

ORIGINAL

Before the
Surface Transportation Board
Washington, D.C.



Southern Motor Carriers Rate Conference, Inc.

) Section 5a Application No. 46 (Sub-No. 20)

Reply Comments of the
United States Department of Transportation

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Introduction

The Surface Transportation Board ("STB" or "Board") in this proceeding is considering a request by the Southern Motor Carriers Rate Conference, Inc. ("SMC") to allow it to expand from a regional motor carrier rate bureau to one with nationwide reach. The United States Department of Transportation ("DOT" or "Department") opposes this request for a number of reasons.¹

Most importantly, the core function of rate bureaus remains the setting of prices by horizontal competitors. Even with widespread discounting, the STB has found this activity contrary to the public interest, and imposed requirements designed to lessen its anticompetitive impact. DOT believes that expanding the geographic scope of this activity by individual rate bureaus is also adverse to the public interest. We are in fact concerned that grant of the instant proposal would tend to exacerbate the negative consequences of collective ratemaking. Moreover, the SMC has offered no persuasive basis on which to grant its request. The Department therefore urges the Board to reject

^{1/} The STB order extending the date for reply comments by its terms applied only to named parties. This important proceeding involves issues substantially identical to those on which the Department has commented in the past, and our participation will prejudice no party. DOT accordingly asks the Board to accept the instant reply comments.

the petition. Alternatively, DOT recommends that the STB institute a proceeding to explore more carefully the likely consequences of nationwide rate bureaus before reaching a decision on this issue.

Background

The Board is now approaching the end of a lengthy process within which it has examined the agreements through which motor carriers have traditionally set rates.² In the course of these proceedings, DOT, the Department of Justice, shipper groups, and others have stressed the inherently anticompetitive nature of collectively established rates, even if those rates have “merely” served as “benchmarks” from which individual trucking companies offer discounts. The same parties have also pointed out that firms in every other mode of transportation have managed to agree to joint rates, interline routes, and to otherwise inform their customers of price and service offerings without benefit or need of antitrust immunity. See 1998 Decision at 5 note 15.

In its 1998 Decision the STB expressly recognized the anticompetitive effects of collective ratemaking, but ultimately decided to continue its approval and immunity for the relevant agreements on one major condition: a reduction in the collectively set benchmark class rates to market-based levels. Id. at 8. Later confronted with the prospect of market disruption and the absence of a “suitable and readily available

²/ EC-MAC Motor Carriers Service Ass’n, et al., STB Section 5a Application No. 118 (Amendment No. 1), et al., (STB served December 18, 1998) (“1998 Decision”); EC-MAC Motor Carriers Service Ass’n, et al., STB Section 5a Application No. 118 (Amendment No. 1), et al., (STB served February 11, 2000) (“2000 Decision”); EC-MAC Motor Carriers Service Ass’n, et al., STB Section 5a Application No. 118 (Amendment No. 1), et al., (STB served November 20, 2001) (“2001 Decision”); EC-MAC Motor Carriers Service Ass’n, et al., STB Section 5a Application No. 118 (Amendment No. 1), et al., (STB served March 27, 2003) (“2003 Decision”). In a companion proceeding the Board examined the related agreements by which carriers have established freight classification systems. National Classification Committee – Agreement, Section 5a Application No. 61 (STB served December 18, 1998); National Classification Committee – Agreement, Section 5a Application No. 61 (STB served November 20, 2001).

methodology” for rolling back class rates, the Board turned to other conditions: a “truth in rates” notice requirement and a prohibition on the loss of discounts tied to class rates in the event of late payment by shippers. 2001 Decision at 6.³

In 1998 the STB also noted its intention to allow rate bureaus to expand their territories from a regional to a national basis. 1998 Decision at 9-10. It cited the “increasingly globalized nature” of transportation and the “anachronistic nature” of geographic restrictions. Id. Congress then intervened with legislation effectively forbidding this result, but that bar has now been removed and the SMC has revived the issue.⁴

The SMC’s Petition

The SMC offers several arguments in support of its request for nationwide collective ratemaking authority. In addition to harkening back to the Board’s earlier favorable view and the recent statutory change, the SMC contends that geographic expansion is necessary for the establishment of class rates that are “coextensive” with the transportation operations of motor carriers. Petition at 2. The SMC avers as well that nationwide “baseline” rates would reflect its members’ “costs and revenue needs.” Id. The rate bureau also believes that such rates would enable its members to offer “truly competitive rates” to shippers. Id. Finally, the SMC points to “unparalleled support” for its request from shippers. Id.

³/ Under this requirement, trucking firms that list or quote rates referencing collectively set rates (*e.g.*, as a benchmark) must inform shippers that such rates are not arrived at competitively and that individual carriers offer substantial discounts. They must also report to shippers the range of discounts tendered by members of the rate bureau from which the rate(s) derive. 2001 Decision at 8.

⁴/ Section 354 of the Omnibus Appropriations Act of 2003, P.L. No. 108-7, 117 Stat. 11 (Feb. 20, 2003) rescinded 49 U.S.C. § 13703(d), which had directed the STB not to take any action permitting “nationwide collective ratemaking authority.”

The Department's Position

The Department opposes grant of this petition. DOT remains strongly of the view that collective ratemaking among competitors is antithetical to the public interest. So long as carriers are free to set class rates in concert, even if only as benchmarks for discounting purposes, the rates ultimately charged will not reflect the marketplace and in fact will tend to be higher than market rates.⁵ The Board has never denied this; it has simply sought to craft conditions that mitigate the impact of such rates. 2001 Decision at 8 (the agency's goal has been "to guarantee that carriers are not able to use the rate bureau process to set above-market class rates and then foist these collectively set class rates onto shippers").

Wholly apart from this fundamental principle, the grounds advanced by the SMC do not warrant the approval and immunity sought. First, Congress' recent action simply removes a legal bar; it does not compel expansion or any other particular result with respect to the geographic boundaries of rate bureaus. Second, the argument that rate bureau boundaries should be "coextensive" with carrier operations overlooks the fact that trucking firms have enjoyed nationwide operating authority as a matter of course for some twenty years, yet the geographic scope of rate bureaus has never been shown to be relevant to carrier decisions about whether to actually operate on that scale.

⁵/ Because rate bureaus invariably produce general rate *increases* rather than decreases, and because there is no evidence that discounts counter such increases in their entirety, even discounts from those (ever higher) baselines result in ultimately higher rates. As the STB noted in denying petitions for reconsideration filed by rate bureaus, "If the level of the class rates were irrelevant, ... then the bureaus would not have objected to reducing them." 2000 Decision at 6, note 12. See also 2003 Decision at 9, in which the Board once again noted that its goal was "[t]o ensure that shippers are not harmed in any way by the artificially high level at which class rates are set."

With respect to carrier "costs and revenue needs," not only has the SMC not made any showing that a nationwide territory would somehow enable class rates to better reflect carrier costs, but the Board has already recognized that even the forced reductions in class rates that it originally proposed "ought to be revenue neutral if the market is as competitive as the bureaus say it is" (*i.e.*, if discounts are virtually always given to shippers). 2000 Decision at 7. It is difficult to imagine that revenue neutrality would not also be the result under conditions through which shippers receive, not mandatory rate reductions, but only information about the range of discounts potentially available.⁶

The assertion that nationwide collectively set class rates would lead to "truly competitive rates" is at least as baseless as the argument, repeatedly rejected by the STB, that regional collectively set class rates are procompetitive.⁷ Finally, although it may be that some shippers support the SMC's request, two very large shipper groups -- the National Industrial Transportation League and the National Small Shipments Traffic Conference -- do not.

For the foregoing reasons the Department believes the SMC petition should be denied. Should the Board still wish seriously to consider the SMC request, DOT alternatively urges the STB to accept the petitioner's alternative suggestion and institute a proceeding in order to compile a record of the likely effects of permitting nationwide rate bureaus. At present all we have on the record on this issue to date is a five year old

⁶/ Although the Board declined shipper requests "to ensure that [general class rate increases] do no more than recoup documented cost increases," the agency also found it "curious that rate bureaus will ... rais[e] class rates, only to have their members turn around and increase the discounts offered to most of their shippers to counteract the effect" of those increases. 2001 Decision at 10.

⁷/ It perhaps bears repeating that the conditions imposed by the STB do not in fact prevent supra-competitive class rates, but rather are intended to ensure that shippers are not prejudiced thereby. 2001 Decision at 10; 2003 Decision at 5, 9.

expression of intent by the Board and conclusory assertions by the SMC. Issues that ought to be explored prior to a decision include whether national geographic expansion of rate bureaus would make rate bureaus more attractive to motor carriers (especially to nationwide trucking firms that do not now hold membership in any bureau), whether the ultimate result might be that only one or a very few rate bureaus would continue to exist, and the implications for the public interest of each of these. In particular, DOT is concerned that nationwide rate bureaus might be more apt to lead to class rates that would not only remain artificially high, but also would be less susceptible to effective discounting -- the extra-agreement practice that enabled the underlying agreements to receive approval in the first place.⁸ All of these considerations in the Department's view preclude grant of the authority sought by the SMC on the present record.

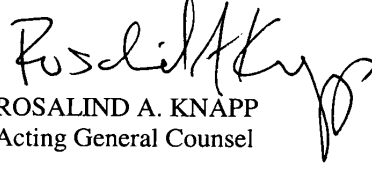
Conclusion

The Board should deny the instant petition. Not only does the core activity of collective ratemaking remain adverse to the public interest, but there can be no confidence that nationwide rate bureaus will not result in a reduction in discounting, the only factor that spared the relevant agreements from disapproval years ago. If the STB is

^{8/} The Department of Justice raised these issues in its prior comments, but they were not addressed to DOT's knowledge. Comments of the U.S. Department of Justice, filed August 18, 1997 at 8-10. They have been raised more recently by the National Small Shipments Traffic Conference. Reply filed November 25, 2003. As the Board is aware, it must now review rate bureau agreements every five years. 49 U.S.C. § 13703(c)(2); 2003 Decision at 12. That period begins in the next calendar year; under the circumstances it might be appropriate to reserve judgment on this issue to that upcoming proceeding.

not disposed to deny the petition outright, the agency should institute a proceeding to establish amore adequate record prior to reaching a decision.

Respectfully submitted,


ROSALIND A. KNAPP
Acting General Counsel

December 15, 2003

CERTIFICATE OF SERVICE

I hereby certify that on this date I caused a copy of the Reply Comments of the United States Department of Transportation in STB Section 5a Application No. 46 (Sub-No. 20) to be served by first class mail, postage prepaid, upon all Parties of Record in this proceeding.

A handwritten signature in cursive script, appearing to read "Paul Samuel Smith".

Paul Samuel Smith

December 15, 2003