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ATTORNEY GENERAL OPINION NO. 82-74

The Honorable Ruth E. Luzzati
State Representative, Eighty-Fourth District
Room 272-W, Statehouse
Topeka, Kansas 66612

Re: Monopolies and Unfair Trade -- Restraint of Trade -- Application of Kansas Antitrust Laws to Motor Carrier Rate Bureaus

Synopsis: Despite the state corporation commission's long-standing acquiescence to the filing of rate applications with the commission by rate bureaus on behalf of motor carriers having Kansas intrastate authority, such practice is without basis in law. Kansas statutes neither recognize nor provide for the regulation of rate bureaus. Moreover, nothing in the Kansas statutes provide rate bureaus with immunity from prosecution under Kansas antitrust laws, and it would appear that the collective rate-making activities of rate bureaus constitute a restraint of trade in violation of said laws. However, before this conclusion can be made as a matter of law, an independent investigation of such activities would be necessary. Cited herein: K.S.A. 50-101, 50-112, 50-148, 50-152, 50-157, 66-101, 66-107, 66-1,105, 66-1,112, 66-1,142.

* * *

Dear Representative Luzzati:

You have requested our opinion as to whether the actions of discussing, planning, voting or submitting a rate bureau application, and the subsequent approval, denial or partial approval of such an application by the state corporation commission, constitute a violation of the Kansas antitrust laws.

In responding to your request, it is important initially to understand the nature of rate bureaus. Our understanding of such organizations has been assisted by the following excerpt from the testimony of the administrator of the corporation commission's transportation division before the Senate Committee on Transportation and Utilities on January 26, 1982:

> "[A rate bureau] is an organization, often an association or corporation, engaged in the business of preparing, submitting and publishing those rates proposed to be charged by a group of carriers that will be filed with the state regulatory commissions or with the Interstate Commerce Commission (ICC) on behalf of the member carriers."

Although rate bureaus have been instrumental in managing the rate structures of motor carriers and in the submission of rates, on behalf of motor carriers seeking collective rates, to the state corporation commission since 1937, we have been unable to discover any recognition of or reference to rate bureaus in the statutes prescribing the jurisdiction and authority of the corporation commission.

The corporation commission is granted authority to regulate public utilities and motor carriers by K.S.A. 66-101 et seq., with additional powers being extended by the motor carrier act of 1925, as expanded in 1931 (K.S.A. 66-1,105 through 66-1,142). The commission has a duty "to license, supervise and regulate every public motor carrier of property or of passengers in this state, and to fix and approve reasonable maximum or minimum, or maximum and minimum rates, fares, charges, classifications and rules and regulations pertaining thereto." K.S.A. 66-1,112.

It is also pertinent to note that "joint rates" are contemplated by K.S.A. 66-107, which provides:

> "Every common carrier and public utility governed by the provisions of this act shall be required to furnish reasonably efficient and sufficient service, joint service and facilities for the use of any and all products or services rendered, furnished, supplied or produced by such public utility or common carrier and to establish just and reasonable rates, joint rates, fares, tolls, charges and exactions and to make just and reasonable rules, classifications and regulations; and every unjust or unreasonable discriminatory or unduly preferential rule or regulation, classification, rate, joint rate, fare, toll or charge demanded, exacted or received is prohibited and hereby declared to be unlawful and void,

> and the state corporation commission shall have the power, after notice and hearing of the interested parties, to require any common carriers and all public utilities governed by the provisions of this act to establish and maintain just and reasonable joint rates wherever the same are reasonably necessary to be put in, in order to maintain reasonably sufficient and efficient service from such public utilities and common carriers."

However, the joint rates provided for by K.S.A. 66-107 are distinguishable from the agency or group rates filed by rate bureaus. Here, again, we premise our conclusion on the previously referenced testimony of the administrator of the commission's transportation division. Accordingly, it is our understanding that a "joint rate" is a rate published by two or more motor carriers to cover transportation over part of either of their routes. The effect is to allow a shipper to obtain a single price for movement of a shipment involving more than one carrier. And pursuant to the commission's procedure, joint rates are normally approved by the commission as a result of a "joint filing," which is the filing of an application with the commission by the parties to the proposed joint rate. On the other hand, a "rate bureau or group filing" is an application with the commission for approval of tariffs containing rates for all member carriers who haul a particular commodity or group of commodities, and it is our understanding that all carriers participating in the group filing agree to charge the same rate once the filing is approved by the commission, although an individual carrier member may submit separate filings providing for rates which differ from the group's tariff.

It is apparent, then, that the statutes authorizing joint rates and joint filings do not authorize or in any way provide legal support for group rates or group filings. Simply stated, joint rates and filings are not synonymous with group rates and filings, and it is clear that joint filings may be made by the appropriate carriers without rate bureau involvement.

Thus, our research discloses that the Kansas legislature has not provided a statutory basis for the existence or operation of rate bureaus in the 45 years these bureaus have been engaged in collective rate-making activities before the commission. However, even though the commission is not expressly authorized to entertain applications based on collective rate making by rate bureaus, the commission has traditionally accepted and acted upon such applications.

The question then arises as to whether the collective or group rate-making activities of rate bureaus violate the Kansas antitrust laws. Unlawful antitrust activities are detailed in K.S.A. 50-101 and 50-112. K.S.A. 50-101 provides:

> "A trust is a combination of capital, skill, or acts, by two or more persons, firms corporations, or associations of persons, or either two or more of them, for either, any or all of the following purposes:
>
> "First. To create or carry out restrictions in trade or commerce, or aids to commerce, or to carry out restrictions in the full and free pursuit of any business authorized or permitted by the laws of this state.
>
> "Second. To increase or reduce the price of merchandise, produce or commodities, or to control the cost or rates of insurance.
>
> "Third. To prevent competition in the manufacture, making, transportation, sale or purchase of merchandise, produce or commodities, or to prevent competition in aids to commerce.
>
> "Fourth. To fix any standard or figure, whereby its price to the public shall be, in any manner, controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, use or consumption in this state.
>
> "Fifth. To make or enter into, or execute or carry out, any contract, obligation or agreement of any kind or description by which they shall bind or have to bind themselves not to sell, manufacturer, dispose of or transport any article or commodity, or article of trade, use, merchandise, commerce or consumption below a common standard figure; or by which they shall agree in any manner to keep the price of such article, commodity or transportation at a fixed or graded figure; or by which they shall in any manner establish or settle the price of any article or commodity or transportation between them or themselves and others to preclude a free and unrestricted competition among themselves or others in transportation, sale or manufacture of any such article or commodity; or by which they

> shall agree to pool, combine or unite any interest they may have in connection with the manufacture, sale or transportation of any such article or commodity, that its price may in any manner be affected. And any such combinations are hereby declared to be against public policy, unlawful and void."

K.S.A. 50-112, which was enacted in 1889 (L. 1889, ch. 257, §1), states:

> "All arrangements, contracts, agreements, trusts, or combinations between persons or corporations made with a view or which tend to prevent full and free competition in the importation, transportation or sale of articles imported into this state, or in the product, manufacture or sale of articles of domestic growth or product of domestic raw material, or for the loan or use of money, or to fix attorneys' or doctors' fees, and all arrangements, contracts, agreements, trusts or combinations between persons or corporations, designed or which tend to advance, reduce or control the price or the cost to the producer or the consumer of any such products or articles, or to control the cost or rate of insurance, or which tend to advance or control the rate of interest for the loan or use of moneys to the borrower, or any other services, are hereby declared to be against public policy, unlawful and void."

Before analyzing the activities of rate bureaus in light of these statutes, we think it appropriate at this point to note that, in the summer of 1979, the corporation commission on its own motion opened its Docket No. 119,183-R. Following a pre-hearing conference in this investigative docket on July 5, 1979, the commission issued a pre-hearing order which identified the central issue of the investigation as being the practice and procedure of joint, agency or bureau tariff filing by motor carriers having intrastate authority in Kansas. One of the specific issues concerning the primary thrust of the investigation was whether such practice and procedure satisfy current statutory requirements, particularly the antitrust laws (K.S.A. 50-101 to 50-157, inclusive) and the 1925 motor carrier act and amendments thereto (K.S.A. 66-1,105 to 66-1,142, inclusive).

The parties to the investigation included motor carriers, associations of motor carriers and motor carrier rate bureaus. These parties and the commission's staff filed extensive,

well-documented briefs on the various issues, and we have found these briefs to be most helpful to our understanding of terminology, the history of current practices and procedures and the various legal questions having pertinence to this opinion.

We mention this investigation here because of the consideration given by the various parties participating in the docket to the provisions of K.S.A. 50-148. That statute provides in pertinent part: "This act shall not apply to persons whose business is under the supervision and control of the state corporation commission . . . ." We do not believe this statute extends antitrust immunity to rate bureaus.

Even though motor carriers themselves are subject to the commission's supervision and control, rate bureaus are not. As noted previously, rate bureaus are neither recognized nor regulated pursuant to Kansas statutes. Despite the commission's long-standing acquiescence to the filing of rate applications by rate bureaus on behalf of motor carriers, we have found no statutory basis for such practice. Moreover, we have not been advised of any statutory interpretation by this or any prior commission providing legal support for this practice.

However, assuming arguendo that such rate bureaus are in fact included in the exemption afforded by K.S.A. 50-148, it is clear that this statute's exemption extends only to the provisions of "this act," i.e., such exemption has application only to the provisions of Chapter 368 of the 1915 Session Laws of Kansas, now codified at K.S.A. 50-148 to 50-152, inclusive. Accordingly, since the antitrust laws contained in Chapter 50 of Kansas Statutes Annotated are composed of a series of separate legislative enactments, each of which is independent of the others except where specifically stated otherwise, it is clear that K.S.A. 50-148 has no application to the various other acts proscribing antitrust activities.

Hence, we believe it appropriate to measure the collective rate-making activities of motor carrier rate bureaus against the previously quoted prohibitions in K.S.A. 50-101 and 50-112. In this regard, we should note our concurrence with the commission's staff that the rate bureaus, not the commission, establishes rates. As noted at pages IV-1 and IV-2 of the staff's brief filed in Docket No. 119,183-R:

> "The statutory framework for the regulation of motor carrier rates adds support to the proposition that the rate bureaus, not the commission, determine the rates. K.S.A. 66-107 requires carriers to establish just and reasonable rates. The commission only establishes maximum, minimum or maximum and minimum rates. K.S.A. 66-1,112."

In other words, the commission approves limitations on carrier rates, but the actual rates are established by the rate bureaus. And as previously noted, except where individual filings are made, all carriers participating in a rate bureau or group filing agree to charge the same rates once the filing is approved by the commission.

It is also relevant to consider the impact of rate bureaus. As noted in the above-referenced testimony of the administrator of the commission's transportation division:

> "The State Corporation Commission currently has on file nine intrastate bureau or agency tariffs. These tariffs were developed through the process of collective rate making and represent the rates or price of transportation charged by 721 motor carrier firms authorized by the Commission to operate in Kansas. These 721 motor carrier firms represent approximately 48% of the 1,509 intrastate common and contract motor carriers authorized to operate in Kansas by the Commission."

The question, then, is whether the collective rate-making of these rate bureaus constitutes an infringement of our anti-trust laws. Based on the factual data available to us, we believe it does. As stated by the commission's staff at page IV-4 of its brief in Docket No. 119,183-R, in quoting an authority on collective carrier ratemaking: "'By definition, the collective ratemaking system involves restrictions upon rate competition of a type which would normally be prohibited by the anti-trust laws.'" (Footnote omitted.)

Certainly the relationship of a rate bureau and its members in the filing of applications for rate increases and, upon commission approval, the publishing of tariffs for those members, accomplish the very thing the legislature sought to prevent by the enactment of the antitrust laws. Collective ratemaking, where neither provided for by statute nor exempt from antitrust prosecution, appears to violate each of the five enumerated provisions of K.S.A. 50-101, as well as the more general provisions of K.S.A. 50-112. On the basis of factual information we have obtained from a review of the record in the commission's Docket No. 119,183-R and from a consideration of the previously-referenced testimony of the commission's staff, we believe the agreement between the rate bureau and its members to collectively establish group rates and to publish group tariffs constitutes the formation of a trust or combination. It would be difficult to assume that the purpose was other than to "create or carry out restrictions in trade or commerce," to "carry out restrictions

in the full or free pursuit of business," to "increase or reduce the price of merchandise," to "prevent competition in the manufacture, making, transportation, sale or purchase of merchandise," to "fix any standard or figure, whereby its price to the public shall be, in any manner, controlled or established, [for] any article or commodity of merchandise," or to "make or enter into, or execute or carry out, any contract, obligation or agreement . . . by which they shall bind . . . themselves not to sell, manufacture, dispose of or transport any article or commodity . . . below a common standard figure," all prohibited activities under K.S.A. 50-101.

Such a combination would also contravene K.S.A. 50-112, if it would "tend to prevent full and free competition in the importation, transportation or sale of articles imported into this state . . . or . . . [would] tend to advance, reduce or control the price or the cost to the producer or to the consumer of any such products or articles."

There is a dearth of case law in Kansas, and in other jurisdictions, dealing with rate bureaus which would be of appreciable benefit. However, a recent federal case in Georgia appears analogous to the situation presented here. In U.S. v. Southern Motor Carrier Rate Confer., Inc., 467 F. Supp. 471 (1979), an action was brought to enjoin the continuing violation of the Sherman Act by three rate bureaus representing common carriers before state regulatory commissions in five states. These rate bureaus publish tariffs containing proposed rates for intrastate for-hire transportation of general commodities on behalf of their members. In granting the government's motion for summary judgment, Judge Freeman of the United States District Court for the Northern District of Georgia, traced the history of the state action immunity doctrine, since the violation alleged was of a federal law (Sherman Act). Upon determining that the practice of collective rate publication did not fall within the category of private activities that are immune from antitrust laws under the "state action" doctrine, the court went on to find that coordinating and fixing of rates, presenting collectively set rates to the commissions, and putting those rates into effect "constitute independently cognizable acts outside the scope of First Amendment protection or the Noerr-Pennington doctrine." Id. at 485. That doctrine concludes that concerted action consisting solely of activities aimed at influencing public officials is not a violation of the Sherman Act. Id. at 484.

The provisions of the Kansas antitrust laws are quite similar to those of the Sherman Act, and the rate bureau activities here appear to be virtually identical to those described in the Southern case, supra. Although we concede that final

adjudication is pending (the Southern case is now on appeal in the Eleventh Circuit), we find the trial court's opinion persuasive.

Therefore, based on our understanding of the collective rate-making activities of motor carrier rate bureaus in Kansas, and in light of the persuasive opinion of the trial court in the Southern case, supra, such collective rate-making activities appear to violate various provisions of the Kansas antitrust laws. However, it should be recognized that not only has the decision in Southern been appealed, but our factual data as to rate bureau activities has been acquired through third-party sources. Thus, before we could state conclusively, as a matter of law, that collective rate-making activities of rate bureaus are in violation of our antitrust statutes, it would be necessary for this office to conduct an independent investigation of these activities.

Very truly yours,

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