



**U.S. Department of
Transportation**
Office of the Secretary
of Transportation

General Counsel

**400 Seventh St., S.W.
Washington, D.C. 20590**

May 24, 2004

Vernon A. Williams, Secretary
Surface Transportation Board
Suite 700
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: Sec. 5a Application No. 46 (Sub-No. 20)

Dear Secretary Williams:

Enclosed herewith are the Reply Comments of the United States Department of Transportation in the above-referenced proceeding. This document is being filed electronically and served on all Parties of Record by first-class mail, postage prepaid.

Thank you for your assistance in this matter. If you have any questions, please contact me at your earliest convenience.

Respectfully submitted,

Paul Samuel Smith
Senior Trial Attorney
(202) 366-9280

cc: All Parties of Record

**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**

Introduction

The Surface Transportation Board (“STB” or “Board”) in this proceeding is considering whether to allow the Southern Motor Carriers Rate Conference, Inc. (“SMC”) to expand from a regional motor carrier rate bureau to one with nationwide reach. Rather than reply upon an outdated record, the Board invited new evidence on the question and SMC has responded. The United States Department of Transportation (“DOT” or “Department”) hereby submits its comments in opposition to the proposed expansion.

The most fundamental reason for the Department’s opposition is that the core function of rate bureaus remains an inherently anticompetitive act: the setting of prices by horizontal competitors. Widespread discounting does not cure this, but serves only to underscore the above-market rates that inevitably result from such activity. Dramatically expanding the geographic scope of this activity within a single organization promises no change. To the contrary, even if SMC is correct -- and it is not -- that expansion will result in a better matching of carrier costs with class rates, participation among motor carriers seems likely to spread along with bureau boundaries. That is not in the public

interest. Nor does the record provide any comfort that discounting will continue unabated in that environment. The Board should reject the pending request and confine rate bureaus to their present geographic limits. Alternatively, the STB should at the very least impose conditions upon approval in order to gather more concrete information about the true effects of nationwide expansion.

The SMC Initial Statement

The SMC supports national expansion of rate bureaus as a means to improve the accuracy and reliability of its core activity, the production of class rates. These rates are supposed to reflect carrier costs and “revenue needs,” and thus the accuracy and reliability of the class rate “output” depends upon the quality of the motor carrier cost “input.” Verified Statement (“VS”) of Jack E. Middleton at 3. When these class rates accurately reflect carriers’ costs and revenue needs, in SMC’s view they function as a “competitive baseline” from which trucking firms offer discounts to individual shippers. VS of Middleton at 7.

However, because motor carrier costs differ by region, according to SMC, the class rates of one rate bureau do not reflect the costs of trucking firms in different areas of the country. VS of Middleton at 6; VS of Daniel M. Acker at 9. This unsuitability is aggravated when different rate bureaus use different dates to effectuate their class rates, for then non-members’ “immediate revenue needs” are not met. VS of Middleton at 7. The SMC concludes that regional rate bureaus are unresponsive to non-member carriers, and thus cannot be relied upon to meet the “economic needs” of these firms. SMC Initial Statement, at unnumbered page 6; VS of Middleton at 9. National rate bureaus, by

contrast, would allegedly produce class rates based upon the costs incurred by their own members in different parts of the country, thereby allowing member carriers to “tailor” their class rates so as to better “reflect their competitive needs.” *Id.* at 6.

The SMC notes that shippers as well as motor carriers strongly support nationwide expansion of rate bureaus, and argues that this would ensure a common baseline of class rates, which would facilitate competitive pricing negotiations. *VS of Middleton* at 4.¹

The DOT Position

The SMC seeks to “improve” collective ratemaking in an environment in which trucking firms operate far beyond their historical geographic ranges. Cost differences among carriers in different parts of the country are the targeted cause of the current imperfection, for they reportedly prevent regionally set class rates from accurately embodying the true costs of non-member carriers that nonetheless rely upon those rates. Mismatched costs lead to mismatched class rates and mismatched revenues.

The Department opposes efforts to perfect an activity that produces above-market prices and is, absent immunity, *per se* illegal under antitrust law. United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).² To posit that rates agreed upon by

^{1/} SMC considers the opposition of the National Industrial Transportation League (“NITL”) to rate bureau expansion as simply an indication that NITL does not represent all of its members. *VS of Middleton* at 10.

^{2/} This is true whether the rates set are minimums, maximums, or “baselines.” *See Kiefer-Stewart Co. v. Jos. E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951). SMC is thus mistaken when it asserts that its “serving the pricing needs of its carrier members by establishing a baseline of class rates responsive to its members’ labor and non-labor costs and revenue needs cannot be deemed anticompetitive.” SMC Initial Statement at unnumbered page 5. With suitable adjustments, however, SMC would very likely be able to gather and distribute price and cost information of value to both carriers and shippers. *See* page 6, *infra*.

competitors are market-based or somehow provide a “competitive baseline” is to ignore reality and to stand competition policy on its head. It is also contrary, of course, to the Board’s own findings in the underlying proceeding. 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).³ The STB deemed the pertinent agreements palatable only because of widespread discounting from such rates, which it took pains to ensure would continue. Id. at 8; 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) at 6.

The Department accordingly suggested that in considering SMC’s petition the Board should focus on certain core questions, such as whether the nationwide expansion of rate bureaus would make them more attractive to motor carriers or result in only a very few surviving rate bureaus. DOT Reply Comments, filed December 15, 2003, at 5-6.

The record now suggests several answers.

First, as already noted, carrier costs differ not only, and certainly not mostly, because of their geographic base or area of operations. Thus, geographic expansion will

^{3/} SMC attempts to portray its collectively set class rates as “considerably lower” than the rates of individual motor carriers operating in the Southern United States. VS of James E. Ridley. But the “expanded marketplace rate comparison” SMC proffers cannot support that conclusion. First, the rates selected for comparison are admittedly “undiscounted,” and thus by definition do not reflect the “marketplace” (*i.e.*, discounted) rates actually charged to and paid by shippers. (Discounts are not uniform and Mr. Ridley does not imply otherwise, so one cannot contend that undiscounted rates are proportionally comparable to marketplace rates.) Moreover, a true marketplace comparison would include a service component under which transit time and other factors could significantly affect prices. In addition, the motor carriers whose rates have been chosen for comparison do not comprise a representative sample of less-than-truckload (“LTL”) firms. At least five of the seven are unionized (Fedex Freight East is not; Vitran Express is a Canadian-based firm whose labor affiliation is unknown to DOT) and hence have markedly higher costs than the non-union firms that are beginning to dominate the LTL industry. VS of Daniel E. Acker at 3 (labor costs amount to roughly two-thirds of LTL carrier costs). The existence, *vel non*, of an organized workforce is thus likely to differentiate the costs of carriers to a much greater extent than the regions in which they operate. Finally, the long-haul nature of other firms selected (such as Yellow Transportation, Roadway Express, and ABF Freight Systems) will tend to introduce additional cost differences.

at most allow one component of carrier costs of uncertain dimension to more closely track (artificially high) class rates. Second, if nationwide rate bureaus were to function as SMC envisions, and produce rates that to some extent more accurately reflect carrier costs and take effect on the same date(s), it seems likely they would attract more carrier members. If that is so, then it also seems likely that rate bureaus generally would tend to expand geographically -- if only to retain or attract members. Thus, rate bureaus would tend to expand both in geographic scope and in membership.

Whether the number of rate bureaus would decline in this circumstance depends, in SMC's opinion, on the value of the services that each rate bureau provides to its members. VS of Middleton at 8-9. DOT does not disagree.⁴ What remain unclear to DOT are the implications of such developments.

The Department's most important concern focuses on the element most critical to the Board's continued approval of these agreements: discounting. Specifically, in our prior comments we deemed it necessary to determine not whether nationwide rate bureaus would continue to produce artificially high class rates -- they will -- but whether those rates would be "less susceptible to effective discounting" because of the emergence of nationwide bureaus. DOT Reply Comments, *supra*.

It is difficult to be sanguine about the prospect that larger, and possibly fewer, rate bureaus would have a salutary effect on discounting. SMC has offered no evidence that it would, only repeated insistence that collective rates more closely reflecting one component of aggregate costs will somehow translate into more "competitive baselines"

⁴/ The existence of already functioning organizations and possible economies of scale make it seem unlikely that nationwide scope would spawn the creation of additional rate bureaus.

that better meet industry “revenue needs.” See SMC Initial Comments at unnumbered pages 3-6; VS of Middleton at 3-6, 9; VS of Acker at 5-9. This claim differs only in degree from the basic contention invariably advanced by rate bureaus. Its repetition does not suffice to overturn economic principle or to deny the reality of supra-competitive class rates. The most appropriate response in these circumstances is to decline to accept the obvious threat to true marketplace pricing when there is so little to be gained by continued regulatory endorsement of rate bureau agreements.

No other type of domestic carrier -- by land, sea, or air -- can legally engage in collective rate-setting. Yet every other type of carrier manages to market its online and interline services nationwide (if not worldwide), matching costs to revenues, communicating with each other and with customers, without benefit of antitrust immunity. Their collective rate-setting ended with the antitrust immunity it once enjoyed, but their trade associations and other organizations gather and distribute information about costs and prices to the benefit of members and customers alike. See EC-MAC Motor Carriers Service Ass’n. et al., STB Section 5a Application No. 118 (Amendment No. 1), et al., DOT Comments at 3-4 (filed August 15, 1997) and DOT Reply Comments at 3-4 (filed October 17, 1997). It is this clearinghouse function that provides real value, and unlike collective rate-setting, it does so in a manner consistent with the public interest, economic principle, and antitrust law.⁵ DOT does not doubt that

^{5/} The STB therefore need not and should not be concerned that elimination of antitrust immunity would somehow impair communications and negotiations about rates and services between trucking firms and shippers. Decisions about such matters properly reside in the marketplace, but continuing approval and immunity transfers those decisions to the regulator.

motor carriers would also make this discovery after suitable adjustments to their traditional practices. We therefore urge the Board to deny the pending petition.

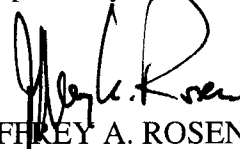
Alternatively, we recommend that the STB condition any approval it may grant on the compilation of specific information addressing the effects of nationwide rate bureaus on pervasive discounting. Specifically, the Board should require rate bureaus to report periodically on their numbers, on their membership, and on the range and weighted average of discounts offered by their membership. Shippers and others should have the opportunity to submit their own evidence and arguments in response. In sum, the STB should not approve this petition, but if it does the Department supports the creation of a real-world record enabling the Board and others to monitor the consequences of nationwide expansion and to prevent injury to the public interest.

Conclusion

Nationwide rate bureaus might attract more motor carrier members, and their existence may or may not cause a decline in the number of rate bureaus overall. Regardless, nationwide rate bureaus would continue to set rates at supra-competitive levels, and there is no record support for the proposition that such bureaus will have benign effects on the only factor that allows rate bureaus to receive continued approval and antitrust immunity: widespread discounting. Every other type of carrier in the domestic transportation industry has successfully marketed services and communicated prices without benefit of antitrust immunity; nothing inherent in the trucking field suggests that motor carriers cannot do likewise. In these circumstances, the Board should decline to permit nationwide rate bureau expansion. Alternatively, at the very

least any approval should be conditioned upon reporting requirements that allow for close monitoring and, if need be, correction of any adverse effects of such entities.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jeffrey A. Rosen". The signature is stylized with a large, looped "R" and a cursive "J".

JEFFREY A. ROSEN
General Counsel

May 24, 2004

CERTIFICATE OF SERVICE

I hereby certify that on this date I have caused a copy of the Reply Comments of the United States Department of Transportation in 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 black ink, appearing to read "Paul Samuel Smith", with a stylized flourish at the end.

Paul Samuel Smith

May 24, 2004