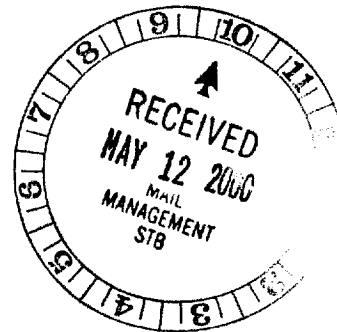


BEFORE THE
SURFACE TRANSPORTATION BOARD



Section 5a Application No. 118 (Sub-No. 2), et al.
EC-MAC Motor Carriers Service Association, Inc., et al.

198512

REPLY COMMENTS OF
THE TRANSPORTATION CONSUMER PROTECTION COUNCIL, INC.
REGARDING

RATE BUREAUS' ESTABLISHMENT OF COLLECTIVE RATES AT MARKET BASED
LEVELS

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THE TRANSPORTATION CONSUMER
PROTECTION COUNCIL, INC.
by George Carl Pezold, General Counsel
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May 11, 2000

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The Transportation Consumer Protection Council, Inc. ("Council") respectfully submits its Reply Comments regarding the Rate Bureaus' establishment of collective rates at market based levels.

Like the Board's recent determination that it should not look at major rail mergers in isolation, see *Canadian National Railway Company, Grand Trunk Western Railroad Incorporated, Illinois Central Railroad Company, Burlington Northern Santa Fe Corporation, and The Burlington Northern and Santa Fe Railway Company – Common Control*, STB Finance Docket No. 33842, Decision No. 1 (December 28, 1999), the Council believes that the issue of antitrust immunity for both the National Classification Committee and the Rate Bureaus cannot be addressed independent of each other. From a review of the comments filed, it is clear that there is a synergistic relationship between both processes, whereby the whole is greater than the sum of the parts. The carriers would preserve the status quo with only nominal shipper participation in the classification process, and then continue to allow any classification changes to be amplified by the changes to the class rates by the Rate Bureaus. The result is a compounding effect that can drive the market rather than respond to changes in the market. This is not the goal or purpose of the antitrust immunity enjoyed by these entities.

Reply to Rate Bureau and Carrier Position

The Rate Bureaus have essentially taken the position in their comments that the Board does not have the power or authority to undertake this proceeding, and/or that as a result of the recent imposition of across the board discounts at 20% or 35% (depending on the rate bureau) for shippers not otherwise receiving a discount, there is no longer a need for the Board to pursue this

proceeding. The Council disagrees on both points.

The analysis submitted by EC-MAC Motor Carriers Service Association, Inc., et al. and by Middlewest Motor Freight Bureau, Inc., regarding the STB's lack of authority to undertake the action proposed, ignores the broad grant of authority to impose or change conditions when necessary to protect the public interest granted in 49 U.S.C. 13703(c). This grant of authority to protect the public interest is not premised upon any "rate reasonableness" determination as suggested by the Rate Bureaus. While the existence of rate bureaus with the ability to establish class rates may possibly continue to be in the public interest, there still has been no evidence submitted to support the proposition that the public interest is served by allowing class rates to be maintained at levels totally divorced from market reality. On the other hand, shippers have submitted evidence that the maintenance of class rates at these high levels is harmful and not in the public interest in that it allows price gouging to unwary shippers and creates an incentive for continued undercharge claims. The statute clearly allows the Board to change or impose conditions to protect the public interest.

The second major point the Rate Bureaus make is that the application of across the board discounts for shippers not otherwise entitled to a discount renders the need for any Board action moot. While this approach may be the most practical, there are still several problems.

First, for any general discount to truly have any meaning, it must be a guaranteed minimum discount, meaning that all shippers will receive a discount of at least this amount.

Second, it is clear from the comments submitted that the general discounts discussed by the rate bureaus, 35% or 20%, are significantly less than the 45% or 50% discounts suggested by shippers. Some statistical analysis is required to determine what amount would actually be

appropriate.

Third, and perhaps most importantly, the use of a general discount (as opposed to a reduction of class rates) does nothing to resolve the risk related to undercharge litigation. The Middlewest Motor Freight Bureau, Inc.'s ("MMFB") assertion that shippers have statutory and regulatory protection from undercharge claims, and "that loss of discount for late payment rules are established individually not collectively", MMFB Comments n.6, p.14, misses the point. Shippers are still being dunned and sued for undercharges, including claims for lost discounts due to alleged late payments (e.g., Humboldt Express, FMEC Accounts Liquidation/Fredrickson Motor Express, Atlanta Motor Lines, Inc., Goggin Truck Line Co., Inc., and Nu-Trans Companies, Inc.). A reduction of class rates to market based levels virtually eliminates any incentive to bring this type of litigation by eliminating the potential windfall, which results when deep discounts are removed from artificially high class rates. The availability of a general discount off the same high class rates simply does nothing to resolve this problem.

The Rate Bureaus also raised the argument that their class rates "fall within the same cluster of market-based class rates maintained by major non-bureau carriers." Comments of EC-MAC at p. 3. This is a travesty. The validity of a market based cluster of rates refers to the cluster of rates at which traffic moves, not the class rates from which discounts are taken. The fact that non-bureau carriers maintain a similarly high class rate structure to that of the rate bureaus, with similar deep discounts to move traffic, is no reason why the rate bureaus should have the benefit of antitrust immunity. Perhaps when the rate bureau benchmark rates are reduced to market based levels (meaning the levels at which traffic moves), the non-bureau carriers will be forced to reduce their

class rates.

Comment on Shippers Positions

The Council has previously expressed its opinion that it is in the public interest to reduce Rate Bureau benchmark rates to market based levels as a condition of continued antitrust immunity. Some other shipper organizations have gone further and suggested that there is no longer any reason for the Rate Bureaus to continue to have antitrust immunity (National Industrial Transportation League, (NITL)). As an alternative to the elimination of antitrust immunity, the suggestions made included either a reduction of class rates by some fixed percentage (45-50%) or an automatic minimum discount of that amount; the prohibition of loss of discount late pay rules; and to require the justification of general rate increases (GRIs) before such increases are imposed.

A reduction of the class rates themselves is preferable to a general discount. As stated above, the application of an automatic general discount does nothing to resolve the potential harm from undercharge litigation. If an automatic general discount approach is used, the Council firmly believes it must be accompanied by some method to protect shippers from loss of discount penalties. While the Council does not have adequate information at this time to suggest the specific percentage class rates should be reduced, it would appear from the comments submitted that it should be in an amount of at least 35% and very possibly up to 50%.

The Council is also in agreement with the other shippers regarding a requirement of some sort of needs-test to justify GRIs before they are imposed.

CONCLUSION

In conclusion, the Council believes that the Board has the authority to change or impose conditions to protect the public interest as a condition of continuing antitrust immunity for the Rate Bureaus, and that it is in the public interest to do so. The Rate Bureaus have failed to support their position that it is in the public interest to allow them to continue to maintain the present class rate structure utilizing class rates so far removed from the market levels at which traffic actually moves, while the shippers have demonstrated actual harm from allowing the status quo to continue.

Notwithstanding the approach ultimately adopted by the Board, the Board's conclusions must take into consideration the synergistic relationship that exists between the classification process of the NCC and the rate making process of the Rate Bureaus.

May 11, 2000

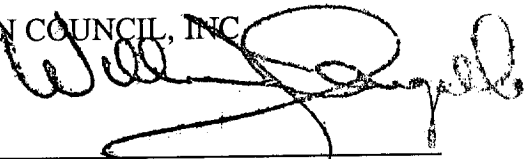
Respectfully submitted:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Reply Comments of the Transportation Consumer Protection Council, Inc. on "Section 5a Application No. 118 (Sub-No. 2), EC-MAC Motor Carriers Service Association, Inc., et al." has been mailed to the parties on the attached service list, with adequate postage affixed thereon, this 11th day of May, 2000.

A handwritten signature in black ink, reading "George Carl Pezold". The signature is fluid and cursive, with the first letters of each name being capitalized and prominent.

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