

Complaint

102 F.T.C.

IN THE MATTER OF

MASSACHUSETTS FURNITURE AND PIANO MOVERS
ASSOCIATION, INC.FINAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket 9137. Complaint, June 12, 1980—Final Order, Sept. 28, 1983*

This order requires a Massachusetts association of common carriers certified to move household goods and office equipment, among other things, to cease entering into, maintaining or adhering to any agreement or plan to fix rates charged for the intrastate transportation of goods and equipment; and to cease providing non-public information relating to changes in any carrier's transportation rates to competing firms. The order also bars the association from knowingly preparing or filing tariff provisions containing collective rates for transportation services; influencing member carriers to file or adhere to any existing or proposed tariff provision affecting intrastate transportation rates; and maintaining a tariff committee or similar entity to consider, pass upon or discuss intrastate transportation rate proposals. Additionally, respondent is required to cancel all tariffs and tariff supplements presently in effect or on file with the Massachusetts Department of Public Utilities; terminate all previously executed powers of attorney and agreements with carriers utilizing its services; cancel provisions in its articles of incorporation, by-laws, policy statements and other relevant documents that do not conform with the terms of the order; and amend its by-laws to require members to observe provisions of the order as a condition of membership.

Appearances

For the Commission: *Harold F. Moody, Charles E. Yon and Janet H. Gilbert.*

For the respondent: *David Brodsky and James C. McMahon, Jr., Brodsky, Linett, Altman & Schechter, New York City and Thomas E. Andresen, Jr., Salem, Mass.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act (15 U.S.C. 41, et seq.) and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Massachusetts Furniture and Piano Movers Association, Inc., (hereinafter sometimes referred to as "respondent," "Mass. Movers" or the "Association"), a corporation, has violated and is now violating the provisions of Section 5 of said Act, and it appearing to the Commission

that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges as follows:

For purposes of this complaint the term *tariff* means a publication stating the rates and charges of a common carrier for the transportation of property within the Commonwealth of Massachusetts and all rules, terms and conditions which the common carrier applies in connection therewith.

PARAGRAPH 1. Respondent Massachusetts Furniture and Piano Movers Association, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, with its office and principal place of business located at 635 Washington Street, Canton, Massachusetts.

PAR. 2. Respondent is an association organized for, and serving its members' interests, including their economic interests, by promoting, fostering and advancing the household goods and office equipment moving industry in the Commonwealth of Massachusetts. One of the primary functions of respondent is the initiation, preparation, development, dissemination and filing of tariffs and supplements thereto on behalf of and as agent for its members with the Massachusetts Department of Public Utilities. Said tariffs and supplements contain rates and charges for the transportation of household goods and office equipment and for related services including, *inter alia*, hoisting and lowering; piano or organ carrying; loading and unloading bulky articles; auxiliary services; overtime loading and unloading; elevator, stair and distance carrying; and reweighing at the request of the shipper.

PAR. 3. Pursuant to Massachusetts state law, each common carrier is required to file a tariff with the Massachusetts Department of Public Utilities containing the carrier's rates, fares or charges for the intrastate transportation of household goods and office equipment. By Massachusetts law, a common carrier is not permitted to charge a different rate, fare or charge other than those contained in its tariff or supplements thereto once the Department of Public Utilities has accepted it.

PAR. 4. Members of respondent are engaged, *inter alia*, in the business of providing transportation and other services for compensation as common carriers for intrastate moves of household goods and office equipment in the Commonwealth of Massachusetts. Except to the extent that competition has been restrained as herein alleged, members of respondent have been and are now in competition among themselves and with other common carriers.

PAR. 5. The membership of the Association consists of approximately 300 common carriers of property by motor vehicle, and other per-

sons engaged in the household goods and office equipment moving industry and allied industries who conduct business within the Commonwealth of Massachusetts. In 1977 the Association's members received more than \$60 million in compensation for intrastate moves. Members of the Association are entitled to and do, among other things, vote for and elect the officers and directors of the Association. The control, direction and management of the Association is vested in the officers and directors who employ or appoint an executive director to carry on the day-to-day administration and management of the Association. [3]

PAR. 6. The acts and practices of respondent set forth in Paragraph Seven have been and are now in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, as amended, and respondent is subject to the jurisdiction of the Federal Trade Commission. Among other things, the aforesaid acts and practices:

(A) Affect the flow of substantial sums of money from the federal government, business and other private parties to the respondent's members for rendering transportation services, which money flows across state lines;

(B) Affect the purchase and utilization of equipment and other goods and services by respondent's members which are shipped in interstate commerce;

(C) Include the use of the United States mail and other instruments of interstate commerce in furthering the agreements described below; and

(D) Are supported by the receipt of dues, advertising revenues and fees for publications and services from out-of-state members and others.

PAR. 7. For many years and continuing up to and including the date of the filing of this complaint, respondent, its members, officers and directors and others have agreed to engage, and have engaged, in a combination and conspiracy, an agreement, concerted action or unfair and unlawful acts, policies and practices, the purpose or effect of which is, was or may be, to unlawfully hinder, restrain, restrict, suppress or eliminate competition among common carriers in the household goods and office equipment moving industry.

Pursuant to, and in furtherance of, said agreement and concert of action, respondent, its members and others have engaged and continue to engage in the following acts, policies and practices, among others:

(A) Initiating, preparing, developing, disseminating, and taking other actions to establish and maintain collective rates, which have the purpose or effect of fixing, establishing, stabilizing or otherwise

tampering with rates and charges for the transportation of household goods and office equipment in Massachusetts; [4]

(B) Participating in and continuing to participate in the collectively set rates;

(C) Filing with the Massachusetts Department of Public Utilities collectively set rates; and

(D) Initiating, organizing, coordinating and conducting meetings or providing a forum for any discussion or agreement between competing carriers concerning or affecting intrastate rates charged or proposed to be charged for the intrastate transportation of property; or otherwise influencing its members to raise their rates, charge the same or uniform rates, participate in or continue to participate in the collectively set rates.

PAR. 8. The acts and practices of respondent, its members and others as alleged in Paragraph Seven, have been and are now having the effects, among others, of:

(A) Raising, fixing, stabilizing, pegging, maintaining, or otherwise interfering or tampering with the prices of household goods and office equipment moves;

(B) Restricting, restraining, hindering, preventing or frustrating price competition in the household goods and office equipment moving industry; and

(C) Depriving consumers of the benefits of competition.

PAR. 9. The acts, policies and practices of respondent, its members and others, as herein alleged were and are to the prejudice and injury of the public and constituted and constitute unfair acts and practices or unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended. The acts and practices, as herein alleged, are continuing and will continue in the absence of the relief herein requested.

INITIAL DECISION BY

MORTON NEEDELMAN, ADMINISTRATIVE LAW JUDGE

DECEMBER 1, 1981

I.

STATEMENT OF THE CASE

The complaint in this matter, which was issued on June 12, 1980, alleges that Massachusetts Furniture and Piano Movers Association,

Inc., and its members have engaged in a price-fixing conspiracy by collectively initiating, preparing, developing, participating in, and filing joint tariffs for moving household goods and office equipment within the Commonwealth of Massachusetts. The complaint further charges that respondent's members have met for the illegal purpose of assuring that moving rates within certain specific geographic zones are adhered to uniformly. These practices are said to violate Section 5 of the Federal Trade Commission Act.

Respondent's answer denies that it or its members have committed any substantive violations, and advances the affirmative defenses that its rate-making activities are: (a) exempt from the federal anti-trust laws and Section 5 of the Federal Trade Commission Act by reason of *Parker v. Brown* and the related line of "state action" cases; and (b) political petitioning of a government agency protected under the *Noerr-Pennington* doctrine. [3]

In the prehearing stage both sides moved for summary decision on the *Parker v. Brown* and *Noerr-Pennington* issues. In Prehearing Order No. 18, complaint counsel's motion was granted, the defenses were stricken, and a trial on the merits was ordered to be held in Boston, Massachusetts, on October 5, 1981. At that time both sides introduced exhibits, but no witnesses were called. Main briefs were filed on November 5, 1981;¹ reply briefs on November 20, 1981.

After reviewing all the pleadings, stipulations,² admissions,³ exhibits, proposed findings, conclusions, and briefs submitted by the parties, and based on the entire record, I make the following findings of fact: [4]

II.

FINDINGS OF FACT

Respondent and Its Members

1. Respondent, Massachusetts Furniture and Piano Movers Association, Inc. (hereinafter "Mass Movers"), is an association of some 300 common carriers certified by a state agency, Massachusetts Department of Public Utilities (hereinafter "MDPU"), to move household goods and office equipment within the Commonwealth of

¹ Respondent's Main Brief is in the form of a Post-Hearing Memorandum In Support of Its Renewed Motion For Summary Decision which essentially renews its "state action" defense.

² Prehearing Order No. 13 incorporated into the record two stipulations, hereinafter identified as "Stip. 1" (undated, and consisting of 33 paragraphs) and "Stip. 2" (dated March 26, 1981, and consisting of one paragraph).

³ Complaint counsel filed two sets of requested admissions. The first request (dated March 20, 1981) and the responses thereto (dated April 1, 1981) are hereinafter referred to as "Adm. 1." The second request (dated April 14, 1981) and the responses thereto (dated April 24, 1981) are hereinafter referred to as "Adm. 2."

Massachusetts.⁴

2. Approximately 80 percent of all movers doing business in Massachusetts are members of Mass Movers.⁵ [5]

3. The members of Mass Movers ostensibly compete amongst themselves to provide moving services.⁶

4. The parties have stipulated to the truth and accuracy of Paragraph Six of the complaint, which charges that the acts and practices of respondent and its members, as alleged in Paragraph Seven of the complaint, are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act. Thus, respondent has stipulated that the practices of Mass Movers—

(A) Affect the flow of substantial sums of money from the federal government, business and other private parties to the respondent's members for rendering transportation services, which money flows across state lines; (B) Affect the purchase and utilization of equipment and other goods and services by respondent's members which are shipped in interstate commerce; (C) Include the use of the United States mail and other instruments of interstate commerce in furthering the agreements [respecting joint-tariff submissions]; and (D) Are supported by the receipt of dues, advertising revenues and fees for publications and services from out-of-state members and others.⁷ [6]

5. Mass Movers performs no moving services, and does not possess a certificate of public convenience and necessity issued by either the Interstate Commerce Commission or the MDPU;⁸ accordingly, the association is not a "common carrier" subject to the Interstate Commerce Act, and has no exemption under Sec. 5(a)(2) of the Federal Trade Commission Act.

6. The day-to-day affairs of Mass Movers are carried out by an Executive Director who is in the employ of the association, and a Board of Directors elected by the members. All persons serving on respondent's Board of Directors are officers and employees of member firms.⁹

Joint Tariff Activity of Respondent

7. Under Massachusetts law, a mover must file a tariff containing the mover's charges for moving household goods and office equipment. A mover is not permitted to depart from the [7] filed tariff (or a filed supplement to the tariff) once the tariff or the supplement has

⁴ Stip. 1, ¶ 1.

⁵ Stip. 1, ¶ 1.

⁶ Complaint and Answer, ¶ 4.

⁷ Stip. 2; *see also* Stip 1, ¶¶ 27-32.

⁸ CX110Z-8; RX10B. About half of respondent's members do not have ICC licenses. CX's 107A-107H. At least 50% of the members are engaged solely in intrastate moving (Stip. 1, ¶ 33), and almost all members are engaged in some intrastate moving (CX's 108A-108F).

⁹ Complaint and Answer, ¶ 5; CX71B.

been accepted by MDPU.¹⁰

8. The main purpose of Mass Movers is to prepare, sponsor, and file with MDPU a joint tariff on behalf of its members.¹¹ The first such joint tariff was filed by respondent in September 1938;¹² the last, Number 14, was filed on May 1, 1971, and was subsequently revised on six occasions.¹³ In filing a joint tariff, respondent acts as the agent for its members.¹⁴

9. There is no Massachusetts law requiring or compelling movers to file a joint tariff. Moreover, there is no Massachusetts law requiring or compelling uniform moving rates among competing movers. Joint tariffs, however, are authorized by the following regulation promulgated by MDPU:

(a) Whenever a carrier or a broker desires to give authority to an agent to issue and file tariffs and supplements thereto in its stead, an appropriate power of attorney . . . shall be used, . . . [8]

(b) Carriers and brokers may become participants in such tariffs which are issued and filed by another carrier or his agent by the giving of a proper concurrence.¹⁵

10. Most of the groundwork involved in preparing joint tariffs is done by respondent's Tariff Committee (renamed "Cost Study Committee" in 1978, and "Governmental Committee" in 1980) appointed from the membership of Mass Movers by the President of the association.¹⁶

11. The Tariff Committee members meet either on their own initiative, or at the direction of the Executive Director or the Board of Directors, to prepare and develop proposals and recommendations respecting a joint tariff.¹⁷

12. The Tariff Committee's proposals for a joint tariff are submitted to respondent's Board of Directors for discussion at the monthly meetings of the board.¹⁸ Thereafter, the Executive Director disseminates the recommendations of the [9] Tariff Committee to the general membership of Mass Movers through the association's monthly bulletin.¹⁹ The membership, in turn, submits comments on the proposed joint tariff to the Board of Directors.²⁰

¹⁰ Mass. Gen. Laws Ann. Ch. 159B § 6A; Complaint and Answer, ¶ 3; Stip. 1, ¶ 22.

¹¹ Stip. 1, ¶ 2(c); Adm. 1, ¶ 2; CX's 71A, 92, 93, 109D, 110D.

¹² Stip. 1, ¶ 3; CX's 102A, 102B; RX12D.

¹³ Stip. 1, ¶¶ 4-7.

¹⁴ Stip. 1, ¶ 7.

¹⁵ MDPU 10405(1), Part III, Sec. 6; Stip. 1, ¶ 17.

¹⁶ Adm. 1, ¶¶ 3-6; Adm. 2, ¶¶ 1-3; CX's 10B, 20A, 32, 33, 35, 36, 109F, 110E-F, 110H, 111M, 112B, 112D.

¹⁷ Adm. 1, ¶ 9; Adm. 2, ¶ 2; CX's 11B, 19, 20A, 22, 27, 32, 33, 70, 109H, 109J, 110F, 110Z-2, 110Z-10, 112R; RX 61.

¹⁸ Stip. 1, ¶¶ 10, 11, 12, 14; Adm. 1, ¶¶ 8-12, 17; CX's 2, 4A, 5-8, 11B, 12, 14, 17, 19-21, 25A, 28, 29, 35, 50A, 54A, 68; RX 89.

¹⁹ Stip. 1, ¶ 13; CX's 4A, 46A, 53A.

²⁰ CX's 69, 70, 94, 95, 109L, 111S, 111T, 112R.

13. From these internal deliberations of the Tariff Committee, the Board of Directors, and the general membership of Mass Movers, there eventually emerges a joint tariff or revisions of existing joint tariffs which the Board of Directors files with MDPU on behalf of the members.²¹ The tariff decisions of the Board of Directors are ratified by respondent's general membership at annual meetings,²² and the members indicate their formal acquiescence in the joint tariff by filing powers of attorney and concurrence forms with the MDPU.²³

14. As in the case of an individual tariff (*see* Finding 7), once the joint tariff is filed by respondent, the members of the association are required under Massachusetts law to charge the [10] rates specified in the tariff unless the tariff is suspended by MDPU, or a mover files an entirely separate tariff, or a mover files for an exception to the joint tariff.²⁴

15. Although there is no state statute or regulation requiring a joint tariff from competing movers in Massachusetts, respondent has been encouraged in the past by MDPU officials to file such tariffs on behalf of its members.²⁵ Moreover, MDPU staff members have consulted with officials of respondent about including, excluding, or clarifying certain provisions in proposed joint tariffs.²⁶

16. The joint tariffs filed by respondent association automatically go into effect on a date specified by respondent unless suspended by MDPU.²⁷ [11]

17. The latest joint tariff submitted by respondent, MDPU tariff No. 14 (effective May 1, 1971), consists of three main sections: Section I contains two tables of rates and charges for packing and unpacking; Section II contains 10 tables of hourly rates for moves up to and including 25 miles; Section III contains a weight/mileage table for moves in excess of 25 miles. In addition to the three main sections, the tariff contains rates for 27 different types of boxes, overtime, claim settlement fees, and for such special services as hoisting and lowering pianos and other extra pick up and delivery charges.²⁸

18. Since May 1, 1971, Mass Movers, its members and directors have initiated, prepared, developed, and filed six revisions of Tariff No. 14 which have been accepted by MDPU. The six revisions of MDPU No. 14 were discussed by the Tariff Committee and submitted to respondent's Board of Directors who, in turn, reported these proposed in-

²¹ Stip. 1, §§ 7, 14, 20; Adm. 1, §§ 10-12, 17; CX's 2, 6, 7A, 14, 17, 27, 110B, 110Q, 110Z-2, 111Z-11, 112M.

²² Adm. 1, § 16.

²³ Stip. 1, §§ 18, 19, 21; CX's 111Z-4, 111Z-5.

²⁴ Stip. 1, § 22.

²⁵ RX's 65B, 67A, 73A, 80B.

²⁶ RX's 1A, 1B, 62B, 66A, 70A, 78B, 79B, 83B, 85B, 87A, 88, 91.

²⁷ Mass. Gen. Laws Ann. Ch. 159B § 6A.

²⁸ Complaint and Answer, § 2; Adm. 1, § 29; CX's 113E-113Z-16; RX12E.

creases to the membership in the association's monthly bulletin.²⁹ [12]

19. While the members of the association have the right to file an independent tariff, there is overwhelming acceptance by the members of the basic joint tariffs filed by respondent,³⁰ as shown in Table 1 below.

TABLE 1: Member Participation in MDPU Tariff No. 14 Filed by Mass Movers:

Date	% Participation in one of 10 hourly rate tables	% Participation in one of two Packing Rate Schedules
2/1/72	99	99
2/15/73	99	99
10/15/73	99	99
2/14/74	99	100
11/30/74	99	N.A.
2/12/75	99	100
2/18/76	99	100
2/28/77	99	100
6/16/77	99	100
2/28/78	97	97
11/30/78	95	N.A.
1/31/79	95	N.A.
1/31/80	95	N.A.
8/14/80	85	96
3/12/81	91	98

Sources: CX's 38B, 40B, 43A, 45B, 49B, 52B, 57B, 59C, 60C, 103, 104A-104K, 105A-H, 106A-F, 111Z-7, 111Z-8. [13]

Other Activity of Respondent Aimed at Higher Uniform Rates

20. Even apart from the filing of joint tariffs, almost from its inception respondent has been engaged in activity aimed at eliminating price competition amongst movers. Thus as early as March 1939, respondent's Board of Directors voted to require that the members submit all supplements to the board for its approval.³¹ In 1957, the President of respondent announced that the association had made considerable progress in stabilizing rates.³² At a Board of Directors meeting in April, 1961, there was a discussion about moving all the members to a higher rate. At this meeting the President of respondent asked how many movers then charging \$16 per hour (for a truck and three men) would raise their rates to \$18; and how many charging \$14 would raise their rates to \$16. All movers charging \$16 agreed to

²⁹ Stip 1, ¶¶ 5-6. See also Findings 12, 13.

³⁰ To these basic tariffs, however, about 50% of the members filed various exceptions in 1980 (CX's 105A-105H), and about 30% filed exceptions in 1981 (CX's 106A-106F).

³¹ RX51B.

³² RX84A.

charge \$18, and all but two movers charging \$14 agreed to raise their rates to \$16.³³ In 1975, prospective members of the association were told that a [14] principal objective of respondent was to obtain uniformity of rates.³⁴

21. The multiple tables appearing in respondent's joint tariff M.D.P.U. No. 14 might conceivably result in some price competition among members; respondent, however, has taken steps to eliminate this eventuality. In fact, the use of multiple tables was designed by respondent for the very purpose of *reducing* the price differences which had occurred prior to 1971 when the association filed a single hourly rate, only to be followed by the widespread use of supplements with the result that "[t]here was an absolute hodge-podge of rates lacking any degree of uniformity."³⁵ Moreover, respondent has used zone meetings (the membership was organized into six zones in 1955³⁶) to obtain agreement amongst competing movers to charge a uniform rate (*i.e.*, to adopt uniformly *one* of the published rate tables), or to move uniformly to higher tables. That this is the purpose of zone meetings was made clear in a March 6, 1970, memorandum from respondent's Executive Director—[15]

It has been my experience that Zone meetings have been very successful if only a good turnout of members can be obtained. The most recent Zone meeting I had was on January 29th among the movers on Cape Cod. We had almost 100% attendance by the movers. It is especially interesting to observe that these competitors have developed growing confidence in each other—they have gotten to know each other. They are all now moving from Table 4 (\$25 per hour) to Table 5 (\$27 per hour). . . .³⁷

Prior to another 1970 Zone meeting, respondent's Executive Director asked the movers to—

. . . give some real thinking to increasing your hourly rates by one Table. School St. Stg. & Worcester Stg. have just jumped their rates from 2 to 4. In Greenfield area, Sitterly & Westcott are jumping up one table and looks like others there will do the same. If just one would make the same move in Springfield and then let the others know—you could all move up. Same in other areas.³⁸

22. Respondent association also acts as a fire brigade which at the first sign of a price reduction rushes into action to discourage such competitive activity. Thus on February 16, 1973, the Executive Director of Mass Movers wrote:

³³ RX's 86A, 86B.

³⁴ CX's 92, 93.

³⁵ CX102D. The use of multiple tables in order to reduce the number of supplements was endorsed by MDPU officials. See RX's 1B, 80B.

³⁶ RX 79B.

³⁷ CX72. See also CX1.

³⁸ CX 73.

I was able to stop the reduction filings of Walsh and Seeeney so they will remain on Table 3.³⁹ [16]

Another mover in this area was told:

Was successful in holding the change to Table 2 of Walsh and Sweeney. They are still on Table 3. Looks like you're finally going to get rate uniformity.⁴⁰

Once the defection to a lower rate table was contained, the Executive Director then directed his efforts to raising the movers up to Table 3. He reported that the movers in the Fall River area "are agreed on maintaining a rate level of *Table 3*," and to one mover in this area he wrote:

In the interest of rate stability in the Fall River area I hope that you will also go along with this rate.⁴¹

Apparently this effort was successful since on March 22, 1973, the Executive Director reported to respondent's Board of Directors:

Fall River area has stabilized their rates and are now all on Table 3.⁴² [17]

The Executive Director did not rest on his laurels, and by 1975 he was organizing a zone meeting in Fall River for the purpose of moving the members up to Table 4.⁴³

23. Not only does respondent actively work to eliminate price competition in specific zones, but it serves as a constant source of inspirational messages to the members which have as their dominant theme that movers should increase prices to consumers.⁴⁴ [18]

³⁹ CX79.

⁴⁰ CX81.

⁴¹ CX82. This letter was apparently sent to several Fall River area movers with the notation that respondent "will hold returns in Assoc. office until rate changes received from all." CX's 83-88.

⁴² CX13.

⁴³ CX's 26A, 89B.

⁴⁴ See, e.g., CX37A ("If your pretax profit margin is shrinking then, as a certificated carrier with an obligation to service the public, you should [almost must] apply for a rate increase to maintain your financial integrity . . . call your association office if you feel in need of further information"); CX38A ("Your association office realizes that many of our carrier members are in need of rate increases and we are prepared to continue to file rate increases with the M.D.P.U. . . . [i]f YOUR company needs a rate increase - CONTACT your association office and file the increase NOW so you will not encounter a time lag . . ."); CX43A ("Your association office is receiving a number of inquiries concerning hourly rates mostly having to do with competitor's rates and what are the averages in each Zone and statewide. This is unusual for this time of year and would seem to indicate that the bottom line [the profit line] is not measuring up to what it should be."); CX44B ("Your association office urges all of our carrier members to take a hard look at your hourly rates—call the office if you want to just talk about this. If your decision is to move up a Table or two it is a very simple matter for us to proceed and we will do all the work . . . Remember—just drop a note or call your association office if you have a need to increase your hourly rate Table."); CX45B (" . . . we have an unusual number of hourly rate increases being filed . . . Call your association office if you have a need to increase your hourly rate Table."); CX50B ("[t]he lesson is taught over and over again that undercutting [prices], while it brings apparent transient prosperity, eats out the vitals of the company practicing it. But it is taught in vain."); CX60C ("DO YOU NEED TARIFF RELIEF? If any of your DPU rates are inadequate, contact your association office.")

24. On the basis of the record before me, I am unable to make a definitive factual finding as to how vigorously the MDPU exercises its statutory power to review proposed joint tariffs for reasonableness. As indicated in the Discussion (Part III, *infra*), proof on this point is not germane to my decision since respondent has failed to meet the threshold requirement of showing that the Massachusetts legislature intended to suspend competition in the moving industry. In the interest of completeness, however, I find that there is some evidence that MDPU does not automatically accept all proposals of respondent, and some joint tariffs have been suspended, or respondent has been asked on occasion to file additional data in support of a joint tariff.⁴⁵ But even assuming that joint tariffs are [19] reviewed, the pervasiveness of MDPU regulation is open to serious question given the importance of the multiple-table schedule in the tariff sponsored by Mass Movers, and MDPU's [20] policy of not requiring movers to justify the reasonableness of their rates as they graduate from table to table.⁴⁶

Finally, there is no clear proof that the joint ratemaking process itself is subject to regulation or supervision by the MDPU. The record evidence relating to this point (on which respondent has the burden of proof) is sketchy. In an affidavit attached to complaint counsel's Motion for Summary Decision, James S. Simpson, Director of Rates Division of MDPU says:

The initiation, development, compilation, preparation, and drafting of the Association's agency tariff schedules, and the revisions thereof, are undertaken solely by the

⁴⁵ Respondent relies heavily on the investigation and eventual rejection by MDPU of Mass Movers' proposed revision of Tariff No. 14 during the period July 14, 1978 to June 14, 1979 (RX's 9A-12V). But this 1979 review may reflect in part MDPU awareness of the challenge by the FTC staff to respondent's claim of immunity by reason of the state action defense. See RX12o. In any event, there is little evidence of similar adversarial review by MDPU of respondent's proposed joint tariffs. A 1966 filing was suspended and hearings were held because of a disagreement between Mass Movers and MDPU over the commodity description, declared value provisions, and determination of running time (RX's 2A-2F, 3A-3D, 27, 28, 29, 30A, 30B, 31). Between 1939 and 1975, however, justifications for rates were established normally by informal meetings with MDPU, and suspensions were so rare that faced with one in 1975, respondent withdrew its rate filing "because we were not prepared to go to hearing by reason of just not knowing how to proceed." CX102B.

The record contains several requests for information from MDPU in support of tariff increases and suggestions as to the form of tariff proposals. See, e.g., CX18 (fuel surcharge would be accepted by MDPU if filed in form of tariff supplement); RX's 1A, 1B (MDPU orders organization of tariff in proper form with table of contents; in addition, multiple tables were accepted by MDPU, and hearing was scheduled on "agreed value"); RX's 3A-3D (MDPU orders revisions in standard bill of lading); RX's 4, 5A, 6 (MDPU calls for additional testimony and exhibits in support of tariff); RX26 (proposed supplement not accepted because it omitted a required change in definition of covered commodities). See also the following suggestions by MDPU to Mass Movers: RX62B (omit tariff pages devoted to transportation of crated furniture from docks and railroad terminals); RX83B (change the definition of a barrel to include the use of so-called "square dish barrels"). I have no basis for concluding one way or the other whether these requests for information, scheduling of hearings, and suggestions are indicative of an independent evaluation of the economic necessity for tariff increases or are merely examples of a bureaucracy fussing over form while ignoring substance. As for the 1978 statement by an MDPU commissioner that his agency does not rubber-stamp proposals (RX's 40A-40G), this must be viewed warily as an observation from an interested source. Moreover, it is noteworthy that this same state official characterized the close scrutiny of tariff submissions as "a change over what you who have been in this business a long time have come to expect from a state regulatory agency" (RX40D).

⁴⁶ RX's 12H, 12I.

Association prior to the filing of said tariffs with M.D.P.U.⁴⁷

While respondent raised a question about Mr. Simpson's authority to speak for MDPU (a doubt, incidentally, that did not deter respondent from adopting certain paragraphs of the Simpson affidavit which it believed were favorable to its cause),⁴⁸ there was no factual evidence presented by respondent which seriously challenges Mr. Simpson's observation of the lack of regulation or supervision of the pre-filing joint rate-making [21] process itself. The affidavit of respondent's Executive Director argues nebulously that the "development and filing" of respondent's joint tariffs "have been subject to M.D.P.U. scrutiny,"⁴⁹ but neither the meaning of "subject" nor "scrutiny" is fleshed out. At most, respondent introduced evidence that some officials of MDPU may have encouraged the process,⁵⁰ and that these same officials may have made some suggestions about what to include in the association's tariffs.⁵¹ But this hardly amounts to regulation or supervision of respondent's Tariff Committee, or its Board of Directors, or its membership, as they prepare collusively a joint tariff which is sufficiently high so as to satisfy the collective self-interest of these supposedly competing firms. [22]

III.

DISCUSSION

The Parker v. Brown Defense

Before granting summary decision on the *Parker v. Brown* defense in Prehearing Order No. 18, both sides were given ample opportunity to submit proof relating to a crucial aspect of this defense—the issue of state intent to suspend the federal antitrust laws. Moreover, although technically the *Parker v. Brown* defense had been removed from this proceeding by the summary decision in Prehearing Order No. 18, during the formal hearing respondent was allowed to supplement its earlier submissions and introduce still additional exhibits relating to the issue of state intent. This late evidence was carefully considered, but nothing in respondent's exhibits or posthearing brief convinces me that I should depart from my earlier decision denying the defense.

⁴⁷ Affidavit of James D. Simpson, ¶ 3 (in Appendix to Complaint Counsel's Cross Motion for Summary Decision).

⁴⁸ Respondent's Reply Memorandum in Support of Its Motion for Summary Decision and Answering Memorandum to Complaint Counsel's Cross Motion for Summary Decision at 17.

⁴⁹ Affidavit of Daniel W. Dunn, ¶ 5 (attached to Respondent's Memorandum In Support of Motion For Summary Decision Dismissing Complaint).

⁵⁰ Finding 15.

⁵¹ Finding 15.

