

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, DC

INTERNATIONAL AIR TRANSPORT	:	
ASSOCIATION	:	
TARIFF CONFERENCE PROCEEDING	:	Docket OST-2006-25307
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COMMENTS OF NASSTRAC, INC. AND
THE HEALTH & PERSONAL CARE LOGISTICS CONFERENCE, INC.

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

Attorney for
NASSTRAC, Inc. and The Health &
Personal Care Logistics Conference, Inc.

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I. INTRODUCTION

NASSTRAC, Inc. and The Health & Personal Care Logistics Conference, Inc. (“H&PCLC”) (collectively, the “Shipper Associations”) hereby file their comments in this proceeding. The Shipper Associations take no position on the issues raised insofar as they relate to IATA’s procedures and continued antitrust immunity with respect to passenger fares. However, as detailed below, the Shipper Associations support the positions of DOT in certain respects as to IATA action on or affecting air cargo. IATA antitrust immunity should be curtailed to the extent necessary to prevent IATA action that directly or indirectly raises air cargo rates.

II. IDENTITY AND INTEREST OF SHIPPER ASSOCIATIONS

The Shipper Associations are incorporated membership associations of shippers of freight. Both Associations have, for many years, pursued their members’ interests in regulatory and other legal proceedings dealing with transportation and logistics issues. Members of H&PCLC, which was begun in 1922, are manufacturers of pharmaceutical,

health care and personal care products, and include most of the nation's largest pharmaceutical companies. Members of NASSTRAC, which was begun in 1952, are large, medium-sized and smaller companies that ship commodities of all kinds, predominantly in package or parcel volumes.

Members of both Shipper Associations are major customers of the airline industry, and collectively ship hundreds of thousands of packages annually in international air freight transportation, including air transportation between the United States and Europe and between the United States and Australia. The Shipper Associations and their members thus have a direct interest in this proceeding.

The Shipper Associations rely on international air carriers, including cargo carriers and passenger carriers that also transport air cargo, for a large and increasing volume of shipments of high-value and time-sensitive goods. As supply chains have come to rely more and more on increased velocity and scheduled freight pick-ups and deliveries, the importance of air carriers in global commerce has increased.

Accordingly, the Shipper Associations have participated in proceedings dealing with security and operational issues affecting air cargo in order to present the views of the cargo shipper customers of air carriers. The Shipper Associations have sought to support the ability of air carriers to provide timely, dependable service. The Shipper Associations regard airline deregulation as a success for carriers, shippers and passengers.

Consistent with that position, however, the Shipper Associations have also supported competition and the operation of market forces with respect to air cargo transportation, just as they have with respect to cargo transportation by motor, rail and water carriers. The Shipper Associations were also active when freight transportation was perva-

sively regulated prior to the deregulatory legislation of the 1970s, 1980s, and 1990s. Their members have experienced first-hand the benefits of deregulation and increased competition, where these new business models have been embraced by carriers of various modes.

III. ARGUMENT

In its Show Cause Order, the Department tentatively determined that the IATA tariff conference agreement “substantially reduces competition” and that “airlines should not make multilateral agreements through IATA on prices, conditions of service, and price applicability conditions for ... cargo services” in the US-EU and US-Australia markets. The Department went on to express its concerns about anticompetitive impacts not just from direct actions taken by IATA members but also from indirect action, including “discussions at committee or working group levels, the sharing of cost and other price-related information through IATA, and mail votes.” Show Cause Order at 27-28. The Department cited basic principles of law and economics supporting competition, as well as pro-competitive initiatives by EU and Australian governmental authorities.

In IATA’s October 20 Comments (styled “Initial Comments,” though the Show Cause Order does not provide for rebuttal comments by IATA), the principles cited by the Department do not appear to be disputed. Rather, IATA’s position appears to be that much of what it does is procompetitive, none of what it does or plans to do in the future is anticompetitive, and in any event, a “rule of reason” rather than a “per se” analysis is appropriate.

At pp. 9-10 of its Comments, IATA concedes that its broad immunity “might be viewed as permitting a substantial reduction of price competition.” IATA goes on to contend:

As established by the affidavit of Rodney Gill and IATA’s previous representations as to future conduct, however, IATA has not used these broad authorities on the routes at issue for the last 26 years and has no intent to take them out of their current standby status. Indeed, IATA would not object to the imposition of a condition on the Provisions which would limit area tariff coordination activity on the routes at issue to interlineable fares and rates and foreclose the exchange of cost information.

IATA Comments at 10, footnote omitted.

The Shipper Associations welcome IATA’s receptiveness to restrictions on its tariff coordination activity.¹ The Shipper Associations do not take a position on interlineable cargo rates, except to note that if they are procompetitive, IATA should not need antitrust immunity to implement them. However, we take issue with the suggestion that IATA’s collective actions with respect to cargo during the last 26 years have been non-controversial.

In the first place, it is not clear how much support IATA’s statement finds in Mr. Gill’s affidavit. That affidavit appears to address only a subset of IATA actions, namely Passenger and Cargo Composite Tariff Meetings. See Gill Affidavit at 2, paragraph 6: “It is important at the outset to understand that the composite meetings, unlike the individual Passenger Tariff Coordinating Conferences, do not agree on the price to be paid

¹ We note that, in its Comments filed October 20, American Airlines states “American has no objection to the withdrawal of antitrust immunity from these conferences [the IATA Passenger and Cargo Tariff Conferences], but would urge the Department to (1) preserve IATA’s ability to perform standard-setting functions that facilitate interline settlement of passenger fares and cargo rates; and (2) create separate time-lines for withdrawing immunity from the passenger and cargo conferences to reflect their inherent differences.”

for online or interline journeys. The same is true for cargo.” Of course, cargo rates can also be affected indirectly, through IATA rule changes.

More fundamentally, however, IATA’s contention appears to ignore the proceedings that took place between 2002 and 2005 in Docket OST-2003-14480. The Shipper Associations participated actively in those proceedings, along with other shippers and shipper groups, including the National Industrial Transportation League and the High Tech Air Freight Shippers’ Coalition, various air freight forwarders, and the U.S. Department of Justice.

For the Shipper Associations, that proceeding is the “elephant in the room.” It must not be ignored, even if it is not discussed in DOT’s Show Cause Order (possibly because the Department made no findings on the merits of the controversy) or in IATA’s Comments (possibly because not referred to in the Show Cause Order).

The Department’s attention is respectfully directed to the filings in Docket OST-2003-14480, for which a brief summary will be provided by the Shipper Associations.

At issue in that proceeding was Resolution 502, adopted in May 2002 by IATA’s Cargo Tariff Coordinating Conference, and in particular, IATA’s decision to replace its existing package dimensional rule of 6000 cc per kg with a new rule of 5000 cc per kg. In English units, IATA was proposing to replace its dimensional rule on international air cargo of 166 cubic inches per pound with a rule of 138 cubic inches per pound. For comparison, the dimensional rule used by US domestic air carriers is a more generous 194 cubic inches per pound.² Moreover, that rule was adopted by domestic air carriers acting

² IATA also contended that it could have justified an even more restrictive dimensional rule of 83 cubic inches per pound.

independently, and not through collective action like IATA's for which antitrust immunity was sought under 49 U.S.C. § 41308.

The Shipper Associations are aware of no shipper support for IATA's dimensional rule change proposal. The Shipper Associations and other shipper opponents characterized the IATA proposal as a collective rate increase by air carriers under IATA auspices of approximately 20%, and pointed to IATA and IATA member filings projecting revenue increases for four air carriers of approximately \$42 million annually as a result of the dimensional rule change. In effect, IATA's rule change amounted to requiring shippers to pay more for low density packages, or to pay the same for less space in air carrier cargo compartments. Either way, this is a rate increase imposed collectively.

The most comprehensive discussion of the relevant economic and legal issues was in the Comments filed by the High Tech Air Freight Shippers' Coalition (joined by the National Association of Manufacturers and National Retail Federation). See also the Comments filed May 29, 2003 by H&PCLC and NASSTRAC, which also expressed support for the High Tech Coalition's comments.

In its Comments filed that same date, the Department of Justice said the "proposal is effectively a price-fixing agreement to increase rates for low density shippers, and IATA has not demonstrated any offsetting important public benefit or fulfillment of a serious transportation need." DOJ Comments at 1.

In Reply Comments filed July 19, 2003, IATA attempted to defend its rule change on several grounds, including that individual air carriers were free to deviate from the IATA rule, and that air forwarders and others might be able to negotiate less disadvantageous provisions.

These Shipper Associations pointed out, in Rebuttal Comments filed August 12, 2003, that IATA's position is akin to arguing that automakers may lawfully agree on list prices for competing autos because most buyers negotiate discounts. See also Arizona v. Maricopa County Medical Society, 102 S.Ct. 2466 (1982). The Shipper Associations also noted that IATA had failed even to acknowledge, let alone address, the issue of whether important public benefits (if any) can be achieved by "reasonably available alternatives that are materially less anticompetitive." 49 U.S.C. § 41309(b)(1).

IATA ultimately withdrew its dimensional rule change proposal, but only after DOT inaction apparently led IATA to conclude that the proposal was unlikely to be approved. Even then, IATA declined to state that its proposal would not be renewed. Rather, the attachment to the March 29, 2005 Submission of IATA included a statement that IATA's Cargo Tariff Conferences Steering Group ("CGS") "recommended that a process for assessing alternative amendments for possible submission at a later date be established."

Under the circumstances, the Shipper Associations cannot accept IATA's contentions in its Comments in this proceeding that air cargo shippers have had, and will have, nothing to fear from IATA action on or affecting cargo rates through its tariff conferences.

IV. CONCLUSION

For the reasons set forth above, the Shipper Associations support the position taken by the Department in this proceeding and call on the Department to terminate or

modify IATA antitrust immunity to the extent necessary to prevent collective air carrier action through IATA that directly or indirectly increases air cargo rates.

Respectfully submitted,

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

Attorney for
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Dated: November 17, 2006

CERTIFICATE OF SERVICE

I hereby certify that I have this 17th day of November, 2006 caused the foregoing document to be served by first class mail on all known parties of record.

John M. Cutler, Jr.