A Matter of Trusts

Transportation Law

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On May 7, 2007, the U.S. Department of Transportation's Surface Transportation Board published decision STB-656; this new policy may sound the death knell for the last vestiges of antitrust immunity regarding collective rate making in the trucking and household- goods-moving industries. The STB, in a thoughtful and detailed 28-page decision, reviewed the historical background for the initial implementation of federal regulation of interstate rail transportation; the extension of that regulation to motor carriers and household goods carriers; the grounds for granting antitrust immunity to the industry; and the reasons why neither the industry, nor its customers, need the troubling features of that anachronistic protection. This report will briefly look at the regulated past of the interstate transportation industry, describe the issues determined by the STB, and venture a view into the near future which will lack the limited antitrust immunity that existed until the May 7 decision in STB-656.

The Regulated Past:

Before the advent of the railroads, interstate and inter-territorial transportation was accomplished by horse and oxen. Oat-powered beasts of burden hoofed across the plains, foothills, and mountains to transport necessities (including alcohol, ribbons, and the Good Book) to the ever-expanding Western territories. The trek was long and dangerous, and hauling capacity was limited by the one-horse power engine of…well, one horse. Then the railroads changed the game. Railroads had a monopoly on efficient long-haul transportation and enjoyed load capacities that were staggeringly large compared to the oat-fueled plodders. Monopolies, however useful, also breed inefficiencies and are prone to market abuse. It did not take long for big shippers, including oil companies, to begin manipulating the railroads into sweetheart deals and cutthroat competitive practices which left small shippers and farmers in dire straights. Some railroads, pickled with power, engaged in pricing and marketing practices that can only be regarded as shameful. The railroads were one of the earliest and the first to generate antitrust legislation: the Interstate Commerce Act of 1887. The Act brought federal regulation and restraints to the railroads, and created the first federal regulatory agency, the Interstate Commerce Commission (ICC).

The railroads managed to survive, and even thrive, in the early days of regulated carriage. But the rise of motor carriers as a competitive force eventually brought the railroads to Congress with a plea to place the motor carrier industry under the regulated restraints of the Interstate Commerce Commission. The pricing freedoms, ease of entry, and lack of regulations gave motor carriers a significant competitive advantage over the railroads. The resulting Motor Carrier Act of 1935 placed the railroads and motor carriers into equally binding regulatory constraints. While the new regulations provided pricing stability for the motor carriers, they also saddled the industry with significantly inefficient rules, which limited the cargo carriers could haul, the routes they could take, and even the customers they could serve. The new rules were also a substantial barrier to entry for burgeoning motor carriers, who had to obtain a certificate of public convenience and necessity in order to operate. However, under the Act of 1935 motor carriers were allowed to set their own line-haul rates, provided that those rates were submitted in tariffs to the Interstate Commerce Commission for approval. Shippers and competitors were allowed to challenge proposed new rates by an action filed with the ICC. But once approved, a filed tariff rate was legally binding on carrier and shipper alike: carriers had to charge and collect the

rates listed in their tariffs. They could not discriminate among shippers by discounting the rates or by giving disguised rebates in the form of paying inflated cargo loss or damage claims.

The antitrust regulation of motor carriers took a turn toward the bizarre in 1948, through passage of the Reed-Bullwinkle Act. After a raft of antitrust investigations and scandals, Congress gave motor carriers the right to collectively set rates for filing with the ICC and immunized those collective activities from prosecution under antitrust laws. Ironically, the ICC was now encouraging the collusive practices that it had been formed to deter. Rate bureaus would now collate or determine prices and standard practices from industry members, then file those standard terms and conditions in tariffs with the ICC. One of the few requirements was that the rates be "reasonable." During the decades following 1948, most motor carriers belonged to rate-filing bureaus and charged the undiscounted class rates set by the bureaus. It was a good time to be a trucker.

Erosion of Regulation:

A movement toward deregulation and an increased reliance on free market forces began during the Ford administration. The aviation industry was the first area to experience deregulation, with the passage of the Airline Deregulation Act of 1978. With the new support for competition from President Carter, Congress then began a systematic dismantling of the regulated structure of interstate rail and motor carriage. The Staggers Rail Act of 1980,and the Motor Carrier Act of the same year slashed regulations and granted both industries the freedom to compete without the protective safety net of regulation beneath them. Barriers to entry into the market were eliminated, resulting in a flood of new motor carriers. It seemed that anyone with a brother-in-law and a pickup truck was advertising himself as an interstate motor carrier. Individual carriers were encouraged to file separate tariffs with even lower freight rates.

After passage of the Motor Carrier Act of 1980, only two major elements of the regulated regime remained: the obligation to file tariffs with the ICC and the antitrust immunity offered to bureaus to collectively establish prices contained in filed tariffs. The former requirement was largely eliminated by the Trucking Industry Regulatory Reform Act of 1994 and the Interstate Commerce Commission Termination Act of 1995. After the passage of ICCTA, most carriers did not have to file their tariffs with a government agency, though they still had to publish and maintain their tariffs for presentation to shippers. Most carriers relied upon rate bureaus to publish those tariffs. The government, through the new Surface Transportation Board, was required to review the antitrust immunity of rate bureaus every five years to ensure that the immunity still served the public interest. During the most recent review, culminating in STB-656, was the coup d'etat for the antitrust immunity of rate bureaus.

STB-656:

Motor carriers have long been free to publish tariffs independently; most did not. They used rate bureaus to determine the rates, terms, and conditions that bureau members would charge and enforce. Until TIRRA and ICCTA passed, it was illegal for a carrier to charge (or a shipper to pay) a rate other than that contained in the carrier's filed tariff. After ICCTA, discounting from published tariffs became commonplace. Motor carriers and shippers would use the bureau tariff rates as a starting point for price negotiations. One rate bureau, the National Motor Freight Traffic Association, published the National Motor Freight Classification, which set less-than truckload industry standards for describing the shipping characteristics of cargo, including weight, dimensions, and even damage liability limitations for certain products. Regional rate bureaus would then use those class rates to set pricing standards for its LTL carrier members.

The STB determined that the public is no longer well-served by granting the bureaus antitrust immunity for their collective rate making and pricing practices. It found that the shipping public has "a significant interest in having the competitive market set the rates for all shippers, without the restraint on competition that collectively set, antitrust-immunized class rates can produce". The STB expressed a special concern for protecting the disadvantaged shipper: those lacking a geographically friendly location or a

volume that allows them to negotiate prices significantly lower than those published by the rate bureaus. Perhaps most significantly, the STB did not prevent all collective practices by the rate and classification bureaus; it merely eliminated antitrust immunity for those activities. If those collective activities can be accomplished without violating the antitrust laws, they may continue. Among the collective activities listed by the STB as beneficial to the public are freight classifications; through rates, joint rates and divisions through partnership and contractor/subcontractor arrangements; mileage guides; and, certain collectively determined rules. However, STB approval of the current National Motor Freight Classification, as well as the published tariffs of eleven regional rate bureaus, has been withdrawn. The Household Goods Carriers Bureau Committee also lost its STB approval.

What happens now?

No one can say with certainty what results the STB-656 decision will have. Industry leaders are mulling over the possible ramifications of the decision, and readers will find widely-varied forecasts for the immediate future of rate bureaus subject to the new rules. Nonetheless, the STB recognized the benefits that collective classifications bring to the market. The industry must determine which aspects of collective practices will continue, albeit under the glare of antitrust laws. The STB suggested that some activities currently conducted by the industry might be acceptable if performed by independent, third party vendors. Perhaps new industries will arise to provide pricing information to shippers. Existing third and fourth party logistics companies might already provide some of this market information. A thriving business in tariff publishing might also be anticipated, especially as individual carriers look to avoid the taint of collective rate publication.

It is certain that the transportation community will survive this bump. It has more than a quarter century of free market operations under its collective belt. Antitrust lawyers may now join the carrier's teams of trusted advisors, but trucks will still roll and shippers will still be looking for the best deal available.

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