UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, v. NIAGARA FRONTIER TARIFF BUREAU, INC., et al. Defendants.	Civil Action No. 83-1313C Judge Curtin

COMPETITIVE IMPACT STATEMENT

Pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. §16 (b)-(h), the United States files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I.

NATURE AND PURPOSE OF THE PROCEEDING

On November 18, 1983, the United States filed a civil antitrust Complaint in the United States District Court for the Western District of New York under Section 4 of the Sherman Act (15 U.S.C. §4) to enjoin defendants Niagara Frontier Tariff Bureau, Inc., Bondy Cartage Limited, Dominion-Consolidated Truck Lines Limited, ICL International Carriers, Ltd., Inter-City Truck Lines (Canada), Inc., and TNT Canada, Inc.

from continuing or renewing violations of Section 1 of the Sherman Act (15 U.S.C. §1). Previously, on June 10, 1983, the United States had filed substantially the same complaint against the same defendants in the United States District Court for the District of Columbia. On November 18, 1983, the United States filed a notice of voluntary dismissal of the complaint pursuant to Rule 41(a)(1)(i) of the Federal Rules of Civil Procedure. The United States refiled the instant Complaint that same day with this Court. As the government advised the District of Columbia District Court, the United States dismissed and refiled the case in this district because defendants, who had filed a motion contesting jurisdiction and venue in the District of Columbia, had stated that they would not contest jurisdiction and venue in the Western District of New York.

The defendant Niagara Frontier Tariff Bureau (NFTB) is a motor carrier rate bureau, which has a collective ratemaking agreement approved by the Interstate Commerce Commission (ICC). The other defendants are motor carriers that are members of the NFTB. The ICC-approved agreement authorizes NFTB members to set rates collectively with immunity from the antitrust laws provided they adhere to the terms of the agreement, the Interstate Commerce Act and ICC regulations.

The Complaint alleges that beginning at least as early as 1966 and continuing at least into 1981, the defendants and

co-conspirators engaged in a combination and conspiracy to restrain interstate and foreign commerce. The substantial terms of the alleged combination and conspiracy were to fix, raise and maintain prices and to inhibit or eliminate competition for the transportation of freight by motor carrier between the United States and the Province of Ontario, Canada, without complying with the terms of the NFTB agreement and by otherwise engaging in conduct that either was not or could not be approved by the ICC.

The instant case was filed to achieve the following purposes: (1) to terminate the unlawful combination and conspiracy and to prevent its recurrence; (2) to prevent the perpetuation of its effects; (3) to identify and proscribe specific anticompetitive conduct that exceeds the scope of antitrust immunity provided to the defendants by the Interstate Commerce Act, 49 U.S.C. §10706(b)(2); and (4) to identify and proscribe certain practices that although not illegal themselves were used by defendants to effectuate the alleged conspiracy. Consistent with these objectives, the Complaint seeks a judgment by the Court that the defendants' conduct did not comply with the terms of the NFTB's collective ratemaking agreement, that such conduct was not immune from the operation of the antitrust laws, and that such conduct constituted a combination and conspiracy in unreasonable restraint of trade in violation of Section 1 of the Sherman Act. Additionally,

the Complaint seeks an order enjoining the defendants from continuing, maintaining or renewing such activities in the future or from engaging in any conduct having a similar purpose or effect. Finally, the Complaint requests that the defendant NFTB be ordered to establish and follow rules and procedures designed to ensure that the conspiracy charged is not continued, maintained or renewed, including rules and procedures designed to ensure that the NFTB does not interfere with the right of NFTB member and non-member carriers to make rates independent of the NFTB collectively agreed-upon rates.

II.

DESCRIPTION OF PRACTICES GIVING RISE TO THE ALLEGED VIOLATION

The following describes the practices or events giving rise to the violation alleged in the Complaint. Included are brief descriptions of the trade and commerce that was the subject of defendants' conspiracy, the defendants, and the defendants' alleged unlawful conduct.

A. Trade and Commerce

The trade and commerce alleged in the Complaint as the subject of defendants' conspiracy is the transportation of freight by motor carrier between the United States and the Province of Ontario, Canada. The Complaint alleges that the international traffic revenues of NFTB carriers with requisite authority to transport freight across the United States/Canadian border were at least $330.3 million in 1980 and that the defendant motor carriers and their co-conspirators

accounted for most of the cross-border traffic among NFTB motor carriers.

This transportation market is shaped by licensing and other regulatory controls on both sides of the border which limit, but do not eliminate, competition. To transport freight across the U.S./Ontario border, a motor carrier must have operating authority from the ICC, in almost all cases, and must also have extra-provincial authority from the Ontario Highway Transport Board (OHTB), the Ontario governmental agency that regulates motor carrier transportation to, or from, Ontario, Canada. In addition to regulating operating authority, both the ICC and the OHTB regulate some other, but not all, aspects of motor carrier transportation. The ICC requires motor carriers transporting freight pursuant to operating authority to file, in Washington, D.C., tariffs that contain all rates for transportation, to make the tariffs available for public inspection, and to implement changes in rates only after thirty days notice to the ICC and the public, unless the ICC specifically grants permission for a shorter notice period. Although the ICC is empowered in certain circumstances to determine and prescribe just and reasonable rates for motor carriers, it does not dictate motor carriers' rates in the first instance. The OHTB also requires motor carriers to file tariffs, to adhere to the rates in the tariffs and to implement changes only after 30 days notice. The OHTB, however, does not prescribe rates.

Carriers holding ICC operating authority may form, by agreement, organizations known as rate bureaus, such as the NFTB, for the purpose of setting rates collectively. If the carriers' agreement is submitted to and approved by the ICC, the participating carriers enjoy limited immunity from the antitrust laws to fix rates collectively (49 U.S.C. §5b, currently codified at 49 U.S.C. §10706(b)(2)). The ICC requires carriers to set forth in their agreement the structure and functions of committees and the procedures by which rates are to be set. Additionally, each agreement must, by statute, reserve to each member the unfettered right to establish rates independently of the collectively fixed rates (49 U.S.C. §5b(6), currently codified at 49 U.S.C. §10706(b)(2)(E)(ii)).

The immunity granted by the ICC extends to actions taken in conformity with the approved ratemaking agreement. It does not extend to any actions that interfere with any carrier's statutory right to price independently or to any collective ratemaking conduct not authorized by the ratemaking agreement.

B. Defendants

The complaint names six defendants, the NFTB and five member motor carriers: Bondy Cartage Limited (Bondy), Dominion-Consolidated Truck Lines Limited (Dominion-Consolidated), ICL International Carriers, Ltd. (ICL), Inter-City Truck Lines (Canada), Inc. (Inter-City) and TNT Canada, Inc. (TNT).

The NFTB is a non-profit, no share incorporated motor carrier rate bureau organized and existing under the laws of the state of New York with offices in Williamsville, New York. The NFTB has authority from the ICC to engage in collective ratemaking in accordance with the terms and conditions of its ICC-approved agreement. The NFTB has immunity from the operation of the antitrust laws for the ratemaking activities described in its agreement.

The five motor carrier defendants are corporations headquartered in Canada. Each holds authority from the Ontario government to transport freight between Ontario and the United States and each has common carrier authority from the ICC. Each engages in the transportation of freight between the United States and Canada and each is a member of the NFTB.

Bondy is incorporated under the laws of the Province of Ontario, Canada and has its headquarters in Windsor, Ontario. Dominion-Consolidated, incorporated under the laws of the Province of Ontario, Canada, has its headquarters in Toronto, Ontario; it is a wholly-owned subsidiary of Dominion Consolidated Holdings Limited, also an Ontario corporation. ICL is incorporated under the laws of the Province of Ontario, Canada and is headquartered in Windsor, Ontario; it is a subsidiary of Industrial Cartage Co., Inc., a Michigan corporation, which, in turn, is wholly-owned by Piggy Back Services, Inc., a Michigan corporation headquartered in

Detroit, Michigan. Inter-City, incorporated under the laws of the Province of Cntario, Canada, is headquartered in Toronto, Cntaric; it is a wholly-owned subsidiary of N.M. Davis Corporation Limited, an Cntario corporation. TNT is a corporation organized and existing under the federal laws of Canada with headquarters in Mississauga, Cntario; TNT is a subsidiary of All Trans Canada, Inc., an Cntario corporation which is owned by Thomas Nationwide Transport, Ltd. of Sydney, Australia.

C. The Terms of the Alleged Conspiracy

The Complaint alleges that the defendants and other co-conspirators who were not named as defendants combined and conspired to restrain interstate and foreign commerce beginning at least as early as 1966 until at least into 1981 in violation of Section 1 of the Sherman Act. The substantial terms of the alleged conspiracy were to fix, raise and maintain prices and to inhibit or eliminate competition for the transportation of freight by motor carrier between the United States and Cntario, Canada. The Complaint alleges that the defendants and co-conspirators did not comply with the terms of the NFTB rate agreement and also engaged in conduct that either was not or could not be approved by the ICC.

As alleged in the Complaint, the defendants and co-conspirators, in furtherance of the conspiracy, engaged in the following conduct:

(1) They participated in the NFTB's Principals Committee, a group that was made up of the senior management officials of the NFTB carriers that operated between the United States and Ontario, Canada. Through the Principals Committee, the defendants and a number of co-conspirators jointly set rates and related policies and also agreed upon methods to inhibit competition. The defendants thus entered an array of agreements, established a variety of procedures and took particular actions to eliminate competitive threats from both within and without the NFTB. The Principals Committee was not in the NFTB agreement and thus was not authorized or approved by the ICC to fix rates.

(2) They set and controlled NFTB rate levels without complying with the procedural requirements of the NFTB agreement and ICC regulations. The NFTB is required under its own agreement and ICC regulations to take certain steps when it engages in collective ratemaking conduct. Those steps include public notice to all its members and interested shippers, public hearings on rate matters, and record keeping of ratemaking meetings. The defendants engaged in ratemaking conduct without complying with these procedures.

(3) They held Principals Committee meetings and other types of meetings where they planned threats, coercion and retaliation against an NFTB member carrier for establishing rates that were independent of the collectively fixed rates of the NFTB.

(4) They interfered with, restrained and restricted the statutory right of other carriers to price independently through pressure, coercion, threatening and taking retaliatory rate cuts, internal NFTB practices, and other means.

(5) They filed tariffs that were the product of their conspiratorial conduct with the ICC in Washington, D.C.

The Complaint alleges that the conspiracy had the following effects: (1) rates for trucking services between the United States and Ontario, Canada, have been fixed, raised or maintained at artificial and non-competitive levels; (2) competition between and among the defendant motor carriers and other trucking firms in the United States-Ontario trade has been restrained; and (3) competition generally in the trucking industry between the United States and Ontario has been suppressed.

III.

EXPLANATION OF THE PROPOSED JUDGMENT

The United States and the defendants have stipulated that the Court may enter the proposed Final Judgment after compliance with the Antitrust Procedures and Penalties Act, 15 U.S.C. §16(b)-(h). The proposed Final Judgment provides that the entry of the Final Judgment does not constitute any evidence against or an admission by any party with respect to any issue of fact or law. Under the provisions of Section 2(e) of the Antitrust Procedures and Penalties Act, the proposed

Final Judgment may not be entered until the Court determines that entry is in the public interest.

A. Prohibited Conduct

Overview

In 1948, Congress authorized motor carriers to form rate bureaus for the purpose of setting rates collectively. When Congress conferred this privilege on motor carriers, it recognized that the resultant rate bureau cartels could amass significant economic power to the detriment of the public and might engage in coercive or retaliatory rate conduct to protect that power. To forestall these possibilities, Congress included in the statutory scheme certain competitive checks for the protection of the public. One principal check is the guarantee that each member of a rate bureau has the absolute right to take independent action, that is, to set rates independent of the rate bureau's collectively set rates. 49 U.S.C. 5b(6), currently codified at 49 U.S.C. 10706(b)(2)(E)(ii); S. Rep. No. 44, 80th Cong., 1st Sess. 15 (1947). Although rate bureaus can set rates collectively, they cannot require adherence to their rates by members. Similarily, rate bureaus cannot force non-members to charge the same rates as bureau carriers. This right to price independently -- unfettered by harassment or coercion -- is a critical check on the economic power of rate bureau cartels; it is an important way that the shipping public can negotiate with a carrier to obtain rates lower than the collectively set level.

In addition to the right of independent action, Congress authorized the ICC to supervise the practices and procedures of rate bureaus. Congress required that motor carrier members of a rate bureau submit their ratemaking agreement to the ICC for its approval. Upon approval, the members of the rate bureau enjoy immunity from the antitrust laws to set rates collectively in accordance with the terms of their agreement and any additional terms and conditions imposed by the ICC under its continuing authority. 49 U.S.C. §5b(2), currently codified at 49 U.S.C. §10706(b)(2); United States v. Bessemer and Lake Erie Railroad Co., 717 F.2d 593 (D.C. Cir. 1983).

Pursuant to its mandate, the ICC has over the years adopted a variety of rules governing rate bureau conduct. Among these are rules requiring that records be maintained of bureau meetings where rates are discussed and that public notice be given before decisions on rates are made. These rules are intended to ensure that the ICC can exercise its supervisory authority over rate bureaus and that the shipping public is aware of, and has input into ratemaking decisions. In addition to adopting procedural rules, the ICC throughout the years consistently has reinforced the right of rate bureau members to take independent action, forbidding rate bureau members and employees from discouraging independent pricing in any way.

The congressional scheme of collective rate setting thus places limits on the motor carriers' privilege to fix prices -- limits that were designed to safeguard the public from

monopolistic pricing. This case was brought because the defendants allegedly exceeded those limits and strengthened the economic power of their rate bureau in unauthorized ways. In substance and effect, the Complaint alleges that the defendants operated as if there were no congressionally-required competitive checks on their collective ratemaking power. Instead, the defendants allegedly treated independent action as an interference with collective ratemaking and sought, through a variety of means to deter independent rate filing and to discipline those who did file such rates. In addition, the defendants allegedly sought to evade public and regulatory scrutiny of their ratemaking conduct by not complying with notice and record keeping requirements.

Among the alleged means used by defendants to deter independent rates was the threat of collective rate cuts below independent rates, and, in some cases, the actual implementation of such cuts. In this regard, two types of rate cuts can be used to deter independent rates: (1) collective rate cutting below the independent rate on the same commodity; and (2) collective rate cutting on a commodity not affected by the independent action. While collective rate cutting might appear to be always beneficial to the shipping public, that is not the case when the threat of rate cuts and the actual rate cuts themselves are used to discourage would-be independent actors and to discipline those who go forward with rate reductions. The end result of such activity is fewer independent actions and higher rates overall.

The proposed Final Judgment seeks to proscribe this important means of deterring independent ratemaking. At the same time, the proposed Judgement recognizes that in authorizing collective ratemaking, Congress has determined that there is an appropriate role for collective rate cutting. It thus bars strategic rate cutting, that is, collective rate cutting designed to deter independent ratemaking, while permitting collective rate cuts that are not strategic in nature, that is, reductions that are normal commerical responses to market forces within the rate bureau context. (See Section VI(A) and (B), infra.)

The proposed Final Judgment also seeks to bar other means by which the rate bureau could deter independent ratemaking. It prohibits threats and other forms of coercion (see Section VII, infra), and it enjoins rate bureau policies designed to undermine members' incentives to file reduced rates. (See Section VIII, infra.) In addition, the proposed Judgment prohibits conduct that has the effect of eliminating the need for independent action, such as agreements among carriers not to solicit each other's traffic on the basis of price. (See Section IX(B), infra.)

In regard to the other checks on collective ratemaking, the proposed Final Judgment seeks to ensure that the defendants' collective ratemaking activities take place in strict compliance with statutory and ICC procedures governing such conduct. It accomplishes this goal in a number of ways,

including requiring defendants to identify publicly all of their ratemaking committees (see Section XII, infra); to tape record meetings of such committees (see Section XIII, infra); and to prohibit all collective ratemaking discussion and agreements except in such committees (see Section XII, infra). In sum, as described section by section below, the proposed Final Judgment parallels the objectives for filing the instant case and seeks to define clearly the limits of the defendants' rate bureau activities and to ensure that the defendants strictly adhere to those limits.

Section V

Section V of the proposed Judgment prohibits each motor carrier defendant from communicating with other carriers or the NFTB about either its own or any other carrier's planned independent rates before such rates are announced or made known to the public. This section also prohibits defendant NFTB from communicating with any motor carrier about its planned independent rate; the NFTB staff may, however, communicate with a member motor carrier that has submitted an independent action to the NFTB for the purpose of clarifying technical matters to facilitate publication of the independent action. The section further enjoins each motor carrier defendant from suggesting to or inviting any other motor carrier to file an independent rate.

Section V is intended to (1) prevent any defendant from filing or arranging for the filing of an independent rate that is the product of collective decision-making, and (2) eliminate

the possibility of any defendant trying to persuade any carrier to change its planned independent pricing decisions. Section V is not intended, however, to prohibit a defendant motor carrier from communicating with the NFTB for the purpose of obtaining factual information or technical advice that will enable the defendant motor carrier to decide whether to file an independent rate as long as the defendant carrier does not divulge its intention to establish an independent rate. Similarly, this section does not bar defendant NFTB from providing such factual or technical information to any requesting member carrier as long as defendant NFTB does not discuss the planned independent rate itself; after an independent rate has actually been submitted by a carrier, the NFTB staff may, if necessary, contact the carrier to obtain clarification of technical matters as provided by Section XI(A) of the Final Judgment.

The terms "announces" and "independent rate" are defined in Section II of the Final Judgment.

Section VI

Section VI seeks to prevent the defendants from planning or establishing strategic, collective rate reductions to discourage competitors' independent pricing decisions. This goal is accomplished by enjoining the defendants from discussing independent rates, taking collective rate cuts below independent rates and establishing any collective reduction that is designed to interfere with or discourage independent

rates. While some of the conduct enjoined by Section VI is not necessarily by itself violative of the antitrust laws, it must nevertheless be prohibited, since it was allegedly among the primary means used by the defendants to eliminate and inhibit competition. Failure to enjoin these activities might facilitate perpetuation of the effects of the alleged illegal conspiracy.

Under section VI(A)(1), after any motor carrier makes public an independent rate on cross-border traffic that is below a corresponding, collectively set NFTB rate, each defendant is prohibited for a 90-day period following the issued date of the independent rate, from discussing the independent rate with any motor carrier, except that the defendants may discuss in an authorized rate bureau committee meeting establishing rates that match the independent rate. Thus, for a 90-day period the defendants may not discuss the independent rate except in terms of matching it, and that discussion may occur only at an authorized rate committee (or subcommittee) meeting the proceedings of which must be tape recorded. (See sections XII and XIII, infra.) Since subsection (A)(1) applies to the NFTB as well as the motor carrier defendants, the NFTB as a rate bureau is enjoined from engaging in the prohibited discussions. The NFTB staff, however, may contact a member that has submitted an independent rate for the purpose of clarifying technical matters to enable the NFTB to publish the rate.

Thus, subsection (A)(1) is intended to prevent opportunities for planning and coordinating collective rate reductions either on the same or on different commodities that could discourage or interfere with a carrier's independent pricing decisions. Subsection (A)(1) accomplishes this objective because it prohibits, for 90 days after an independent rate is announced, all collective discussions about the independent rate except for discussions to collectively match it. Discussions about matching are permitted because a carrier reducing its rates should reasonably expect its competitors in a rate bureau will do the same to protect their own market shares. Thus, the collective matching by competitors can be anticipated and planned for by the independent pricing carrier.

On the other hand, collective reductions below an independent rate are not reductions that a carrier pricing independently could reasonably anticipate since, in general, such reductions are not necessary to protect market share. Rather, collective rate cutting in these circumstances could well be used to discourage and interfere with independent pricing decisions of competitors. Faced with collective undercutting, the carrier that initially reduced rates independently would have to decide whether to reduce its rates further, perhaps to a non-compensatory level, or to negctiate with the bureau in order to get the bureau to raise its rates. In such circumstances, the independent carrier may have to

promise to go along with future, collectively set rates. Thus, strategic, collective rate reductions can be used to discourage independent pricing and to interfere with carriers that are trying to establish and maintain independent rates that are lower than the collectively set level. For these reasons, subsection (A)(1) prohibits discussions where such plans or strategies to retaliate against an independent rate could be devised.

For 90 days after the issuance of an independent rate, section VI(A)(2) prohibits the NFTB from processing motor carriers' collective rate proposals or advance notice independent actions that would reduce NFTB rates below either the specific independent rate or any other corresponding, independent rate, whichever is lower. Under subsubsection (A)(2), the NFTB may contact a motcr carrier that has submitted such a proposal or an advance notice independent action for the purpose of informing the carrier that the rate submitted to the NFTB is prohibited by the Final Judgment. Section VI(A)(2)'s ban on processing applies to proposals submitted by non-defendant member carriers, as well as by defendants. The section however, does not prohibit the defendants or other NFTB member carriers from collectively establishing rates that match those of an independent actor. Further, it does not prohibit an individual carrier from adopting any rate it chooses by a no notice independent action, that is an independent action in

which other member carriers are not given an opportunity by the rate bureau to have the same rate published for their account with the same effective date.

Ninety days after the announcement of an independent rate, sections VI(A)(1) and (2) will no longer bar the defendants from discussing or taking collective reductions below the lower of either the specific independent rate or any other corresponding, independent rate. We believe a 90-day period is adequate to insure that the collective power of the rate bureau is not used against an independent actor. Even after the 90-day period, however, section VII of the proposed Final Judgment, infra, will continue to prohibit the defendants from targeting independent rates for strategic, collective ratemaking that would discourage or interfere with independent ratemaking by another motor carrier.

Subsection (B) requires that whenever a motor carrier defendant submits a rate to the NFTB for collective action, the carrier must certify that: (1) it has not communicated with other carriers outside of authorized rate bureau meetings concerning the rate; and (2) the proposed rate reduction has not been conceived or docketed to induce any carrier to raise any independent rate. Subsection (C) prohibits defendant NFTB from processing any proposal for a collective rate reduction from any of the motor carrier defendants that is not accompanied by the required certification. Subsection (D) prohibits each motor carrier defendant from suggesting to or

inviting any person, including a shipper, to file a rate reduction proposal for collective action that the defendant knows could not be processed by defendant NFTB under section VI(A)(2). Subsection (D) also prohibits each motor carrier defendant from suggesting to or inviting a non-defendant motor carrier to submit a rate proposal to the NFTB for the purpose of inducing any other carrier to raise its independent rates.

Subsections (B), (C), and (D) are intended to eliminate remaining opportunities for the planning or setting of rate reductions to discourage independent pricing decisions. Subsection (B) requires that the motor carrier defendants affirm that their collective ratemaking behavior is non-strategic, i.e., that it is not designed to induce any other carrier to raise an independent rate. As explained supra, the proposed Final Judgment seeks to bar two types of strategic, collective rate cutting in response to an independent rate: (1) collective reductions below the same independent rate, and (2) collective reductions on other commodities or in other geographic areas. The first type of strategic collective cuts, i.e., undercutting on the same rate, is expressly barred by subsection (A)(2). It is not possible, however, to have a similar express bar against "off commodity" rate cutting because it is extraordinarily difficult, absent evidence other than the rates themselves, to distinguish "off commodity" collective rate cuts taken for nonstrategic, commerical reasons from those taken in retaliation for an

independent rate. The certification requirement of subsection (B) is intended to address the issue of "off-commodity" rate cuts. It means that a defendant motor carrier will be unable without lying under oath to submit to the NFTB a strategic rate cut for collective action. (No attempt is made to address "strategic" rate cuts by individual firms since, as discussed supra, anticompetitive pricing in the motor carrier industry by single firms is neither empirically observable nor theoretically forseeable.) Both subsections (B) and (C) place on the defendants themselves the burden of policing their own conduct to prevent strategic, collective ratecutting behavior.

Subsection (D) proscribes conduct that if not otherwise prohibited might permit the defendant carriers to accomplish indirectly, through non-defendants, that which they are prohibited from doing directly. The first part of subsection (D) is intended to prevent the defendant carriers from suggesting to other persons, particularly shippers, that such persons file proposals that the NFTB could not process if filed by a motor carrier. Since subsection (A)(2) does not prevent the NFTB from processing shippers' proposals that would establish rates below those of the lowest independent action, subsection (D) is intended to insure that any such shipper proposals are in fact generated by shippers and are not a means of avoiding the prohibitions in subsection (A)(2). The second part of subsection (D) is aimed at preventing the motor carrier defendants from suggesting to or inviting non-defendant

carriers to submit proposals for strategic, collective rate reductions that the defendant carriers themselves cannot submit under the certification requirement of section VI(B)(2).

The prohibitions and requirements of section VI cover a five-year period. The terms "issued date" and "cross-border traffic" are defined in section II of the Final Judgment.

Section VII

Section VII enjoins each defendant from interfering with any carrier's planned or actual independent rates. Specifically, it prohibits the defendants from harassing, discouraging, coercing, or threatening any motor carrier to withdraw, forbear from filing or modify in any way its planned or actual independent rates. This section mirrors existing statutory and case law which prohibits interference and coercion with respect to independent ratemaking within the context of immunized ratemaking agreements. This section is intended to preclude all types of harassment, discouragement and coercion, including oral and written threats, retaliatory rate conduct and the destruction of property.

Section VIII

Section VIII is intended to eliminate alleged past practices among the defendants that discouraged independent ratemaking and to bar prospectively the formulation of the same or different practices concerning independent rates and general rate increases that would discourage independent ratemaking.

Section VIII(A) prohibits the defendants from developing, adopting, or maintaining any predetermined policy to respond in any specified way to independently established rates. The reason for the prohibition is that the mere knowledge by a carrier of such a policy may be sufficient to dissuade it from engaging in independent rate conduct. Section VIII(B) enjoins the defendants from reconsidering automatically general rate increases whenever an NFTB carrier flags out of any portion of a general rate increase. A policy to withdraw a general rate increase automatically upon a flag-out reduces a carrier's incentive to flag out of any portion of the general rate increase in the first place and thus discourages independent ratemaking.

Section VIII bars the motor carrier defendants from joining with other carriers in establishing the prohibited policies but does not prohibit them from establishing such policies unilaterally. The NFTB as a rate bureau, however, is enjoined from engaging in the prohibited conduct.

Section IX

Section IX is intended to prohibit certain collaborative conduct among the defendant motor carriers that exceeds the scope of an ICC-approved ratemaking agreement and discourages independent actions.

Subsection (A) enjoins the defendant motor carriers from joining other carriers in an agreement not to take independent action. This provision makes clear, however, that authorized

rate bureau decisions to approve or disapprove rate proposals do not constitute an agreement not to take independent action. Subsection (B) prohibits the carrier defendants from combining with other carriers to agree not to solicit the customers of any carrier. In subsection (C), the defendant carriers are barred from agreeing to provide shippers with certain rates in exchange for a shipper's promise not to negotiate with any other carriers or not to purchase transportation services at lower rates or from particular carriers. Subsection (C) does not bar the defendant carriers from unilaterally entering such arrangements with shippers; it simply bars agreements between two or more carriers and a shipper.

Subsection (D) prohibits the defendant carriers from agreeing not to offer any particular kind, type, class or category of transportation service. For example, subsection (D) would enjoin the defendants from agreeing to refrain from offering freight forwarder or consolidation services to shippers.

Subsection (E) bars the carrier defendants from agreeing not to establish certain kinds of rates. For example, subsection (E) would prohibit the defendants from agreeing not to establish freight-all-kinds rates.

Subsection (F) prohibits the carrier defendants from agreeing to prevent an NFTB member carrier from filing a rate proposal on traffic that the member has not already carried. This subsection is intended to reach all manner of conduct that

could prevent a member from filing the rate proposal, including the physical destruction of rate proposals and oral or written communications to dissuade such filing.

Subsections (D), (E), and (F) make clear, however, that authorized rate bureau decisions that disapprove or approve rate proposals do not constitute the type of agreement prohibited by the subsections.

Section X

Section X enjoins the NFTE from engaging in or allowing its rate committees or staff to engage in particular types of conduct, most of which is outside of the scope of the NFTB's approved rate agreement.

Subsection (A) enjoins the NFTB from negotiating, or allowing any of its rate committees to negotiate, with a shipper for a particular level of NFTB rates on the condition that the shipper promise (1) not to negotiate with motor carriers for lower rates or (2) not to purchase transportation services at lower rates or from certain motor carriers. This subsection mirrors section IX(C), supra, and is intended to bar the NFTB from negotiating or entering into such an arrangement with shipper(s).

Subsection (B) prohibits the NFTB from preventing, or allowing any of it rate committees to prevent, an NFTB member carrier from submitting a rate proposal on traffic that the member has not carried. This subsection mirrors section IX(F), supra, and would prohibit the NFTB from allowing its general

rate committee members to agree not to file proposals on traffic unless such members had been carrying the traffic for a certain period of time.

Subsection (C) in section X mirrors section IX(E), supra, and enjoins the NFTB and its rate committees from refusing to establish certain types of rates. This subsection would prohibit, for example, an authorized NFTB rate committee or subcommittee from agreeing not to establish freight-all-kinds rates, commodity column rates, or discount tariffs.

Subsections (B) and (C) make clear that when an authorized NFTB rate committee or subcommittee votes to approve or disapprove a particular proposal, the collective decision on the proposal does not constitute the prohibited conduct.

Subsection (D) enjoins the NFTB from permitting or allowing any of its employees to interfere with, control or direct any action taken or to be taken by any NFTB rate committee or subcommittee. The purpose of subsection (D) is to ensure that control or direction of the ratemaking activities of the NFTB member carriers rests with the carriers, not the NFTB staff.

Section XI

Section XI imposes certain restrictions on the NFTB's staff with respect to communications about and the handling of independent actions and the role of the staff in the initiation, development and disposition of NFTB rate proposals. The purpose of section XI is to limit the opportunities for the NFTB staff to involve itself in or influence the ratemaking process.

Subsection (A) enjoins the NFTB from allowing its staff to commence communications with an NFTB member that has submitted an independent action. This provision is intended to prevent NFTB employees from recommending that a member withdraw or change in any way its independent action or resubmit the independent action as a rate proposal. Subsection (A) permits the NFTB staff, however, to commence communication with such a member for the purpose of clarifying technical matters to facilitate publication of the independent action by the NFTB. This exception applies to situations where the NFTB staff is unable to publish the independent action because of substantive omissions or irreconcilable inconsistencies contained in the member carrier's instructions to the NFTB. As a further safeguard, this provision requires the NFTB staff to maintain a detailed log of each such communication.

Subsection (B) enjoins the NFTB from permitting its staff to take a position on whether a particular rate should be docketed or to initiate, docket or take a position on docketed proposals. This subsection is intended to remove the NFTB staff from any substantive involvement in the ratemaking process. The provision, however, permits the NFTB staff to provide NFTB members with its technical expertise. The NFTB staff may process members' rate proposals, and, upon request, may analyze and give advice to members to enable the members to docket their rate proposals. The NFTB staff may also, upon request of NFTB members, collect and present to rate committees

and other interested parties, factual information related to rate proposals, although NFTB staff presentations may not include expressions of opinion or recommendations.

Subsection (C) enjoins the NFTB from allowing its staff to initiate or develop a collective response among NFTB members to any carrier's rates. This provision is intended to reach conduct such as the NFTB staff initiating a survey among members concerning how the NFTB can respond to a carrier's independent rates. It is the intent of this subsection that the carriers, not NFTB employees, initiate or develop responses to rates. Subsection (C) permits the NFTB staff to provide members with their technical expertise to the same extent and with the same restrictions as are contained in section XI(B).

Subsection (D) prohibits the NFTB from allowing its staff to handle or publish independent actions in any way other than the way that is explicitly described in the NFTB rate agreement. This provision is intended to eliminate any discretion by NFTB staff with respect to the way independent actions are handled or published. For example, if the NFTB agreement provides that carriers wishing to join an independent action must affirmatively indicate their intentions by flagging into the independent action, the NFTB staff may not use a procedure whereby all carriers are automatically included in an independent action and those carriers wishing to be excluded are required to indicate their intentions by flagging-out of the independent action.

Section XII

Section XII is intended to limit communications and discussions of rate matters to official rate bureau committees. This provision is intended to reach all rate matters about which the defendant carriers may communicate. In that regard, each of the defendant motor carriers is enjoined from communicating about non-NFTB rate matters with other carriers unless such communications take place in an authorized ratemaking body of an ICC-approved rate bureau. Defendant NFTB is similarly enjoined whenever it engages in discussions about rate matters with two or more carriers.

When the defendants communicate about rates in the NFTB, they must do so within (1) an NFTB rate committee that is explicitly authorized to consider rate matters in the NFTB agreement, or (2) an NFTB subcommittee created by an NFTB general rate committee resolution that explicitly describes the subcommittee and the nature of the rate matters it considers.

The terms "communications," "discussions," and "rate matters" are defined in section II of the proposed Final Judgment.

Section XIII

Section XIII requires that for a five year period, the NFTB tape record every meeting of any NFTB rate committee or subcommittee that is authorized to consider rates or rate matters in conformity with section XII. This provision imposes a recording requirement that is broader than existing ICC

regulations on record keeping of rate committee meetings. As set forth in the Complaint, the lack of accurate record keeping at NFTB meetings during the period covered by the Complaint was one of the means used by defendants to further the alleged illegal conspiracy. Thus, this provision is intended to insure that the most accurate record possible be made of NFTB rate committee or subcommittee meetings. Defendant NFTB is required to maintain the tapes for a period of five years and must make them available to the Justice Department upon written request.

B. Permissable Business Transactions

Section XIV

Section XIV of the proposed Final Judgment makes clear that the Judgment would not prohibit communications or agreements between a defendant and another carrier for the sole purpose of achieving interline operations or interline rates. Interline operations involve an exchange of equipment and/or freight between two or more connecting carriers. It is a means by which carriers can serve points for which they do not possess the requisite operating authority from the respective regulatory agencies or for which they do not ordinarily offer direct service themselves. The relationship is thus end-to-end or vertical in nature and does not involve parallel or horizontal competition.

Section XV

Section XV makes clear that the mere announcing or establishing of an independent rate with no advance notice does

not constitute a communication, discussion, or other conduct prohibited by sections V, VI, or VII of the Judgment. As we explained, supra, the Final Judgment places no impediments on such pricing.

Section XVI

Section XVI makes clear that the proposed Final Judgment would not prohibit the NFTB staff from carrying on the legitimate business of the NFTB. This section provides that upon request of any rate committee or subcommittee member, it is permissable for the NFTB staff to collect and present factual information to the general rate committee or subcommittee that will enable the committee to develop proposals for (1) the simplification of tariffs, (2) the removal of obsolete tariff items, (3) general rate increases or decreases, (4) broad changes in tariff structure, or (5) changes in general rules or regulations. Under this section, however, the NFTB staff is barred from expressing opinions or making recommendations in any of its presentations to the general rate committee or subcommittee.

Section XVII

Section XVII makes clear that the proposed Final Judgment applies only to rates or rate matters for the transportation of freight that originates or terminates in the United States. This section means that the proposed Final Judgment would not apply, for example, to rates or rate matters for the transportation of freight that originates and terminates wholly within Canada.

C. Affirmative Obligations

Sections IV, XVIII, and XIX(A) and XX of the proposed Final Judgment impose a number of affirmative obligations upon the defendants. Section IV requires that each motor carrier defendant give at least 60 days notice to the Antitrust Division of any plans to sell or transfer its assets as a motor carrier. The purpose of this section is to ensure that the plaintiff will have notice of any such planned transaction so that the government can take appropriate action to protect its interests in securing compliance with this Judgment.

Section IV is different from provisions routinely included in other final judgments concerning the sale or disposition of a defendant's assets. Usually, a defendant is enjoined from selling or disposing of assets unless the buyer agrees as a condition of the transaction to be bound by the final judgment. In the instant case, most of the defendants' assets are located in Canada, thereby presenting unique issues of jurisdiction and comity. For this reason, section IV imposes a notice requirement so that the government can take whatever action would be appropriate at the time to protect its interest.

Section XVIII(A) requires each defendant within 60 days of the date of the Final Judgment to furnish a copy of the Judgment to each of its (1) officers and directors, (2) agents and employees who are supervisors or managers or who have responsibility over rates or rate matters, and (3) the officers and directors of its parent and subsidiary corporations.

Within 70 days of the date this Final Judgment is entered, each defendant must certify to the Clerk of the Court that it has complied with Section XVIII(A).

Section XVIII(B) requires the defendants to initiate a compliance program for their respective employees.

Section XVIII(C) requires each of the defendants to furnish the government periodically with an account of all steps taken by each defendant to fulfill its obligations under sections XVIII(A) and (B). The first accounting must be made within 120 days from the entry date of the Judgment. Thereafter, the accountings must be made annually for a period of 5 years.

Section XIX(A)(1)(a) places an obligation on each defendant to cooperate with the plaintiff's efforts to monitor compliance with the proposed Judgment. The defendants must permit duly authorized representatives of the Department of Justice access to inspect and copy documents in the United States-located offices and terminals of each defendant. Further, upon 60 days notice, under section XIX(A)(1)(b) the defendants must provide to the Department of Justice copies of documents in their possession or under their control that relate to the subjects covered by this proposed Judgment. This requirement is not restricted to United States-located documents.

Under section XIX(A)(1)(c), each defendant must provide written reports, under oath, if requested, with respect to compliance matters. Section XIX(A)(1)(d) requires that each

defendant permit the Department of Justice to interview its officers, employees, and agents regarding subjects covered by the Judgment.

Section XIX(A)(1)(e) makes clear that nothing in sections XIX(A)(1)(a)-(d) requires any defendant to violate Canadian federal or provincial law. This section imposes a requirement on each defendant that it try in good faith to obtain permission to engage in the conduct that it believes is prohibited by foreign law.

Section XX

Under section XX, each defendant must appoint an agent (and successor agents if needed) for service of process in any proceeding related to this Final Judgment.

D. Obligations of the United States

Section XIX(B)

Under section XIX(B), the Department of Justice is barred from divulging information obtained under section XIX(A) to anyone except a duly authorized representative of the Executive Branch of the United States government. Such disclosure is not barred, however, in any legal proceeding to which the United States is a party or for the purpose of securing compliance with the Final Judgment or as otherwise provided by law. Under this section, the Department of Justice may also disclose practices that it believes violate the Interstate Commerce Act to the Office of Compliance and Consumer Assistance of the ICC.

Section XIX(C)

Under section XIX(C) each defendant may assert a claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure when such defendant provides to the Justice Department information or documents required under the compliance provisions of the Final Judgment. If any defendant asserts such a claim, the plaintiff will provide the defendant with 10 days notice prior to disclosing such material.

B. Scope of the Proposed Judgment

Duration of the Judgment - Section XXII

Except as otherwise provided, the proposed Final Judgment will remain in effect for a period of ten (10) years from the date of entry. Time prohibitions for less than the 10 year period are provided for in two general types of situations: (1) where prohibitions are imposed on conduct not in and of itself unlawful, for example, discussions of and collective reductions below independent rates in section VI; or (2) where affirmative obligations are imposed on defendants which treat them differently than others in the industry, for example, the tape recording requirement in section XIII. The specific provisions that have time limitations are the following: sections VI, XIII, and XVIII(C).

Persons Bound by the Judgment - Section III

Section III of the proposed Final Judgment provides that its terms 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.

Effect of the Proposed Judgment on Competition

The proposed Judgment is intended to prevent the defendants from continuing their unlawful conspiracy or resuming their unlawful conduct. The Judgment is intended to ensure that defendants will comply with the provisions of the antitrust laws. The proposed Judgment also seeks to ensure through its negative prohibitions that not only will the alleged conspiracy be terminated and opportunities for its resumption be eliminated, but also that competition will be restored to the motor carrier industry between the United States and Ontario. The affirmative obligations are designed to ensure that each defendant's employees are aware of their obligations under the decree in order to avoid a repetition of the behavior that allegedly occurred.

The Department of Justice believes that the proposed Final Judgment contains adequate provisions to prevent further violations by the defendants of the type upon which the Complaint is based. The Department believes that disposition of the lawsuit without further litigation is appropriate because the proposed Judgment provides all the relief that the United States sought in its Complaint, and the additional expense of litigation would not result in additional public benefit.

IV.

REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act (15 U.S.C. §15) provides that any person who has been injured in his or her business or property as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages such person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment in this proceeding will neither impair nor assist the bringing of any such private antitrust action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. §16(a), this Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against these defendants.

V.

PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED CONSENT JUDGMENT

As provided by the Antitrust Procedures and Penalties Act, any person who wishes to comment upon the proposed Final Judgment may submit written comments to Elliott M. Seiden, Chief, Transportation Section, Antitrust Division, Department of Justice, Washington, D.C. 20530, within the 60-day period provided by the Act. These comments and the responses to them will be filed with the Court and published in the Federal Register. All comments will be given due consideration by the Department of Justice, which remains free to withdraw its

consent to the proposed Judgment at any time prior to entry of the Judgment if it should determine that some modification is necessary.

After the proposed Judgment has been entered, this Court will retain jurisdiction for the purpose of enabling any of the parties to apply tc the Court for such further orders and directions as may be necessary to interpret, apply, modify, or enforce the Judgment, or to seek punishment for any violation of its terms.

VI.

ALTERNATIVES TO THE PROPOSED CONSENT JUDGMENT

In negotiating this decree, the United States originally sought to apply section VI(A)(2) to both the carrier defendants and the NFTB. That is, the United States sought to enjoin each of the motor carrier defendants from submitting to the NFTB rate proposals for collective action or advance notice independent action that were reductions below an independent rate.

The provision enjoining the defendant carriers from submitting the aforementioned rate cuts to the NFTB was deleted during negotiations. The defendants claimed that the NFTB was in a better position than each of the carrier defendants to investigate and adopt procedures to assure that the collective undercutting prohibited by the decree did not occur. Further, the defendants claimed that the application of section VI(A)(2) to each carrier defendant could discourage the defendant

carriers from making any proposals for collective reductions. Ultimately, the Department determined that the strategic, collective undercutting that it sought to enjoin could be accomplished by the bar against the NFTB's processing of the prohibited rate cuts.

Further, the Department determined that other sections of the proposed Final Judgment also protect the public from strategic undercutting by the defendant carriers. For example, sections V and VI(A)(1) prohibit collective discussions about planned or actual independent rates and section VI(B) requires each defendant motor carrier to swear that any rate reductions for collective action are not strategic in nature. Thus, the Department determined that the public was adequately protected from strategic collective undercutting by the carrier defendants.

VII.

DETERMINATIVE MATERIALS

There are no materials or documents which the Government regards as determinative in formulating this proposed

Judgment. Therefore, none are being filed with this Competitive Impact Statement pursuant to Section B of the Antitrust Procedures and Penalties Act, 15 U.S.C. §16(b).

Respectfully submitted,

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Dated: January 18, 1984