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October 12, 2005

The Honorable Thomas O. Barnett
Acting Assistant Attorney General
Antitrust Division, Department of Justice
Washington, D.C. 20530

Re: Request for Business Review - American Trucking Associations, Inc. Model Broker-Carrier Agreements

Dear Mr. Barnett:

On behalf of the American Trucking Associations, Inc. ("ATA"), I request, pursuant to 28 C.F.R. § 50.6, a business review letter regarding an effort by the ATA to develop and publicize model agreements between motor carriers and freight transportation brokers (the "Model Agreements").

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 charged with promoting and educating on behalf of the trucking industry. More than 2,000 trucking companies and suppliers of equipment and services compose ATA's membership. ATA directly or indirectly represents more than 37,000 companies conducting motor carrier operations. These members include truckload ("TL") carriers, less-than-truckload ("LTL") carriers, tank truck carriers, specialized carriers, and autohaulers. ATA provides these members with services such as industry information, training and educational opportunities, media relations advice, and policy development and advocacy.

In 2002, ATA developed a model contract for use by motor carriers and shippers to increase efficiency and decrease transaction costs associated with contract negotiations. ATA requested a business review letter from the Department of Justice for this model contract in June 2002 and received a positive response on November 15, 2002. In that business review letter the Department concluded that such a model contract would not reduce competition and indicated that it had no intention to challenge the development and circulation by ATA of such a model contract. Working with the National Industrial Transportation League, an association of freight shippers, the ATA thereafter finalized a Model Truckload Carrier/Shipper Agreement ("Model Shipper Agreement"), which was published by both associations. Although ATA does not track

usage of this model contract, it understands that the model has been beneficial to both motor carriers and shippers.

In light of the success of the Model Shipper Agreement, the ATA now wishes to develop and circulate similar model contracts relating to agreements between freight transportation brokers and motor carriers. The ATA is contemplating a long-form Model Broker-Carrier Agreement ("Model Broker Agreement") and a Shorter Form Broker-Motor Carrier Agreement ("Short Form"). Draft copies of each are included as Attachments A and B.

These Model Agreements would aim to increase efficiency in contract negotiations and reduce transactional costs for all parties. The long-form Model Broker Agreement seeks to offer model clauses addressing nearly all issues regularly included in longer term agreements between brokers and motor carriers. As in the case of the Model Shipper Agreement, use of the Model Broker Agreement would in no way be mandatory; rather, ATA members would be free to use all or part of the provisions contained within the model. Like the previous model, all provisions relating to rates and charges would be segregated in a separate attachment that leaves blanks for negotiation of dollar amounts and other potentially competitively sensitive terms by the individual parties. The attachment also explicitly reminds readers that the model clauses are illustrative, may not be needed or may need to be supplemented, and should be reviewed to ensure they accurately reflect the parties' individual agreement.

The Short Form is intended to achieve the same increased efficiency, reduced transaction costs, and other benefits of the longer Model Broker Agreement, while providing brokers and carriers the option of using a much shorter form. While ATA expects the longer Model Broker Agreement to be most useful for regulating long term broker-carrier relationships, it expects that the Short Form will be most useful to brokers and carriers transacting only episodically or under extreme time constraints, when extensive negotiations would not be worthwhile or would unduly delay the shipment. At present, ATA understands that many such transactions are documented mainly by "load confirmations" of simple shipments that often do not fully address the terms of the transaction and lead to post-shipment disputes. ATA hopes that the Short Form will enable parties to continue their current business practices of very streamlined negotiations in these circumstances, while benefiting from a model contract that incorporates other terms from the full Model Broker Agreement. Like the full Model Broker Agreement, the Short Form is not mandatory and its clauses related to rates and charges are left blank, to be completed after individual negotiation by the parties.

The trucking industry continues to be highly competitive with little concentration of market power. Collusion and coordinated anticompetitive action are thus unlikely. ATA's Model Agreements would not increase the likelihood of such anticompetitive behavior. ATA believes, to the contrary, that these model broker agreements would likely enhance competition by further reducing the costs of negotiations, by making standard terms and conditions more transparent, and by facilitating comparison of competitive alternatives.

I. The Trucking Industry Has Low Barriers to Entry And Is Highly Competitive

The trucking industry is fiercely competitive and lacks participants with significant market power.[1] According to the Federal Motor Carrier Safety Administration, there were 564,699 interstate motor carriers in the United States as of August 2005.[2] The top ten U.S. trucking companies accounted for only approximately 15.7% of $671.2 billion in total trucking revenue nationwide in 2004.[3] The top twenty-five U.S. trucking companies account for only approximately 19.6% of total trucking revenue.[4] Moreover, approximately 96% of motor carriers operate fewer than 20 trucks and approximately 87% operate just six or fewer trucks.[5] Finally, the trucking market also faces significant competition for freight from rail, water, and air freight carriers.

Because market power is diffuse and startup costs are relatively low, the trucking industry has low barriers to entry and continues to see significant growth in the number of competitors. The 564,699 interstate motor carriers reported this year by the Federal Motor Carrier Safety Administration represent a 33% increase in number of interstate motor carriers since April 1997 when there were 423,153 interstate motor carriers in the United States.[6] From March 2000 to August 2005, the total number of interstate motor carriers increased by more than 12% (from 501,744 to 564,699).[7]

II. The Proposed Model Agreements

The Model Broker Agreement and the Short Form would both contain rate and non-rate related provisions. ATA believes that the non-rate related provisions do not address topics about which motor carriers have historically competed. Provisions relating to rates and charges would

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[1] *See* Cynthia Engel, *Competition Drives the Trucking Industry*, Monthly Labor Review 34 (April 1998).

[2] Federal Motor Carrier Safety Administration, U.S. Department of Transportation, Motor Carrier Management Information System (Washington, DC, August 15, 2005).

[3] U.S. Freight Transportation Forecast…to 2016, Global Insight, Inc. (Lexington, MA 2005) & ATA (Alexandria, VA 2005); Transport Topics Publishing Group, *Transport Topics* (July 25, 2005).

[4] *Id.*

[5] Federal Motor Carrier Safety Administration, U.S. Department of Transportation, Motor Carrier Management Information System (Washington, DC, August 15, 2005).

[6] American Trucking Associations, Inc., *American Trucking Trends* 2 (1997).

[7] Federal Motor Carrier Safety Administration, U.S. Department of Transportation, Motor Carrier Management Information System (Washington, DC, August 15, 2005); American Trucking Associations, Inc., *American Trucking Trends* 10 (2002).

contain general language describing the rate or charge, but leave blank space for the parties to fill in applicable dollar amounts or formulas reflecting their individual negotiations and agreement. No specific amounts are suggested or otherwise provided by either the Model Broker Agreement or the Short Form.

A. Non-rate Provisions

The non-rate related terms would include provisions regarding payment terms, carrier insurance and broker bonds, dispute resolution, and other standard contract terms.

1. The geographic and commodity scope of the agreement would be specified either within the body of the agreement or in an Attachment 1, in both cases to be completed by the parties. This clause is intended to allow the parties to delineate the scope of the agreement within a longer term relationship or with regard to multiple shipments.

2. The invoicing and payment clause would allow the parties to negotiate payment due dates and possible late payment penalties. The clause also would set forth general payment and collection obligations owed by both the broker and carrier. These obligations may be changed by individual parties.

3. The insurance clause would provide that the broker must maintain a minimum surety/bond trust in an amount to be negotiated between the carrier and broker. Likewise, the carrier would be required to maintain cargo liability insurance of a minimum amount per occurrence. This amount would also be subject to negotiation between the carrier and broker.

B. Rate Provisions

The Model Broker Agreement would segregate most rate-related provisions in an Attachment 2. As stated explicitly at the top of the attachment's first page, the provisions are intended to illustrate possible language and may need amendment or supplementation to reflect

the terms agreed by the parties. They thus would constitute a catalogue of potentially useful model clauses from which the parties would select clauses to include in their agreement. Rate related contract clauses would include, among others, the basic freight charge, as well as a mileage charge, fuel surcharges, loading and unloading charges, detention charges, and drop charges. All rate clauses would require completion of key terms such as dollar amounts and, in some instances, formulas, pursuant to individual negotiations.

The Short Form would provide the option of referring to an Attachment 2 negotiated by the parties or filling pertinent terms in a blank space in the Short Form itself. Here again all rate clauses would leave blanks.

1. The mileage calculation clause would calculate mileage by determining practical miles traveled using generally accepted mileage software to be specified by the parties. The clause also would allow the parties to calculate a mileage surcharge for situations where a different route must be taken because of conditions making it impossible for the carrier to take the prescribed route.

2. The fuel surcharge provision would allow the parties to negotiate not only a base fuel price but also a fuel surcharge based on fluctuation in either the national or regional average price for diesel fuel. The amount of the fuel surcharge is completely open to negotiation. There would also be a provision allowing the broker to receive a rebate when the price of diesel fuel drops a certain amount.

3. The loading and unloading clauses would provide that the carrier will perform loading or unloading to or from tailgate that can be performed without mechanical assistance. If mechanical assistance is required, loading or unloading must be performed by the shipper or consignee. If the carrier's employee performs any loading or unloading beyond the tailgate, the carrier must be paid a negotiable amount per hour or fraction of hour, not to fall below a negotiable minimum charge. Any additional labor or equipment costs must be paid by shipper or consignee, or the

shipper would guarantee the payment of any costs the carrier incurs as a result of the additional labor.

4. The detention clauses would permit a broker and shipper to negotiate the number of hours that a shipper or consignee be allowed to load or unload a truck without incurring an additional charge. The clause also would allow negotiation between the parties about a per hour penalty for any time either the trailer, tractor, or driver is detained beyond that negotiated grace period.

5. The stops in transit clause (drop clause) would provide that additional charges may be incurred for each mile traveled to make a stop while in transit. Also, an additional fee may be charged for each hour of fraction of hour the truck is detained while loading or unloading the trailer. Both charges are subject to negotiation.

III. Model Provisions Would Be Pro-Competitive Because They Broaden Choice, Lower Prices, And Facilitate Market Entry

A. Broader Choice

In the highly fragmented domestic trucking industry, LTL and TL brokers and shippers may have limited options when it comes to alternative contract provisions. Small brokers may deal regularly with only a few carriers, each with its own contract forms and terms. The Model Agreements would offer alternative terms that were developed with all parties' interests in mind and widely publicized by the leading trucking industry trade association. To the extent smaller brokers are unwilling or unable to invest time and resources in developing detailed terms for the broad range of subjects included in the Model Broker Agreement, they would also benefit from the readily available models.

Wide dissemination of the Model Agreements may also enhance all brokers' ability to negotiate for these terms when dealing with carriers using their own forms or offering variations from the Model Agreements' terms. The long-form Model Broker Agreement could serve as a point of comparison for assessing an individual carrier's proposed terms. And once a broker is aware that a carrier wanted to change some terms, the broker would be able to have stronger arguments for concessions on other terms.

B. Lower Barriers To Entry

The Model Agreements could further ease entry into the trucking and freight brokerage industries. New trucking companies and new freight brokers alike would devote their limited resources to tasks other than developing contract forms. New entrants would also gain acceptance of their proposed terms more quickly by adopting standard industry terms.

C. Increased Competition

Development and dissemination of the Model Agreement could ultimately enhance competition among trucking companies. They would reduce the transaction costs of changing carriers by simplifying brokers' comparisons among carriers. Able to focus more quickly on variations from standard terms and on price differences, brokers may find it easier to compare trucking companies' service offerings and less costly to switch from one to another.

The spread of standard contract language would also simplify "interlining" between carriers. When interlining occurs, two or more carriers combine services to transport the goods, but only one carrier contracts with the broker, initiates the shipment, and collects the payment to be shared with the other carrier or carriers. Interlining increases competition because it allows smaller or regional carriers to expand their reach and thus compete with larger or national carriers. But interlining can encounter problems unless the terms of transport are clear and consistent, which is most easily achieved when brokers sign one contract that applies to all interlining carriers, and the carriers all agree to accept a single set of terms and conditions. Thus the Model Agreements would facilitate interlining because carriers would be more willing to accept "standard" contract provisions.

IV. Model Agreements Would Not Result In Anticompetitive Behavior

The Model Agreements would not produce anticompetitive behavior by trucking companies. As noted already, no rates or prices would be included in the Model Agreements. Rather, those critical terms would be left to the parties to negotiate and complete on their own. The Model Agreements would also not result in the sharing of other competitively sensitive information such as late payment penalties, expenses per mile, service volumes or capacities, or revenues. All of these terms are either absent from the contract or negotiable with no reason to share such information with other carriers.

Although ATA would publicize and encourage use of the Model Agreements, it would make clear that its members remain entirely free not to use them. ATA members may use the provisions of the Model Contract in part or whole at their discretion.

VII. A Positive Response to this Business Review Letter Request Would Be Consistent With Both The Surface Transportation Board's Regulatory Authority And The National Transportation Policy

Approval of the Model Agreements would be consistent with the regulatory power of the Surface Transportation Board ("STB") to approve both rate bureau agreements and National

Classification Committee agreements. Rate bureau agreements are agreements between one or more motor carriers that 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 carriers costs; or procedures for joint consideration, initiation, or establishment of matters described previously that are in the public interest.[8] These agreements also set benchmark rates or list prices that facilitate the discounting common in the motor carrier industry.[9] Importantly, these agreements receive antitrust immunity under 49 U.S.C. § 13703(a). ATA's Model Contract does not establish rates, and thus poses fewer antitrust concerns than rate bureau agreements.

The STB has also approved the National Classification Committee ("NCC") Agreement.[10] The NCC evaluates and establishes freight classifications under an agreement first approved by the Interstate Commerce Commission, which was the STB's predecessor. The NCC classifies commodities by their transportation characteristics and then uses those classifications with a rate schedule to calculate the class rate charged for a shipment.[11] In approving 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.[12]

ATA's Model Agreements only attempt to standardize terms of conditions of carriage. The Model Agreements do not attempt to set rates.

Finally, allowing the development and dissemination of the Model Agreements would be consistent with the National Transportation Policy.[13] Among other goals, the National Transportation Policy strives to promote competitive and efficient transportation services in order to encourage fair and reasonable rates; promote efficiency in the motor transportation

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[8] 49 U.S.C. § 13703(a)(2).

[9] *EC-MAC Motor Carriers Service Association, Inc.*, Section 5a Application No. 118 (Sub-No. 2) (November 20, 2001).

[10] *National Classification Committee-Agreement*, Section 5a Application No. 61 (Sub-No. 6) (November 20, 2001).

[11] *Id.*

[12] *National Classification Committee Agreement*, Section 5a Application No. 61 (1998).

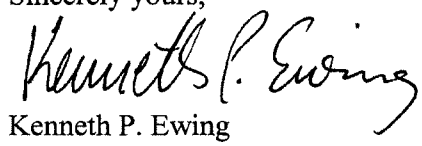
[13] *See* 49 U.S.C. § 13101.

system; meet the demands of shippers, receivers, passengers and consumers; allow a variety of quality and price options; allow the most productive use of equipment and energy resources; and improve and maintain a sound, safe, and competitive privately owned motor carrier system.[14] ATA's Model Agreements would increase efficiency, have pro-competitive effects, and benefit both broker, carriers, and, ultimately, shippers. All of these results are consistent with the National Transportation Policy, and thus support approval of both Model Agreements.

VII. Conclusion

The ATA's Model Agreements would enhance efficiency, have pro-competitive effects, and benefit both carriers and brokers. Thus the ATA respectfully requests that the Division issue a business review letter stating that it has no intention of taking enforcement action against the ATA for developing and publishing Model Agreements as described. If you have any questions or need additional information, please do not hesitate to contact me.

Sincerely yours,



Kenneth P. Ewing

Attachments (2)

cc: Robert Digges, Esq., American Trucking Associations

[14] *See* 49 U.S.C. § 13101(a)(2).