

**BEFORE THE**  
**SURFACE TRANSPORTATION BOARD**

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**SECTION 5A APPLICATION NO. 46 (SUB-NO. 20),  
SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC.**

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**REPLY OF THE NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE,  
INC. TO PETITION OF SOUTHERN MOTOR CARRIERS RATE CONFERENCE,  
INC. TO REOPEN AND RECONSIDER**

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**I. INTRODUCTION**

The National Small Shipments Traffic Conference, Inc. ("NASSTRAC") hereby replies to the November 5, 2003 Petition of Southern Motor Carriers Rate Conference Inc. ("SMC"). In that petition, SMC asks the Board either to approve its 1997 request for nationwide authority based on the record made in Section 5a Application No. 46 (Sub-No. 20), or to reopen the old proceeding and establish a procedural schedule for the filing of additional evidence and argument by interested parties.

NASSTRAC opposes SMC's request for approval of its application for nationwide authority without further proceedings. NASSTRAC does not oppose SMC's request for establishment of a procedural schedule so that SMC's request can be considered at this time. However, NASSTRAC notes that the record in Section 5a Application No. 46 (Sub-No. 20) is now many years old, and the filings in that proceeding contain data of questionable reliability today and are evidently no longer available to the public on the

STB's website. It therefore appears preferable to institute a new proceeding to consider the important issues presented by SMC's request for nationwide authority.

## **II. INTEREST OF NASSTRAC**

NASSTRAC is a non-profit membership corporation representing the interests of shippers of freight, with special emphasis on truck shipments of LTL and package shipments. Since 1952, NASSTRAC has been active in proceedings before the ICC and STB on behalf of hundreds of shipper members, as well as shippers generally. NASSTRAC participated actively in the Board's recently-concluded NCC and rate bureau reform proceedings.<sup>1</sup> NASSTRAC members are directly affected by the actions taken collectively by the carrier groups with antitrust immunity.

More particularly, NASSTRAC has in the past expressed general support for nationwide authority, reflecting its belief that competition among rate bureaus is desirable, and its recognition of a number of forward-looking initiatives adopted by SMC. These include associate membership status for shippers (including a number of NASSTRAC members), and SMC's practice of holding open meetings which shippers may attend.

Notwithstanding these considerations, NASSTRAC does not believe the Board should effectively act summarily, granting SMC nationwide authority on the basis of filings that may be 6 years old. Whether SMC's request should be granted, denied, or approved only subject to conditions should be decided in the context of today's motor carrier environment, on the basis of current evidence, arguments and policies.

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<sup>1</sup> Section 5a Application No. 61 (Sub-No. 6), National Classification Committee -- Agreement, and Section 5a Application No. 118 (Amendment No. 2), et al., EC-MAC Motor Carriers Service Association, Inc., et al.

### **III. NATIONWIDE AUTHORITY FOR SMC SHOULD BE CONSIDERED IN LIGHT OF PRESENT CIRCUMSTANCES**

In its November 5 petition, SMC bases its arguments for nationwide authority without further proceedings on two factors. First, SMC points out that the decision by Congress in Section 227 of the Motor Carrier Safety Improvements Act of 1999 to prohibit nationwide authority for rate bureaus was reversed by Congress in a provision of the Omnibus Appropriations Act FY 2003. Petition at 3-4. However, the change in the statute enacted in 2003 merely restores to the Board the power to consider whether, and on what terms, to authorize nationwide authority for rate bureaus. See 49 U.S.C. § 13703(a)(2) and (3).

Second, SMC points out that the Board announced its intention to grant requests for nationwide authority in its decision served December 18, 1998 in Section 5a Application No. 118 (Amendment No. 1), et al. However, this decision itself is almost five years old. More fundamentally, the Board's announced intention to approve nationwide authority was conditional. The Board would not approve nationwide authority in the face of a clear expression of contrary Congressional intent, which the Board received in 1999 and was bound by until earlier this year. In addition, the Board was prepared in 1998 to lift territorial restrictions "provided the bureaus reduce their class rate scales appropriately." In fact, there has been no reduction in class rates.

As NASSTRAC and other shippers and shipper organizations pointed out in their filings in Section 5a Application No. 118 (Amendment No. 2), the extraordinarily high levels to which bureau class rates were raised in the wake of trucking deregulation under the Motor Carrier Act of 1980 were the major driving force behind the undercharge epidemic of the 1980s and early 1990s. NASSTRAC also pointed out that antitrust immu-

nity is disfavored in American law and policy, and should be granted (or expanded) sparingly, if at all. See, e.g., NASSTRAC's Opening Comments filed April 11, 2000 in Section 5a Application No. 118 (Amendment No. 2).

As the Section 5a Application No. 118 (Amendment No. 2) proceeding progressed, the Board abandoned its call for reductions in class rates to reasonable levels. Unfortunately, the Board also refused to hold, or even establish a presumption, that undiscounted class rates are inherently unreasonable, even though discounts in excess of 70% are common today for large shippers.

The Board also rejected shippers' call for automatic minimum discounts, preferring instead a "truth-in-rates" requirement under which rate bureaus must disclose ranges of discounts (without disclosing whether the smallest discounts are common or rare). See the Board's decision in Section 5a Application No. 118 (Amendment No. 2), EC-MAC Motor Carriers Service Association, Inc., et al., served November 20, 2001.

The context in which SMC seeks nationwide authority today is thus different from the context in which the Board contemplated granting such authority in 1998. Bureau class rates today are even higher than they were in 1998. When the various bureaus filed their status reports in May, 2003 in accordance with the Board's November 20, 2001 decision, discounts of as high as 89% were disclosed.<sup>2</sup>

There are other changed circumstances that necessitate a new look at SMC's request for nationwide authority. Prominent among them is the apparent collapse of other

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<sup>2</sup> The rate bureaus also disclosed their minimum discounts in those status reports. Despite earlier claims by certain bureaus that there were no discounts smaller than 35%, and that automatic minimum discounts were therefore not need to protect infrequent or unsophisticated shippers, significantly smaller discounts are in fact being charged (e.g., 25% for Rocky Mountain Tariff Bureau, 10% for Niagara Frontier, and 20% for EC-MAC). To its credit, SMC reported that its members comply with the 20% minimum discount agreed to by SMC in light of its generally lower class rate levels.

rate bureaus, as noted in the Board's recent decision served October 16, 2003 in Section 5a Application No. 118 (Amendment No. 2). There are reportedly other bureaus whose ability to survive is far from assured. And even bureaus with solid financial and member support may wonder whether they will be able to provide real value to their members, let alone satisfy the public interest standard of the statute, if SMC gains nationwide authority and if SMC's CzarLite rate base becomes, de facto, the sole nationwide class rate tariff, maintained and amended by SMC acting unilaterally.

In past filings, NASSTRAC has supported nationwide authority for SMC on the theory that it would then provide competition for other rate bureaus, which have often been seen as less shipper-friendly than SMC. However, if nationwide authority means SMC becomes the only, or the only significant, motor carrier rate bureau in the U.S., NASSTRAC's former goal of increased competition will not be achieved.

In addition, NASSTRAC must ask whether SMC will continue to be so shipper-friendly if it obtains nationwide authority. As noted above, SMC operates with commendable transparency today. Will that change if it becomes the dominant rate bureau? Will that change if its dominance leads shippers and shipper organizations to participate more actively in its meetings? Is SMC prepared to adopt some of the reforms adopted by the National Classification Committee, as mandated by the Board in Section 5a Application No. 61 (Sub-No. 6), National Classification Committee -- Agreement, decision served November 20, 2001 and subsequent decisions?

Ancillary issues arise, ranging from fundamental issues of regulatory policy to commercial issues. As an example of the former, will nationwide authority lead to a single nationwide class rate base controlled by a single regional membership and staff, and

if so, are adequate safeguards in place to preserve the competition Congress sought when it deregulated trucking? Is it enough for a few shippers that follow these issues to be aware of the changes that might result?

If CzarLite does become the baseline class rate tariff for the motor carrier industry, so that a license to use it becomes more necessary than it is today, will licensing fees go up? Should there be any limit on those fees or on how licenses may be used? How often will class rates be subject to change? Assuming (as NASSTRAC believes is true) that smaller shippers tend to be least aware of increases in base rates, and therefore slowest to negotiate offsetting adjustments in their discounts, then more frequent rate increases mean more such periods of arguably excessive payments by shippers and charges by carriers.

Similarly, if nationwide authority for SMC leads to a dramatic expansion of its membership (currently 129 carriers, according to SMC's website), will the organization's responsiveness to individual carriers, shippers or regions be compromised?

NASSTRAC members are the beneficiaries of competition in the marketplace for truck transportation, and regard trucking deregulation as a stunning success. For that very reason, however, NASSTRAC is not willing to assume that shippers' ability to engage in arms length negotiations with motor carriers will always adequately protect their interests, regardless of changes in the context in which such negotiations take place.

To draw an obvious analogy, dealings between shippers and carriers as to freight classification are sometimes adversarial. While the reforms adopted by the Board may prove helpful once implemented, the possibility of abuses of market power by carriers acting collectively with antitrust immunity has not been eliminated. With freight classifi-

cation, as with class rates, it is the small-scale abuses, affecting relatively few in relatively small ways, but with significant cumulative effects, that are hardest to address.

### **CONCLUSION**

For the foregoing reasons, the full implications and impacts of SMC's request for nationwide authority, for shippers, carriers, other rate bureaus and the public interest, need to be explored in detail. There could be significant benefits from nationwide authority for SMC. Whether those benefits outweigh interested parties' concerns, warranting denial or conditioning of SMC's request, cannot be decided without further proceedings.

NASSTRAC suggests that a proceeding be instituted to consider SMC's request, in which SMC would file opening comments, with at least 30 days for responses by other interested parties.

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CERTIFICATE OF SERVICE

I hereby certify that I have this 25th day of November, 2003, served the foregoing document by first class mail on SMC and other interested parties, as follows:

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