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July 16, 2007



VIA HAND DELIVERY

Vernon A Williams
Secretary
Surface Transportation Board
395 E St, NW
Room 100
Washington, DC 20024

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Office of Proceedings

JUL 17 2007

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RE: Ex Parte No. 656
Petition for Clarification of Decision

Dear Mr Williams

Enclosed for filing is an original and eleven copies of a *Petition for Clarification of Decision* in the referenced proceeding. A copy of the Petition has been served this date on all parties appearing on the service list in this proceeding.

Kindly date- and time-stamp one of the enclosed copies and return to our courier.
Thank you for your attention to this matter.

Very truly yours,

ROBERT G ROTHSTEIN

General Counsel

219775
RICHARD P. SCHWEITZER, P.L.L.C.

Attorneys at Law

1776 K Street, NW ■ Suite 800 ■ Washington, DC 20006
Phone: (202) 223-3040 Fax: (202) 223-3041
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July 16, 2007

VIA HAND DELIVERY

Ms Linda Darr
American Moving and Storage Association
1611 Duke Street
Alexandria, Virginia 22314

Re: Filing the Petition for Clarification with the Board

Dear Linda

Enclosed is the Petition for Clarification of Decision Please sign where indicated and file and serve as discussed below

For filing, we must submit the **original and 10 copies** to the Board You should also include at least one extra copy and instruct the courier service to file stamp it and return it to you The courier services are used to the stamp and return process and it should not present a problem The filing should be made by hand delivery to

Office of the Secretary
Surface Transportation Board
Room 100
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We have also enclosed mailing labels for everyone on the service list Please send one copy of the filing to everyone via regular mail There is no need to include cover letters with the service copies

Please let me know if you have any questions or problems with the filing

Sincerely,

Richard P. Schweitzer

Richard P. Schweitzer

Enclosures

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**BEFORE
THE
SURFACE TRANSPORTATION BOARD**

**STB EX PARTE NO. 656
MOTOR CARRIER BUREAUS—
PERIODIC REVIEW PROCEEDING**

**PETITION FOR CLARIFICATION OF
DECISION**



Pursuant to 49 C F R § 1115.5, the Household Goods Carriers' Bureau Committee ("HGCBC" or "Bureau"),¹ a standing autonomous committee of the American Moving and Storage Association, Inc. ("AMSA"), respectfully requests that the Surface Transportation Board ("STB" or "Board") clarify its May 7, 2007 decision in this proceeding by specifying the tariff transition requirements permitted under the Board's decision.

The HGCBC seeks clarification from the STB on how to lawfully transition from the collectively-established Tariffs 400-N, 400-M and 600 to a new pricing system based on rates and rules that are established individually by the carriers in the moving industry. "Naturally, companies governed by a regulatory agency that is beginning to relinquish its control over an industry will be uncertain of their current legal obligations." *Fla. E. Coast Ry. Co. v. Seaboard Coast Line R.R. Co.*, No. 81-0269, 1982 WL 1926, at *3 (D.D.C. Dec. 23, 1982). In particular, clarification is necessary because, even with the extension of Ex Parte 656's effective date to January 1, 2008, the industry must meet a

¹ The HGCBC is located at 1611 Duke Street, Alexandria, Virginia 22314

looming deadline for termination of its immunity from the antitrust laws as set out in the STB's May 7, 2007 decision. Moreover, many HGCBC members have already contacted the Bureau seeking guidance on how to effect these changes. The complexity of transitioning to a structure of individually-set rates and the uncertainty among household goods carriers underscore the need to clarify the Board's May 7 decision.

I. BACKGROUND

As set out in the Bureau's earlier Petition for Modification of Decision Effective Date in this proceeding, filed May 30, 2007, the HGCBC currently operates pursuant to a collective ratemaking agreement approved in *Household Goods Carriers' Bureau Committee – Agreement*, STB Section 5a Application No. 1. That Agreement is embraced by the Board's May 4, 2007, decision in this proceeding. In accordance with the provisions of its Agreement, HGCBC publishes and maintains collectively established tariffs on behalf of 2,388 participating motor carriers licensed by the Federal Motor Carrier Safety Administration (FMCSA) to engage in the interstate transportation of household goods. These carriers are parties to the HGCBC Agreement.

The primary tariff at issue is STB HGB 400-N, which contains nationwide rates and charges on all household goods personal effects movements on a general application basis, names linehaul transportation rates and rates for additional services, and includes valuation and storage-in-transit services and related rules and regulations for the transportation of used household goods. Tariff 400-N includes 81 pages of rules and a CD-ROM loaded with rating software.²

² Tariff STB HGB 104-G sets out the approximately 2,700 independent actions taken by carriers as exceptions to the general application provisions of published in Tariff 400-N. The exceptions tariff itself is a 1,200 page document.

Other tariffs, however, are still in use. Some carriers use Tariff HGB 400-M (the immediate predecessor to Tariff 400-N), with or without individual actions to create exceptions. In addition, the HGCBC has already approved Tariff HGB 600, a successor to 400-N, which is scheduled to become effective January 2, 2008. Tariff 600 further simplifies industry pricing and reflects an across-the-board reduction in all base rates. Many carriers have previously expressed interest in adopting Tariff 600, with or without independent actions on exceptions.

II. TARIFF TRANSITION ISSUES

To effect a transition to individual tariffs, the HGCBC requests that the Board clarify its May 7, 2007 decision and announce a mechanism similar to that mandated by the ICC for the household goods forwarders and/or for rail carriers transporting produce in the wake of the Staggers Act. Specifically, the HGCBC requests that the STB express its approval for household goods carriers—if they so choose—to adopt Tariff 400-N, Tariff 400-M, Tariff 600, or another HGCBC collective tariff as an individual tariff, with or without individual actions as exceptions.

The STB's predecessor agency, the Interstate Commerce Commission ("ICC"), has twice considered such tariff transition issues. In its 1991 decision terminating the antitrust immunity for the Household Goods Forwarders Tariff Bureau ("HGFTB"), the Commission dismissed the HGFTB request for approval of an amended collective ratemaking agreement and revoked its antitrust immunity for future collective ratemaking actions by the HGFTB and its members. *Household Goods Forwarders Tariff Bureau—Section 5a Application No. 106*, Interstate Commerce Commission, decided June 5, 1991 (A copy of the decision is enclosed for the Board's convenience as Attachment A.) But

in fashioning a remedy, the ICC established a procedure allowing the HGFTB to transition to individual ratemaking. The Commission's decision stated that "we will not immediately require the Bureau to cancel its tariffs." Instead, the decision provided, "In order to smooth the transition to competitive individual forwarder ratemaking, we will require that the Bureau amend its tariffs so that they apply to individual forwarders." *Slip op.*, at 5

More than ten years earlier, in withdrawing antitrust immunity for rail transportation of most fresh produce after passage of the Staggers Act, the ICC issued a similar decision *Rail Gen. Exemption Auth.—Fresh Fruits & Vegetables*, ICC Ex Parte No. 346 (Mar. 21, 1979). (A copy of the decision is attached for the Board's convenience as Attachment B.) There, the ICC allowed rail carriers to continue using the preexisting tariff rates "to the extent adopted" by individual carriers. In other words, "as an interim accommodation," the Commission expressed approval for *individual* use of *formerly collective* rates. The ICC went even further, expressing its view that this would comply with all antitrust laws. "We see no potential antitrust problems with referring to tariffs in existence prior to the effective date of the exemption."

III. THESE CLARIFICATIONS WILL NEITHER HARM THE PUBLIC INTEREST NOR SANCTION VIOLATIONS OF THE ANTITRUST LAWS

Allowing the household goods carriers and the Bureau to adopt the procedures set forth in this proposal would not harm the public interest. Rather, this procedure would permit immediate compliance with the antitrust laws, but do so in a way as to accommodate the realities of amending 70 years of commercial practices and information technologies in a limited time. As discussed in the Bureau's prior request for a modification of the effective date of the May 7 decision, household goods carriers

provide linehaul transportation services, packing, unpacking, storage-in-transit and a variety of origin and destination services for upwards of 1.4 million household each year. The rates and terms for each of these moves will be affected by the revised tariffs to be established by the carriers, and the carriers require a reasonable amount of time to create a new rate structure. The Bureau's planned facilitation of individual carrier-customizing of the tariff elements principally affecting the overall charges for a shipment will promote further meaningful differentiation and competition in individual carrier service-offerings to shippers—in addition to the variations that currently occur as a result of carriers' differing independent actions for tariff exceptions, discounts from base rates, and shipper contracts.

The public interest is also protected by the current statutory requirements to publish household goods tariffs, 49 U.S.C. § 13702(c), and the rate reasonableness requirements in 49 U.S.C. § 13701(a). Neither of these requirements was affected by the Board's decision.

Finally, in the HGFTB proceeding, the ICC concluded that the public interest would not be harmed by allowing the Forwarders Bureau to amend its tariff, which was initially adopted by collective action, to apply to individual forwarders. Similarly, in revoking antitrust immunity for collective ratemaking by rail carriers of produce, it reasoned that the individual carriers could adopt formerly collective rates. The HGCBC requests that the STB reach a similar conclusion with regard to household goods carriers' use of the Tariff 400-N,³ Tariff 400-M, Tariff 600, or another HGCBC collective tariff.

³ Using the pricing mechanism of Tariff 400-N (with rates based on the actual weight of shipments) also protects consumers from carriers basing rates on cubic feet, linear feet or other arbitrary and non-verifiable methods of pricing sometimes used by unscrupulous

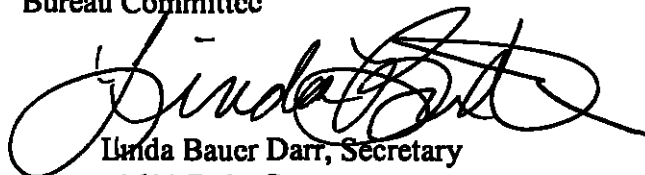
CONCLUSION

For the foregoing reasons, the HGCBC requests that the Board clarify its decision served May 7, 2007 in this proceeding by adding the following language "Recognizing the need for a smooth transition to individual carrier ratemaking, the Board's decision does not immediately require carriers to cease using collectively established tariffs, including Tariffs 400-N, 400-M, or 600, or the individual-carrier exceptions to those tariffs reflected in Tariff 104-G (and predecessor tariffs) We see no potential antitrust problems with referring to tariffs in existence prior to the effective date of the exemption. Instead, we will allow these carriers to continue use of these tariffs. And we will further permit these carriers to utilize the Bureau or other entities as a publishing agent of their individual tariffs going forward."

Alternatively, the HGCBC respectfully requests that the Board clarify its decision as appropriate to express approval of similar measures.

Respectfully submitted,

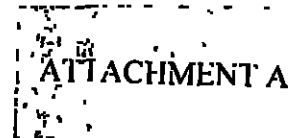
Household Goods Carriers'
Bureau Committee



Linda Bauer Darr, Secretary
1611 Duke Street
Alexandria, VA 22314

movers to defraud consumers. These non-actual weight pricing methods also do not comply with the congressional mandate in sec 4203 of SAFETEA-LU, Pub. L No 109-59, codified at 49 U S C § 13707(b)(3), that requires non-binding estimates to be based only on the weight of the shipment.

1991 WL 120330 (I.C.C.)



SURFACE TRANSPORTATION BOARD (S.T.B.)

HOUSEHOLD GOODS FORWARDERS TARIFF BUREAU
Decided: June 5, 1991.

INTERSTATE COMMERCE COMMISSION DECISION

SECTION 5a APPLICATION No 106

By the Commission, Chairman Philbin, Vice Chairman Emmett, Commissioners Simmons, Phillips, and McDonald Commissioner McDonald, joined by Commissioner Simmons, dissented with a separate expression

BACKGROUND

*1 The Household Goods Forwarders Tariff Bureau (HGFTB or Bureau) is a rate bureau whose membership currently consists of 100 regulated household goods freight forwarders as defined at 49 U.S.C. 10102(12). Each of the Bureau's members is a household goods freight forwarder authorized by the Commission to forward used household goods, unaccompanied baggage, and used automobiles, between points in the United States. The Bureau operates under a collective ratemaking agreement that the Commission approved in 1972.

On December 8, 1978, the HGFTB submitted an application for continued approval of its collective ratemaking agreement. The Bureau filed its application in response to the Commission's decision in Ex Parte No. 297 (Sub-No. 4), Reopening of Section 5a Application Proceedings to Take Additional Evidence (not printed), served January 6, 1978. In that decision, the Commission reopened all previously approved non-rail collective ratemaking agreements to take additional evidence to determine whether those agreements continued to qualify for Commission approval. The decision required each bureau to submit evidence to establish: (1) that its agreement enhanced one or more National Transportation Policy (NTP) goals; (2) that the agreement did not have anticompetitive effects; and (3) that if anticompetitive effects were found, the benefits the agreement conferred on the public interest outweighed the harm.

Subsequently, following passage of the Motor Carrier Act of 1980 (MCA), which established new standards for review and approval of motor carrier rate bureau agreements, the Commission terminated the Ex Parte No. 297 (Sub-No. 4) proceeding to the extent it involved review of motor carrier agreements. The proceeding continued for freight forwarder and water carrier rate bureaus. Thereafter, pursuant to the Surface Freight Forwarder Deregulation Act of 1986, non-household goods freight forwarders were substantially deregulated, and the Commission's jurisdiction to grant antitrust immunity for their collective ratemaking was revoked. However, our jurisdiction over household goods freight forwarders has continued, and a collective ratemaking agreement filed by the HGFTB would require our approval under 49 U.S.C. 10706(c). That section requires that, "the Commission shall approve the agreement only when it finds that the making and carrying out of the agreement will further the transportation policy of section 10101 ..." (the NTP).^[FN1]

In a decision served November 28, 1989, the Commission indicated that a preliminary examination of the HGFTB's current activities had raised questions as to whether continued antitrust immunity for the Bureau was necessary or appropriate. We noted that, by statute, we no longer immunize collective ratemaking for single-line rates for motor carriers or railroads, for such ratemaking has harmful anticompetitive effects and is inconsistent with the goals of the NTP. Accordingly, we indicated that no single-line collective activity would be approved for the HGFTB. It was unclear, however, whether the Bureau continued to engage in any joint-line ratemaking or other collective activities for which it might seek, or we might grant, immunity from the antitrust laws. In the circumstances, we directed the Bureau to describe any current or contemplated collective ratemaking activities within the Commission's jurisdiction for which it believed antitrust immunity is required.



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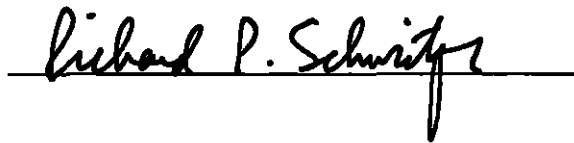
Attorney for Household Goods
Carriers' Bureau Committee

Dated July 16, 2007

CERTIFICATE

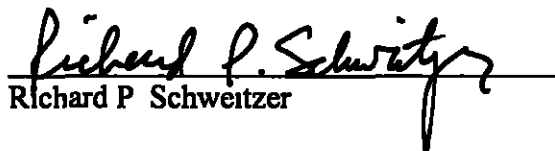
I, Richard P Schweitzer, declare under penalty of perjury that that the foregoing
is true and correct Further, I certify that I am qualified and authorized to file this
pleading

Executed on July 16, 2007



CERTIFICATE OF SERVICE

I hereby certify that I have this 16th day of July, 2007 served a copy of the
foregoing Petition for Clarification of Decision upon all parties of record in this
proceeding by first class mail, properly addressed with postage prepaid



Richard P Schweitzer

***2** In our decision, we indicated that if the Bureau demonstrated that it had a need for and a continuing interest in immunity that we properly may grant, we would review a revised agreement on the merits. The Commission advised the Bureau that we would reach findings under section 10706(c) by applying the three-part test set forth in Ex Parte No. 297 (Sub-No. 4), supra. The Commission also advised the Bureau that, if it did not show that it now conducts, or needs in the future to conduct, collective ratemaking for which immunity is required, we would consider: (a) dismissing the application for approval of its amended collective ratemaking agreement; (b) revoking antitrust immunity for future collective actions by the Bureau and its members; and (c) requiring the Bureau to cancel its tariffs.

In response to the Commission's decision, the HGFTB, the Department of Defense (DOD), and the Department of Justice (DOJ) filed comments, and the HGFTB replied to the comments of DOD and DOJ.

The Bureau asserts that it does conduct collective ratemaking activities that require antitrust immunity. It acknowledges that all rates in the Bureau's tariffs are single-line rates. This is so, it explains, because, by definition, a freight forwarder is the originating and delivering carrier and may not interchange shipments. It requests, nevertheless, that its members be authorized to act collectively to the same extent that household goods motor carriers may do so under 49 U.S.C. 10706(b)(3)(D).^[FN2]

This section not only states the general prohibition against carriers' discussing or voting on single-line rates, it also describes the exceptions to the prohibition. Exceptions are made generally for: (i) general rate increases or decreases, (ii) changes in commodity classifications; (iii) changes in tariff structures, and (iv) publishing tariffs, filing independent actions, providing support services, and making changes in generally applicable rules and regulations. That is, a motor carrier agreement may provide for single-line collective action falling within one or more of these four areas.

The Bureau avers that its collective activities in recent years have been limited to activities coming within the exceptions. Over the past 3 years, it published eight general increases in line-haul rates, five general increases in accessorial charges, two filings involving rate restructuring, five changes in commodity classifications, and numerous generally applicable changes in rule and item provisions.

The HGFTB contends that collective action by household goods forwarders is necessary because they need the Bureau: (1) to advise them of changes in household goods motor carrier tariffs, particularly general rate increases and decreases and rule changes by the Household Goods Carriers Bureau (HHGCB); (2) to provide a mechanism for the forwarders to amend their tariffs; (3) to furnish technical advice and support; (4) to publish their tariffs; and (5) to enable them to comply with Commission requirements. The Bureau contends that it requires the same approval granted motor carriers regarding tariff publication and support activities. It asserts that, without continued immunity, each of its 100 members would have to publish and maintain its own tariff, monitor underlying motor carrier tariff rates and rule changes, and separately bear the effort and expense of filing changes. This assertedly would be impractical and unduly expensive.

***3** To justify its collective activities, the HGFTB avers that forwarder and motor carrier rates and charges are inextricably related and that the principal cost component of household goods forwarder rates and charges is the cost of the underlying motor carrier transportation. The Bureau asserts that when there is a general rate increase or decrease or other collective tariff change by HHGCB, the Bureau's forwarders must respond by changing their rates, charges, or tariff provisions proportionally. It argues that the ability to take collective action to respond to HHGCB collective actions is necessary because changes (other than in joint-line rates) made by that bureau affect each member of the HGFTB in an identical manner.

The HGFTB contends that its activities further the goals of the NTP, particularly those at section 10101(a)(1)(A), (C), and (D), which, respectively, require the Commission to recognize and preserve the inherent advantage of each mode of transportation, to encourage sound economic conditions in transportation, and to encourage the establishment and maintenance of reasonable rates without

unreasonable discrimination or unfair or destructive competitive practices

The Bureau states that household goods forwarders comprise a distinct mode of transportation and that their services offer inherent advantages, particularly in the transportation of household goods in containers, that should be recognized and preserved. The Bureau claims that the ability of forwarders to respond promptly in a collective manner to motor carrier rate increases and decreases promotes sound economic conditions by ensuring that the forwarder rates are reasonable, compensatory, and competitive. It adds that its members would be at a competitive disadvantage if it were deprived of antitrust immunity while household goods motor carriers continue to have such immunity for similar practices.

The HGFTB also argues that its collective activities are not anticompetitive. The relationship between motor carrier and freight forwarder rates already is established, it says. According to the Bureau, the motor carrier rates provide both the floor below which freight forwarder rates cannot go and remain compensatory, and a ceiling above which they cannot go and remain competitive. The Bureau asserts that the pass-through of motor carrier rate increases permits the forwarders to maintain rate parity, not to increase rates to an artificially high level. The Bureau adds that direct competition between its members and HHCB's members is a natural restraint against inflated prices.

DOD uses HGFTB members for handling thousands of shipments of personal property of DOD personnel each year. Since 1984, it has not been accepting collectively formulated rates for the interstate transportation of household goods. Based on its experience over 6 years, DOD contends that the Bureau does not need to assist its members in responding to carrier bureau rate increases. DOD asserts that the forwarders have evidenced no difficulty in adjusting their rates to remain competitive in DOD's personal property program and that the HGFTB has not shown that a forwarder that participates in the highly competitive DOD program cannot compete for commercial business without the Bureau's assistance.

*4 DOD avers that the Bureau does not need immunity to provide tariff publishing services or to furnish technical advice. DOD contends, then, that there are no current or contemplated collective ratemaking activities for which the Bureau's members require antitrust immunity.

DOD argues that, in any event, the proposed collective ratemaking activities will not further NTP objectives. In the past 6 years, it has seen both a significant improvement in the quality of service and a steady decline in rates. The Bureau's described collective ratemaking activities, DOD contends, promote inflated rates not based on individual forwarder costs. In DOD's view, the collective activities will inhibit competition and protect inefficient forwarders.

DOJ contends that the Bureau's collective cost pass-through activity does not qualify for approval under any of the provisions of section 10706(b)(3)(D). DOJ argues further, in a similar vein to DOD, that the HGFTB's information exchange goals do not raise legitimate concerns of antitrust liability and that the Bureau has not shown why it cannot perform such functions for its members without antitrust immunity. DOJ asserts that the Bureau can continue to provide public information, such as information about motor carrier tariff changes, without violating antitrust laws, just as do tariff-watching services. Additionally, in DOJ's view, there is no need for immunity for the Bureau to publish independently determined rates and rules in a joint tariff on behalf of its members.

DOJ further contends that collective decisions to pass through cost increases imposed by motor carriers seriously harm competition without furthering any NTP goal. Firms that agree on prices, DOJ maintains, are likely to charge higher prices than firms that must set their prices independently. Promoting competitive and efficient transportation services, DOJ believes, requires that each freight forwarder individually assess the amount of the cost increase it must pass through. It asserts that a direct collective pass-through diminishes competition and reduces forwarders' incentives to be more efficient. DOJ also argues that the HGFTB's burden of proof is higher than it was in 1978, because, in the MCA, Congress attached increased importance to promoting competition in transportation.

DISCUSSION AND CONCLUSIONS

Initially, we must consider whether the HGFTB conducts collective ratemaking activities within the Commission's jurisdiction for which antitrust immunity is required. The Bureau indicates that, over the past 3 years, it published general increases in line-haul rates, general increases in accessorial charges, filings involving rate restructuring, and changes in commodity classifications. The Bureau also intends to file general rate increases or decreases in the future.

We agree with the Bureau that collectively formulating general rate increases or decreases and, as they affect rates and charges, changes in commodity classifications and tariff structures, are activities that cannot be conducted without antitrust immunity. On the other hand, we disagree that the Bureau needs antitrust immunity to engage in the activities described in section 10706(b)(3)(D)(iv). No immunity is needed to publish tariffs for its members (so long as collusive rates are not involved), to file independent actions for individual members, or to provide its members support services such as securing and disseminating information that is publicly available.

***5** The Bureau has not presented detailed information concerning past or anticipated changes in rules or regulations of substantially general application, the final subject of the above-cited subparagraph. Changes in some rules or regulations may result in changes in rates, commodity classifications, or tariff structures, in which case immunity would be required. We advise the Bureau that changes in rules or regulations would not require immunity only if the related changes in rates, commodity classifications, or tariff structures would not. Immunity thus would not be required for changes in rules or regulations that have no effect on such items or matters.

Having determined that the HGFTB conducts, or plans to conduct, collective ratemaking activities that require antitrust immunity, we must, under section 10706(c), approve the agreement if we find that "the making and carrying out of the agreement will further the [NTP]." ^[FN3] As previously noted, in making this assessment we will apply the three-part test set forth in Ex Parte No. 297 (Sub-No. 4), *supra*. Thus, the Bureau must establish: (1) that its agreement enhances one or more NTP goals, (2) that the agreement does not have anticompetitive effects, and (3) that, if there are anticompetitive effects, the benefits the agreement confers on the public interest outweigh the harm. ^[FN4]

We find that the HGFTB has failed to bear its burden of establishing that its collective activities enhance the goals of the NTP. Its arguments in this area are unpersuasive. For instance, DOD's experience refusing collectively set prices has shown that forwarders have had no difficulty adjusting their rates and remaining competitive with carriers. At the same time, DOD benefitted from improved service and declining rates-products of competition fostered by the elimination of collective pricing. Therefore, rather than placing forwarders and motor carriers on an equal footing and preventing forwarders from being at a competitive disadvantage vis-a-vis household goods motor carriers (with a view toward recognizing and preserving the inherent advantage of each mode and promoting adequate, economical, and efficient transportation), it would appear that regulatory protection in the form of antitrust immunity tends to be, at best, irrelevant. At worst, such protection could dampen the incentives for both groups to compete with one another and for forwarders to compete among themselves.

We also conclude that an implausible argument underlies the contention that collective ratemaking encourages sound economic conditions in the household goods transportation industry and forestalls unfair or destructive competitive practices. The assumption is that, without collective ratemaking, forwarders would compete by pricing below long run costs, thereby hurting themselves and the industry. But, household goods forwarder costs, dominated by the cost of underlying motor carrier transportation, is almost entirely variable in nature. With virtually no fixed or "sunk" costs, the full or long run costs of household goods forwarders are thus almost identical to "out-of-pocket" expenses. And profit seeking firms will not ordinarily accept less than their "out-of-pocket" expenses when they sell their product. Thus, forwarders have little leeway or incentive to price below full costs, so the lower rates offered individually by some forwarders must represent competitive levels, rather than destructively low, below cost rates. We conclude that individual forwarder rate competition, rather than being destructive, tends to maintain household goods forwarding rates at competitive levels.

***6** Turning to the second part of the three-part test, we find that the proposed collective

ratemaking agreement would have anticompetitive effects. As DOJ points out, firms that collectively set prices are likely to charge higher prices than those that must act independently. Individual ratemaking undoubtedly would provide a competitive advantage to forwarders that are able to negotiate more effectively with carriers and shippers and to operate more efficiently. It would appear, then, that collective ratemaking serves to insulate individual forwarders, to some degree, from competing with one another and with household goods carriers, not to enable them to compete more fairly or effectively. The continuing effort to maintain collectively-determined rate levels may operate to slow the spread of individually negotiated and competitive rates to all markets. This could have a negative impact on the small or infrequent household goods shipper in an inferior bargaining position. The public should not be denied the full-time benefits of competitive forwarder rates. We believe that individual forwarders, if prohibited from collusion, would likely bargain more effectively, thereby more readily reflecting individual cost levels and circumstances in their prices, leading more promptly to competitive and efficient rate levels. The DOD experiences of the past several years support such a conclusion. Accepting only individually-determined rates, DOD has seen prices drop and services improve.

Finally, we do not find anything in the Bureau's arguments to establish that anticompetitive effects would be outweighed by benefits to the public interest. Inefficient forwarders would be protected by collectively-made rates at the direct expense of household goods shippers. While the Bureau has listed some perceived benefits to its members, these so-called benefits do not translate into benefits to the public. Moreover, the possible benefits from disseminating publicly available information, jointly publishing tariffs, or providing other support services are readily achievable in the absence of antitrust immunity.

As the Bureau has failed to bear its burden of proof, we will dismiss its application for approval of an amended collective ratemaking agreement and revoke its antitrust immunity for future collective actions by the Bureau and its members. However, we will not immediately require the Bureau to cancel its tariffs. In order to smooth the transition to competitive individual forwarder ratemaking, we will require that the Bureau amend its tariffs so that they apply to individual forwarders.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The application of the Household Goods Forwarders Tariff Bureau for approval of an amended collective ratemaking agreement is dismissed.
2. Antitrust immunity for future collective actions by the Bureau and its members is revoked.
- *7 3. The Bureau must amend its currently filed tariffs to make them apply to individual forwarders.
4. This decision will take effect on August 11, 1991.

Sidney L. Strickland, Jr.
Secretary

FN1 As pertinent, section 10101(a) states that, "It is the policy of the United States Government to provide for the impartial regulation of the modes of transportation subject to this subtitle, and-(1) in regulating those modes-(A) to recognize and preserve the inherent advantage of each mode of transportation; (B) to promote safe, adequate, economical, and efficient transportation, (C) to encourage sound economic conditions in transportation, including sound economic conditions among carriers; (D) to encourage the establishment and maintenance of reasonable rates for transportation, without unreasonable discrimination or unfair or destructive competitive practices; (E) to cooperate with each State and the officials of each State on transportation matters; and (F) to encourage fair wages and working conditions in the transportation industry."

FN2 As pertinent, section 10706(b)(3)(D) provides:

No agreement approved under this subsection may provide for discussion of or voting upon single-line rates . . . This subparagraph . . . shall not apply to the following

- (i) general rate increases or decreases if the agreement gives shippers, under specified procedures, at least 15 days' notice of the proposal and an opportunity to present comments on it before a tariff containing the increases or decreases is filed with the Commission and if discussion of such increases or decreases is limited to industry average carrier cost and . . . does not include discussion of individual markets or particular single-line rates,
- (ii) changes in commodity classifications;
- (iii) changes in tariff structures if discussion of such changes is limited to industry average carrier costs and . . . does not include discussion of individual markets or particular single-line rates;
- (iv) publishing of tariffs, filing of independent actions for individual members carriers, providing of support services for members, and changes in rules or regulations which are of at least substantially general application throughout the area in which such changes will apply.

FN3 In contrast, 49 U.S.C. 10706(b)(2), applicable to motor carriers, provides that a rate bureau agreement submitted to the Commission for approval "shall be approved by the Commission upon a finding that the agreement fulfills each requirement of this subsection, unless the Commission finds that the agreement is inconsistent with the transportation policy set forth in section 10101(a) of this title." A freight forwarder bureau's agreement must further the NTP; a motor carrier bureau's agreement need only be consistent with it.

FN4 As noted above, the HGFTB has requested that its members be authorized to act collectively to the same extent that household goods motor carriers may do so under 49 U.S.C. 10706(b)(3)(D). This section permits motor carriers to engage in the ratemaking activities described above, subject to Commission approval. It does not apply specifically to freight forwarders. To grant the HGFTB the sought antitrust immunity, we first would have to decide that the provisions of the section should apply to freight forwarders, as well as motor carriers. In view of our findings below, we need not reach the issue.

COMMISSIONER MCDONALD, joined by COMMISSIONER SIMMONS, dissenting:

*8 The removal of antitrust immunity once statutorily granted should not be done in an arbitrary manner or in the absence of compelling justification. The test to determine whether HHGFTB's collective ratemaking agreement continues to qualify for Commission approval is found in Ex Parte No. 297 (Sub-No. 4), Reopening of Section 5a Application Proceedings to Take Additional Evidence (not printed), served January 6, 1978. The bureau must submit evidence to establish:

(1) That its agreement enhances one or more National Transportation Policy (NTP) goals; (2) that the agreement does not have anticompetitive effects, and (3) that if anticompetitive effects are found, the benefits the agreement conferred on the public interest outweighs the harm.

Because of deep discounting and the ease of entry for household goods freight forwarders, any anticompetitive effect from the bureau's lawful actions is minimal, perhaps, even irrelevant. Thus, the real issue here is not anticompetitive effects but, rather, furthering the NTP. I believe the test has been met for several reasons.

In 1972, the Commission approved the collective ratemaking agreement of HHGFTB, finding that this agreement was in the furtherance of the NTP. The NTP for household goods freight forwarders has not changed since 1972 and I see no compelling reason to reverse our previous finding.

In 1985, during the hearing on the bill to deregulate freight forwarders, a witness from HHGFTB urged Congress to amend the existing bill to continue regulation and antitrust immunity for household goods freight forwarders. [FN1] Subsequently, the bill was so amended and passed into law. A

reasonable inference can be made that by such action, Congress presumed a furtherance of the NTP for this particular bureau. The Commission is not justified, in my view, to do what Congress pointedly chose not to do-remove this bureau's immunity without new, specific and convincing evidence

Lastly, HHGFTB has submitted evidence that its agreement serves a useful function for its members, and the shipping public and is in furtherance of a NTP goal of 49 USC 10101(a)(1). Freight forwarding is a distinct mode of transportation which has inherent advantage. The bureau's members compete directly with regulated motor carriers of household goods who still have antitrust immunity, and they must respond quickly to their competitors' collectively set rates. They respond effectively and economically through their own bureau. Such collective action preserves the viability of the industry (and the advantage of its service). Without the bureau, each individual member would have to maintain inhouse monitoring systems which would be an excessively duplicative and expensive way to remain competitive. For these reasons, I would allow HHGFTB to retain its immunity and maintain the equal playing field between it and its competitors.

FN1 Surface Freight Forwarder Deregulation Act of 1985· Hearing Before the Subcommittee on Surface Transportation of the Committee on Commerce, Science, and Transportation, United States Senate, 99th Cong., 1st Sess. 52-61 (1985)

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361 I C C 374, 1979 WL 11122 (I C C)

SURFACE TRANSPORTATION BOARD (S T B)
RAIL GENERAL EXEMPTION AUTHORITY-
FRESH FRUITS AND VEGETABLES
Decided May 25, 1979

*374 On appeal, dried beans, peas, and lentils, excluded from the fresh fruit and vegetable exemption, subject to further examination in another subproceeding Interpretative problems with the application of the exemption clarified Request for further postponement of the effective date and modification of the exemption denied

EX PARTE NO 346 (SUB-NO 1)
DECISION

*378 By the Commission, Chairman O'Neal, Vice Chairman Brown, Commissioners Stafford, Gresham, Clapp and Christian Commissioner Christian was absent and did not participate

BY THE COMMISSION

**1 In a decision served March 22, 1979, under the authority of 49 U S C 10505, we exempted the rail transportation of fresh fruits and vegetables included in Standard Transportation Commodity Codes (STCC) No 01 2 Fresh Fruits or Tree Nuts (except No 01 232 Bananas, No 01 294 Cocoa beans, and No 01 232 Coffee, green) and No 01 3 Fresh Vegetables, from the provisions of Subtitle IV of Title 49, with the exception of certain informational reporting and accounting requirements Appeals and petitions for clarification of that decision have been filed The effective date of the exemption was postponed temporarily until May 28, 1979, partly to give the Commission time to review fully these appeals and petitions Comments were also filed by Fred H Tolan on behalf of various perishable shipper groups for modification and further postponement of the effective date of the exemption until September 1, 1979

The appeals consist solely of requests to exclude dried beans, peas and lentils from the list of exempted commodities It is argued that these

commodities possess the same transportation characteristics as grain, which was not included under the exemption The Secretary of Agriculture states that unlike most fresh vegetable shippers, most shippers of beans, peas, and lentils are small, are located in remote areas of the country and are extremely dependent on rail transportation, citing an average 50-percent nationwide rail *375 market share and as much as 85 to 90 percent in Minnesota and North Dakota Similar statistics were submitted by the National Dry Bean Council, Inc., the Rocky Mountain Bean Dealers Association and DOA for the State of Nebraska There were numerous other letters and telegrams supporting the exclusion of these commodities from the exemption

After reconsideration we find that the evidence presented on appeal warrants excluding dried beans, peas, and lentils from this exemption, subject to further examination Accordingly, we are placing these commodities in the Sub-No 2 proceeding which has been instituted to consider exemptions for certain miscellaneous commodities not covered by the fresh fruit and vegetable exemption in the Sub-No 1 proceeding In order to afford all parties an opportunity to comment, the due date for comments in Ex Parte No 346 (Sub-No 2), *Rail General Exemption Authority-Miscellaneous Commodities* is extended from May 29, 1979 until June 27, 1979

**2 Petitions for clarification were filed by Diamond/Sunsweet Inc., The Western Pacific Railroad Company, Fibre Box Association, and United Fresh Fruit and Vegetable Association These petitions involve interpretative problems with the application of the exemption The first item which requires clarification is our statement that the railroads, in the absence of alternative arrangements, will probably refer to existing tariff provisions in making quotations To insure that the tariffs would be available for reference, we included in the exemption a statement that all tariffs pertaining to the transportation of fresh fruits and vegetables would be of no further effect, except to the extent adopted by carrier quotations This was intended primarily as an interim accommodation, in recognition of the fact that railroads may wish to quote to preexisting tariffs, where they have yet to negotiate alternative arrangements In further response to the petitions for clarification, we do not believe that this exemption precludes publication of tariffs, if the individual carriers so choose to utilize this method It would not

be tariff publication in the regulated sense, since the railroads would not file the tariffs with the Commission and there would be no requirement that they adhere to the notice and publication rules that are applicable to regulated traffic. We anticipate that once the exemption has been phased-in, use of tariff publication will be limited to cover switching, demurrage, and the like, where negotiation of these matters for each individual rate quotation would not be necessary or practical.

***376** This brings us to the second area in need of clarification-the question of antitrust immunity. Petitioners submit that in referring to published tariffs, the railroads may be in violation of the antitrust laws. Clarification is requested as to whether the Commission will confer antitrust immunity for the purpose of tariff reference. We see no potential antitrust problems with referring to tariffs in existence prior to the effective date of the exemption. However, if a railroad in its quote on exempt traffic refers to a new or amended tariff which has been made through collective action on its regulated traffic, the inference of antitrust law violation may arise. The practical effect may be that carriers will only refer to tariffs that are frozen in time as of the effective date of the exemption, which was a point raised by the Fibre Box Association. As far as modifications to the existing tariffs, these can be individually negotiated. Violation of the antitrust laws is a risk inherent in operating in a deregulated environment and one which presumably the railroads will weigh in electing an appropriate method of quotation. In the decision of March 22, 1979, we stated that in view of our finding that regulation of the rail transportation of fresh fruits and vegetables is not necessary to effectuate the national transportation policy, we cannot continue to grant the requested rate bureau immunity. This is because of the opposite finding which must be made in order to approve rate bureau agreements and thus confer antitrust immunity-that relief is necessary to further the national transportation policy. Since the decision, conditions have not changed to the extent that regulation is now necessary to effectuate the national transportation policy. Furthermore, we do not believe that antitrust immunity should be granted without actual regulation of the rates to replace the vigilance of the antitrust laws. We will closely monitor this area to see if modification is necessary.

****3** The third interpretative problem was raised by Diamond/Sunsweet Inc. and Western Pacific Railroad and concerns the treatment of mixed shipments of exempt and nonexempt commodities. Specifically, petitioners state that in-shell walnuts

which are exempt, are normally shipped in mixed carloads with nonexempt shelled walnuts and dried fruits. In the motor carrier area, the regulated portion of mixed loads of exempt and nonexempt commodities, governs. We believe for the time being, the same rule should apply for railroads.^{FN[FN1]} However, we will also consider an exemption on this traffic in the Sub-No. 2 proceeding.

***377** United Fresh Fruit and Vegetable Association asks the Commission to clarify the effect of the exemption on overcharge and loss and damage claims where the cause of action arose prior to the effective date of the exemption, but a claim is not filed with the Commission until after the exemption goes into effect. We find that such claims could still be brought under sections 11706 and 11707, where the relevant dates occur prior to the effective date of the exemption.

An additional matter which must be disposed of is the comments filed by Fred H. Tolan for modification and further postponement of the effective date of the exemption.^{FN[FN2]} Mr. Tolan requests that the exemption be redrafted to provide that fresh fruits and vegetables, including fish, not be subject to suspension and that publication of tariffs relating to these commodities be permitted on 1 day's notice. We considered a more limited exemption, such as described above, in our previous decision and rejected this approach in favor of a broader exemption in order to permit the railroads maximum flexibility. We continue to believe that this exemption as drafted and the flexibility which it will afford the railroads is essential to reverse the steady trend of declining railroad participation in the fresh fruit and vegetable market. It has not been demonstrated that a further extension of the effective date of this exemption is warranted. As noted in our previous decision, we will monitor the new operations to see if modification of the exemption is necessary in light of actual experience.

It is ordered

The following commodities are deleted from this exemption and are included for consideration in Ex Parte No. 346 (Sub-No. 2), *Rail General Exemption Authority-Miscellaneous Commodities*. STCC No. 01 341 Beans, dry ripe, STCC No. 01 342 90 Peas, nec, dried aao split peas, nec, and STCC No. 01 343 10 Lentils, nec, dried. The question of an exemption for mixed shipments of exempt and nonexempt commodities is also included. The due date for comments in that proceeding is extended to June 27, 1979. The exemption in this proceeding is effective

May 28, 1979, as scheduled

This is not a major Federal action significantly affecting the quality of the human environment

1 The Rail Public Counsel, in comments filed in response to the petitions, agrees that ICC regulation of mixed carloads should continue

2 In a petition filed April 4, 1979, Mr Tolan, on behalf of Pacific Northwest Perishable Shippers Association, requested modification of the March 22, 1979 decision in this proceeding to provide for continued regulation where existing annual volume rates apply to both exempt and nonexempt commodities The purpose of the request was to insure that perishable shippers could continue to take advantage of the annual volume rates It was alleged that the tariff minimum could only be met through combined shipments of exempt and nonexempt commodities Union Pacific and Burlington Northern have filed tariffs which give the shippers that assurance by providing that mixtures of exempt and nonexempt commodities will be allowed See TCFB Freight Tariff ICC TCFB 7020-K, supplement 116, item 1636-H, effective May 28, 1979 and item 1638-F, effective April 29, 1979 Accordingly, the petition appears to be moot

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