

BEFORE THE  
ANTITRUST MODERNIZATION COMMISSION

COMMENTS OF  
SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC.

IMMUNITIES AND EXEMPTIONS  
SECTION 13703(a) OF 49 U.S.C.  
MOTOR CARRIER EXEMPTION

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Southern Motor Carriers Rate Conference, Inc. (SMC) is an association of motor carriers authorized to transport freight in interstate commerce. In addition to the products SMC provides to the transportation community to facilitate the pricing of motor carrier transportation services, its member motor carriers, pursuant to a collective ratemaking agreement initially approved by the former Interstate Commerce Commission as Section 5a Agreement No. 46, establish a baseline of class rates applicable in the so-called Southern Territory. That region encompasses the States of Alabama, Florida, Georgia, Kentucky, Louisiana (East of the Mississippi River), Mississippi, North Carolina, South Carolina, Tennessee and Virginia. Additionally, SMC has ratemaking authority between the Southern Territory and certain other defined regions. The baseline of class rates is part of the pricing mechanism and used by carriers and shippers for negotiating the discounts which establish the rates agreed to between the parties to transport the involved shipments. SMC's collective ratemaking agreement was most recently approved for renewal by the Surface Transportation Board (STB) in its decision served on October 16, 2003, in a consolidated proceeding entitled Section 5a Application No. 118 (Sub-No. 2), et al., EC-MAC Motor Carriers Service Association, Inc., Et Al. (not published)

The so-called Section 5a Agreements of the extant collective ratemaking organizations currently are governed by the provisions of Section 13703(a) of 49 U.S.C. However, as was the requirement of former Section 5a of the Interstate Commerce Act, in order to be approved, the STB must conclude that the Agreement is in the public interest. (See Section 13703(a)(2)). That determination is made by concluding that the Agreement will further the objectives of the National Transportation Policy (NTP) now found in Section 13101 of 49 U.S.C. (See Florida Specialized Carriers Interstate Rate Conf., 355

I.C.C. 623 (1977)). Included among the goals of the NTP are the encouragement of fair competition and reasonable rates for transportation by motor carriers of property; and the implementation of a variety of quality and price options to meet changing market demands and the diverse requirements of the shipping public. (Sections 13101(2)(B) and (D) of 49 U.S.C.).

As pertinent, as identified in Section 13703(a), the principal collective activities of SMC involve the establishment of rate adjustments of general application based on industry average costs, through routes and joint rates, rules, divisions, and procedures for the joint consideration, initiation, or establishment of those matters. Any such collective action taken regarding rates and related matters is subject to the reasonableness standard set forth in Section 13701(a). Moreover, under Section 13703(a)(5), the STB is authorized to suspend and investigate the reasonableness of any rate, rule, classification, or rate of general adjustment made pursuant to an approved agreement. As to the procedures to be utilized in taking collective actions, the regulatory agency may require compliance with reasonable conditions to assure that the process is consistent with the NTP. (Section 13703(a)(3)). Further, under Section 13703(c) the STB can review an approved agreement at any time, upon its own motion or upon request. As a result of such review the STB can approve, deny, end, or change the approval, or prescribe or change the conditions on which approval is granted. (Section 13703(c)). SMC has operated under the procedures approved by and subject to the jurisdiction of the former Interstate Commerce Commission (ICC), and presently the STB, for over 50 years.

The General Rate Committee (GRC) is the member carrier body which administers SMC's approved collective ratemaking procedures in the course of the open,

public meetings at which the authorized activities are conducted. Notice of all public meetings of the GRC is given at least 15 days prior to the meeting date. Although not required under its Agreement, at the meeting any person in attendance is provided a copy of the same information that the carrier members of the GRC have before them to consider any rate action that may be proposed. Thereafter, a minimum of 15 days' notice is provided of the public meeting date on which the docketed proposal will be considered. At that meeting, as well, all persons participating are provided the same information to be considered by the carriers in voting on the general rate action proposal. Any persons interested in a general rate action, both before and after a proposal is docketed, not only have the opportunity to review the carriers' data, but can also present their own data or information.

Under the ICC's regulation, procedures were prescribed in EX Parte No. MC-82, New Procedures In Motor Carrier Rev. Proc., 339 I.C.C. 324 (1971), by which carriers could justify general rate increases. However, with the demise of the ICC by virtue of the Interstate Commerce Commission Termination Act of 1995, the costing principles and procedures established in Ex Parte No. 82 were no longer required. To ensure the continuance of cost-based pricing, in 1999 SMC pioneered and developed its Carrier Cost Index (CCI) to create a process to address and quantify the impact of changes in the relevant categories of the expenses of the less-than-truckload motor carriers which affect general rate actions. Thus, the CCI is a defined process of gathering, quantifying, analyzing and applying both industry specific and public information to create a reliable index of the expense increases the SMC carriers have experienced during the study period. It reviews both surveys of its member carrier labor costs, which comprise 64% of

their total expenses, and their various non-labor costs, which comprise the remaining 36%. The CCI also provides an accurate indicator of anticipated expenses.

Prior to 1995, one of the most valuable tools for evaluating the cost/revenue relationship of the class rates was the Continuing Traffic Study (CTS) that SMC started in 1959. The CTS was a stratified statistical sample of the freight bills of the member carriers. The statistical sampling process was designed and monitored by the world-renowned Dr. W. Edwards Deming. The CTS was a strategic tool that provided an industry baseline by which each participant could measure itself against, relative to the traffic it was actually handling. With the termination of the Ex Parte No. MC-82 requirements, the CTS was no longer mandated as a component of general rate increase actions, and was discontinued because of budget constraints.

Reacting to the loss of regional and operational data, SMC's member carriers requested that it restore the availability of that information. In response, SMC formulated the National Traffic Database (NTD). More than a sampling, the NTD creates an aggregated database based on all the freight bills on all the traffic handled by the participating carriers. In addition to the value of the NTD to the individual carriers, the aggregated data, which yields valuable information regarding traffic moving within the Southern Territory, is of considerable use to the GRC in evaluating general rate actions. The assistance which the NTD provides in formulating sound ratemaking enables the GRC to create a competitive level of class rates.

Viewed in its proper context it can be seen that the collective ratemaking activities of the member motor carriers of SMC facilitate the goals of the NTP, as both the former ICC and the STB have concluded. Specifically, consistent with Section

13101(a)(2)(A), the use of the class rates formulated under the GRC's ratemaking procedures provides the benchmark for carrier and shipper negotiations which foster fair competition and reasonable rates. Using the SMC rate scales for rate negotiations enables each party to the transaction to assess definitively the competitiveness of the rate bid with respect to the pricing offers submitted by the member carriers, as well as those submitted by other nonmember, competitive carriers. Stated somewhat differently, the use of a reasonable, common baseline in rate negotiations prevents the confusion otherwise created in attempting to assess rate bids using multiple baselines in making rate comparisons or in rate negotiations.

Facilitated as well is the goal in Section 13101(a)(2)(B) of promoting efficiency in motor carrier operations. In addition to enhancing the ability of the member carriers to reach markets dispersed throughout SMC's ratemaking territory, the need to use interline arrangements with other carriers to reach more distant markets is aided. The class rate scales have enabled participating carriers to more easily establish through rates by utilizing a competitive and reasonable baseline to conduct their negotiations. That has helped eliminate the disputes which occurred when the carriers attempted to construct joint rates from the abyss of individual carrier rates that were otherwise applicable to those arrangements. Thus, the elimination of that confusion has aided in the successful negotiation of interline arrangements which have enabled the carriers to make the most efficient utilization of their equipment in the markets they are best capable of serving, while enabling them to meet customer demands in other territories through their interline carrier partners.

Section 13101(a)(2)(c) seeks to encourage the creation of competitive and efficient transportation services adequate to meet the needs of shippers and receivers. Expanded just-in-time inventory control and the global nature of the economy have increased the pressures on shippers and receivers to obtain the most efficient and economical carrier services available. Through the use of the SMC class rate scales shippers and receivers are better able to compare motor carrier pricing in an efficient and economical manner. Likewise, carriers are better able to respond to shipper and receiver needs by having the ability to determine what other motor carriers are offering to provide the requested services, and to competitively price their rates to meet those needs.

Section 13101(a)(2)(D) encourages the facilitation of a variety of quality and price options to meet changing market demands and the diverse requirements of the public. While the highly competitive trucking industry has created those options, the literally thousands of rates and rate bases which flooded the marketplace with the elimination of filed tariffs and the influx of carriers into the industry, left many shippers and receivers without the ability to access and/or assess those rates. Utilizing the class rate baseline as the pricing vehicle to identify, on equal terms, the variety of available quality and price options has proven to be a valuable tool in the transportation community.

Section 13101(a)(2)(F) seeks to enable efficient and well managed carriers to earn adequate profits, attract capital and maintain fair wages and working conditions. SMC's carrier members have the lowest linehaul cost per vehicle mile, and that economy is reflected in their class rate baseline which is the lowest of any class rates in any of the other ratemaking territories. Yet, as has been evidenced before the ICC and the STB in

conjunction with the justification of their general rate actions, the profitability of the member carriers under those class rate scales have made them among the most successful and economically sound carriers operating within the United States. Plainly, that success evidences the achievement of the objectives identified in Section 13101(a)(2)(F).

SMC's collective ratemaking activities foster the goals of Section 13101(a)(2)(I) of improving and maintaining a sound, safe, and competitive privately-owned motor carrier system. Through the creation of competitive pricing under their baseline class rate scales, the member carriers have earned adequate profits thereby strengthening their financial viability through their profitable operations. Additionally, it is well recognized that financially sound carriers have a greater ability to maintain and operate safe equipment thereby promoting public safety.

The rational and competitive pricing encouraged under SMC's class rate scales can promote the greater and successful participation of minorities in the trucking industry, which is the goal of Section 13101(a)(2)(J). Small and minority-owned entrants in the ratemaking territory served by SMC have a better opportunity under its class rate scale to avoid the pitfalls of entering into unreasonably low rates dictated by the lack of pricing information to make a reasoned choice. Throughout the course of the legislative revisions of trucking, Congress has acknowledged the expertise and technical assistance that the carrier ratemaking organizations provide to carriers. This is particularly important in meeting the carriers' increasingly difficult efforts to construct and maintain pricing structures in the newly evolved, market-driven transportation industry. The rate, traffic, cost and financial data made available by SMC's Carrier Cost Index and the

National Traffic Database provide carriers – particularly those of small and medium size, with the information necessary to reap the benefits of competition.

Since the enactment of the Motor Carrier Act of 1980, Congress has sanctioned the continuation of motor carrier collective ratemaking associations by enacting mandatory presumptions designed to preserve antitrust immunity for the collective ratemaking activities conducted under their Agreements. Under former Section 10706(b)(3) of 49 U.S.C., an Agreement had to be approved by the ICC if the Agreement “fulfills each requirement of this subsection, unless the Commission finds that such agreement is inconsistent with the transportation policy set forth in section 10101(a) of this title.” Thus, compliance with the statutory standards gave rise to the presumption that the Agreement was in the public interest, which fact could only be rebutted by a showing of inconsistency with the National Transportation Policy. In addressing the impact of that presumption the ICC acknowledged that “it is apparent a substantial change in the burden of proof associated with the approval of rate bureau agreements has been mandated by Congress.” (See Motor Carrier Rate Bureau-Imp. Of P.L. 96-296, 364 I.C.C. 464, 466 (1980)).

In the Interstate Commerce Commission Termination Act of 1995, Congress continued the applicability of a statutorily-created presumption, mandatory in terms, regarding the continuation of antitrust immunity for collective ratemaking agreements. While the continuation of an Agreement had to be requested three years after approval or it would expire, Congress required that “the Board shall approve the renewal unless it finds that such renewal is not in the public interest.” (Section 13703(d) of 49 U.S.C.) The presumption that the Agreement is in the public interest was to prevail unless there

was a clear and unequivocal showing that the collective ratemaking activities were not in the public interest.

The Motor Carrier Safety Improvement Act of 1999 rescinded the automatic termination which had been provided in former Section 13703(d) of an approved Agreement after three years, unless renewed by the Board. Rather, under newly-created Section 13703(c)(2), the STB is only required to conduct a periodic review of the Agreements during every five-year period commencing with the effective date of that Act. Importantly, in Section 13703 (c)(1) Congress has prescribed that in reviewing those Agreements further agency action must be shown as “necessary to protect the public interest.” The burden of proof necessary to trigger that finding must be substantial and not rest on bare allegations or unsubstantiated assertions. (Compare *New York Life Ins. Co. v. Ganer*, 303 U.S. 161, 58 S. Ct. 500 (1938)). As indicated, SMC’s Section 5a Agreement was most recently approved by the STB in October, 2003.

As the Antitrust Modernization Commission (AMC) is aware, on July 15, 2005, the National Small Shipments Traffic Conference, Inc. (NASSTRAC) submitted letter comments to the AMC, including comments it submitted in the STB’s pending proceeding in Ex Parte No. 656, Motor Carrier Bureaus-Review Proceeding. SMC filed extensive comments rebutting the allegations made by NASSTRAC in the STB proceeding, and respectfully refers the AMC to those pleadings which can be viewed online at the STB’s website. Also, a number of the incorrect allegations made in the July 15, 2005 NASSTRAC letter was addressed in the letter response of SMC which was dated July 23, 2005 and submitted to the AMC. SMC will not burden the AMC with a repetition of the factual errors made by NASSTRAC. However, it must be pointed out

that a NASSTRAC representative, although invited on a number of occasions to attend an SMC GRC meeting, has never done so. Therefore, its criticism of the collective ratemaking procedures is made without any personal knowledge of the process which has been approved by the STB. Additionally, the statement that the members of NASSTRAC oppose collective ratemaking is contrary to the position of various shippers, transportation intermediaries, and motor carriers members of NASSTRAC, who are on record in Section 5a Application No. 46 (Sub-No. 20), Southern Motor Carriers Rate Conference, Inc., which is pending before the STB, in support of SMC's request to expand its ratemaking territory in order to serve the nationwide operations of the member motor carriers.

Further, NASSTRAC has been inconsistent in its various positions on collective ratemaking. For example, in NASSTRAC's January 22, 2002 Reply to Rate Bureau Petitions for Reconsideration in Section 5a Application No. 118 (Sub-No. 1), et al., EC-MAC Motor Carriers Service Association, Inc. Et Al., it stated that:

NASSTRAC has acknowledged that there can be pro-competitive aspects of motor carrier ratemaking based on discounts off class rates, especially in today's environment of widespread contracting. (NASSTRAC Reply, p. 3)

Further, in the May 24, 2004 Reply Comments of NASSTRAC in Section 5a Application No. 46 (Sub-No. 20), Southern Motor Carriers Rate Conference, Inc., counsel stated that:

Today's trucking industry is characterized by intense competition, generally reasonable rates, generally excellent service, and a level of responsiveness to customers that far exceeds what railroads and water carriers manage to provide. Since 1980, more efficient motor carriers and more efficient shippers working together, have produced a more efficient distribution system benefiting the entire American economy. (NASSTRAC Reply, p. 3)

Therefore, its opposition to the continuation of antitrust immunity for Section 5a.

Agreements approved by the STB should not be given weight.

NASSTRAC's attempt to make it appear that the freight classification and the class rate structure act in tandem with the motor carrier ratemaking associations' using classification changes to enhance collective ratemaking activities is incorrect. As is well settled, the freight classification and collective ratemaking activities are entirely separate and distinct functions. As the former Interstate Commerce Commission concluded in Charge For Shipments Moving On Order – Notify Bills, 367 I.C.C. 330, 335 (1983):

The classification tariff and the class tariff, although complementary, serve entirely different purposes. While the classification is designed to reflect the characteristics of the commodity transported, the class tariff reflects the characteristics of the haul. Specifically, the class tariff establishes the rate relationship between localities based upon the weight and distance.

Moreover, in Investigation Into Motor Carrier Classification, 367 I.C.C. 243, 248-49 (1983), the ICC concluded that the former elements of trade conditions, value of service and competition with other commodities, were economic factors not related to the transportability of commodities, but were more properly considered by the ratemaker. Thus, those factors could no longer be considered by the classifier. Therefore, the contrived relationship that NASSTRAC attempts to create between the separate activities of the classification maker and the ratemaker simply does not exist.

Equally flawed is NASSTRAC's contention that an increase in a classification rating is the stimulus for a general rate increase (GRI) used to increase a class rate level. As was noted by the ICC in the Order—Notify proceeding, supra, GRIs are distributed over the weight brackets and distances, and are not tied to the classification rating. These

are totally distinct functions based on factors wholly unrelated; class ratings are assigned based on the transportability of a commodity in the carriers' vehicles, and GRIs are based on economic considerations related to the carriers' industry average costs.

In addition to its 120 member motor carriers, SMC has some 1,400 associate members consisting principally of shippers, receivers and transportation intermediaries. The immense value of SMC's collective ratemaking activities to those members of the transportation community has been acknowledged in various regulatory proceedings. For example, in support of SMC's pending request in Section 5a Application No. 46 (Sub-No. 20), for authority to meet the collective ratemaking needs of its member carriers which operate nationwide, Masco Corporation, with some 60 operating companies in the United States and abroad with 61,000 employees, stated that:

The level of class rates established by Southern Motor Carriers in Southern Territory is fair and reasonable, and very competitive with the class rates established by non-SMC member motor carriers operating in those areas. We are confident that with the costing procedures it has developed and its National Traffic Database, Southern Motor Carriers would establish a fair, reasonable and competitive baseline of class rates which would benefit its member motor carriers and shippers moving products throughout the United States. (Statement of Rose Minchella, Manager, Logistics Services, Masco Corporation, dated March 26, 2004, pg. 2.)

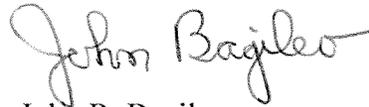
In similar vein, in that same proceeding Delta Air Lines, Inc. indicated that:

In the process of negotiating and contracting for those Transportation services, it is essential that Delta Air Lines has an efficient and affordable method of benchmark carrier rates and charges. SMC's CzarLite baseline rating system has provided my company such a benchmark. It would be more efficient and responsive if SMC member motor carriers could tailor their baseline of class rates with reference to the transportation operations they conduct throughout the United States. (Statement of Pattie Weaver, Manager North American Logistics, Delta Air Lines, Inc., dated April 5, 2004.)

Thus, SMC's collective ratemaking activities benefit the entire transportation community.

In conclusion, given the historical and consistent context of Congress' continuation of antitrust immunity for approved Section 5a Agreements under the numerous legislative measures that have changed the motor carrier industry, and the pervasive regulatory oversight of the procedures and actions taken in the collective activities conducted under those agreements, it is requested that the AMC make no recommendations to Congress to change or terminate Section 13703(a) of 49 U.S.C.

Respectfully submitted,



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