

STATEMENT OF NEED AND REASONABLENESS  
IN SUPPORT OF COLLECTIVE RATEMAKING RULES

The purposes of these rules are to ensure nondiscriminatory rates and charges for shippers and receivers, and to preserve and continue collective ratemaking in Minnesota by immunizing the collective activity of Minnesota motor carriers from federal antitrust laws. These rules also effectuate Minn. Stat. § 221.165 (1984).

Joint consideration of rates and charges is necessary to provide an orderly rate system. Without collectively set rates shippers and receivers would be subject to a veritable patchwork of charges and rates which would involve hundreds of individual tariff filings in lieu of agency tariffs filed for account of all participating carriers. Other justifications for collective ratemaking include the following:

1. Collective ratemaking is a practical way for the state to effectively regulate in the public interest the level of motor carrier rates and the relationship of rates to each other.

2. Collective ratemaking may prevent, or at least minimize, the damaging effects upon the economy of serious discrimination in the prices paid for motor carrier service by large and small shippers who are in competition with each other.

3. Collective ratemaking will help to preserve a well-coordinated network of motor carrier service required for efficient and expeditious distribution of the vast variety of goods which move to and from every corner of the economy by truck.

4. Collective ratemaking helps assure the degree of rate stability and certainty that producers, shippers and distributors must have in order to plan current and projected production and marketing operations efficiently.

5. Collective ratemaking provides a method by which shippers are involved in monitoring and influencing the ratemaking process.

These justifications are taken from J. J. Friedman, Collective Ratemaking by Motor Common Carriers: Economic and Public Policy Considerations, 10 *Transp. L. J.* 33 (1978)

Under collective ratemaking, rates are established by joint consideration of the motor carriers holding authority to provide transportation services in a particular territory. Collective pricing action by competitors would, under ordinary circumstances, violate the antitrust laws. However, collective ratemaking by motor carriers regulated by the Interstate Commerce Commission is exempt from Federal Antitrust Laws (i.e., Sherman Antitrust Act and Clayton Act) by virtue of the Reed-Bulwinkle Act of 1948, codified in 49 U.S.C. 10706, as long as such carriers participate in an I.C.C. approved ratemaking agreement.

Collective ratemaking in Minnesota has been viewed as exempt from state antitrust laws by Minn. Stat. § 325D.55, subd. 2 (1984); however, such collective activity has been viewed by the U. S. Department of Justice as a violation of federal antitrust laws. In United States v. Southern Motor Carriers Rate Conference, Inc., et al., 467 F.Supp.1 (N.D.Ga.1979); aff'd, 672 F.2d 471 (5th Cir. 1982); aff'd en banc, 702 F.2d 532 (5th Cir. 1983) ("Southern Motor Carriers Rate Conference") the United States Department of Justice successfully enjoined the collective ratemaking activities of three motor carrier rate bureaus representing common carriers before regulatory commissions in the states of Alabama, Georgia, Mississippi, North Carolina and Tennessee. The United States District Court for the Northern District of Georgia found that the practice of collective ratemaking constituted a per se violation of the Sherman Antitrust Act. That decision was upheld by a three-judge panel and by the Court sitting en banc. The United States Supreme Court granted certiorari in this case. 467 U.S. 1240 (June 11, 1984). The Southern Motor Carriers Rate Conference case established several standards that would qualify an intrastate collective ratemaking procedure for exemption from federal antitrust laws under the state action doctrine enunciated in Parker v. Brown, 317 U.S. 341, 63 S.Ct. 307 (1943). The collective activity must be:

- (1) compelled by the state,
- (2) "clearly articulated and affirmatively expressed as state policy", and
- (3) "actively supervised by the state."

On March 27, 1985, the United States Supreme Court, in a 7-2 decision, ruled that the intrastate ratemaking activities of Southern Motor Carriers Rate Conference (SMCRC) and North Carolina Motor Carriers Assn. (NCMCA) in Georgia, Mississippi, North Carolina and Tennessee are immune from the Federal antitrust laws by virtue of the "state action" doctrine. The United States v. Southern Motor Carriers Rate Conference, Inc. et al., 105 S. Ct. 1721 (1985). The compulsion prong of the earliest decision was removed; however, the remaining two prong test was still ruled to be necessary in order to qualify for an antitrust exemption:

1. The challenged restraint must be one clearly articulated and affirmatively expressed as state policy.
2. The state must supervise actively any private anticompetitive conduct.

After Southern Motor Carriers Rate Conference, the legislature, in an effort to preserve and continue collective ratemaking in Minnesota enacted Minn. Laws 1983, Ch. 256 § 1, codified as Minn. Stat. § 221.165 (1984), to immunize intrastate ratemaking. These rules implement Minn. Stat. § 221.165 (1984) and further clarify that collective ratemaking in the state of Minnesota is:

(1) "clearly articulated and affirmatively expressed as state policy," and

(2) "actively supervised by the state."

#### 8900.0300 General Duties of Motor Carriers

Subpart 1. This subpart requires all motor carriers subject to rate regulation to participate in collective ratemaking as required by Minn. Stat. § 221.165 (1984). The latter statute also confirms the fact that collective ratemaking is "clearly articulated and affirmatively expressed as state policy."

Subpart 2. Minn. Stat. § 221.165 (1984) also requires that collective ratemaking procedures be submitted to the Board for approval. Parker v. Brown also requires that collective activity be "actively supervised" by states to qualify for state action immunity. The review and approval of collective ratemaking procedures by the Board establishes active supervision of collective ratemaking in Minnesota. Thus, this subpart accomplishes the supervisory requirement of Parker v. Brown.

#### 8900.0400 Filing Requirements

Subpart 1. Provisional Approval. For the purpose of implementing Minn. Stat. § 221.165 (Supp. 1983) without further delay, it is proposed that the Board will provisionally approve initial collective ratemaking procedures filed by collective ratemaking organizations provided they conform generally to requirements set forth in Subparts 2 to 12 of the proposed rule. The Board's authority for granting provisional approval is in part Minn. Stat. § 174A.02, subd. 1 (1984). Under Parker v. Brown, collective activity must be "clearly articulated and affirmatively expressed" as state policy. This section also further exemplifies active supervision by the state as required by Parker v. Brown.

Subp. 2. Each carrier must be specifically identified in order for the Board to verify that the carrier possesses Minnesota intrastate operating authority and the extent of such authority to serve the public.

Subp. 3. Member carriers must be allowed to discuss any proposal docketed, but only those carriers with authority to participate in the transportation may vote on the proposal. The reason for this rule is to prevent frivolous voting by carriers, either in favor of or against rate proposals, when those carriers do not have appropriate authority to participate in the movement.

Subp. 4. The right of independent action must be guaranteed in any collective ratemaking organization, and beyond that, carriers are prohibited from any activity which may prevent another carrier from exercising its right of independent action.

Subp. 5. Notice of carrier proposals must be given in a joint docket bulletin in order that other carriers, the Board, and other persons who subscribe to the bulletin may be in a position to respond to the proposed action as they deem appropriate.

Subp. 6. The organization must not be allowed to protest or complain of tariff proposals submitted by member carriers. The reason for this rule is obvious. The organization is merely an administrative body acting only at the direction of its participating carriers. This rule is also present in interstate agreements.

Subp. 7. Revenues and expenses of participating carriers in any rate structure must be ascertained in arriving at collectively set rates. Both MMFB and MTSA agree on this principle, as required in Minn. Stat. 221.165, but still does not preclude the right of independent action by a member carrier to establish a rate deviating from the collectively set rate, in accordance with procedures set forth in these rules (8900.0800).

Subp. 8. Employees of the organization are prohibited from docketing or voting upon a proposal resulting in a change in carriers rates. The employees may only act at the express direction of the carriers, and then must further observe the rules of procedure prescribed herein. Interstate agreements contain similar language.

Subp. 9 and 10. The organization must divulge the name of the proponent carrier submitting docket proposals. This will insure that the proposal came from a specific carrier and not from an unnamed source, and will enable an interested person to respond to the proposal prior to final action on the proposal.

Subp. 11. Meetings of the organization discussing rates, charges, rules or classifications must be open to the public, and any person has the right to ascertain how a member carrier voted on proposals listed in the docket bulletin.

Subp. 12. The minimum quorum standard of 30% of the membership for general meetings and 30% of the membership of a committee for committee meetings are the same as prescribed by the ICC for interstate agreements. These standards will assure meaningful representation on voting and prevent abuse in voting which might result from a small group voting consistently in a manner which may or may not be in attune with the wishes of the majority. It also prevents the voting from being dominated by large carriers. The rule requires the presence in person of said membership in order to establish quorum requirements. Members may vote by a written statement received prior to or at the commencement of the meeting, provided that quorum requirements are met prior to voting.

8900.0500. Final notice of approval or disapproval. The Board must take final action on collective ratemaking agreements filed within six months from the date of filing the provisional agreement. This means that during the interim period, the Board will notify the ratemaking organization of any

necessary changes in order to meet the standards set forth in Subparts 2 to 12. If the Board deems the standards have been met, the organization will receive final approval. If the organization does not respond to Board directives for amendments to the proposed agreement, or fails to fully satisfy suggested changes by the Board, the ratemaking agreement will not be approved, and the organization shall be notified of this action.

8900.0600. Filing of Tariffs. When a rate proposal is approved by a collective ratemaking organization, the proposal will then be published in a tariff and filed with the Commissioner of Transportation in accordance with Minnesota Statutes, Section 221.041 and 221.161. (1984)

#### 8900.0700 Individual Name on Tariffs

Under the concept of collective ratemaking, the organization issues an agency tariff applicable to the carriers participating therein. Some carriers prefer to issue tariffs in their own name. This rule allows that practice, provided that the carrier indicates the individual tariff is based on a tariff filed with and approved by the Board pursuant to the ratemaking agreement in which the carrier participates.

#### 8900.0800 Individual Deviations

The right of independent action will necessarily result in some deviations from the collectively set rates. In the case of regular route common carriers and petroleum carriers, present Minn. Stat. 221.041 requires all rate changes to be approved by the Board prior to publication in a tariff. The Board approves or disapproves such rate changes on a regular basis at the present time.

Permit carriers are authorized to publish rate changes under Minn. Stat. 221.161 on ten days' notice, subject to complaint, suspension or rejection, as provided for in that statute. Minn. Stat. § 174A.02 (1984) and Minn. Stat. § 221.165 (1984) requires that this rule contain a provision permitting a carrier to deviate from the collectively set rate.

#### 8900.0900 Board Monitors Activities

The Board shall actively supervise the activities of each ratemaking organization by means of field audits, attending scheduled meetings and review of minutes from prior meetings. This provision also serves as fulfilling one of the tests of the state action doctrine by means of the collective activity being "actively supervised by the state."

#### 8900.1000 Exemption

Any carrier authorized by Minnesota Statutes, section 221.165 to engage in collective ratemaking may request the Board to exempt its operations, or any part thereof, by commodity or type of authority held from the prescribed ratemaking procedures. The Southern Motor Carriers Rate Conference case provides that a state may exempt a specific subclass of carriers from regulation or may predetermine a set amount or type of activity

that may remain in the free market. As a result of the United States Supreme Court decision in the Southern Motor Carriers Rate Conference case, the compulsion aspect of collective ratemaking has been removed as a precondition for carriers to accomplish federal antitrust immunity for intrastate collective ratemaking.

Participating in a collective ratemaking organization involves an expense to the carrier, in the form of membership fees as well as tariff publishing costs. Small carriers with limited operations who do not need the services performed by a collective ratemaking organization should not be forced to join such an organization. While all common carrier rates are open to public inspection in the office of Minnesota Department of Transportation, certain carriers, large or small, have no interest in their competitor's rates, and seek only to publish their own rates, without regard to other carrier rate structures.

For those carriers, immunity from federal antitrust laws is unnecessary. Forcing these carriers to engage in anticompetitive behavior is repugnant to the purposes of Minnesota Statutes Chapter 221 and is inconsistent with public policy.

These carriers do not discuss their rates with any other carriers, nor do they desire other carriers to utilize their rates or influence their rates in any manner. In this kind of setting, it would be inconsistent with Public Policy to force anticompetitive behavior on carriers who have no need for immunity from federal antitrust laws. It would also be inconsistent with Chapter 221, which mandates that any tariff changes for regular route common carriers or petroleum carriers must receive Board approval prior to publication. Permit carriers, by statute, are authorized to permissively file their rates, subject to rejection, suspension or complaint, as set forth in Minn. Stat. 221.161.

#### Rule 8900.1100 Penalty for Violation

This rule, once adopted, will have the force and effect of law. Failure to comply with the motor carrier duties and responsibilities described in this rule is tantamount to a failure to comply with other motor carrier law. Therefore, the Board may penalize a motor carrier who fails to comply with this rule as it would a motor carrier who fails to comply with other motor carrier law.

This section is necessary to ensure compliance. Informing motor carriers that penalties may result for failure to comply will aid in obtaining compliance.

The Board's authority for exercising the control and supervision described by this section is contained in Minn. Stat. § 174A.02 Subd. 1 (1984).

#### COLLECTIVE RATEMAKING RULE IMPACT ON SMALL BUSINESS

Pursuant to Minn. Stat. 14.115 SMALL BUSINESS CONSIDERATIONS IN RULEMAKING, the Minnesota Transportation Regulation Board submits the following:

Subd. 2 IMPACT ON SMALL BUSINESS "(a) The establishment of less stringent compliance or reporting requirements for small business."

The proposed rule is not applicable to any small business except motor carriers under regulation of the Transportation Regulation Board (TRB). All carriers, large and small, must be treated alike in order to achieve the benefits of anti-trust immunity afforded by Minn. Stat. 221.165 and the rule implementing this statute.

"(b) The establishment of less stringent schedules or deadline for compliance or reporting requirements for small business." Same response as given for (a).

"(c) The consolidation or simplification of compliance or reporting requirements for small businesses." The filing of an annual financial report is a current rule requirement which is not involved herein. The only reporting requirement contained in the proposed Rules is that any collective ratemaking agreement filed by any organization or association of two or more carriers engaged in collective ratemaking must be filed with and approved by the Board.

"(d) The establishment of performance standards for small business to replace design or operational standards required in the rule." Not applicable, as the obligation of submitting appropriate collective ratemaking procedures to the TRB for approval lies with the rate bureau organization.

"(e) The exemption of small businesses from any or all requirements of the rule." The proposed rule requires all motor carriers under jurisdiction of the TRB to participate in a rate bureau organization in order to have the protection of anti-trust immunity in collective ratemaking, which stems from certain outstanding court orders. The rule does provide for any carrier, large or small, to petition the TRB for deviation from any collectively set rate or to petition for exemption from all aspects of the rule.

"Subd. 3 FEASIBILITY. The agency shall incorporate into the proposed rule or amendment any of the methods specified under Subdivision 2 that it finds to be feasible, unless doing so would be contrary to the statutory objectives that are the basis of the proposed rulemaking."

None of the methods specified under Subdivision 2 would be feasible in this rule. In fact, treating motor carriers differently on the basis of the definition of small business would be contrary to the statutory objectives that are the basis of the proposed rulemaking. Minn. Stat. 221.165 states that all motor carriers subject to rate regulation under Chapter 221 are required to comply with the ratemaking procedure. As stated earlier, the proposed rules do provide for deviation for exemption from the rule requirements under certain circumstances.

"Subd. 4 SMALL BUSINESS PARTICIPATION IN RULEMAKING. In addition to the requirements under Section 14.14, the agency shall provide an opportunity for small businesses to participate in the rulemaking process, utilizing one or more of the following methods:

(a) The inclusion in any advance notice of proposed rulemaking of a statement that the rule will have an impact on small businesses which shall include a description of the probable quantitative and qualitative impact of the proposed rule, economic or otherwise, upon affected classes of persons; or

(b) The publication of a notice of the proposed rulemaking in publications likely to be obtained by small businesses that would be affected by the rule; or

(c) The direct notification of any small business that may be affected by the rule; or

(d) The conduct of public hearings concerning the impact of the rule on small businesses.

The only quantitative or qualitative impact would be on motor carriers regulated by TRB. The proposed rule is designed to retain the status quo as to how motor carriers will continue to provide service to shippers and receivers in Minnesota.

In regard to the publication of a notice of the proposed rulemaking, the TRB utilized the following methods:

1. Direct notice to 64 parties registered at Transportation Regulation Board as interested parties for rulemaking proceedings, including transportation-interested parties.

2. An additional 13 parties interested in transportation matters, including tariff publishing officers.

3. Notice of Intent to Solicit Outside Opinion Regarding New Rules to Implement Collective Ratemaking Procedures for Motor Carriers was published in the State Register and the TRB Weekly Calendar of Notices.

4. The draft of the proposed rule was sent to all parties who wished to be notified, resulting from our Notice of Intent to Solicit Outside Opinion, and in addition, the Rule Draft was sent to Mr. Mike Hickey, Director of the local chapter of the National Federation of Independent Businesses, representing 19,000 members in Minnesota.

"Subd. 7 APPLICABILITY."

The rule at issue affects only motor carriers under the jurisdiction of the Transportation Regulation Board, and in that context would apply only to those motor carriers coming within the purview of the small business definition.

In summary, we do not believe that the proposed rule will have an adverse effect on small business. To the contrary, we believe that the rule will provide anti-trust immunity for large and small motor carriers alike, and will allow these motor carriers to continue serving all shippers and receivers in Minnesota on the basis of single and/or joint line rates in effect today and for the future. This service is extended to large shippers and receivers as well as smaller shippers and receivers who may come under the definition of small business.