

DICKSTEIN SHAPIRO MORIN & OSHINSKY LLP

2101 L Street NW • Washington, DC 20037-1526

Tel (202) 785-9700 • Fax (202) 887-0689

Writer's Direct Dial: (202) 828-2221

E-Mail Address: Kleinmanj@dsmo.com

JUN 17 2002

June 11, 2002

The Honorable Charles James  
Assistant Attorney General  
Antitrust Division, Department of Justice  
Washington, DC 20530

Re: Request for Business Review - American Trucking  
Associations, Inc.'s Model Contract

Dear Mr. James:

On behalf of the American Trucking Associations, Inc. ("ATA"), I request, pursuant to 28 C.F.R. § 50.6 a business review letter regarding ATA's proposed Model Motor Carrier Contract ("Model Contract").

ATA is the national trade association representing the trucking industry. ATA is a united federation of motor carriers, state trucking associations, and national trucking conferences created to promote and protect the interests of the trucking industry. Its membership includes more than 2000 trucking companies and industry suppliers of equipment and services. Its members include, *inter alia*, tank truck carriers, less-than-truckload ("LTL") carriers, specialized carriers, autohaulers, and truckload ("TL") carriers. Directly and through its affiliated organizations, ATA represents over 34,000 companies and every type and class of motor carrier operation. ATA provides services to its members including: policy development and advocacy; industry information; training and education opportunities; and media relations.

ATA would like to develop and circulate a Model Contract to help its motor-carrier members increase efficiency in contract negotiations, fairly allocate the risks and rewards of freight transportation, reduce transactional costs, and enhance services to shippers. The Model Contract would provide common contract provisions that carriers could voluntarily use in their contract negotiations with shippers. All provisions for rates and charges would be blank on the Model Contract, and would be left for each carrier to negotiate individually with its shippers. The Model Contract will be made available for ATA members to use individual provisions or in its entirety on a voluntary basis.

The trucking industry is a highly competitive market with little concentration of market power. Because of the high level of competition and low level of concentration, there is little possibility of collusion or anticompetitive action. ATA's proposed Model Contract would not increase the possibility of collusion or anticompetitive action. In fact, the Model Contract will likely have pro-competitive effects and provide benefits to shippers.

1177 Avenue of the Americas • 41st Floor • New York, New York 10036-2714

Tel (212) 835-1400 • Fax (212) 997-9880

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## **I. The Trucking Industry Is Highly Competitive And Has Low Barriers For New Entrants**

The trucking market is highly competitive and lacks participants with significant market power.<sup>1</sup> According to data compiled by the Federal Motor Carrier Safety Administration, there were 597,427 interstate motor carriers in the U.S. in January 2002. The top ten U.S. trucking companies accounted for only approximately 13% of \$606 billion in total trucking revenue nationwide in 2000.<sup>2</sup> The top twenty-five U.S. trucking companies account for only approximately 16% of total trucking revenue.<sup>3</sup> Price competition exerts significant pressure on prices and revenues.<sup>4</sup> Over 83% of motor carriers operate twenty or fewer trucks and more than 75% operate just six or fewer trucks.<sup>5</sup> The trucking market also faces significant competition for freight transportation from rail, water, and air carriers.

Because market power is not concentrated, and the start up costs are relatively low, the trucking market has low barriers for new entrants and is characterized by an increasing number of new participants. According to the Federal Motor Carrier Safety Administration, there were 597,427 interstate motor carriers in January 2002. This is a 41% increase in number of interstate motor carriers in U.S. since April 1997 when there were 423,153 interstate motor carriers in the U.S.<sup>6</sup> During the same time period, the number of carriers operating over 20 trucks each increased by only 6% (from 93,940 to 99,736).<sup>7</sup> From December 2000 to January 2002, the total number of interstate motor carriers increased by more than 10% (from 542,363 to 597,427).<sup>8</sup>

## **II. The Proposed Model Contract**

The Model Contract will contain both provisions that are rate-related and provisions that are not. See Model Contract attached as Exhibit A. For those provisions related to rates, the Model Contract will provide general language, but no actual rates or

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<sup>1</sup> See Cynthia Engel, *Competition Drives the Trucking Industry*, Monthly Labor Review 34 (April 1998).

<sup>2</sup> American Trucking Associations, Inc., *American Trucking Trends* (2002); Transport Topics Publishing Group, *Transport Topics* (July 23, 2001).

<sup>3</sup> American Trucking Associations, Inc., *American Trucking Trends* (2002).

<sup>4</sup> Standard & Poor's DRI, *U.S. Freight Transportation Forecast...to 2007* 12 (American Trucking Associations, Inc., July 1999).

<sup>5</sup> American Trucking Associations, Inc., *American Trucking Trends* 6 (2002); Transport Topics Publishing Group, *Transport Topics* (July 23, 2001).

<sup>6</sup> See American Trucking Associations, Inc., *American Trucking Trends* 2 (1997).

<sup>7</sup> *Id.*

<sup>8</sup> American Trucking Associations, Inc., *American Trucking Trends* 10 (2002).

prices. The actual rates will be determined through negotiations between the shipper and the individual carrier.

A. Non-rate Provisions

The non-rate related terms of the contract will include the following provisions: Mileage Calculations; Payment Terms; Insurance; Salvage Value; and other standard contract provisions that do not relate to the rate for carriage.

1. The Mileage Calculation clause provides that mileage will be based on practical miles using a generally recognized and available mileage calculation software or service. This provision provides a standard method of determining mileage and will allow shippers to more accurately compare carriers' rates.
2. The Payment Terms provision requires the shipper to pay the carrier at the earlier of: thirty days after the date the carrier first makes the freight bill available to the shipper or thirty days after the freight delivery date. This provision will allow for prompt payment of services by shippers. The provision also includes a service charge per month on any past due payments to be determined through negotiations between the carrier and the shipper.
3. The Insurance clause provides that the carrier will obtain cargo insurance for a negotiated amount per occurrence. There is also an optional provision for when the shipper desires additional insurance coverage. Under this provision, the carrier will charge the shipper the

actual cost of the additional coverage plus an administrative charge. See Appendix C, optional Paragraph 47. The administrative charge will be determined through negotiations between the carrier and the shipper. This provision allows carriers to provide a reasonable level of standard coverage for shippers generally and requires shippers with high dollar value shipments to pay for additional coverage.

4. The Salvage clause provides two options: (1) the carrier can deduct the salvage value of the damaged cargo from the shipper's claim or (2) if the shipper disagrees with the carrier's good faith estimate of the salvage value, the shipper can transfer ownership of the damaged goods to the carrier. This provision allows the carrier to pay claims equal to only the out-of-pocket loss of the shipper.

#### B. Rate Provisions

The rate related contract provisions include: Fuel Surcharges, Loading and Unloading Services, Detention Charges, and Drop Charges and are attached to the contract in the Appendices. For each of these provisions, the actual rate or price is left blank for the individual carrier to negotiate with its shippers. The overall schedule of rates and charges will be a separate appendix to the agreement and negotiable with the shippers.

1. The Fuel Surcharge will be a separate appendix to the agreement. The surcharge per mile as well as the base fuel price will be determined through negotiations between the carrier and the shipper.

2. The Loading and Unloading provision requires that the shipper be responsible for loading and unloading services pursuant to 49 U.S.C. § 14103.
3. The Detention provisions require the shipper to pay the carrier an hourly detention charge for every hour beyond two hours that is required to complete loading or unloading. The carrier may extend the two hour grace period or charge a different hourly rate if the shipper detains only the trailer and not the tractor. These detention rates will be determined through negotiations between the carrier and the shipper.
4. The Drop Charge provision requires shippers to pay for the time that it takes to make an additional stop for partial loading or unloading.

**III. Publication of Standard Contract Provisions Would Be Pro-Competitive Because It Would Broaden Consumer Choice, Lower Prices, and Facilitate Market Entry**

**A. Broaden Consumer Choice**

In the fragmented domestic trucking industry, customers for LTL and TL intracity and over the road trucking services generally do not have a broad array of choices in the provisions of their carriage contracts. They might contact one or only a few truckers for service, and those truckers generally have only their own contract forms with varying provisions. Moreover, in an industry in which the line marketing personnel may be legally unsophisticated, shippers are likely to be reluctant to deviate from the non-price standard terms and conditions that their managers have pre-approved. And where the customer needs service urgently, there may not be time even for those shippers willing to have their counsel review contract revisions to have them actually do so.

In these circumstances, shippers will benefit from the availability of standard pre-printed terms and conditions because it will give shippers an alternative set of conditions from which to negotiate. The fact that the terms and conditions have been circulated by the industry's leading trade association will give them an aura of acceptability, which should strengthen the hand of shippers in negotiations with individual carriers. Moreover, unsophisticated shippers who lack experience in this area will be educated about standard contract terms and conditions, which some carriers they approach may not show them without a model contract.

Even experienced shippers could benefit if the ATA Model Contract contains provisions that do not appear in their regular carriers' contracts. Those shippers will learn of additional advantageous contractual provisions from which they could seek to benefit which could create increased competition between carriers seeking their business. In addition, to the extent that negotiations over terms and conditions were to proceed from the ATA Model Contract, shippers would be able to discern any modifications that a carrier sought because the original draft terms would be known to the potential shipper. Likewise, a shipper aware that the carrier desired to delete or modify such terms would have a better appreciation of its bargaining strength, which it might devote to seeking more favorable price rather than non-price terms. In other words, shippers would not negotiate "in the dark," as there will be enhanced price and term transparency in the industry.

#### B. Lower Barriers to Entry

The availability of a model contract could also further remove barriers to entry in the trucking industry. The greatest efficiency, of course, is that new entrants would not have to devote resources to preparing their own contracts. Moreover, new entrants could acquire more immediate acceptance of their proposed terms and conditions were they to adopt an accepted industry norm. An example of this effect can be seen in the construction industry. To analogize to the construction industry, a new construction firm does not suffer the competitive disadvantage it otherwise would endure in bidding against an established competitor if it uses the standard American Institute of Architects contract as the basis of its bid. In that situation, competition is based upon quality and price, and while the new entrant still must establish its professional credentials, it need not spend capital establishing the bona fides of its other terms and conditions of service.

#### C. Increased Competition

The Model Contract would also reduce the shipper's transaction costs associated with changing carriers. Presently, a shipper considering changing its carrier would have to "comparison shop" both price and non-price terms. Carrier substitution would be simplified by establishing a standard set of terms and conditions on which to compare the incumbent and any potential replacements.

The existence of standard contract language could also simplify "interlining" between carriers – the practice of more than one carrier handling a shipment. In that situation, two carriers carry the goods, with one carrier contracting with the shipper, initiating the shipment, collecting the contract price and sharing it with the carrier that

completes the shipment and makes delivery. Interlining increases competition because it permits regional carriers who could not otherwise provide the entire shipping service to compete with larger carriers who can. Interlining works best when it is transparent to the shipper. That transparency occurs when the shipper signs one contract that applies to all carriers, and the carriers agree to accept a single set of terms and conditions. Interlining would be easier if carriers understood and were willing to accept "standard" contract provisions.

#### **IV. Publication of Standard Contract Provisions Would Not Have An Anticompetitive Effect**

Because the Model Contract will not contain competitively sensitive items, it will not have an anticompetitive effect on the trucking market. The Model Contract will not contain actual rates or prices; those specifics will be determined through negotiation between carriers and shippers. Additionally, the Model Contract will not cause or increase the possibility of competitors sharing other competitively sensitive information such as revenue or total expense per mile, service volumes or capacity, or late payment penalties.

The Model Contract will be made available for ATA members to use individual provisions or in its entirety on a voluntary basis. The ATA will make it clear when circulating the Model Contract that use of the contract or any provision is left to the individual determination of each member company acting independently. Additionally, the provisions of the contract and the actual rates and prices are open to negotiation with shippers.

The high level of competition and low level of concentration of market power in the trucking industry means that there is little possibility of collusion or anticompetitive action. The creation of industry standard terms and conditions resulting from a Model Contract would not increase the possibility of collusion or anticompetitive action. In fact, the Model Contract will likely have pro-competitive effects and provide benefits to shippers.

#### **V. The Model Contract Will Benefit Shippers**

As noted above, the creation of a Model Contract with standard provisions will provide important benefits to shippers. The creation and use of a Model Contract will allow shippers to compare apples to apples and more easily determine which carrier is offering the lowest rates. This increased pricing transparency may lead to lower prices. Moreover, the optional Insurance Surcharge, Drop Charge, Loading and Unloading, and Detention Charges provisions of the Model Contract allow carriers to allocate the charges incurred with these services to the shippers that utilize the services. Without this allocation as provided in the Model Contract, these types of charges increase the cost of doing business for carriers and consequently drive up rates for all shippers whether they utilize these services or not. The Model Contract will allocate these types of charges fairly to those shippers that incur them and reduce the rates of service to those shippers that do not. Shippers will also be able to compare the non-price-related provisions among carriers to choose the provisions and services that best meet its needs. Finally, the Model Contract

will make the terms and conditions of the trucking industry more easily understood by new or small shippers.

**VI. A Business Review Letter In Support Of The Model Contract Would Be Consistent With The Surface Transportation Board's Approval Of Rate Bureau Agreements And The National Transportation Policy**

Approval of the ATA's Model Contract would be consistent with the antitrust immunity that is given to rate bureau agreements and the National Classification Committee ("NCC"). The Surface Transportation Board ("STB") has the authority to approve an agreement with one or more motor carriers to establish through routes and joint rates; rates for the transportation of household goods; classifications; mileage guides; rules; divisions; rate adjustments of general application based on industry average carrier costs; or procedures for joint consideration, initiation, or establishment of matters described previously that are in the public interest.<sup>9</sup> Agreements approved by the STB have antitrust immunity pursuant to 49 U.S.C. § 13703(a). Because the ATA's Model Contract does not establish standard rates, it raises fewer antitrust concerns than the rate bureau agreements.

The STB recently approved eleven rate bureau agreements.<sup>10</sup> The rate bureaus collectively set class rates, which are known as benchmark rates or list prices that serve as the basis for discounts common throughout the motor carrier industry.<sup>11</sup> The STB also recently approved the National Classification Committee ("NCC") Agreement.<sup>12</sup> The

<sup>9</sup> 49 U.S.C. § 13703(a)(2).

<sup>10</sup> *EC-Mac Motor Carriers Service Association, Inc.*, Section 5a Application No. 118 (Sub-No. 2) (November 20, 2001); *Pacific Inland Tariff Bureau, Inc. - Renewal Agreement*, Section 5a Application No. 22 (Sub-No. 8) (November 20, 2001); *The New England Motor Rate Bureau, Inc.*, Section 5a Application No. 25 (Sub-No. 9) (November 20, 2001); *Middlewest Motor Freight Bureau, Inc.*, Section 5a Application No. 34 (Sub-No. 10) (November 20, 2001); *Niagara Frontier Tariff Bureau, Inc.*, Section 5a Application No. 45 (Sub-No. 16) (November 20, 2001); *Southern Motor Carriers Rate Conference, Inc.*, Section 5a Application No. 46 (Sub-No. 21) (November 20, 2001); *Motor Carriers Traffic Association - Agreement*, Section 5a Application No. 55 (Sub-No. 2) (November 20, 2001); *Machinery Haulers Association, Inc. - Agreement*, Section 5a Application No. 58 (Sub-No. 4) (November 20, 2001); *Rocky Mountain Tariff Bureau, Inc.*, Section 5a Application No. 60 (Sub-No. 11) (November 20, 2001); *Nationwide Bulk Trucking Association, Inc. - Agreement*, Section 5a Application No. 63 (Sub-No. 4) (November 20, 2001); *Western Motor Tariff Bureau, Inc. - Agreement*, Section 5a Application No. 70 (Sub-No. 12) (November 20, 2001); and *Willamette Tariff Bureau, Inc. - Renewal of Agreement*, Section 5a Application No. 116 (Sub-No. 1) (November 20, 2001).

<sup>11</sup> *EC-Mac Motor Carriers Service Association, Inc.*, Section 5a Application No. 118 (Sub-No. 2) (November 20, 2001).

<sup>12</sup> *National Classification Committee - Agreement*, Section 5a Application No. 61 (Sub-No. 6) (November 20, 2001).



NCC, an organization within the National Motor Freight Tariff Association (“NMFTA”), collectively discusses and establishes freight classification under an agreement which was first approved by the Interstate Commerce Commission (“ICC”), the predecessor to the STB. The NCC classifies commodities according to their transportation characteristics.<sup>13</sup> These classifications are then used in conjunction with a rate schedule established by one of the rate bureaus to determine the class rate charged for a shipment.<sup>14</sup> In its approval of the NCC Agreement, the ICC stated:

Industry-wide standardization measures, rules and practice are commonly accepted throughout the commercial world ... The universal acceptance by competitors of industry-wide terms, which are the “rules” of that business, do not violate the spirit of the antitrust laws. In fact the courts have recognized that clarification of commercial terms stimulates price competition.<sup>15</sup>

The Model Contract is an effort by the ATA to standardize the terms and conditions of motor carriage, not to set collective rates. Because the Model Contract does not establish collective rates, it is even less likely to lead to collusion or anticompetitive activity than the rate bureau agreements or the NCC Agreement which have antitrust immunity. The ATA should be allowed to proceed with development and circulation of the Model Contract because it does not establish rates and would not violate the spirit of the antitrust laws.

In addition, approval of the Model Contract would be consistent with the National Transportation Policy.<sup>16</sup> The National Transportation Policy provides for government oversight of modes of transportation to ensure the development, coordination, and preservation of a transportation system that meets the transportation needs of the U.S.<sup>17</sup> In overseeing the modes of transportation, the government’s goals include: recognizing and preserving the inherent advantage of each mode of transportation; promoting safe, adequate, economical, and efficient transportation; encouraging sound economic conditions in transportation, including sound economic conditions among carriers; encouraging the establishment and maintenance of reasonable rates for transportation, without unreasonable discrimination or unfair or destructive competitive practices.<sup>18</sup> Specifically, in overseeing transportation by motor carrier, the government’s goals are to promote competitive and efficient transportation services in order to: encourage fair competition and reasonable rates; promote efficiency in the motor carrier

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *National Classification Committee Agreement*, Section 5a Application No. 61 (1998).

<sup>16</sup> *See* 49 U.S.C. § 13101.

<sup>17</sup> *Id.*

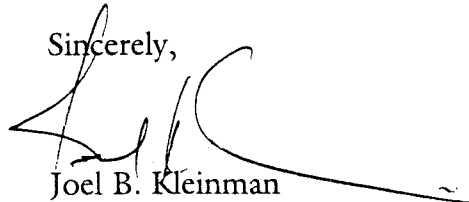
<sup>18</sup> 49 U.S.C. § 13010(a)(1).

transportation system; meet the needs of shippers, receivers, passengers, and consumers; allow a variety of quality and price options; allow the most productive use of equipment and energy resources; enable efficient and well-managed carriers to earn adequate profits, attract capital, and maintain fair wages and working conditions; provide and maintain service to small communities and small shippers and intrastate bus services; improve and maintain a sound, safe, and competitive privately owned motor carrier system; promote greater participation by minorities in the motor carrier system; and promote intermodal transportation.<sup>19</sup> Approval of the ATA's Model Contract is consistent with the National Transportation Policy because development and distribution of the Model Contract will enhance efficiency, have pro-competitive effects, and benefit carriers and shippers.

## VII. Conclusion

For all of the above reasons, the ATA Model Contract would enhance efficiency, have pro-competitive effects, and benefit carriers and shippers. The ATA requests that the Division issue a business review letter that it has no intention of taking enforcement action against the ATA for circulating a Model Contract, as described herein, between carriers and shippers or for its members' individual use of the Model Contract. If you have any questions or need any additional information, please do not hesitate to contact me. Thank you for your time and consideration of this matter.

Sincerely,



Joel B. Kleinman

JBK/tms

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<sup>19</sup> 49 U.S.C. § 13101(a)(2).