OPINION
76-28

March 5, 1976 (OPINION)

Ms. Janet Sauter, Secretary
Public Service Commission
State Capitol
Bismarck, ND 58505
Dear Ms. Sauter:

RE: Section 146 of the North Dakota Constitution

You have asked this office to render an opinion concerning the applicability of Section 146 of the Constitution of the state of North Dakota to the ratemaking function through a rate bureau. Section 146 of the North Dakota Constitution provides as follows:

> Any combination between individuals, corporations, associations, or either having for its object or effect the controlling of the price of any product of the soil or any article of manufacture or commerce, or the cost of exchange or transportation, is prohibited and hereby declared unlawful and against public policy; and any and all franchises heretofore granted or extended, or that may hereafter be granted or extended in this State, whenever the owner or owners thereof violate this article shall be deemed annulled and become void.

A typical rate bureau is empowered to:

(a) Investigate, analyze, compile, disseminate and make recommendations with respect to the establishment, revision and change of tariffs, charges, rates, rules, regulations and practices for the transportation of property wholly or in part by motor vehicle, and, as agent for its members, to compile, publish, issue and file tariffs and schedules of such charges, rates, rules, regulations and practices;

(b) Procure, analyze, compile, disseminate and publish statistics, reports and information with respect to the operation, accounts, revenues, expenses, costs, traffic and rates of carriers;

(c) To cooperate otherwise, in any lawful manner, with individual motor carriers on groups thereof for the benefit and advantage of such motor carriers or of the motor carrier industry.

The rate bureau acts as the agent for member carriers with respect to the proposal and publication of rate structures and tariffs applicable to the intrastate transportation of products within the state of North Dakota.

In addition, each member of the rate bureau has the free and unrestrained right to take independent action to secure a change in any rate according to the dictates of that carrier to the extent that such carrier may possess operating authority to provide any given

service.

In addition to the rate and tariff activity, a typical rate bureau devotes a substantial portion of its facilities to the maintenance of a continuing cost and traffic study program.

Ratemaking and the activities of a rate bureau above described is authorized by the Interstate Commerce Commission in Section 5(a) of the Interstate Commerce Act. The I.C.C. has approved these procedures on the basis of its finding that they are in "the furtherance of the National Transportation Policy" as declared by the Congress of the United States. The question before us is whether or not these same procedures are subject to attack under North Dakota's antitrust laws.

In our opinion, the comprehensive regulation of common carriers by the state through the Public Service Commission ("PSC") and the fact that ultimate control over the tariffs, rates, charges, rules, regulations, and practices of the carriers rests with the state and the PSC, exempts a rate bureau from the proscriptions of Section 146. In Parker v. Brown, 317 U.S. 341 (1943), the United States Supreme Court in analogous circumstances unanimously upheld a California Administrative Order issued at the request of producer associations, establishing production quantities and prices for California raisins, from attack under the federal antitrust laws because those laws were not intended to reach state governments as "persons" subject to their promotions. Similarly here, the North Dakota Legislature did not intend to prohibit conference ratemaking which is supervised and controlled by the state, specifically the PSC. The Legislature's intent is manifested by the wording of Section 146, which is expressly and specifically directed at "individuals, corporations, (and) associations", not state action. Moreover, public regulation such as we have here is generally considered to be a substitute for free market forces and the antitrust laws which reinforce those free market forces. For example, Representative Bulwinkle, one of the sponsors of the provision in the Interstate Commerce Act which exempts common carriers from the federal antitrust laws, once remarked that:

> "The purpose of the antitrust laws is to protect the public from price fixing at the hand of private business. But in the field of transportation this protection is already provided through government price fixing by the Interstate Commerce Commission."

94 Cong. Rec. A-4032-33 (1948). In a similar vein, the United States Supreme Court recently held that when the CAB approves the acquisition of control of an air carrier pursuant to Section 408 of the Federal Aviation Act, such acquisition is immune from antitrust liability. Hughes Tool Company v. TWA, 490 U.S. 363 (1973). The point is simply that when the actions of common carriers are subject to complete and minute regulation in the public interest by the ICC and PSC, there is no need to apply antitrust laws to reinforce competition.

In Goldfarb v. Virginia State Bar, --- U.S. ---, 95 S. Ct. 2004, 44 L. Ed. 2d. 572 (1975), the United States Supreme Court recently

considered whether or not a minimum fee schedule published by the Fairfax County Bar Association and enforced by the Virginia State Fairfax County Bar, violated the federal antitrust laws. The Court held that the Bar's status as a state agency for certain "limited purposes" did not shield it from antitrust liability when it engaged in anticompetitive activities for the benefit of its members. Because the State Bar was unable to point to any state statute requiring such activities or even mentioning attorneys' fees, the Court concluded that the advisory fee schedule and the kind of minimum price schedule enforced by the State Bar was not immune from antitrust liability. The point the Court is making here is that absent explicit or implicit statutory authority demonstrating that it is the intent of the state to restrain competition in a given area, anticompetitive governmental activities are not immune or exempt from antitrust liability. Such an intent may be demonstrated by explicit language in state statutes or may be inferred from the nature of the powers and duties given to a particular governmental agency. Measured against this standard, a rate bureau's activities, in our opinion, are immune from antitrust liability. Historically, states have regulated the tariffs, rates, charges, rules, regulations, services, and practices of common carriers as public utilities. See, e.g., N.D.C.C. Ch. 49-18. It is the comprehensive and minute nature of such regulation that obviates the need for the protection of antitrust legislation. Such regulation is a substitute for free market forces and antitrust legislation which has in the past proven its inability to preserve competition. This was not the case in Goldfarb. The attorneys' fees and services involved there were not subject to comprehensive regulation by the state. The point is simply that when the actions of common carriers are subject to complete and comprehensive regulation in the public interest by the ICC and the PSC, there is no need to apply antitrust laws to reinforce competition. In our opinion, therefore, these activities are immune from antitrust liability.

Our opinion is reinforced by the recent Report and Order of the ICC in Ex Parte No. 297, Rate Bureau Investigation, decided June 3, 1975. In that investigation, to which the Antitrust Division of the Department of Justice was a party, the ICC concluded the most thorough review of the operation and procedures of rate bureaus to date, and specifically found that its investigation revealed no significant abuses of the procedures employed by the ratemaking bureaus and concluded that their immunity from antitrust legislation should continue. This is strong evidence that rate bureau activities need not be subjected to antitrust legislation and that the comprehensive regulation pursued by the ICC and state regulatory bodies, such as the PSC, is sufficient to protect the public interest and preserve competition to the extent desired.

Moreover, Section 146 is expressly and specifically directed at "combinations . . . having for (their) object or effect the controlling of . . . the cost of . . . transportation." In our opinion, it cannot be said that a rate bureau has control over the cost of transportation. In the first place, Section 142 of the North Dakota Constitution, which was enacted at the same time as Section 146, and is found in the same article, specifically provides that:

> " . . . all . . . transportation companies of . . . freight,

> are declared to be common carriers and subject to legislative control; and the legislative assembly shall have power to enact laws regulating and controlling the rates of charges for the transportation of . . . freight, as such common carriers from one point to another in this State; provided, that appeal may be had to the courts of this State from the rates so fixed; but the rates fixed by the legislative assembly or board of railroad commissioners (now the PSC) shall remain in force pending the decision of the courts."

As the North Dakota Supreme Court once remarked:

> "The rule is, of course, too well settled to admit of dispute that the Legislature has the power to fix and regulate rates to be charged by common carriers upon intrastate traffic, provided such rates are not confiscatory, but are reasonably remunerative. Section 142 of our Constitution expressly confers such power upon the Legislature."

State Ex Re. McCue v. Northern Pac. Rwy, Company, 120 N.W. 869 (N.D. 1909). See also, PSC v. Montana-Dakota Utilities Company, 100 N.W.2d. 140 (1959), in which the North Dakota Supreme Court once again recognized that:

> "The Commission shall supervise the rates of all public utilities, and have the power, after notice and hearing, to originate, establish, modify, adjust, promulgate, and enforce rates in accordance with the provisions of law."

Id., at 152. Thus, the North Dakota Supreme Court has consistently recognized that control over the costs of transportation within North Dakota is vested in the legislature and the PSC, not the carriers or a rate bureau.

Obviously, it would be inconsistent to prohibit conference ratemaking of the type under discussion here in Section 146, while at the same time and in the same document vesting the legislature and the PSC with the power and authority to regulate and control such ratemaking. Because the concurrent enactment of Sections 146 and 142 creates an ambiguity, it is necessary to look elsewhere for an explanation of the legislature's intention. In our opinion the recent amendment to and reenactment of Section 49-18-11 of the North Dakota Century Code provides such an explanation and expresses the legislature's intention to approve conference ratemaking of the type involved herein. Section 49-18-11 now provides as follows:

> "RATES MUST BE UNIFORM FOR ALL CLASSES OF CARRIERS - The rates and tariffs prescribed by the commission shall be uniform for similar service for all classes of carriers affected by this chapter. The use of a tariff bureau to promulgate and file a proposed tariff shall create no presumption that the carrier using the bureau is violating Section 146 of the Constitution of North Dakota."

The obvious import of this provision is that Section 146 was not aimed at the activities of a rate bureau, the reason being that a public body, specifically the legislature and the PSC, already

exercise control over the costs of transportation within North Dakota. Thus, it cannot be said that a rate bureau is a combination of common carriers having for its object of effect the controlling of the costs of transportation, for such control already lies elsewhere.

A rate bureau can only propose, suggest, and request the immense class rate structures, general commodity tariffs, and specific commodity tariffs involved herein. It cannot fix them. These proposals, suggestions, and requests are arrived at in response to the confidential application of a carrier, following a public hearing and notice thereof, and any appeal therefrom. In addition to vesting final control in the PSC, this procedure is itself state action. Not only is the procedure authorized by state law, but it functions like the government itself in providing for public participation. Moreover, it should be noted that this procedure was deemed by the ICC to be "in furtherance of state transportation policy" since it provides a mechanism for fulfilling the mandates of legislation requiring that tariffs and rates be uniform and nondiscriminatory for similar service for all classes of carriers governed by Chapter 49-18 of the North Dakota Century Code. Thus, it is once again evident that a rate bureau does not exercise control over the costs of transportation.

In the second place, each carrier member has the full right of independent action, and this right is not insignificant. Because each member has the free and unrestrained right to take independent action, it cannot be said that a rate bureau controls the cost of transportation.

In any event, conference ratemaking is necessary to ensure the uniform and nondiscriminatory rates mandated by the legislature in Section 49-18-11 of the North Dakota Century Code, as quoted above. The purpose of the PSC is to eliminate the preferences granted some shippers by some carriers. In the absence of uniform tariffs and rates, discrimination against small shippers is possible. Thus the conference ratemaking engaged in by freight bureaus furthers North Dakota's transportation policy and is a necessary and integral part of the mechanism by which uniform tariffs and rates can be established. Thus, if it is not the only mechanism therefor, it certainly is one that facilitates the establishment of reasonable, uniform and nondiscriminatory tariffs and rates and inasmuch as the rates are subject to regulation by the state through the PSC, it is impossible for the carriers to control the cost of transportation in violation of Section 146.

The purpose of antitrust laws like Section 146 is to reinforce free market forces and ensure competition. Such laws are concerned with the activities of unregulated businesses, not the actions of public bodies like the PSC. This is especially the case when, as here, the free market forces are inadequate or deficient and cannot ensure competition and the antitrust laws prove to be ineffective, and public regulation is deemed necessary. Thus, public regulation is commonly understood to be exempt from the antitrust laws and a substitute for the free market forces.

For the reasons just stated, it is our opinion that a rate bureau's publication of tariffs governing the charges for intrastate

transportation of property within North Dakota is infused with sufficient state action to exempt it from the proscriptions of Section 146.

In our opinion there is a second basis for finding a rate bureau's activities immune from North Dakota's antitrust laws. The initial determination which must be made in cases of this type is whether any of a rate bureau's activities are outside the scope of its Section 5(a) Agreement and the immunity conferred by 49 USC Section 5(b)(9) (Section 5(a), Interstate Commerce Act). To the extent that a rate bureau's intrastate activities affect interstate commerce, they come under the umbrella of its 5(a) Agreement and are thereby exempt from the operation of the antitrust laws by reason of 49 USC Section 5(b)(9) (Section 5(a), I.C.A.). 49 USC Section 5(b)(9) (Section 5(a), I.C.A.) incorporates the definition of interstate commerce used in the Sherman Act. Thus, the antitrust exemption under discussion here extends to intrastate ratemaking activities that affect interstate commerce. This is a broader definition than that originally included in the Interstate Commerce Act. As the Eighth Circuit recently remarked:

> "In interpreting other grants of federal power, it has long been acknowledged that Congress may regulate intrastate activity if simultaneously it is an integral part of or constitutes an instrumentality of interstate commerce."

Myzel v. Fields, 386 F. 2d. 718, 727 (8th Cir. 1967). Just as the court there found that the intrastate use of a telephone involved the use of an instrumentality of interstate commerce, id., at 727, so should the court find that the use of North Dakota's highways involves the use of an instrumentality of interstate commerce. To the extent the federal antitrust laws apply as a result of this broader definition of interstate commerce, state antitrust laws are inapplicable and of no effect. Therefore the area of commerce which states may regulate is much narrowed and the federal government has occupied the field. The federal government has for all intents and purposes occupied the field and so long as the ratemaking activities under review are within the framework of an established rate bureau approved by the ICC and so long as the rates are set within that framework, the activities of the rate bureau are exempt from the antitrust laws.

Thus there are two bases for finding a rate bureau's activities to be beyond the pale of North Dakota's antitrust laws. To find otherwise would make it practically impossible for the PSC to prescribe reasonable, uniform and nondiscriminatory rates for intrastate transportation of property as required by Section 49-18-11, N.D.C.C. It would also create a precedent of dangerous consequences. For example, the activities of the Milk Stabilization Board set up by the North Dakota State Legislature and other administrative agencies might be subject to similar antitrust attacks. See, e.g., Capital City Foods v. Mertz and the North Dakota Milk Stabilization Board, Civ. No. 1218 (D.N.D. - 3 Judge Ct.; 1975). Thus, it is in the interest of the national transportation policy, the state transportation policy, and other state policies that the types of activities engaged in by a rate bureau not be prohibited and a proper reading of the North Dakota Constitution, statutory framework and

case law supports such a result.

Similar constitutional provisions may be found in the states of South Dakota and Montana. And construction of those constitutional provisions supports the result advocated here. For example, Section 20 of the Montana Constitution provides as follows:

> "No incorporation, stock company, person or association of persons in the State of Montana, shall directly or indirectly, combine or form what is known as a trust, or make any contract with any person, or persons, corporations, or stock company, foreign or domestic, through their stockholders, trustees, or in any manner whatever, for the purpose of fixing the price, or regulating the production of any article of commerce, or the product of the soil, for consumption by the people. The legislative assembly shall pass laws for the enforcement thereof by adequate penalties to the extent, if necessary for that purpose, the forfeiture of their property in franchises or in case of foreign corporations, prohibiting them from carrying on business in the State."

of Montana had an opportunity to consider this constitutional provision in relation with the activities of their PSC in the establishment of the rates and charges for natural gas. The court there held that the PSC's activities did not prevent competition or offend Section 20 of their constitution because the purpose of those activities was to determine a just and reasonable price for all concerned, while the purpose of the constitutional provision was to prohibit combinations or contracts having for their object or effect a taking advantage of the public in an unlawful way. In our opinion, the situation considered by the Montana Supreme Court is directly on point with the subject of this letter and supports our opinion that a rate bureau's activities do not offend Section 146 of the North Dakota Constitution.

The wording of Article XVII, Section 20 of the South Dakota Constitution, comes even closer to that of Section 146. The South Dakota Constitution provides in pertinent part that:

> "no . . . person . . . shall directly or indirectly combine . . . in any manner whatever to fix the prices, limit the production or regulate the transportation of any product or commodity so as to prevent competition in such prices, production or transportation or to establish excessive prices therefor."

In The House of Seagram, Inc. v. Assam Drug Company, 176 N.W.2d. 491 (S.D. 1970) the South Dakota Supreme Court reconsidered its earlier decision in Miles Laboratories, Inc. v. Owl Drug Company, 295 N.W. 292 (S.D. 1940) in which it had upheld South Dakota's Fair Trade Law upon finding that it did not violate the South Dakota Constitution, specifically Section 20 quoted above, and overruled that decision insofar as it upheld the validity of a "nonsigner clause." In the course of its opinion, the Court stated that:

> "Regulation of wages and prices is a legislative function to be exercised by an elected legislative body. The power and

> authority to do so may be delegated to other governmental officers or agencies to a limited extent provided understandable standards are adopted to guide the officer or agency in the exercise of that power."

Id., at 494-95. The Court went on to declare the nonsigner provision in the Fair Trade Law constitutionally invalid as an unlawful delegation of legislative power to private parties. The Court's construction of its constitution indicates that in order to conform to the dictates of antitrust provisions such as Section 20 and Section 146, control must be vested in the legislature or some other governmental agency. This is precisely the point being made in this letter. Unlike the activity under review by the South Dakota Supreme Court, a rate bureau and its member carriers do not have discretionary power to fix prices or rates. Absent such power, it cannot be said that a rate bureau of its member carriers have control over the cost of transportation within North Dakota and it, therefore, follows that such activities do not violate Section 146.

It should be noted in passing that the question under review in this letter is to be distinguished from a line of cases involving public utilities that have recently been given a good deal of publicity; specifically, Cantor v. Detroit Edison and Mazzola v. Southern New England Telephone Company On the 6th of October, 1975, the United States Supreme Court agreed to decide whether state regulation of electric rates shields Detroit Edison's electric bulb tie-in plan from the federal antitrust laws. Under that plan, electric bulbs are actually replaced free of charge in residences by the utility as part of the overall electric rate plan approved by the Michigan Public Service Company. Similarly, the Connecticut Supreme Court recently held that Southern New England Telephone Company's policy of requiring individuals to lease particular interface devices for telephone answering mechanisms obtained from noncompany sources was not immune from attack under the Connecticut antitrust laws. Regardless of the Supreme Court's ultimate decision in Cantor v. Edison, both that case and Mazzola v. Southern New England Telephone Company are factually distinguishable from the publication of tariffs governing the charges for intrastate transportation of property within North Dakota. Both Cantor and Mazzola involve a tie-in, not suggested, requested or proposed tariffs, rates, charges, rules, regulations, services and practices of a public utility. Unlike the suggested, requested and proposed tariffs, rates, charges, rules, regulations, services and practices involved herein, the tie-ins are not subject to comprehensive and minute state regulation. Because Cantor and Mazzola are thus factually distinguishable and based on totally different antitrust provisions, they do not undercut our opinion.

It is important to bear in mind here that the North Dakota Supreme Court has considered Section 146 only once and the resulting opinion in that case, State v. Gamble-Robinson Fruit Company, 176 N.W. 103 (N.D. 1919), offers no guidance whatsoever to the question under discussion here. It is also important to bear in mind that the carriers who publish tariffs through a rate bureau also conduct interstate operations of which their intrastate operations are an integral part. Separate tariffs are required for each operation. Since carriers possessing intrastate authority in North Dakota also

have interstate authority, intrastate and interstate shipments are co-mingled in vehicles operating within North Dakota. For this reason, the carriers have utilized a rate bureau which was established pursuant to Section 5(a) of the Interstate Commerce Act for the publication of their various intrastate tariffs as well as their interstate tariffs. This method of intrastate rate publication has proven its efficiency, economy, and usefulness in accomplishing a public purpose. The member carriers are able to file interstate tariffs with the PSC without requiring each carrier to compile and publish its own separate tariffs, thus avoiding incalculable duplicative efforts. Individual tariff publication would place an intolerable burden on motor carriers conducting intrastate operations as well as a burden upon the shipping public and the PSC. Most carriers simply do not possess the manpower, equipment and capital necessary to compile, print and publish their own intrastate tariffs, nor to prepare and present evidence and argument relating to the "reasonableness" of their rates, in the manner required by the N.D.C.C. Such evidence is essential if the PSC is to regulate and control rates in accordance with the N.D.C.C.'s mandates.

In conclusion, it is our opinion that the use of a rate bureau for the publications of tariffs governing the transportation of property within the state of North Dakota is consistent with the constitution, laws, case law and policies of North Dakota, and in no way violative of Section 146.

Sincerely yours,

GERALD W. VANDEWALLE

Deputy Attorney General