

# **Antitrust Guidelines for the Machinery Haulers Association**

The purpose of this document is to briefly review the federal antitrust laws applicable to trade association activities and to set forth some general guidelines for compliance with those laws.

## **Introduction:**

It is important for trade association participants to be aware of their legal responsibilities to comply with state and federal antitrust laws. Individuals, the companies they work for and MHA are all subject to severe penalties, including imprisonment, for the non-compliance for the individual or company.

The purpose of these guidelines is to alert MHA members to those types of activities which are most likely to raise antitrust compliance concerns and what precautions must be taken to avoid antitrust implications. It is not intended as a primer on antitrust and should any concerns or questions arise with respect to MHA activities, it is essential that such concerns and questions be brought to the attention of Associations' counsel.

The antitrust laws are intended to ensure free and open competition. These laws, the Sherman Antitrust Act and the Federal Trade Commission Act, prohibit contracts, combinations and conspiracies in restraint of trade. An "agreement" among trade association members in antitrust terms is a very broad concept – it may be oral or written, formal or informal, expressed or implied. The Supreme Court, however, has said that not every contract or combination in restraint of trade constitutes a violation; only those which unreasonably restrain trade are unlawful. Thus, in most situations, the courts will look at all of the factors and circumstances surrounding the conduct in question in order to determine whether it unreasonably restrains trade and, therefore, violates the antitrust laws.

Certain kinds of conduct are presumed to be unreasonable and, therefore, unlawful. Such conduct, which is considered to be unlawful "per se", consists of certain practices which clearly restrain competition and have no other redeeming benefits. Examples of such practices include:

- ✓ Agreements to establish price or factors relating to price such as credit, discounts, or profit levels
- ✓ Agreements to refuse to deal with third parties (boycotts), whether customer or supplier
- ✓ Agreements to allocate markets, such as an agreement not to provide service to a particular geographic area, industry, or group of customers in return for a reciprocal agreement from a competitor
- ✓ Tie-in sales which require the customer to buy an unwanted item or service in order to buy the product or service desired.

---

Trade associations by their very nature present potential antitrust problems... One reason is that in bringing competitors together into an association, one element of a possible antitrust violation is already present — a combination of competitors. Thus, only the action to restrain trade must occur for there to be a violation.

Another special antitrust problem of a trade association is that many of its valuable programs deal with subjects sensitive from an antitrust viewpoint — price reporting, product standards, certification, statistics, and customer relations.

Trade association members should refrain from any discussion which could provide the basis for an inference that the members agreed to take any action that might restrain trade. Remember, an "agreement" among trade association members need not be in writing. A "gentleman's agreement" to "hold the line" on prices is more than sufficient to evidence an unlawful conspiracy to fix prices. The "agreement" can be inferred by the parallel actions of trade association members that happen to follow the discussion of the topic at an association gathering.

The basic principle to be followed in avoiding antitrust violations in connection with association activities is to see that no illegal agreements, expressed or implied, are reached or carried out through the association. Members should also avoid engaging in conduct which may give the appearance of an unlawful agreement between themselves at association functions.

### **Meeting Guidelines**

Following are some general guidelines which can minimize the possibility that an inference of antitrust violation can be drawn from association activities:

Meetings should be held only when there are proper items of substance to be discussed which justify a meeting.

In advance of every meeting, a notice of meeting, along with an agenda, should be sent to each member of the group; the agenda should be specific and such broad topics as "marketing practices", which might look suspicious from an antitrust standpoint, should be avoided.

Participants at the meeting should adhere strictly to the agenda. In general, subjects not included on the agenda should not be considered at the meeting. If a member brings up a subject of doubtful legality for discussion at a meeting, he or she should be told immediately the subject is not a proper one for discussion. This, of course, is the counsel's responsibility, but in his/her absence, the association's staff representative or any member present who is aware of the legal implications of a discussion of the subject should attempt to halt the discussion. Should the discussion continue, despite protest, it is advisable that members leave the meeting.

Minutes of all meetings should be kept by the association, and they must accurately report what actions, if any were taken.

An association staff member should usually attend all meetings. Secret or "rump" meetings held at the time of the regular meeting should be strictly avoided. Such meetings bear the stigma of illegal activities, and, accordingly, they seriously jeopardize legitimate association activities and create a very substantial risk that those activities will be investigated.

During meetings, there should be no recommendations for action or discussions with respect to "sensitive" antitrust subjects – those that relate to prices, matters relating to price, costs, allocation of markets, or the selection of customers or suppliers. In the less sensitive areas, such as data collection, cooperation research, code of ethics, and standard setting activities, discussions may be conducted by associations, but only under the guidance of the antitrust counsel.

Members should not be in any way coerced into taking part in association activities. There should be no policing of the industry to see how individual members are conducting their business.

If a member has any doubt about an association program or subject of discussion, the member should immediately bring the matter to the attention of the MHA's Law Department or executive staff. Members are also encouraged to consult with their company's counsel on all such matters.

It is essential that members cooperate with MHA counsel in all such matters, particularly when counsel has ruled adversely about a particular activity.

The following topics are some of the main ones which should not be discussed at meetings of trade association members, except under circumstances which are discussed later:

1. Current or future prices of members or non-members should not be discussed. Past prices also should not be discussed by members. The association may publish a report on past prices as long as it preserves the confidentiality of the identity of reporting parties.
2. Participants should also refrain from discussing matters that affect price, such as discounts, credit terms, profit levels or terms of services. Items such as these that affect price, or are elements of the terms and conditions of service, must be subject to the same competitive forces as price.
3. Since costs are an element of price, the actual costs of individual companies should not be discussed either. The association may report on past costs as long as the identity of reporting participants is kept confidential. Discussions on ways of reducing costs are not prohibited but should be carefully monitored so as not to be allowed to stray into the prohibited areas of actual costs.
4. The allocation, division or "rationalization" of markets or customers is another area which should not be discussed. These subjects are considered and treated the same under the antitrust laws as those affecting prices.
5. The subject of boycotts or agreements not to deal with competitors, customers or suppliers should be avoided by association participants.

6. While associations may discuss and develop standards, there should be no discussion of efforts to enforce such standards on members or others. The subject of service or product quality should be avoided except with respect to an established standard setting program. The requirements for a standard setting program are discussed later in this outline.

An exception to the antitrust laws exists with respect to discussions involving petitioning the government (congress, state legislatures, or government agencies and departments). It is under this exemption, known as the Noerr-Pennington Doctrine, that many association activities take place. All such discussion should take place only under the supervision of association counsel or staff trained in the antitrust area.

### **Association Activities**

Some of the basic areas of association activity, which should be carefully scrutinized from an antitrust standpoint, are the following:

1. Denial of association membership to an applicant.
2. Expulsion of an association member.
3. Conduct of a statistical reporting program.
4. Conduct of a standardization and certification program.
5. Conduct of a joint research program.
6. Establishment and enforcement of codes of ethics.
7. Denial of association services to non-members.

### **Standard Setting Procedures**

An issue of concern to association members is the guidelines for standard setting. Standard setting is a common and beneficiary activity engaged in by over 400 trade associations. There are two rules that an association must follow with respect to any standard setting program.

- Standardization programs must not be used as devices for fixing prices or otherwise lessening competition.
- Standardization programs must not have the intent of boycotting or excluding competitors for economic purposes.

It is the policy of the MHA to observe, to the extent feasible, the guidelines that apply to standard setting organizations, even though the association has no intent to set such standards and only engages in the development of recommendations as to product performance and maintenance. The rules below are those that should thus be observed so that there can be no question as to compliance with the antitrust laws.

It should be remembered, however, that any adopted recommendations represent a majority consensus of those participating in the adoption process and are not to be regarded as endorsing or refusing endorsement of any specific product, whether or not it

meets the description used.

Provided that the association and the participants follow the two rules stated above, as well as the following more general rules for such programs, there should be no question as to the program's ability to pass antitrust scrutiny:

- Design, materials, or construction based practices should not be used if performance based practices can be developed.
- An effort should be made to make the committee that is charged with the drafting of practices representative of a broad spectrum of interests.
- Fees assessed for participation in a standardization program should be reasonable as related to the direct and indirect costs involved.
- Every interested or affected party must be afforded notice of meetings, meeting agenda, and the opportunity to participate in timely discussions on claims with regard to the practices.
- Care should be taken that all comments on a proposed practice are considered and proper weight given to them.
- Adoption or revision of practices should be by majority vote.
- Records of the proceedings should be maintained.
- Once the proposed practice has been formulated it should be published and public notice of its adoption given.
- Practices must reflect existing technology, be kept current and adequately upgraded to allow for technological innovation.
- All recommended practices must be voluntary.

A program that does not follow each of these guidelines may still be legal, as long as there is not price-fixing, boycotting or other antitrust violation. However, to ensure that any programs run by or participated in by MHA members are beyond question, it is the goal of the MHA to ensure that the programs meet the intent of these rules.

Abuse or violation of these rules or the procedures adopted governing the program can result in antitrust liability for the association, the individuals and the companies involved. For that reason the MHA will constantly monitor and review those activities in which it is involved. We ask you to do so as well.

## Antitrust Penalties

There are both civil and criminal penalties for violating the antitrust laws. The penalties for violating the antitrust laws are severe. An individual and a corporation found to have violated the antitrust laws may be fined up to \$100,000 and \$1 million, respectively, for each violation. Individuals and corporate officers may be imprisoned for up to three years. Additionally, there are civil penalties available to government antitrust enforcement agencies such as a cease and desist orders and dissolution of the association. In addition to government enforcement of the antitrust laws, an individual or company that suffers injury as a result of an antitrust violation may file a private suit against the violator and recover three times their actual damages.

Therefore, neither the association's nor the participating members' antitrust liability lies solely at the hands of the government enforcement agencies.