are set to match the class rates quoted individually by large motor carriers. Such carriers' class rates are said to be set by competition.<sup>3/</sup> Of course, any similarities could be the result of independent decisions by large national carriers to keep their class rates at the same general level as those of the Rate Bureaus, but let us assume arguendo that major carriers are price leaders. The contention that Rate Bureau class rates are market-based remains disingenuous.

It is often said that the members of Rate Bureaus are smaller carriers whose services are less extensive than those of large national carriers. If this is so, but Bureau class rates are as high as larger carriers' class rates, antitrust immunity may have led to inflated Bureau class rates. But for immunity, competition might have led to reductions in the class rates on which Rate Bureaus base their discounts.

Even if Rate Bureau class rates are below the class rates of major carriers, they may still be higher than they would be absent antitrust immunity, and, to that extent, not market-based. A hypothetical situation may help illustrate this point.

---

<sup>3/</sup> It should be borne in mind that many authorities are critical of even independent "bargain" pricing that depends on absurdly inflated list prices and deep discounts.

Assume, for example, that Xerox Corporation is the price leader for copiers, and that many smaller manufacturers make copiers that compete with Xerox copiers. Is it conceivable that smaller copier manufacturers would be allowed to fix their list prices collectively, so long as their list prices were agreed to be at parity with (or even 5% lower than) Xerox's prices for comparable copiers? Even pervasive discounting by Xerox and by other manufacturers would not constitute a valid defense to a charge of price-fixing by the smaller manufacturers.

Another problem with the Rate Bureaus' analysis is that individual carriers can increase their class rates by more than their cost increases. If major national carriers want to increase their class rates by 5% per year, with 2% of each increase representing profit enhancements, they can do so (assuming their pricing decisions are truly independent). The Rate Bureaus, in contrast, are prohibited by 49 U.S.C. § 13703(a)(1)(G) from increasing class rates by more than increases in "industry average carrier costs." Rate increases to increase profits must be published by the member carriers on their own. Therefore, the contention that Rate Bureau class rates are market-based because of their similarity to major individual carriers' class rates must be rejected.<sup>4/</sup>

---

<sup>4/</sup> The Shipper Conferences do not believe a "revenue need" component of collective rate increases should be permitted, but even if it were, the revenue need factor could not be unlimited for Rate Bureaus, as it is for individual carriers.

The claim that existing Rate Bureau class rates must be preserved unchanged because they are accepted by willing buyers and willing sellers in the marketplace is not persuasive. Buyers pay what they must pay to obtain the services they require, and relatively few producers of goods do not rely on the trucking industry to help transport their goods to their customers.

The fact that some customers -- who may be uninformed, desperate, or responsible for charges they did not negotiate -- pay high prices is not enough to make those prices legitimate. If "willing" buyers were all it took to justify whatever service providers may charge, there would be no need for the antitrust laws, or for the regulation of monopolies. The widespread availability of discounting certainly tempers the problems of collective action by motor carriers. However, class rates are doubly affected by collective action by competitors, first when the National Classification Committee classifies freight, and then when Rate Bureaus publish, and periodically increase, class rates.

It may be, as the Rate Bureaus contend, that instances of shippers paying undiscounted class rates are uncommon, and are getting less common thanks to the internet. The Bureaus appear to have made no effort to determine how often shippers pay full class rates, despite their access to carrier data.<sup>5/</sup> However, the Shipper Conferences can attest that such shippers exist, and those that remain are actually less and less "willing."

---

<sup>5/</sup> If hardly any shippers pay undiscounted class rates, there can be no serious objection from the Rate Bureaus to the use of automatic minimum discounts.

When shippers must pay full undiscounted class rates today, it is likely that an absence of competition is involved. The shipper may not have time for comparison shopping, or may be shipping an unusual item on an emergency basis with an unfamiliar carrier, or the payor of the freight charges may be the receiver of freight, or of customer return shipments, via carriers it did not choose.

EC-MAC, et al. suggest that in such instances, "undiscounted . . . class rates may be the rates that the market dictates" (Comments at 10), but this is sophistry. Such shippers are compelled to pay Rate Bureau class rates because competitive options are not available and because a rate case would be prohibitively expensive. The result is windfall profits for the carrier.

The law does not provide a remedy for all instances of windfall profits. But where price fixing with antitrust immunity is involved, there is ample justification for regulatory relief like that under consideration in this proceeding.

**III. AUTOMATIC MINIMUM DISCOUNTS  
SHOULD HELP PREVENT COLLECTION  
OF UNDISCOUNTED CLASS RATES**

At page 7 of its February 11, 2000 decision on reconsideration, the Board suggested an alternative to forced reductions in class rates that would avoid many of the implementation issues raised by the Rate Bureaus. The Board said:

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 their Opening Comments, the Shipper Conferences considered this option and supported automatic minimum discounts. Although lacking data necessary to determine what discount level might "reflect market rates," the Conferences observed that the ICC's comprehensive analysis of motor carrier pricing in Investigation of Motor Carrier Collective Ratemaking and Related Practices and Procedures, 7 I.C.C.2d 388 (1991), suggested that the average discount off rate bureau class rates in 1990 was 40%. Since many general rate increases have taken effect in the last decade, it is almost certain that the average discount today exceeds 40%, and may exceed 50%.

In their opening comments, the Rate Bureaus appear to have made no effort to address this issue, preferring to reiterate arguments made in their petitions for reconsideration in favor of the discounts already in place. This is not helpful, given the Board's rejection of those arguments in its February 11 Decision. Nor is it the "formal proposal to which other parties may respond" that the Board called for. In addition, not all Rate Bureaus have such discount arrangements, and those that do are not obliged to maintain them in the future.

The Rate Bureaus will presumably respond to the Shipper Conferences' arguments on this point in their reply comments. However, this is procedural gamesmanship, since shippers will be

unable to respond to the Rate Bureaus' reply comments in this proceeding.

The Rate Bureaus' contention that shippers with no discount program should get 35% discounts but that shippers with 5% discounts should continue to pay 95% of undiscounted class rates should be rejected. This approach would lock in above-market rates for shippers who agreed to them in ignorance or because the only available alternative was worse. It could also lead to attempts by carriers to press the smallest and most vulnerable shippers to agree to 5% discount programs in order to disqualify such shippers from larger discounts.

To its credit, the SMC appears to have analyzed members' pricing and determined that its minimum discount was slightly above 20%. By adopting an across-the-board 20% discount, SMC has sought to make its discount a true automatic minimum discount, though there appears to be no barrier to smaller discounts.

The SMC Comments also contain evidence indicating that SMC's class rates are generally lower than the class rates of other rate bureaus. If accurate, this disparity might warrant a lower automatic minimum discount for SMC than for the other rate bureaus, but 20% may nevertheless be too small. In Investigation of Motor Carrier Collective Ratemaking, supra, the ICC found that the average discount for SMC in 1990 was 43.5%. 7 I.C.C.2d at 450.<sup>6/</sup>

---

<sup>6/</sup> As the Shipper Conferences read Exhibits 2 and 3 to the Verified Statement of SMC Witness Acker, the average discount for SMC in December 1994 was 46.78% with an average discount of 47.26% projected for February 1995. These figures illustrate the trend of larger average discounts in the years since 1990.

Of course, individual carriers could charge individual shippers rates that are higher or lower than the Bureau class rates with the automatic discount, as the Board observed in its December 18, 1998 Decision at 7. However, as the Board also observed (id.):

[T]he most effective shipper protection that we can afford, short of abolishing collective ratemaking entirely, is to ensure that if a carrier wants to charge a rate above a competitive level, it will not be able to justify its charges by reference to an unrealistically high list price set through a governmentally-sanctioned collective rate-making process.

Whatever the level of the Rate Bureaus' automatic minimum discounts (and the Shipper Conferences have seen no evidence that their proposal of at least 45% would be unreasonable, SMC possibly excepted), that automatic minimum discount should be adjusted for inflation. Otherwise, as future general rate increases move the range of market-based rates to higher discount levels, the automatic minimum discounts will become less reflective of competitive forces.

SMC's Opening Comments are silent on the issue of whether its class rates are collected through loss of discount penalty items in SMC tariffs. Other Rate Bureaus contend that no collectively made tariffs contain loss of discount penalties, but the Shipper Conferences have been unable to confirm this statement. Typically, loss of discount penalties for late payments appear in rules tariffs, and it is clear from the websites of Middlewest and Rocky Mountain that they publish rules tariffs. SMC does too (Acker V.S.

at 5). Other Rate Bureaus may also publish rules tariffs. Without access to copies of those tariffs, the Shipper Conferences cannot determine whether they contain provisions setting forth penalties for late payment.

Shippers can take little comfort from the point made by EC-MAC, et al. (Comments at 17-18) and Middlewest and PITB (Comments at 14) that late-pay loss of discount penalties based on Rate Bureau class rates would be unlawful under 49 U.S.C. § 13703(f)(1). As the Comments say, the Act there provides that "Nothing in [Section 13703] shall serve as a basis for any undercharge claim." However, bankrupt trucking companies consistently take the position that late-pay penalty claims are not undercharge claims, and at least one court has arguably provided some support for that interpretation. See Humboldt Express, Inc. v. The Wise Co., 190 F.3d 624, 640-41 (4th Cir. 1999).

In any event, it appears that no Rate Bureau seeks to defend the use of their undiscounted class rates as the basis for late-pay penalties. The Shipper Conferences therefore urge the Board to hold in its decision in this proceeding that Rate Bureaus shall not collectively publish tariffs providing for the loss of all discounts as a penalty for late payments. Even if the Rate Bureaus have no such tariffs today, this condition will prevent the collective publication of such tariffs in the future.

In addition, the Board should state that, because they have become too high to be presumptively reasonable, undiscounted bureau

class rates should not be the basis for late-pay loss of discount penalties.

**IV. CONDITIONS ARE NECESSARY  
TO PREVENT EXCESSIVE  
GENERAL RATE INCREASES**

At page 8 of its December 18, 1998 Decision in this proceeding, after stating that existing collective ratemaking agreements should be approved only if class rates are reduced, the Board went on as follows:

We should also point out that, if the class rates 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.

The Opening Comments of Middlewest, PITB and EC-MAC, et al. are silent on the issue of general rate increases, or GRIs. This may be because GRIs exceeding inflation are prohibited by 49 U.S.C. § 13703(a)(1)(G) and the Rate Bureaus have scrupulously complied with this requirement, but the Shipper Conferences have their doubts.

When the Conferences protested the GRIs of four of the Rate Bureaus (Middlewest, EC-MAC, Rocky Mountain and North American Transportation Council) in September 1999, the replies of the rate bureaus contained no cost information. The absence of "quantifiable evidence" supporting the rate bureaus' claim of increased costs was a key factor in the Board's September 30, 1999 decision in Docket ISM 35006 suspending those rate increases.

The Shipper Conferences were concerned that the 4.9%-5.5% GRIs at issue were based not on cost studies supporting those

particular increases, but on the fact that large national carriers had published increases in that range in their individual class rates. That concern is not mitigated by the EC-MAC, et al., Middlewest, and PITB Comments in this proceeding, which confirm an inclination by these Rate Bureaus to follow the lead of large national carriers.

Also relevant here is the fact that SMC's GRI in September 1999 was approximately 3.5%, based on its "Carrier Cost Index." This lower GRI, coupled with SMC's adoption of a minimum discount, led to the Shipper Conferences' decision not to protest SMC's GRI. It appears that SMC's methodology focuses on cost increases experienced by SMC member carriers, and may therefore produce results that would not apply as well to the members of other rate bureaus. Nevertheless, there was a difference of almost 2% between SMC's GRI and those of other Rate Bureaus in September 1999. Under the circumstances, the Shipper Conferences are reluctant to assume that all Rate Bureau GRIs always reflect cost increases and no more.<sup>2/</sup>

Accordingly, the Conferences reiterate their call for greater disclosure of information on GRIs, including better notice of the GRIs themselves, publication of cost data supporting the GRIs, and a requirement that the Rate Bureaus comply with reasonable requests by shippers or shipper representatives (subject to appropriate confidentiality arrangements) for access to cost information.

---

<sup>2/</sup> As noted in the Conferences' Opening Comments (at 20), the pervasive use of fuel surcharges makes the risk of cost over-recovery through GRIs particularly acute now.

The SMC Comments do address the GRI issue, and SMC's approach appears to have much to recommend it, including the fact that shippers seem to be welcome at SMC business meetings. The Shipper Conferences have not spent enough time analyzing SMC's formula or its "Carrier Cost Index" to express approval or disapproval of that approach to carrier cost analysis. However, SMC's comparatively "open" approach to GRIs, and its recognition of the need for cost-based increases, appear to be steps in the right direction.

V. CONCLUSION

For the reasons set forth above and in their Opening Comments, the Shipper Conferences urge the Board to adopt their suggested reforms in rate bureau collective ratemaking.

Respectfully submitted,

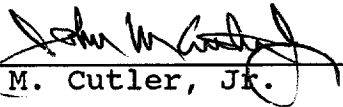
  
\_\_\_\_\_  
John M. Cutler, Jr.  
McCarthy, Sweeney & Harkaway, P.C.  
2175 K Street, N.W., Suite 600  
Washington, DC 20037  
(202) 393-5710

Attorney for  
National Small Shipments Traffic  
Conference, Inc. and  
The Health and Personal Care  
Distribution Conference, Inc.

Dated: May 11, 2000

## CERTIFICATE OF SERVICE

I hereby certify that I have this 11th day of May 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.