

LAWRENCE W. BIERLEIN
DOUGLAS M. CANTER
PHILIP L. CHABOT, JR.
JOHN M. CUTLER, Jr.
ANDREW P. GOLDSTEIN
STEVEN J. KALISH
RICHARD D. LIEBERMAN
CHANNING D. STROTHER, Jr.

LAW OFFICES
MCCARTHY, SWEENEY & HARKAWAY, P.C.
SUITE 600
2175 K STREET, N.W.
WASHINGTON, D.C. 20037
(202) 775-5560

FACSIMILE
(202) 775-5574

E-MAIL
[REDACTED]

WEBSITE
[HTTP://WWW.MSHPC.COM](http://www.mshpc.com)

WARREN S. FELDMAN, STAFF ATTORNEY*

*Admitted in CA & NY

July 15, 2005

Deborah A. Garza, Chair
Jonathan R. Yarowsky, Vice Chair
Antitrust Modernization Commission
1120 G Street, NW
Suite 810
Washington, D.C. 20005

By Electronic Mail

Re: AMC Requests for Comments – Immunities and Exemptions

Dear Commissioners Garza and Yarowsky:

The National Small Shipments Traffic Conference, Inc (“NASSTRAC”) hereby responds to the Commission’s request for public comments, with particular reference to the category “Immunities and Exemptions” and the exemption for the motor carrier collective action in Section 13703 of the Interstate Commerce Act, 49 USC § 13703.

NASSTRAC is a non-profit membership corporation which has for more than 50 years represented the interests of its members before Congress, Federal and State Courts, the ICC and STB and other federal and state agencies. The regular members of NASSTRAC are companies of all sizes and in many industries in their capacities as shippers of freight. NASSTRAC and its members are particularly concerned about issues affecting freight transportation by motor carrier.

Section 13703 authorizes motor carriers to act collectively in certain activities relating to freight classification and ratemaking, to the extent that they do so in accordance with agreements approved by the Surface Transportation Board, an independent regulatory agency within the Department of Transportation.

NASSTRAC understands that the Commission intends to focus on the first eight items on the list of immunities and exemptions (a through h on AMC’s list; motor carrier collective action is t on the list). The Commission should nevertheless be aware that

continued antitrust immunity for collective ratemaking and freight classification (which affects rates) is opposed by many shipper customers of the trucking industry.

Pursuant to 49 USC § 13703 (c) (2), the STB is required to review the motor carrier agreements supporting antitrust exemptions every five years. Such a review proceeding is pending now in STB Docket Ex Parte No.56, Motor Carrier Bureaus – Periodic Review Proceeding.

Attached to this letter are the Opening and Rebuttal Comments filed by NASSTRAC in the STB proceeding, which will provide the Commission with information about the issues raised by continued antitrust exemption under 49 USC § 13703. Other comments in the proceeding, including comments by DOT calling for termination of the exemption, and comments by motor carrier interests supporting the exemption, are available on the STB website, www.stb.dot.gov.

Summary of Comments

There are two forms of collective action by motor carriers under 49 USC § 13703. The first form involves freight classification by a group of carriers known as the National Classification Committee, or NCC. The NCC's members, all of whom are motor carriers, decide whether to change the class "rating" of various commodities using procedures and standards adopted by the NCC members themselves.

The position of NASSTRAC and its members is that an antitrust exemption for freight classification is objectionable for two reasons. First, aspects of the NCC procedures and standards favor the motor carrier interests, and the motor carrier decision makers themselves may also benefit from their actions because an increase in a class rating for a commodity generally leads to an increase in freight rates. While NCC decisions can be challenged through litigation at the STB or through arbitration, shippers would prefer to avoid the need for proceedings before the NCC followed by litigation or arbitration.

In addition, shippers question the need for collective freight classification in today's deregulated environment. Shippers and carriers are free to negotiate bilaterally over freight classification and freight rates. To the extent that an overall classification is useful, shippers and carriers can use the existing classification and all future changes can be negotiated individually without collective action or an antitrust exemption.

The second form of motor carrier collective action that takes place under Section 13703 involves motor carrier "rate bureaus". These organizations' motor carrier members establish "class rates" that are widely used as baseline rates for discounting in the marketplace. The rate bureaus also vote on periodic, collectively set increases in these baseline class rates. Here again, challenges to rate bureau decisions are possible

through STB litigation, but there is a clear incentive on the part of the motor carriers in rate bureaus to vote for baseline class rate increases.

Some shippers have enough leverage or sophistication to limit the impact of increases in NCC class ratings and rate bureau class rates through contracts. Other shippers with less marketplace leverage or sophistication are more vulnerable to rate increases based on collective carrier action. This is inconsistent with deregulation and not in the public interest.

The purpose of this filing is to bring these issues to the Commission's attention. NASSTRAC appreciates the opportunity to comment.

Respectfully submitted,

John M. Cutler, Jr.
McCarthy, Sweeney & Harkaway, P.C.
2175 K Street, N.W.
Suite 600
Washington, D.C. 20037

Attorney for National Small Shipments
Traffic Conference, Inc.

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BEFORE THE
SURFACE TRANSPORTATION



EX PARTE NO. 656

MOTOR CARRIER BUREAUS – PERIODIC REVIEW PROCEEDING

OPENING COMMENTS OF NATIONAL SMALL SHIPMENTS TRAFFIC
CONFERENCE, INC., AND NATIONAL INDUSTRIAL
TRANSPORTATION LEAGUE

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Nicholas J. DiMichael
Thompson Hine, LLP
1920 N Street, N.W., Suite 800
Washington, DC 20036
(202) 331-8800

Attorney for National Industrial
Transportation League

John M. Cutler, Jr.
McCarthy, Sweeney and Harkaway, P.C.
2175 K Street, N.W., Suite 600
Washington, DC 20037
(202) 775-5560

Attorney for National Small Shipments
Traffic Conference, Inc.

Dated: March 2, 2005

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I. INTRODUCTION

The National Small Shipments Traffic Conference, Inc. ("NASSTRAC") and the National Industrial Transportation League ("NITL" or the "League") (collectively, the "Shipper Associations") hereby submit their opening comments pursuant to the Board's Decisions served December 13, 2004 and January 21, 2005.

In this proceeding, the Board is considering whether it should terminate, renew, or renew subject to additional conditions the antitrust immunity of the National Classification Committee ("NCC") and a number of regional rate bureaus, including major rate bureaus such as Southern Motor Carriers Rate Conference, Inc. ("SMC"), Middlewest Motor Freight Bureau ("Middlewest"), Rocky Mountain Tariff Bureau ("RMB"), Pacific Inland Tariff Bureau ("PITB"), EC-MAC Motor Carriers Service Association, Inc. ("EC-MAC"), and others.

II. IDENTITY AND INTEREST OF NASSTRAC AND NITL

NASSTRAC is a trade association consisting of regular members who ship, control or direct the shipment of freight, such as shippers and 3PLs, and associate members such as carriers. For over 50 years, NASSTRAC has provided advocacy, education and other services to its members, including active participation in proceedings before the ICC and STB, other agencies, and the courts. NASSTRAC's principal focus is on parcel and smaller package shipments by companies of all sizes.

NITL is one of the oldest and largest national associations representing companies engaged in the transportation of goods in both domestic and international commerce. The League is almost 100 years old and has approximately 600 company members, ranging from some of the largest users of the nation's transportation system, to smaller companies engaged in the shipment and receipt of goods. Though its membership consists predominantly of shippers, the League has had motor, rail, air and water carriers as full members since 2001.

NASSTRAC and NITL were active participants in the last round of NCC and rate bureau antitrust immunity proceedings,¹ and are parties to the pending proceeding concerning the application of SMC for nationwide authority.² Many members of both Shipper Associations, as well as thousands of other shippers by motor carrier, pay rates based on the commodity class ratings established by NCC and the baseline class rates established by the rate bureaus.

¹ Section 5a Application No. 61 (Sub-No. 6), National Classification Committee – Agreement, (hereafter National Classification Committee) and Section 5a Application No. 118 (Sub-No. 2) et al., EC-MAC Motor Carriers Service Association, Inc., et al (hereafter EC-MAC).

² Section 5a Application No. 46 (Sub-No. 20), Southern Motor Carriers Rate Conference, Inc.

In their past comments, and in their comments in this proceeding, NASSTRAC and NITL support the need rely on competition as the determinant of motor carrier prices and service levels, as Congress intended in the Motor Carrier Act of 1980.³ Accordingly, antitrust immunity for collective carrier action should either be terminated or minimized.

It makes no sense in today's deregulated trucking environment to preserve anti-trust immunity for collective action that is actually or even potentially anticompetitive. Moreover, structural remedies that prevent abuse are preferable to remedies that depend on litigation for their effectiveness. Accordingly, the Board should go beyond the reforms previously adopted and should adopt the recommendations set forth below.

III. BACKGROUND OF THIS PROCEEDING

At issue here are two forms of motor carrier collective action that are holdovers from the era of cartel-based pricing and pervasive regulation that existed prior to 1980. Although pervasive regulation of the trucking industry is long gone, the NCC and the regional rate bureaus persist, and continue to influence motor carrier ratemaking in ways that distort the competitive market.

The process is as follows. Rather than establishing rates for many individual commodities, the motor carrier members of the NCC, with help from the NCC staff, collectively decide to group commodities together in classes based on their transportation characteristics, with density generally being the most significant characteristic. The NCC takes this information and publishes a tariff called the National Motor Freight Classification, or NMFC, which contains hundreds of class ratings for types of commodities rang-

³ See Central & Southern Motor Freight Tariff Assn. v. United States, 757 F.2d 301 (D.C. Cir.), cert. denied, 474 U.S. 1019 (1985).

ing from Class 50, generally covering the densest commodities, to Class 500, generally covering the least dense.

For their part, the regional rate bureaus take the commodity class ratings adopted by the NCC and publish class rates, which correspond to the class ratings. In general, the class rate for a commodity in Class 150 will be 50% higher than the class rate for a commodity in Class 100. The rate bureau class rates are the "baseline" rates for many, if not most, of the rates shippers actually negotiate and pay. Typically, shippers will negotiate "discounts" off these collectively-established class rates; discounts range from about 20% to as much as 70% or more off the class rate.

The process was analyzed at length by the ICC in Investigation of Motor Carrier Collective Ratemaking and Related Practices and Procedures, 7 I.C.C. 2d 388 (1991). At that time, discounts averaged around 40%. It has since been recognized that this system led to the undercharge epidemic, with defunct carriers and trustees in bankruptcy repudiating discount rates in order to pursue mass collection actions. The "spread" between discount rates and undiscounted baseline class rates proved irresistible to carrier and trustee plaintiffs, even though the undiscounted class rates they sought to collect were, by definition, uncompetitive and were consistently found unreasonable by the ICC.

Not only do the NCC and rate bureaus publish the NMFC and bureau class rate tariffs, but their members meet to collectively adopt changes to both the class ratings and the class rates. Four times a year, NCC panels consisting of roughly a dozen carrier members, and the full NCC, consisting of 60-100 carriers, meet to consider changes to commodity class ratings. Dockets for each of these meetings may include 20 or 30 pro-

posals, and a similar number of Review Matters, which may be docketed as proposals at a subsequent meeting. Shippers are allowed to attend and to speak, but have no vote.

The rate bureaus also meet collectively, and generally agree to annual General Rate Increases, or GRIs. The basis for these GRIs is not always explained, though the bureaus consider both actual industry cost increases, and "revenue need," i.e., profit enhancement.⁴

The NCC and the rate bureaus defend this system as helping to rationalize rate-making. The problem for shippers is that it also facilitates "stealth" rate increases. Such collectively-established rate increases take two forms. First, if the NCC increases the class rating for a commodity from, for example, Class 100 to Class 150, then the class rate on that commodity will increase by fifty percent. Second, a rate bureau may increase a class rate level through a GRI or otherwise, thus increasing the baseline rate used for discounting. The 50%-70% discount negotiated by a shipper may be unchanged, but with a higher baseline for discounting, the shipper's actual rate will rise. Today, there is no obligation on the part of a carrier serving a shipper to disclose that the shipper's rates have gone up for these reasons.

This system clearly gives the NCC and the rate bureaus, and their motor carrier members, an incentive to raise commodity class ratings and bureau class rates. Some shippers may never even know that motor carriers, acting collectively with antitrust immunity, have raised the shippers' rates. Other shippers may notice the rate increases but may be unable to avoid them because of the time needed to negotiate adjusted discounts, or to find substitute carriers. Even the largest shippers, who are able to negotiate con-

⁴ SMC operates more openly than other rate bureaus, allowing shippers to attend and be heard (though not to vote) at its meetings addressing GRIs, and providing more explanation than most on the basis for the GRIs.

tracts protecting them against most such increases, are not totally protected. Large and knowledgeable shippers with contracts may nevertheless receive bills for full undiscounted class rates. This may happen, for example, when a customer returns an item, at the manufacturer's expense, using a carrier with which the manufacturer has no discount agreement.

NASSTRAC and NITL members recognize that the prices of goods and services sometimes increase, either because of cost increases incurred by the supplier or because supply and demand support new prices for the goods or services being offered. The issue presented by this proceeding and its predecessors is whether it is in the public interest to permit such rate increases through collective carrier action with antitrust immunity, or whether it is better to rely primarily or exclusively on rate increases negotiated at arms length by individual carriers and shippers. Assuming, as we do, that sound public policy dictates the latter choice, the Board needs to consider barriers to the goal of minimizing collective ratemaking, and ways of achieving that goal. While the reforms the Board ordered in the last round of NCC and rate bureau proceedings were helpful in that regard, they did not go far enough. Therefore, the Board should either eliminate collective ratemaking or further reform the collective ratemaking process.

IV. ARGUMENT

A. Applicable Law, Policy and Precedent Support Eliminating or Further Reforming Collective Ratemaking

The trucking industry, unlike virtually any other industry in the country, has the ability to raise rates through commodity reclassifications and/or class rate increases with antitrust immunity. The purpose of these proceedings 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 further reform any exercise of the trucking industry's extraordinary collective rate-making authority that is not justified in today's deregulated marketplace.

Antitrust immunity with respect to pricing is extremely 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, markets are not workably competitive and where 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 operating 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,⁵ and 1996, when the ICC Termination Act of 1995⁶ 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).

⁵ Pub. L. No. 103-311, § 201 et seq., 108 Stat. 1683 (1994).

⁶ Pub. L. No. 104-88 (1995), 49 U.S.C. § 10101, et seq.

The logic underlying exemptions from the antitrust laws – that they are warranted to the extent 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, NASSTRAC and NITL have called for termination of antitrust immunity for the rate bureaus. We continue to believe that immunity is no longer needed. At a minimum, however, it is imperative that antitrust immunity be further reformed since NCC and rate bureau actions affect the rate structure of the motor carrier industry in ways that are anticompetitive. In other words, if antitrust immunity is to be preserved, it must be conditioned in such a way as to insure that the carrier members of the NCC and the rate bureaus cannot "game" the system.

There is nothing unfair about further 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, and there is no unfairness in eliminating or minimizing barriers to the workings of the competitive market.

Finally, to the extent that collective carrier action is preserved, the Board should give preference to structural remedies that prevent or deter abuses, over regulatory or litigation remedies that depend for their effectiveness on injured shippers shouldering the burdens of engaging lawyers and consultants, gathering facts, and going before an arbitrator, the Board, and/or a court for relief. Assuming that collective action is unobjec-

tionable absent vigorous (and burdensome) shipper opposition turns antitrust policy on its head. There should be no rebuttable presumption in favor of continued collective rate-making. In addition, such an approach gives carriers an enormous advantage. Through "business as usual," they can raise commodity classifications and base rates, secure in the knowledge that a large number of modest increases may not be challenged, even if cumulatively and over time, the increases represent significant distortions of the competitive market.

B. Antitrust Immunity for the Rate Bureaus Should be Eliminated Or Further Conditioned

In its decision served February 11, 2000 in EC-MAC, supra, the Board called on the rate bureaus to address the concerns discussed above by reducing their baseline or "benchmark" rates to competitive levels. The Board noted that 49 U.S.C. § 13701 re-quires collectively set rates to be reasonable. It did not rule out "default" discounts, but questioned the rate bureaus' attempt to rely on 35% automatic discounts for shippers with no other discount agreement. As the Board recognized, "it appears that the 'default' discounts would not apply if a shipper is given any other discount, no matter how small, and they might be revoked if a carrier or a bankrupt carrier's estate considered payment to be untimely." Decision served February 11, 2000, at 7.

In subsequent decisions in EC-MAC, the Board softened its position considerably. Commendably, the Board ordered that undiscounted bureau class rates may not be the basis for late-pay penalties. See the Decision served March 27, 2003 in EC-MAC, at 9-11.

However, the Board abandoned its call for a reduction in bureau class rate levels. It also refused to adopt a presumption that the collection of such rates is unreasonable,

and even refused to require the bureaus' "automatic" discounts to be made true minimum discounts. Instead, the Board adopted a "truth in rates" requirement, under which the carrier members of rate bureaus are to disclose discount ranges to shippers, and report their discount ranges to the Board annually. In other respects, the Board evidently concluded that shipper self-help remedies are adequate protection against collective carrier action with respect to bureau class rates and GRIs. See, e.g., the Board's Decisions served November 20, 2001 and March 27, 2003.

While the Board's reforms are helpful as far as they go, NASSTRAC and NITL respectfully submit that further conditions are needed. Further reforms would not weaken the financial position of the trucking industry. Since 2003, tighter capacity in the trucking industry has meant that LTL and TL motor carriers have been in a position to raise their rates and collect fuel surcharges. Indeed, these individual actions, which are subject to arms-length negotiations between carriers and shippers, comport far better with the intent of Congress in deregulating trucking than rate increases in baseline bureau class rates through collective, and largely secret, carrier action.

Under the circumstances, the Board should reconsider its refusal to adopt a rebuttable presumption of the unreasonableness of full undiscounted class rates, if antitrust immunity for rate bureaus is to continue. The rate bureaus and their members do not need rate increases through commodity classification increases or GRIs of baseline class rates. As detailed above, law and policy favor replacing collective ratemaking with individual ratemaking to the extent possible.

The Board should also make the bureaus' automatic discounts true minimum discounts, and it should make them mandatory. The voluntary system currently in use has

not worked, as shown by several rate bureaus' own filings. Specifically, EC-MAC, RMB and Midwest argued in the last round of rate bureau proceedings that infrequent or less informed shippers are protected by these rate bureaus' 35% discount programs. However, status reports filed May 27, 2003 by EC-MAC and RMB in Section 5a Application No. 118 (Sub-No.2), et al., and the status report filed May 23, 2003 by Midwest in Section 5a Application No. 34 (Sub-No. 10) disclose that the actual minimum discounts were as low as 20% for EC-MAC, and 25% for RMB and Midwest.⁷

Fewer and fewer shippers maintain large traffic departments. This is a tribute to the success of deregulation, which has made more shippers regard transportation as a service to be purchased as other services are. However, it has also increased the number of shippers vulnerable to little known and poorly understood collective carrier action immune from the antitrust laws.

In the last proceeding, the rate bureaus defended their practice of raising class rates not just to cover trucking industry cost increases, but also to increase carrier profit margins. The rate bureaus have defended this arrangement by arguing that smaller carriers lack the resources to analyze costs and revenue needs.

Producers of other goods and service manage without rate bureaus to analyze the price increases needed to cover cost increases and enhanced profits. NASSTRAC and NITL are therefore skeptical about this argument. At best, it might support the use of rate bureau staffs to gather and analyze data on industry costs and cost projections. However, antitrust immunity for collective action should not extend beyond cost recovery to profit enhancement, which should be driven by the competitive market. Accordingly, the

⁷ To its credit, SMC reported no discounts among member carriers lower than the 20% minimum discount SMC adopted several years ago.

Board should require the rate bureaus' agreements to be modified to prohibit agreement on increases in bureau class rates to enhance member carriers' profits.

Finally, the Board should require more transparency. The other bureaus should follow the lead of SMC by providing public notice of proposed class rate increases, and an opportunity for interested parties to comment at and/or attend the meetings where these decisions are made by bureau members. All rate bureaus, including SMC, should provide fuller advance notice to the public of the basis for proposed increases in bureau class rates. The Board required such advance notice by NCC of information underlying proposed commodity classification changes. This notice has helped shippers identify errors of fact and errors of analysis prior to NCC meetings. Similar transparency would help shippers assess bureau class rate increases.

C. Antitrust Immunity for the NCC Should be Eliminated or Further Conditioned

In its prior decisions approving continued antitrust immunity for the NCC, the Board imposed two conditions – that the NCC provide more data about the justification for its proposals, and that there be an arbitration option, in addition to the option of a protest filed with the STB, for dispute resolution. So far as NASSTRAC and NITL are aware, the arbitration option has not yet been tried. The requirement of additional data has been helpful.

However, problems remain. Like the rate bureaus, the NCC's members and the trucking industry generally benefit when commodity class ratings are increased. In the last proceeding, the NCC conceded that the number of increases in class ratings far exceeds the number of decreases.

NCC procedures appear to favor increases in class ratings. A single letter or fax from a member of NMFTA is apparently enough to trigger an investigation by the NCC staff. The carrier (whose identity will not be revealed) merely has to advise the NCC Staff that it handled a shipment of a commodity whose density appears to support an increase in the current class rating. The NCC Staff will then send out surveys to NASS-TRAC, NITL, and known shippers of the commodity in question, seeking information about the transportation characteristics of the commodity.

These inquiries generally come as a surprise to shippers, since carriers are usually actively soliciting their business at the current class rating.

The surveys are also extremely burdensome, taking substantial time to fill out completely. Nor are they limited to the specific commodity about which a carrier has raised a question. If a carrier notifies NCC that it handled a shipment of Revere 10-inch frying pans from a particular distributor to a particular retail outlet, specifics of that shipment of that commodity are not sought from its manufacturer. Instead, all manufacturers and shippers of all pots and pans of all sizes may be asked to analyze and report to the NCC on the density, handling characteristics, stowability and liability experience of their wares. If they don't "cooperate," they may face an across-the-board class rating increase, based on the NCC Staff's own research.

There are several problems with this approach. First, carriers have no incentive to report to the NCC when shipments have transportation characteristics justifying a lower class rating. Second, there is a clear imbalance between the costs and burdens confronting a carrier who wants to initiate a proceeding (basically, an anonymous "tip"), and the costs and burdens confronting affected shippers. The shippers are asked to provide reams

of data, which may be available only after many hours of work, as to a broad range of products that may include hundreds of products about which no carrier inquiry has been received by NCC.

In addition, shippers have no anonymity, and they must therefore be concerned about disclosure of commercially sensitive data concerning what they make and how and where they ship it. They may also have to travel to NCC meetings to defend a status quo that their own carriers apparently find satisfactory.

Third, the decision makers are all carriers and the NCC Staff is answerable to a carrier organization whose members benefit from increased class ratings.

Compounding these problems are the standards the NCC uses. For many commodities (those without unusual handling, stowability or liability characteristics), the class rating is a function of density. The NCC uses Density Guidelines,⁸ as follows:

⁸ These Guidelines are part of the NCC's Policies and Directives which are available on the NCC's website at www.nmfta.org/directives.pdf, and at www.nmfta.org/DensityValueGuidelines.pdf. The NCC also has Value Guidelines that are non-linear, favoring carriers.

NATIONAL CLASSIFICATION COMMITTEE DENSITY GUIDELINES

Minimum Average Density (in pounds per cubic foot)	Class
50	50
35	55
30	60
22.5	65
15	70
13.5	77.5
12	85
10.5	92.5
9	100
8	110
7	125
6	150
5	175
4	200
3	250
2	300
1	400
Less than 1	500

Note that this is a non-linear scale. As density falls, class ratings and bureau class rates rise quickly, with a similar result for discounted rates for many shippers. This benefits carriers. However, as density rises, class ratings fall far more slowly, resulting in slower reductions in the bureau class rates that are the baseline for discounting in the marketplace. This also benefits carriers.

To illustrate, if a commodity currently rated at Class 100, based on a minimum average density of 9 pounds per cubic foot, is found after research by the NCC to have an actual minimum average density of 6 pounds per cubic foot, the commodity will be rerated from Class 100 up to Class 150, leading to a 50% increase in the applicable bureau class rate. However, if shippers were to come in and show a change in another Class 100 commodity from 9 pounds per cubic foot to 12 pounds per cubic foot, the commodity

would be rerated from Class 100 down to Class 85, leading to a 15% reduction in class rates, even though the change in both cases is 3 pounds per cubic foot in minimum average density.

Not only are NCC's procedures and standards skewed in favor of carriers and against shippers, but NCC proceedings often involve small changes as to 20 or 30 different commodities. On occasion, a large increase in a large number of commodities may be proposed, energizing shippers. NASSTRAC and NITL note that manufacturers of lighting fixtures have expressed their opposition to renewed antitrust immunity for the NCC in a number of letters filed in this proceeding. We share their concerns.

However, there are also many instances in which, by keeping the increases varied and modest, NCC can avoid shipper opposition. Few shippers today have employees who follow NCC dockets, and large shipper associations like NASSTRAC and NITL must devote most of their resources of the interests of all their members. They lack the resources to represent shippers of chainsaws, motorcycle saddles, footlockers and sneeze guards, etc., in May, shippers of animal antlers and soap dispensers, etc., in August, and shippers of ac adapters, boilers and office counters, etc., in November. The STB should therefore favor structural remedies in proceedings like this one that will eliminate or minimize potential abuses.

The NCC can be expected to make two arguments in favor of the status quo. One is that shippers can protect themselves through contracts. Many shippers have done this, but it makes no sense to tolerate, let alone preserve, a system that so clearly enables carriers to act collectively, with antitrust immunity, to further their own interests merely because many knowledgeable shippers have elected to protect themselves through con-

tracts. Smaller and less knowledgeable shippers' interests are not irrelevant, and even large shippers may not always be able to enter contracts covering all of their freight.

Caveat emptor may be an acceptable rule of commerce in markets characterized by full and free competition, but it should not be the Board's guiding principle in determining the rules for collective carrier action with STB-approved antitrust immunity.

Another likely argument from NCC is that it needs to increase some shippers' commodity class ratings so other shippers don't pay too much. This would be a more convincing argument if the NCC were lowering as many class ratings as it is raising. Even then, however, the fundamental question remains: why should carriers, acting collectively with antitrust immunity, decide which shippers need to pay higher freight rates on which commodities, when these determinations can be left to the free market?

What most shippers want is for their rates to be determined by competition and by arms-length negotiations, and not through carrier price-fixing by an anachronistic remnant of a long-abandoned regulatory model.

NASSTRAC and NITL therefore urge the Board to terminate antitrust immunity for the NCC. Antitrust immunity is not necessary for freight classification, or the National Motor Freight Classification, to continue to be used, subject to future changes negotiated by shippers and carriers. However, if antitrust immunity is to be maintained for the NCC, further conditions need to be imposed. The Board has in the past considered shipper voting participation in NCC proceedings, possibly including a 50-50 mix of carrier and shipper decisionmakers. This recommendation was not adopted, but it should be reconsidered.

A possible alternative to a continuing shipper presence in all NCC actions would be the formation of an advisory panel of shipper and carrier representatives, under STB auspices and with antitrust immunity, to consider reforms beyond the access to data and arbitration reforms previously ordered by the Board. Such a group could attempt to develop procedures that address the problems of disparate burdens on carriers (light) and shippers (heavy). The group could also explore the possibility of a linear scale of density guidelines, as well as other points of contention between shippers and carriers.

There is a precedent for such an advisory group. Several years ago, representatives of motor carrier members of the NCC met over a period of several months with representatives of NASSTRAC and NITL to develop a new bill of lading. The result of these negotiations was the "Uniform Straight Bill of Lading" that currently appears in the NMFC.

Whether or not it authorizes formation of a carrier-shipper advisory group, the Board should direct the NCC to adopt fair density guidelines, to modify its investigation procedures so shippers know the precise issues involved (e.g., 10 inch Revere frying pans rather than all pots, pans and cookware from all manufacturers), and to further simplify and facilitate shipper participation.

V. CONCLUSION

For the foregoing reasons, NASSTRAC and NITL urge the Board to terminate antitrust immunity for the rate bureaus and the NCC, or to condition their continued immunity as discussed in these Opening Comments.

Respectfully submitted,

Nicholas J. DiMichael
Thompson Hine, LLP
1920 N Street, N.W., Suite 800
Washington, DC 20036
(202) 331-8800

Attorney for National Industrial
Transportation League


John M. Cutler, Jr.
McCarthy, Sweeney and Harkaway, P.C.
2175 K Street, N.W., Suite 600
Washington, DC 20037
(202) 775-5560

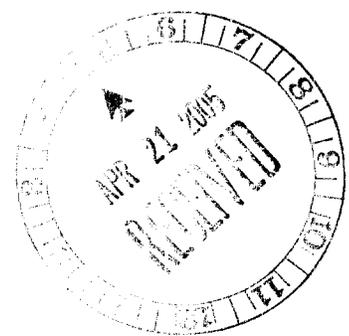
Attorney for National Small Shipments
Traffic Conference, Inc.

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Public Record MOTOR CARRIER BUREAUS – PERIODIC REVIEW PROCEEDING

REBUTTAL COMMENTS OF NATIONAL SMALL SHIPMENTS TRAFFIC
CONFERENCE, INC., AND NATIONAL INDUSTRIAL
TRANSPORTATION LEAGUE

The National Small Shipments Traffic Conference, Inc. ("NASSTRAC") and the National Industrial Transportation League ("NITL") (collectively, the "Shipper Associations"), hereby file their rebuttal comments in this proceeding.

I. INTRODUCTION

Every five years, the Board is required by law to consider whether continued anti-trust immunity for the NCC and rate bureaus is still in the public interest, and, if not, whether to terminate or further condition that immunity. The issues presented in this proceeding cannot be considered in isolation. There have been several highly relevant developments since the Board concluded its last antitrust immunity proceeding, which was commenced in 1997.

First, SMC is seeking not just five more years of antitrust immunity, but approval of its application to operate nationwide.

Second, several rate bureaus have folded or appear to be in poor financial condition, and there may be fewer operating rate bureaus even if nationwide authority for SMC is denied.

Third, if nationwide authority for SMC is granted, the ability of other rate bureaus to survive would be even more doubtful. It is possible that SMC, its CzarLite class rate base and its ancillary software and services would come to dominate motor carrier rate-making. Reduced competition among rate bureaus would increase the need for further reforms.

Fourth, trucking industry capacity has decreased relative to demand. As a result, more carriers are negotiating higher rates and charges without regard to rate bureau general rate increases. And carriers such as FedEx and UPS have demonstrated the ability to operate in a highly profitable way without using collective ratemaking at all.

Fifth, increasing freight volumes reflect a growing economy in which more and more shippers, unfamiliar with the details of carrier pricing. Such shippers may be fully aware that their rates are subject to overt increases resulting from arms-length negotiations following a carrier rate increase request. However, many such shippers are unaware that their rates are also subject to covert rate increases resulting from NCC increases in the class ratings of their commodities, or rate bureau increases in the baseline bureau class rates to which their discount percentages are applied, or both.

Sixth, pressure on carriers for rate increases is high and rising, due to increased costs for fuel, insurance, additional drivers and driver pay increases, security screening, cleaner diesel and cleaner truck engines, etc. Rate increases resulting from collective car-

rier action could provide a non-market based means by which carriers could seek to recover such costs.

This Periodic Review Proceeding offers an opportunity to consider whether conditions imposed in the last such proceedings still provide adequate protection against anticompetitive carrier conduct in light of changed and changing conditions. However, in their comments to date, the NCC and rate bureaus have simply ignored the foregoing considerations.

Instead, they argue that they have not violated their agreements, that they perform various useful functions, and that any additional conditions would destroy the current system of collective carrier ratemaking. These arguments would not justify five more years of the status quo even if they were correct.

II. CONGRESS HAS NOT MANDATED CONTINUED ANTITRUST IMMUNITY

The NCC goes so far as to suggest that this proceeding can have only one outcome, contending that "[t]he public interest value of the motor carrier freight classification cannot be disputed." Reply Argument at 6. NCC relies on the fact that Congress has not yet eliminated NCC and rate bureau antitrust immunity by statute.

This argument is specious. Congress has also preserved the power of the STB to terminate (or condition) antitrust immunity administratively. The Shipper Conferences also note that, in its reply comments in this proceeding, the Department of Transportation expressed its support for termination of antitrust immunity for motor carrier collective ratemaking. We agree with DOT.

The principal result of NCC and rate bureau activity is price fixing, which would be a per se violation of the antitrust laws but for the antitrust immunity at issue in this

proceeding. The right of individual carriers to offer discounts based on competitive forces does not change this fundamental fact, particularly where the baseline rates are not competitively set, and where the carriers refuse to forego the right to charge full undiscounted rates.

Indeed, continued antitrust immunity would be difficult to justify under more lenient rule of reason standards. Under those standards, the issue is not whether there is some pro-competitive effect from collective action by competitors. It is rather whether there are such extensive pro-competitive effects as to outweigh any anticompetitive effects. See National Society of Professional Engineers v. United States, 435 U.S. 679, 688-89 (1975).

In those few instances in which antitrust immunity has been allowed, it has been disfavored and narrowly construed, based on sound legal and policy considerations. See, e.g., Silver v. New York Stock Exchange, 373 U.S. 341 (1963); American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp., 456 U.S. 556 (1982) ("a standard setting organization ... can be rife with opportunities for anticompetitive activity"); and Indian Head, Inc. v. Allied Tube & Conduit Corp., 817 F.2d 938, 943-44 (2d Cir. 1987), aff'd, 486 U.S. 492 (1988).

Under the circumstances, then, the fundamental issue in this proceeding is whether the status quo represents the way of pricing truck transportation services that best comports with the public interest. The issue can be addressed in two parts. First, assuming there are public benefits to have a national motor freight classification and having one or more baseline class rate tariffs, can those benefits be maintained without antitrust immunity for collective carrier action? Second, if antitrust immunity is not termi-

nated, can the risks of anticompetitive conduct by carriers be further reduced without losing benefits offered by a classification and base rates? The answer to each of these questions is yes.

III. ELIMINATION OF ANTITRUST IMMUNITY IS IN THE PUBLIC INTEREST

To the extent that it addresses the issue of termination of its antitrust immunity, the NCC bases its arguments on the alleged efficiency of motor carrier ratemaking based on a limited number of freight class ratings, and bureau tariffs containing corresponding baseline class rates. However, these arguments assume that these benefits would be lost if the NCC were to lose its antitrust immunity. This assumption is erroneous.

If the NCC were to lose its antitrust immunity, the National Motor Freight Classification, with its class ratings of thousands of commodities and commodity groups, would not vanish. Carriers could still quote rates based on the NMFC, just as they do today, and shippers could accept, reject, or negotiate modifications in Classification based rates, just as they do today. The Board recognized this point years ago in its decision served December 18, 1998 in Section 5a Application No. 118 (Sub-No. 1), EC-MAC Motor Carriers Service Association, Inc., Et. Al:

Indeed, if all that carriers needed were a baseline to which they can refer when making individual pricing decisions, they already have it: the class rate on any given commodity as of the date of this decision (or one week or one month or one year before this decision).

Slip opinion at 6. In a footnote to the quoted passage, omitted here, the Board also disposed of the argument that antitrust immunity is needed for interline rate setting.

It is true that if, in the future, changes in one or more commodity class ratings were thought necessary, there would be no NCC, acting with antitrust immunity, to make

those changes. But this would not make changes impossible. If a carrier wanted to change a current class rating, it would need to do so openly, by negotiating the change it sought with shippers, who could agree, disagree or negotiate a compromise.

This process routinely occurs in negotiations between shippers and carriers of other modes and between buyers and sellers of goods and services across America every day. There is nothing extraordinary about it. What is extraordinary is the motor carrier freight classification process, which is a complex, expensive anachronism that is unintelligible to most shippers. Railroads, air carriers, couriers and water carriers, not to mention millions of other enterprises populating the marketplace, obviously manage well with no collective ratemaking. The trucking industry can also do without it.

The rate bureaus make the same mistake. For example, the reply comments of Rocky Mountain Tariff Bureau state (at 4): "Further, the Shipper Associations pay no serious attention to the fact that elimination of antitrust immunity, or severe limitations on it, would heighten the transportation costs of their shipper members, and of the carriers with which they do business."

Just as the NCC contends that the end of its antitrust immunity would mean the end of the NMFC or of freight classification generally, the rate bureaus contend that the end of their antitrust immunity would mean the end of bureau class rates or of baseline rates generally. Neither contention is true.

Many discounts today are based on individual motor carriers' nationwide tariffs, or on shipper produced rate compilations, or on bureau class rate tariffs or products such as SMC's CzarLite. However, as with the NMFC, shippers and carriers are free to accept, reject or modify these baseline rate guides. As NASSTRAC has acknowledged in the

past, the use of baselines has efficiency benefits and is common in shipper carrier contracts.

It does not follow, however, that if antitrust immunity were terminated, the use of baselines for comparison purposes would end. Instead, shippers would simply identify an existing baseline rate set (e.g., the 2005 Yellow or Roadway tariff or a 2005 edition of CzarLite the shipper had purchased), and call for carriers to provide competitive bids based on that common baseline. This does not need to "heighten transaction costs" at all, and could reduce them, since shippers would be better able to track changes in rates and charges over time.

To be sure, one thing would change. With the passage of time, carrier revenue needs can be expected to rise, due to increased operating costs, insurance premiums, security requirements, compliance programs, efforts to attract and retain drivers, etc. Without antitrust immunity, there would presumably be no rate bureaus and no collectively-set rate increases.

The rate bureaus attack NASSTRAC and NITL on this point, accusing the Shipper Associations of being opposed to any increases in carrier profits. Middlewest Motor Freight Bureau points to the National Transportation Policy's reference to adequate profits for well-managed carriers, and argues that Congress in Section 13703 contemplated profit enhancement through collective ratemaking (Reply Comments at 7), while acknowledging in a footnote that Congress amended 49 U.S.C. § 13703 in 1995 to eliminate "reasonable profit" as an element of the reasonableness of collectively set rates (*id.*).¹

¹ In that same footnote, Middlewest cites 49 C.F.R. Part 1139 for the proposition that GRIs should be based on revenue need including reasonable profits, but that regulation has not been amended since 1988, is no longer observed, and could not trump the statute if it were.

SMC goes even farther. Its reply comments include the following statement:
"The Shipper Associations' myopic view of motor carrier costing as recovering only costs without any contribution to profit ultimately would lead to the demise of the carriers to the direct detriment of shippers." Reply Statement of Daniel Acker at 4.

In fact, NASSTRAC and NITL understand that carriers sometimes need to raise rates, and that rate increases to preserve or enhance profit margins may be legitimate. The question, however, is how this should be done. The bureau reply comments confuse the recovery of profits, which we do not oppose, with the recovery of profits through collective carrier action immune from antitrust exposure, which we do oppose. Nothing in the National Transportation Policy even mentions collective carrier action, much less establishes a Congressional preference for collective action over competition.

If antitrust immunity were terminated, individual carriers seeking rate increases to cover increased costs, profits or both would need to inform their customers of the proposed increase. The proposed increase could be individually tailored or include many shippers, and could take the form of an increase in the baseline rates or a reduction in the carrier's discount. The shipper would accept the increase, look elsewhere, or negotiate a compromise, as is done throughout the rest of the deregulated economy.

Over time, the combination of collectively-set holdover base rates and negotiated rate increases would change motor carrier ratemaking. The proportion of motor carrier rates set collectively would decrease, and the proportion set through negotiations would increase.

Such an approach is plainly preferable to the status quo. Even if GRIs are voted on with full disclosure of underlying costs, inflation indices (if any) and notice to the uni-

verse of affected shippers (a standard even SMC does not meet), the GRI is voted on only by the bureaus' carrier members. In addition, while GRI decisions may be communicated to shipper members on mailing lists or through websites, there is no legal requirement for carriers to notify shippers when discounted rates increase as the result of GRIs, comparable to the "truth in rates" notice requirement the Board adopted for ranges of discounts.

NASSTRAC and NITL recognize that pervasive discounting may temper the impact of classification changes and GRIs, and that knowledgeable shippers may be able to negotiate complete, if temporary, protection against such increases by providing that their negotiated rates will not change during the term of their contracts. However, termination of NCC and rate bureau antitrust immunity would bring these covert rate increases into the open, allowing competition to set more rates.

Motor carrier ratemaking without carrier antitrust immunity would not require the end of the current system of freight categorized by class rating and discounting off base-line rates. Termination of antitrust immunity would, however, lead to more rates for more shippers based on competitive forces rather than collective carrier action, and to increased openness in motor carrier ratemaking. Because the benefits of such a change would far outweigh its costs, the public interest supports termination of antitrust immunity for NCC and the rate bureaus.

IV. ADDITIONAL CONDITIONS ON NCC AND RATE BUREAU IMMUNITY WOULD BE IN THE PUBLIC INTEREST

NASSTRAC and NITL argued unsuccessfully for an end to immunity in the prior round of NCC and rate bureau reform proceedings, as various carrier-group reply comments are quick to point out. While termination of antitrust immunity is fully justified in this proceeding for reasons set forth above, the Shipper Associations also urge the Board,

in the alternative, to impose further conditions on NCC and the rate bureaus as discussed in our prior comments. The counterarguments of the NCC and rate bureaus are specious.

NCC

The NCC's attitude seems to be that if it can attack every concern expressed in the Shipper Associations' comments, it can ignore recommended improvements in NCC operations. The thrust of NCC's reply comments is that its actions have nothing to do with ratemaking, that the NCC orders classification reductions as often as it orders increases, and that NCC standards do not favor carriers. It is wrong on all counts.

NCC cites a study, based on figures from the 1990s, for the proposition that class rating increases are not more frequent than decreases. Specifically, 784 NCC proposals out of 1,506 involved rating changes (the other proposals are said to have involved clarifications, packaging matters, etc. that are irrelevant here). Of these 784 proposals, 307 involved increases, 252 were mixed (i.e., they involved increases and decreases) and 225 involved reductions. Reply Statement of William Pugh at 1.

Obviously, the wild card here is the "mixed" category. If those docket items were predominantly increases, then 71% of the total number of docket items involved increases in whole or in large part. Clearly, 71% of these changes had some adverse impact on shippers. Conspicuous by its absence is any suggestion by NCC (which presumably has the details) that those mixed items involved predominantly class rating decreases, or increases and decreases in equilibrium (which would mean more increases overall than decreases, since there were more unmixed increases than decreases).

Also conspicuous by its absence is any analysis of dockets since the 1990s, i.e., the last 5 years of NCC's operations. NCC's reliance on such dated and equivocal (at best) analysis is not reassuring.

NCC goes on to point out that shippers as well as carriers may docket items for NCC consideration. Pugh Reply Statement at 4. No information is provided on the success rate of the shippers' proposals, but it bears mentioning that the same 1990s study on which NCC relies to argue that increases are not more common than decreases also analyzed the source of the proposals. NCC's analysis indicated that 62% of the classification proposals came from carriers. It is a safe bet that in few, if any, of those proposals by anonymous carriers, was the carrier asking NCC for a lower commodity class rating.

Notably, NCC does not deny that an "anonymous tip" by a single carrier is all it takes to institute a classification change proceeding. Rather, NCC argues that anonymity is necessary to protect carriers from retaliation. Even if the identity of the carrier seeking the change needs to be protected, it does not follow that the number of carriers supporting a change, or their familiarity with the freight, is irrelevant. NCC also does not deny that a single carrier communication, by a carrier whose experience need not be shown to be representative or accurate, can be enough to initiate a classification change proceeding.

Shipper anonymity is said to be readily available, but this is true only if shippers are content to have their arguments and evidence presented by the NCC Staff, and if it is assumed that the NCC Staff does not disclose information sources within NCC. Few shippers are comfortable with these arrangements, and those that appear at NCC meetings to argue their own cases must do so openly, with significant disclosure of facts about their freight.

NCC goes to great lengths in attempting to rebut the Shipper Associations' concerns about standards that favor carriers, and in particular, NCC's non-linear density guidelines, which raise class ratings more quickly as density falls than they lower class ratings as density rises. See the Pugh Reply Statement at 8-9. (SMC Witness Acker goes out of his way to support the NCC (Reply Statement at 3-4)).

However, neither witness disputes the Shipper Associations' analysis. Rather, both concede that it is correct, but argue that NCC should penalize lighter freight more than it rewards denser freight because this approach is necessary to maintain carrier revenues. NCC Witness Ringer proceeds to point out that freight in general is becoming less dense as commodities become lighter and use lighter packaging. Reply Statement at 22.

The upshot of all this is that shippers should not be surprised that their class ratings and class rates and discount rates are rising. This is the way the system is designed to work.

NCC Witness Ringer ridicules the Shipper Associations discussion of a hypothetical request for a classification proceeding based on a hypothetical carrier's communication regarding whether a shipment of a specific item – Revere 10 inch frying pans – is thought to lack the density necessary to warrant its class ratings. However, his discussion (Reply Statement at 14-15) simply provides more confirmation of the point NASSTRAC and NITL sought to make.

Witness Ringer concedes that, even if the issue presented to the NCC merely involved one transportation characteristic of one specific item, the NCC would seek information as to all transportation characteristics of all commodities covered by the relevant NMFC Item from all manufacturers of those items. This is absurd, and demonstrates the

imbalance in burdens about which the Shipper Associations complained in their opening comments.

The NCC makes much of shippers' ability to resolve disputes as to individual classification determinations through arbitration or protests. These remedies are necessary but not sufficient, since they entail additional burdens and legal fees, and have a narrow rather than structural focus. Shippers want their rates to be set through negotiations in a competitive marketplace, not through proceedings and appeals.

Finally, the NCC argues that shippers' economic self-interest necessarily disqualifies shippers from voting on freight classification issues (Pugh Reply Statement at 10), while vigorously denying that economic self-interest would ever influence carrier or NCC Staff classification actions (*id.* at 7). The NCC cannot have it both ways.

There is ample evidence in the record of this proceeding that the status quo with respect to NCC freight classification requires change. If NCC antitrust immunity is to be preserved, the Board should establish an advisory group as called for by the Shipper Associations, and it should order corrective action by the NCC.

Rate Bureaus

For their part, the rate bureaus are as ready to make "straw man" arguments as the NCC, and as unreliable in their defense of the status quo. For example, in arguing against the Shipper Associations' suggestion that full undiscounted class rates should be presumed unreasonable, Rocky Mountain Tariff Bureau contends that this "is tantamount to terminating collective ratemaking since carriers would not participate in a system in which any product of their efforts was presumed to be unreasonable." Reply Comments at 4.

For any rate bureau to defend full undiscounted class rates as presumptively reasonable rather than presumptively unreasonable in today's environment is astonishing. According to the rate bureaus' own May 2003 status reports, discounts were as high as 83%.

Nor is Rocky Mountain alone. Witness Acker challenges the basic connection drawn by the Shipper Associations and the STB between the system of high discount rates and the undercharge epidemic, saying that "class rates were never found to be uncompetitive, unreasonable or contrary to the public interest." Reply Statement at 2.

The rate bureaus are incorrect. The leading case here is Georgia-Pacific Corp. – Petition for Declaratory Order, 9 I.C.C. 2d 103 (1992), aff'd. sub nom Oneida Motor Freight, Inc. v. ICC, 45 F.3d 503 (D.C. Cir. 1995). The Commission there explained:

In due course, various "corrected" freight bills were delivered to Georgia-Pacific, and payment for alleged undercharges in ever increasing amounts were demanded. Most of the corrections were based on either Middle Atlantic Conference class rates or, in a few instances, New England Motor Freight Bureau class rates.

9 I.C.C. 2d at 109, footnote omitted. Of course, the Commission went on to find those bureau class rates uncompetitive, unreasonable and contrary to the public interest.

Rocky Mountain cites this very decision for the proposition that rates cannot be found unreasonable unless they exceed market cluster of rates used for comparison. However, the rate bureaus have already claimed that their members no longer charge full undiscounted class rates to any shipper. And, of course, as the Board pointed out early in the last rate bureau reform proceeding:

Thus, the 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 ratemaking process.

EC-MAC, *supra*, decision served December 18, 1998 at 7.

The rate bureaus also resist the Shipper Associations' call for true automatic minimum discounts, even though they cannot deny that their voluntary minimum discount programs have not worked. The defense offered by Middlewest's CEO, Jeffrey Michalson, would permit any bureau carrier to offer a 5% discount off full bureau class rates, or even 0% discount rates. The latter example would bring us full circle: actual rates would be precisely the rates set collectively by a rate bureau, with individual carrier action absent.

The goal of the Shipper Associations' prior recommendation was not to force reductions in undiscounted bureau class rates (that option having been rejected by the Board) but to make sure that such rates serve only as baseline rates, and are never actually collected. The rate bureaus' comments in this proceeding show why this goal is now more pressing than ever.

In addition, if minimum discounts are to become more rare, it is all the more important for the rate bureaus to explain the basis for their GRIs. To what extent are they designed to cover cost increases, and what cost calculations underlie the proposed rate increase? Are fuel cost increases being recovered?

Only SMC offers details, and it has not been forthcoming on the matter of index adjustments, if any. EC-MAC's skeletal comments ignore this and other issues. The Rocky Mountain, Middlewest and PITB replies are silent.

The Shipper Associations have already addressed the deficiencies in the rate bureaus' defense of collective ratemaking for profit enhancement. Essentially, the rate bureaus' defense is that they have always used collective ratemaking for that purpose, and that if laws supporting that approach are now gone, at least no laws prohibit collective profit enhancement with antitrust immunity.

To reiterate, the Shipper Associations do not oppose carrier profit enhancement. The trade press indicates that the trucking industry is enjoying healthy returns as a result of reduced capacity. However, collective ratemaking should, at most, be used only for cost recovery, and today's rising freight rates demonstrate that there is no need for profit enhancement through collective rate increases.

Finally, as noted in the Shipper Associations' reply comments, the Board and the public would benefit from knowing more about the membership, staffing, operations and finances of the rate bureaus, if their antitrust immunity is to be maintained. Some have informative websites, like SMC's, but even SMC resists disclosure about its financial health. At the other extreme, EC-MAC and some other rate bureaus do not maintain websites, and provide little or no public information. This should change.

V. CONCLUSION

For the reasons set forth above and in their prior comments, the Shipper Associations urge the Board to terminate the antitrust immunity of NCC and the rate bureaus. The result would benefit the public interest in a competitive but still orderly trucking marketplace. If the Board elects not to do so, it should, at a minimum, further condition the immunity of NCC and the rate bureaus to reduce their incentives and opportunities for anticompetitive conduct.

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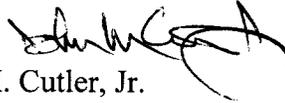
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Respectfully submitted,



John M. Cutler, Jr.
McCarthy, Sweeney & Harkaway, P.C.
2175 K Street, N.W., Suite 600
Washington, DC 20037
(202) 775-5560

Nicholas J. DiMichael
Thompson Hine, LLP
1920 N Street, N.W., Suite 800
Washington, DC 20036
(202) 331-8800

Attorney for National Industrial
Transportation League

Attorney for National Small Shipments
Traffic Conference, Inc.

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