

BEFORE THE
SURFACE TRANSPORTATION BOARD

EX PARTE NO. 656
MOTOR CARRIER BUREAUS – PERIODIC REVIEW PROCEEDING

EX PARTE NO. 656 (Sub-No. 1)
INVESTIGATION INTO THE PRACTICES OF THE
NATIONAL CLASSIFICATION COMMITTEE

REPLY OF NASSTRAC, INC. IN OPPOSITION TO REQUEST
FOR EXTENSION OF TIME

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NASSTRAC, Inc. hereby replies in opposition to the Request for Extension of Time (hereafter “Extension Request”) filed May 18, 2007 by the National Classification Committee (“NCC”) and National Motor Freight Traffic Association (“NMFTA”). In keeping with the practice of the Board in this proceeding, NASSTRAC will refer to NMFTA and NCC collectively as “NCC.”

The amount of time requested by NCC for compliance with the Decision served May 7, 2007 in this proceeding – 18 months versus the 120 days provided for by the Board – could be used by NCC for unprecedented increases in commodity class ratings and other activities that would injure shippers. The fact that the Board’s Decision terminates NCC’s antitrust immunity means NCC will have every incentive to adopt such measures while collective action is still lawful. In addition, NCC has offered only specious arguments in favor of its Extension Request. Accordingly, NCC’s Extension Request should be denied.

I. NCC’s Claim That No Interests Would Be Harmed By Its Extension Request Is False

At page 2 of its Extension Request, NCC argues that “no interests would be harmed by this extension,” and the same claim is made at page 13, where NCC states that “no person would be prejudiced or disadvantaged by granting the relief sought.” These arguments are false. NCC provides no support for these contentions, but appears to rely on the fact that it has operated for many years, and on a self-serving misreading of the Board’s Decision.

Conspicuous by its absence is any suggestion that the NCC would refrain from continuing to act collectively to increase commodity class ratings over the next 18

months if its Extension Request is granted. The NCC has already stated that, during the next 120 days it intends to go forward with its meeting planned for June 4-5, 2007, in Alexandria, VA. See the Press Release on its website, www.nmfta.org.

At best, granting NCC's Extension Request would mean 18 more months instead of 120 more days of the abuses complained about at length by numerous shippers and shipper organizations in record filings in this proceeding. That is to say, shippers would be confronted with disparate burdens (heavier for shippers than carriers), and with procedures, decisional standards, policies and personnel that have for many years been challenged as biased to at least some degree in favor of motor carriers.

At worst, the Extension Request could lead to a flurry of activity by carriers and the NCC to increase most if not all commodity class ratings, convert every NMFC Item to a density scale based standard, multiply unfair rules like the mixed shipment rule, make the non-linear Density Guidelines even more non-linear, modify the NMFC bills of lading to favor carriers even more, etc. With termination of antitrust immunity only 18 months away, the NCC members and staff would have every incentive to take the fullest possible advantage of the additional time to lock in collective actions that could not be undertaken after the effective of the STB's Decision without exposure to the antitrust laws.

Given the reality that the risk to shippers of abuses by the NCC would at best, continue as is for an extended period, and at worst, increase dramatically, NCC's claim that "no person would be prejudiced or disadvantaged by granting the relief requested" cannot be taken seriously.

In light of these concerns, not only should the Board reject NCC's request for an effective date 18 months after the Decision, but the Board should grant no extension of its current effective date of September 4, 2007. The NCC website indicates that NCC intends to go forward with its June meeting. The meeting after that is scheduled for September 29-October 2, 2007. If the Board were to grant even a 30-day extension of its current effective date of September 4, 2007, NCC would be in a position to docket major new collective freight classification proposals at its June meeting and adopt them at its meeting beginning in late September. Evidently, this is exactly what NCC has in mind. See Extension Request at 5 (emphasis added): "First, the NCC must be prepared to change its structure and formulate an alternative classification-making procedure that will appropriately evaluate the transportation characteristics of virtually all products moving in commerce and group these products according to their transportability."

In this way, NCC members would be able to "use the classification process as a revenue protection device," as the Board feared might happen. Decision at 21. Absent an extension, NCC would presumably cancel or postpone its late September meeting, or at least refrain from collective action on controversial commodity classification issues.

Only through a willful and perverse misreading could the Board's decision terminating antitrust immunity for collective carrier action on freight classification be read as a green light for a final feeding frenzy of collective classification changes while such action is still immunized from the antitrust laws. Unfortunately, the history of motor carrier collective action reflects just such extreme positions. See, e.g., Clark & Reid Co. v. United States, 851 F. 2d 1468 (1988).

II. The NCC Does Not Need An Extension Of Time To Achieve Any Legitimate Goals

Even if the NCC had stated in its Request that it would maintain the status quo during any extension of the effective date, or that it would accept an extension of time conditioned on such a freeze of current classifications, there would be no reason to grant NCC's Request. No good cause has been shown for any extension of the current September 4, 2007 effective date.

The main rationale offered by NCC for more time is that it "will give very serious consideration to the Board's advice to 'reform' the classification process." NASSTRAC takes this to mean that NCC is reserving its right to reject reform, and to challenge the Board's decision in court or through a testing of how much it can do without antitrust immunity. These options are available to NCC, but do not warrant granting the requested extension.¹

NCC also makes much of its plans to seek a business review letter from the Department of Justice. Apparently, NCC would have the Board believe that continued antitrust immunity is necessary to allow NCC to take advantage of DOJ business review letter procedures. Any such implication is false.

Many years ago, NASSTRAC and the Health & Personal Care Logistics Conference, acting separately, obtained business review letters as to motor carrier discount pricing information. More recently, the American Trucking Associations sought and obtained a business review letter. These associations do not enjoy any generalized immu-

¹ NASSTRAC addresses below the possibility that NCC is effectively seeking a stay pending judicial review without openly asking for one or acknowledging the governing standards.

nity from the antitrust laws, though limited immunity under the Noerr-Pennington doctrine may have applied, and may apply to NCC.²

More fundamentally, the NCC does not need continued antitrust immunity while it is learning how to operate without antitrust immunity. Its new antitrust counsel (Extension Request at 4) can advise NCC within the next 120 days on how to operate lawfully without antitrust immunity. This is done routinely and daily by thousands of trade associations and businesses across America.

To the extent that NCC is worried about litigation risk, its concerns are illegitimate. In this regard, NASSTRAC would ask the Board to take official notice of the Report and Recommendations issued April 2, 2007 by the Antitrust Modernization Commission, and especially Chapter IV, Government Exceptions to Free-Market Competition, and pp. 332-366. See, in particular, pp. 350-351 (footnotes omitted):

The Commission finds two arguments in favor of antitrust exemptions particularly unpersuasive, however. First, no immunity should be granted to create increased certainty in the form of freedom from antitrust compliance and litigation risk. Antitrust compliance and litigation risks are costs of doing business that hundreds of thousands of American businesses manage every day. No particular companies or industries should be specially entitled to avoid these costs; if the costs are unreasonable, broader reform applicable to all businesses is the proper remedy. Second, no immunity should be granted to stabilize prices in order to provide an industry with certainty and predictability for purposes of investment or solvency. This too is a benefit that all industries would appreciate, but that none should be singled out to receive. The costs of price “stability” typically flow to consumers and result in inflexibility that undermines economic growth.

² See Eastern Railroad Presidents Conference v. Noerr Motor Freight, 365 U.S. 127 (1967), United Mine Workers & Pennington, 381 U.S. 657 (1965) and their progeny.

In any event, the NCC does not need an extension of the September 4 effective date to avoid exposure to liability because a simpler and better alternative is available. The NCC can simply suspend collective action on freight classification that carries a risk of impropriety, while it is analyzing its future options. This approach would preserve the present benefits of the current classification and effectuate the Decision of the Board in this proceeding.

As NASSTRAC has pointed out many times, the National Motor Freight Classification will not go out of existence merely because the Board has terminated the NCC's antitrust immunity for future collective action that would otherwise violate the antitrust laws. Carriers and shippers will still be able to use the NMFC in rating freight, so long as they act individually rather than collectively. The NCC may even be able to continue acting collectively as to non-controversial matters, such as effective packaging standards.³ Carriers may even be able to act unilaterally in employing NMFC commodity classifications as to freight moving in common carriage under vestigial carrier "tariffs", though individual shippers could negotiate with carriers as to class ratings along with class rates and discounts.

To be sure, the 20-30 individual commodities that are typically addressed through collective action when the NCC has one of its meetings may have to be dealt with individually rather than collectively after September 4, 2007. However, this result is neither unduly disruptive to the nation's motor freight transportation system nor undesirable as a

³ It should be noted, however, that certain collective actions as to packaging can give rise to antitrust concerns. See, for example, the Final Order served March 30, 2007 by DOT in Docket OST-2006-25307, terminating the antitrust immunity of the International Air Transport Association, effective June 30, 2007, as to international air cargo shipments between the US and EU and between the US and Australia. At pp. 43-46 of that Order, DOT cites comments by NASSTRAC regarding collective action by IATA's carrier members to change the dimensional rule on cargo that would have increased cargo rates by 20% for many shippers.

matter of law or public policy. On the contrary, individual action on future freight classification issues is preferable to collective carrier action.⁴

III. The Extraordinarily Long Extension of Time Sought by NCC Would Resemble a Stay Pending Judicial Review

In seeking an extension of the effective date of the Board's Decision until November 2008, the NCC is seeking an extension that could produce the same result as a stay pending judicial review. If the NCC obtained an 18 month extension, it could then file a petition for judicial review, and could continue to act collectively on commodity classification issues, either as it has done in the past or at an expanded level, while challenging the STB's Decision in the court of appeals.

The Board's Rules of Practice, 49 C.F.R. § 1115.5, permit parties to seek a stay pending review, though NCC's Extension Request exceeds the 10 page limit on petitions and replies. However, Board precedent indicates that stay petitions are considered under the following familiar tests: "(1) that there is a strong likelihood that movant will prevail on the merits; (2) that the movant will be irreparably harmed; (3) that other interested parties will not be substantially harmed; and (4) that the public interest supports the granting of the stay." See the Board's decision served July 27, 2005 in Finance Docket No. 32760 (Sub-No 44), Union Pacific Corporation – Control and Merger, at page 7, citing Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 559 F. 2d 841, 843 (D.C. Cir. 1977) and Virginia Petroleum Jobbers Ass'n v. FPC, 259 F. 2d 921, 925 (D.C. Cir. 1958).

NASSTRAC submits that NCC has met and can meet none of these tests, and that NCC's Extension Request should be denied. We fear that, in failing even to acknowl-

⁴ The NCC's discussion of changes in its operations between 1980 and 1988 while antitrust immunity continued in effect (Extension Request at 7-9) is therefore inappropriate.

edge these tests, the NCC may be pursuing a strategy of attempting to achieve its goals through its Extension Request, while planning to come back to the Board for a stay pending judicial review if the Extension Request is denied. NASSTRAC would regard such an approach as an abuse of the STB's Rules of Practice, and expects to oppose any stay request NCC files.

IV. Conclusion

For the foregoing reasons, NASSTRAC urges the Board to deny NCC's Extension Request.

Respectfully submitted,



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Dated: May 25, 2007

CERTIFICATE OF SERVICE

I hereby certify that I have this 25th day of May, 2007, caused copies of the foregoing document to be served by first-class mail on all parties of record.



John M. Cutler, Jr.