

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Civil Action No. 83-1313C
v.	)	
	)	Judge Curtin
NIAGARA FRONTIER TARIFF	)	Filed: January 19, 1984
BUREAU, INC., <u>et al.</u> ,	)	Entered: June 26, 1984
	)	
Defendants.	)	

FINAL JUDGMENT

Plaintiff, United States of America, having filed its Complaint herein on November 18, 1983, and plaintiff and defendants, by their respective attorneys, having consented to the entry of this Final Judgment, prior to the taking of any testimony, without trial or adjudication of any issue of fact or law herein and without admission by either party with respect to any issue:

NOW THEREFORE, prior to the taking of any testimony, before adjudication of any issue of fact or law herein and upon consent of the parties hereto, it is hereby,

ORDERED, ADJUDGED, AND DECREED as follows:

I.

This Court has jurisdiction of the subject matter of this action and of each of the parties consenting hereto. The Complaint states a claim upon which relief may be granted against each defendant under Section 1 of the Sherman Act (15 U.S.C. §1).

## II.

As used in this Final Judgment the term:

(A) "Announcing or announces" shall mean: (1) the issued date of an independent rate that has been filed at the ICC pursuant to 49 U.S.C. §10762(a)(1); or (2) the date of a NFTP docket bulletin that publicizes that a motor carrier intends to establish or is establishing a rate by independent action.

(B) "Commence" shall mean: to make contact with any person without first having been specifically requested by that person to make that contact.

(C) "Communications" shall mean: all forms of oral and written contact between two or more persons.

(D) "Cross-border traffic" shall mean: the transportation of freight to or from the United States from or to the Province of Ontario, Canada by any motor carrier required to file rates at the Interstate Commerce Commission pursuant to 49 U.S.C. §10762(a)(1).

(E) "Discussions" shall mean: all forms of oral contact between two or more persons.

(F) "ICC" shall mean: the Interstate Commerce Commission.

(G) "Independent action" shall mean: any action taken by a common carrier member of a rate bureau (1) to establish a rate to be published in the appropriate rate bureau tariff, or to cancel a rate for that carrier's account or (2) to instruct the rate bureau that an existing rate (whether established by independent action or collective action) that is proposed to be

changed or cancelled be retained for that carrier's account and published in the appropriate bureau tariff or (3) to have published for its account in the appropriate rate bureau tariff a rate established by the independent action of another carrier. This definition applies regardless of the manner in which the carrier joins in the rate, as long as the rate published for the joining carrier's account is the same as the rate established by the other carrier under independent action.

(H) "Independent rate" shall mean: a rate that has been established by an NFTB member motor carrier by independent action and published in an NFTB tariff publication or a rate that has been established by any motor carrier and published in its own tariff publication.

(I) "Issued date" shall mean: the month, day, and year which appear on the first page of a tariff publication next to the word "issued."

(J) "Motor carrier" shall mean: any person authorized, pursuant to 49 U.S.C. §10922(b)(1), to provide transportation subject to the jurisdiction of the ICC as a motor common carrier of property.

(K) "NFTB" shall mean: the Niagara Frontier Tariff Bureau, Inc.

(L) "Person" shall mean: any individual, firm, partnership, association, corporation, or any other business or legal entity.

(M) "Planned independent rate" shall mean: an independent rate that has not been announced.

(N) "Predetermined" shall mean: to plan beforehand to treat a particular matter in a certain way.

(O) "Processing" shall mean: publication by the NFTB of a rate proposal for collective action or of an independent rate with advance notice.

(P) "Rate agreement" shall mean: the agreement, bylaws, and any amendments thereto, either (1) approved by the ICC pursuant to 49 U.S.C. §10706(b) or (2) submitted to the ICC for approval under 49 U.S.C. §10706(b) and pursuant to which a rate bureau has been authorized to operate pending approval by the ICC.

(Q) "Rates or rate matters" shall mean: specific rates or rate levels or divisions of rates; allowances or charges; rules or classifications affecting or relating to rates; the formulation, development, establishment, implementation, application, or maintenance of specific rates or rate levels, or types or kinds of rates or procedures or policies pertaining thereto.

(R) "Rate committee or subcommittee" shall mean: any group of persons that includes at least two or more motor carriers that discuss "rate matters."

### III.

The provisions of this Final Judgment shall apply to the defendants and to each of their respective subsidiaries, successors, assigns, officers, directors, employees, and agents, and to all other persons in active concert or participation with any of them who receive actual notice of this Final Judgment by personal service or otherwise.

### IV.

Each motor carrier defendant, at least 60 days prior to the transfer, sale or disposition of all, or substantially all, of the assets used by it as a motor carrier, shall provide notice in writing to the Assistant Attorney General in charge of the Antitrust Division concerning the planned transfer, sale or disposition. The notice shall identify the person(s) acquiring such assets, the terms, and the expected consummation date of the transaction.

### V.

Prior to announcing an independent rate, each motor carrier defendant is enjoined and restrained from communicating with any other motor carrier or the NFTB that it is considering, contemplating or planning to establish an independent rate; if any defendant learns about any motor carrier's planned independent rate, said defendant is enjoined and restrained from communicating with any motor carrier or the NFTB about the planned independent rate of which it has become aware, except that the defendants may engage in the communications authorized

by section XI(A) of this decree. Each motor carrier defendant is further enjoined and restrained from suggesting to or inviting any other motor carrier to file a rate by independent action.

VI.

For a period of five years from the date of entry of this Final Judgment:

(A) Whenever any motor carrier announces an independent rate on cross-border traffic that is a reduction below the corresponding, collectively established NFTB rate,

(1) Each defendant, for a period of 90 days following the issued date of the independent rate, is enjoined and restrained from discussing the independent rate with any other motor carrier, except that discussions concerning lowering by collective action the corresponding NFTB rate to an amount not lower than the independent rate may take place within an authorized rate committee or subcommittee meeting after the issued date of the independent rate, and the defendants may engage in the communications authorized by section XI(A) of this Final Judgment, and

(2) Defendant NFTB, for a period of 90 days following the issued date of such independent rate, is enjoined and restrained from processing a motor carrier's rate proposal for collective action, or advance docketing for independent action, reductions of the corresponding NFTB rate(s) to an amount that is known or should be known by defendant NFTB to be below the lower of the specific amount that was

established (a) by such independent rate or (b) any other corresponding independent rate; if defendant NFTB receives a rate proposal or an independent action for advance docketing which contains reductions in rates prohibited by this section VI(A)(2), defendant NFTB may communicate with the proponent of the rate proposal or the independent action for the purpose of informing said proponent that its rate reduction is prohibited by this section of this Final Judgment.

(B) Whenever any motor carrier defendant docketed a rate reduction on any NFTB rate for collective action, a responsible official for said defendant must prepare and file with the NFTB a sworn affidavit in the form attached certifying that:

(1) Said defendant has not communicated with any motor carrier outside of authorized rate bureau meetings concerning said rate; and

(2) The proposed rate reduction has not been conceived, designed, proposed or docketed for the purpose of inducing any motor carrier to raise any independently established rate.

(C) Defendant NFTB is enjoined and restrained from processing any proposals for collective rate reductions from any of the motor carrier defendants that are not accompanied by the sworn affidavit described in section VI(B). Defendant NFTB must maintain said affidavits for a period of five years and said affidavits must be made available to the Department of

Justice upon written request of the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice.

(D) Each motor carrier defendant, is enjoined and restrained from suggesting to or inviting any other person to file a proposal for collective action which it knows could not be processed by defendant NFTB pursuant to section VI(A)(2) of this Final Judgment if filed by a motor carrier; each defendant motor carrier is further enjoined from suggesting to or inviting a non-defendant motor carrier to submit to the NFTB a rate proposal for collective action for the purpose of inducing any other motor carrier to raise any independently established rate.

#### VII.

Each defendant is enjoined and restrained from harassing, discouraging, coercing, or threatening in any way any motor carrier to withdraw, forbear from filing, or modify in any way said carrier's planned or actual independent rates.

#### VIII.

Each defendant motor carrier is enjoined and restrained from combining or conspiring with any other motor carrier to develop, adopt or maintain, and further, defendant NFTB is enjoined from developing, adopting, or maintaining:

(A) Any predetermined policy, plan or program to respond in any specified way to rates established independently by a member or by a non-member motor carrier; and



(B) Any predetermined policy, plan or program to reconsider automatically a general rate increase when a member flags any portion of a general rate increase.

IX. ~~1977~~

Each defendant motor carrier is enjoined and restrained from combining or conspiring with any other motor carrier to:

(A) Refrain from exercising the right to take independent action, except that when an authorized ratemaking body of a rate bureau with a rate agreement votes to approve or disapprove a particular rate proposal, the collective decision on the proposal shall not be deemed to constitute a combination or conspiracy within the meaning of subsection (A) of this section IX;

(B) Refrain from soliciting any motor carrier's customer(s);

(C) Change or refrain from changing any rates on the condition that (1) a shipper promise not to negotiate with any other motor carrier(s) for lower rates, or (2) a shipper promise not to purchase transportation services at lower rates or from particular motor carrier(s);

(D) Refrain from offering any kind of class or category of transportation service, except that when an authorized ratemaking body of a rate bureau with a rate agreement votes to approve or disapprove a particular rate proposal, the collective decision on the proposal shall not be deemed to constitute a combination or conspiracy, within the meaning of subsection (D) of this section IX;

(E) Refrain from establishing certain types of rates, except that when an authorized body of a rate bureau with a rate agreement votes to approve or disapprove a particular rate proposal, the collective decision on the proposal shall not be deemed to constitute a combination or conspiracy, within the meaning of subsection (E) of this section IX;

(F) Prevent an NFTB member motor carrier from filing a proposal for a reduced rate on traffic that that member motor carrier has not carried, except that when the authorized ratemaking body of a rate bureau with a rate agreement votes to approve or disapprove a particular rate proposal, the collective decision on the proposal shall not be deemed to constitute a combination or conspiracy within the meaning of subsection (F) of this section IX.

X.

Defendant NFTB is enjoined and restrained from:

(A) Negotiating or allowing any of its rate committees or subcommittees to negotiate, for a particular level of NFTB rates on the condition that (1) a shipper promise not to negotiate with any motor carriers for lower rates, or (2) a shipper promise not to purchase transportation services at lower rates or from particular motor carriers;

(B) Preventing or allowing any of its rate committees or subcommittees to prevent, an NFTB member carrier from filing a proposal for a reduced rate on traffic that that member motor

carrier has not carried, except that when any authorized NFTB rate committee or subcommittee votes to approve or disapprove a particular proposal, the collective decision on the proposal shall not be deemed to constitute preventing the filing of a proposal within the meaning of subsection (B) of this section X;

(C) Refraining or allowing any of its rate committees or subcommittees to refrain from establishing certain types of rates, except that when any authorized NFTB rate committee or subcommittee votes to approve or disapprove a particular rate proposal, the collective decision on the proposal shall not be deemed to constitute a decision to refrain from establishing certain types of rates within the meaning of subsection (C) of this section X; and

(D) Permitting or allowing any employee of NFTB, in any way, to interfere with, control or direct any action taken or to be taken by any NFTB rate committee or subcommittee.

#### XI.

Defendant NFTB is enjoined and restrained from allowing its staff to:

(A) Commence any communication with a member carrier that has directed the NFTB to publish an independent action for the member carrier's account with respect to that independent action, except that the NFTB staff may commence communications with such a member for the purpose of clarifying technical matters to facilitate publication of the independent action, provided, however, that defendant NFTB must maintain a log of

each such communication which shall include the date, time, the names of the persons involved in such communication, the length of time of the communication, and the matters discussed, including the specific technical matter or inquiry that constituted the purpose of the communication;

(B) Take a position that any rate be docketed as a proposal, initiate tariff proposals, docket tariff proposals, or take a position on or determine whether to adopt, reject, or otherwise dispose of tariff proposals, except that the NFTB staff may process members' rate proposals, and, upon request, may perform the analysis and offer the advice that will enable the proponent of a rate change to docket the proposal, and upon request, may gather and present to the rate committees or subcommittees that will consider proposals and to other interested carriers and shippers factual information relating thereto, provided, however, that such presentations shall not include any expressions of opinion or make any recommendations;

(C) Initiate or develop any collective response by or among NFTB members to rate proposals or independent rates, except that the NFTB staff may process members' rate proposals, and upon request, may perform the analysis and offer the advice that will enable the proponent of a rate change to docket the proposal, and upon request, may gather and present to the rate committees or subcommittees that will consider proposals and to other interested carriers and shippers factual information relating thereto, provided, however, that such presentations

shall not include any expressions of opinion or make any recommendations; and

(D) Handle or publish independent actions in any way other than that which is explicitly described in the NFTB rate agreement.

## XII.

Each motor carrier defendant is enjoined and restrained from engaging in any communications relating to rate matters with any motor carrier, and defendant NFTB is enjoined and restrained from engaging in any discussions relating to rate matters with two or more motor carriers, unless such communications and discussions take place within an authorized ratemaking body of a rate bureau with a rate agreement. In the NFTB such discussions and communications must take place within a rate committee or subcommittee that is explicitly authorized to consider rate matters; if, however, the NFTB's general rate committee is authorized to create subcommittees pursuant to the NFTB rate agreement that has been filed with the ICC, the defendants may discuss rate matters in such subcommittees in conformity with this section, provided that said subcommittees are created by resolution adopted by the NFTB general rate committee, which explicitly describes such subcommittee and the nature of the rate matters they consider.

## XIII.

For a period of 5 years from the date of entry of this decree, defendant NFTB must tape record every meeting of any

NFTB rate committee or subcommittee that is authorized to consider rate matters in conformity with section XII of this Final Judgment, and said tapes must be maintained for a period of 5 years. Defendant NFTB must make the tapes available to the Department of Justice upon written request of the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice.

XIV.

No provision of this decree prohibits communications or agreements between a defendant and any other motor carrier or carriers, including another defendant, for the sole purpose of achieving interline operations or interline rates.

XV.

The mere announcing or establishing of an independent rate with no advance notice shall not be deemed to constitute conduct prohibited by sections V, VI or VII of this Final Judgment.

XVI.

No provision of this decree shall prohibit the NFTB staff, upon request of any NFTB rate committee or subcommittee member or members, from gathering and presenting to the general rate committee or subcommittee factual information to enable the development of proposals for the simplification of tariffs, the removal of obsolete items from tariffs, general increases or decreases in rates, broad changes in tariff structures or rates, or changes in rules or regulations of substantially

general application provided, however, that any such presentations shall not include any expressions of opinion or make any recommendations.

XVII.

This Final Judgment applies only to rates or rate matters for the transportation of freight that originates or terminates in the United States, whether by single line or joint line movement.

XVIII.

Each defendant is ordered and directed:

(A) To mail or otherwise furnish within sixty (60) days after the entry of this Final Judgment a copy thereof to each of (1) its officers and directors, (2) its agents and employees with supervisory or management responsibility, or with responsibility over rates or rate matters, and (3) the officers and directors of its parent and subsidiary corporations and within seventy (70) days from the aforesaid date of entry to file with the Clerk of this Court and the plaintiff an affidavit setting forth the fact and manner of compliance with this section XVIII(A);

(B) To establish a reasonable program for dissemination of, education as to, and compliance with this Final Judgment, involving each corporate officer, director, employee and agent having responsibilities in connection with or authority over the establishment of rates or rate matters, advising them of their obligations under this Final Judgment. This program

shall include, but is not necessarily limited to the inclusion, in an appropriate company manual or internal memorandum, a copy of this Final Judgment in whole or in part or an explanation thereof, and a statement of corporate compliance policy thereunder; and

(C) To furnish to plaintiff within one hundred and twenty (120) days of the entry of this Final Judgment, and thereafter upon request by plaintiff, on or about the anniversary date of this Final Judgment for a period of five (5) consecutive years from the date of its entry, an account of all steps said defendant has taken during the preceding year to discharge its obligations under subsections (A) and (B) of this section XVIII and to include with said account copies of all written directives issued during the prior year with respect to compliance with the terms of this Final Judgment.

XIX.

(A) For the purpose of determining or securing compliance with this Final Judgment:

(1) Upon receipt of a written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, each defendant shall, on reasonable notice and subject to any legally recognized privilege:

(a) Permit duly authorized representatives of the Department of the Justice access, during the office hours of such defendant, to inspect and copy all United States-located books, ledgers, accounts,



correspondence, memoranda, records and documents in the possession or in the control of the defendant relating to any of the matters covered by this Final Judgment;

(b) Provide within sixty (60) days to the Department of Justice in Washington, D.C., copies of any books, ledgers, accounts, correspondence, memoranda, and other documents or records in the possession or under the control of such defendant relating to any subjects covered by this Final Judgment;

(c) Submit written reports, under oath if requested, with respect to its compliance with this Final Judgment as may, from time to time, be requested; and

(d) Permit any duly authorized representative of the Department of Justice, subject to the reasonable convenience of each defendant and without restraint or interference from it, to interview officers, employees and agents of such defendant, who may have counsel present, regarding any subject covered by this Final Judgment. Such request and notice may be made by delivery to the person appointed pursuant to section XX of this Final Judgment to receive service of process on behalf of each defendant.

(e) Nothing in this section XIX(A) shall require any defendant to take any action in Canada which is prohibited by the government of Canada or any provincial government pursuant to provisions of Canadian or provincial law, provided that said defendant has exercised good faith efforts to obtain permission of the appropriate person or governmental authority and such permission has not been secured.

(B) No information or document obtained by the means provided in this section XIX shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the United States, except in the course of legal proceedings to which the United States is a party, or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law, provided however, any representative of the Department of Justice may divulge to the Office of Compliance and Consumer Assistance of the ICC the existence of any practice which is discovered by the means described in this section XIX and which is believed to violate any of the provisions of the Interstate Commerce Act.

(C) If at the time information or documents are furnished by a defendant to plaintiff, such defendant represents and identifies in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(7) of the Federal Rules of Civil Procedure, and said

defendant marks each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure," then 10 days notice shall be given by plaintiff to such defendant prior to divulging such material in any legal proceeding (other than a grand jury proceeding) to which that defendant is not a party.

XX.

Each defendant shall appoint a person located in the United States as its agent for service of process in any proceeding for the purpose of the construction, implementation, modification, enforcement of compliance, or punishment of any violation of this Final Judgment. Each defendant shall maintain such agent for the life of this Final Judgment and, within ten (10) days from the date of entry of this Final Judgment, file with this Court and serve on plaintiff a statement identifying such agent. In the event of a need to appoint a successor agent, defendant shall immediately file with this Court and serve on plaintiff a statement identifying the successor agent.

XXI.

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and direction as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification of any of the provisions hereof, for the enforcement of compliance herewith, and for the punishment of any violation hereof.

XXII.

This Final Judgment shall expire ten (10) years from the date of entry or, with respect to any particular provision, on any earlier date specified.

XXIII.

This Court finds that the entry of this Final Judgment is in the public interest. .

Dated this 25th day of June 1984 .

/s/ Chief Judge John T. Curtin  
United States District Judge