

BEFORE THE
SURFACE TRANSPORTATION BOARD

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DOCKET NO. ISM 35008

PETITION FOR SUSPENSION AND INVESTIGATION
NMFC 100-AP SUPPLEMENT 2
AMENDMENTS TO THE UNIFORM STRAIGHT BILL OF LADING

SUPPLEMENTAL REPLY OF NASSTRAC, INC., AND
THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

In its September 12, 2016 Comments, the National Motor Freight Traffic Association, Inc. asserts that courts have jurisdiction over bill of lading disputes. However, NMFTA fails to establish that the STB is not also empowered to address certain bill of lading disputes between shipper and carrier interests (represented by NMFTA), including those raised by NASSTRAC and NITL, the Transportation & Logistics Council, the Transportation Intermediaries Association and others in this proceeding.

NMFTA also argues that the Uniform Straight Bill of Lading (“UBOL”), which is published in the National Motor Freight Classification (“NMFC”), is not the product of commodity classification activity. Based on this distinction, and the fact that NMFTA itself has not operated with antitrust immunity under 49 USC 13703, NMFTA argues that the STB’s 2007 decisions in EP 656, Motor Carrier Rate Bureaus – Periodic Review Proceeding, and EP 656 (Sub-No. 1), Investigation into Practices of the National Classification Committee, have no bearing on this proceeding.¹

¹ Shipper interests have questioned the relevance of those 2007 decisions here, based on the fact that the Board’s focus in 2007 was collective ratemaking, not the UBOL. However, because the UBOL is not part of the trucking industry classification process, NMFTA cannot cite in its favor

In support of its claim that the bill of lading concerns of shippers must be resolved by the courts, NMFTA begins its recent filing with citations to various federal laws, including the Federal Bill of Lading Act (49 USC 80101-80116), whose focus is negotiable bills of lading, and other laws like COGSA (the Carriage of Goods by Sea Act), that have even less to do with the STB. The list could have included the Uniform Commercial Code, in UCC Section 7-301 and other sections.

That bill of lading disputes are sometimes resolved in the courts is correct, but is not determinative unless NMFTA can show that such disputes can only be resolved by courts. NASSTRAC and NITL submit that the Board also has an important role to play here, just as it does in other statutory contexts. See 49 USC 14704(c), providing for an election of STB or court remedies. Note, too, that the statutory right to seek relief from the Board is one of many statutory rights vulnerable to elimination by NMFTA through the device of changing the verbiage on the back of the UBOL.

Contrary to the recommendation of DOT in its 1998 Cargo Liability Study, produced pursuant to 49 USC 14706(g), many bills of lading, and the UBOL in particular, do not serve simply as receipts for shipments tendered to carriers. See the Report at 59:

The bill of lading has achieved undeserved legal significance. It is, in fact, a receipt for the goods, but it is often thought to be the contract of carriage. The bill of lading is not a good instrument by which to contract for carriage.

The UBOL, which is produced by NMFTA on behalf of hundreds of its member carriers, is often treated as a contract of carriage, particularly by shippers and consignees who lack the experience or opportunity to negotiate for contract carriage as defined in Section 13102(4)(B) of the Act. NMFTA suggests that the UBOL is not relevant to operations by thousands of carriers which are not NMFTA members, but it is well known that for many such carriers the UBOL is their main form of bill of lading.

The UBOL also overlaps in significant ways with provisions of the Act, mainly through the verbiage on the back that NMFTA wants the right to modify at will. So long as that verbiage was

the Board's 2007 indication that commodity classification would thereafter be subject to the antitrust laws rather than STB oversight.

an accurate reflection of statutory provisions, shippers were generally comfortable with the UBOL. It was a reasonable “default” shipping paper and both parties could use individual contracts under 49 USC 14101(b) to modify otherwise applicable UBOL verbiage.²

More recently, however, NMFTA has been making unilateral changes in UBOL verbiage that tilt the scales in favor of its carrier members and against shippers, effectively rewriting statutory provisions and other long-established legal principles. These problems are compounded by NMFTA’s attempt to accomplish broad rewrites of statutory provisions without the individual negotiations and contracting under Section 14101(b) that Congress provided for. Moreover, other provisions of the NMFC, like Items 360 and 362, neutralize efforts by shippers to protect themselves by using their own bills of lading.

It is these features of the current dispute that support STB jurisdiction and remedial action. The Board has the ability to clarify the limits of its jurisdiction, the discretion to resolve important issues, and primary responsibility for interpreting its governing statute.

NASSTRAC, NITL and TLC cited a number of sources of STB jurisdiction in recent filings. NMFTA ignores several of those sources, including the Transportation Policy of 49 USC 13101, 49 USC 1321 (formerly 721) and 1302 (formerly 702), and the Carmack Amendment (49 USC Section 14706.)

NMFTA did discuss 49 USC 13703 and 14706, but its arguments were not persuasive. As to Section 14706, NMFTA relied solely on the Board’s final decision in Docket No. ISM 35002. In that decision, the Board did defer to the courts, but it also said “In these circumstances, we believe it is preferable that we take no position at this time.” This decision thus falls far short of establishing that NMFTA can say whatever it likes on the back of the UBOL with no risk of STB involvement. We urge the Board to bear in mind that if NMFTA has a free hand to modify or

² There have been exceptions over the years. See, e.g., Shippers National Freight Claim Council, Inc. v. ICC, 712 F. 2d 740 (2nd Cir. 1982), and decisions discussed in the extensive historical overviews in the majority and dissenting opinions. Sometimes carriers have won and sometimes shippers have won, but this agency has a long history of helping resolve disputes over fundamental issues.

eliminate statutory protections for shippers merely because of its control over UBOL changes, the current Carmack Amendment revisions will not be the last changes we see.³

A particularly important basis for STB jurisdiction is 49 USC 14101. It is clear from 14101(b)(1) that individual shippers and carriers have the right to waive provisions of the Act (other than “provisions governing registration, insurance or safety fitness”). It is equally clear, however, that any such waiver must be express and in writing, and must also be in a “contract with a shipper... to provide specified services under specified rates and conditions.” If these requirements are met, “the transportation provided under the contract shall not be subject to the waived rights and remedies.”

Consistent with these provisions of Section 14101(b)(1), it has become common for transportation service contracts negotiated by individual shippers and individual carriers to include a statutory waiver along the lines of the following:

Pursuant to 49 USC 14101(b), the parties expressly waive provisions of US Code Title 49, Subtitle IV, Part B, to the extent such provisions conflict with this Agreement.

As pointed out in our last filing, when this process is followed, and a shipper and carrier expressly agree to a statutory waiver that results from the normal give-and-take of commercial negotiations involving rates, charges and other contract terms, there can be no objection to the parties’ modification of most statutory norms. Moreover, under such circumstances, any subsequent dispute over “any alleged breach” must be resolved in a federal or state court, per Section 14101(b)(2).

However, that is not the process NMFTA has engineered. In contrast, NMFTA seeks to modify laws applicable to motor freight transportation on a mass basis, applicable for the most part to shippers and shipments subject to no “contract” other than the UBOL, through a verbiage change in a routine shipping paper. No “specified rates” are set forth in the UBOL. Rather, the

³ For this reason, if the Board were to decide (erroneously, in our view) to take no action in this proceeding, it should confine its ruling to the “circumstances” of this case. The Board should avoid indicating that UBOL verbiage changes can never be addressed by the STB, no matter how egregious the changes may be. An unwarranted narrowing of Board jurisdiction could well have unintended and irremediable adverse consequences for a great many shippers.

UBOL's "Received subject to" preamble cross-references agreed rates in an actual written contract, or generic carrier tariff rates.⁴ If the former applies, the contract must contain the required waiver. If tariff rates apply, there is no contract within the meaning of Section 14101(b), and therefore no waiver of statutory provisions. Accordingly, Section 14101(a), not Section 14101(b) would apply, and Section 14101(a) provides for STB, not court, jurisdiction. And no court is as well suited as the STB for the task of clarifying these principles.

At page 5 of its September 12 filing, NMFTA concludes its arguments concerning STB jurisdiction by contending that Section 14701(a), covering the Board's "General Authority", cannot be invoked because the Board can act only "to compel compliance with this part." NMFTA goes on to argue that no provision of the Act has been violated. However, NMFTA's UBOL changes reflect a clear violation of the requirements of 49 USC 14101(b)(1). Other violations have been cited in the record of this proceeding, and further violations can be anticipated if no corrective action is taken.

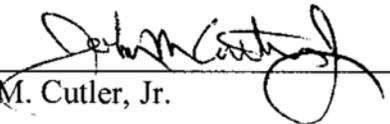
Jurisdictional delineation of the kind called for here is not always simple. However, if the Board were to decide that NMFTA's changes in the UBOL fall outside the scope of STB authority, the result would be a fundamental alteration in the law governing much US motor freight transportation. NMFTA, not Congress or the STB, would have the dominant role in establishing baseline terms and conditions of transport.

NASSTRAC and NITL urge the Board to find that it has the power to address the issue presented here. We also urge the Board to provide guidance to carriers and carrier associations, and shippers and shipper associations, concerning the recent UBOL changes, and to provide corrective action as requested by shipper parties.

⁴ For a copy of the UBOL, see the Petition for Suspension and Investigation filed July 29, 2016 in this proceeding by TLC, at Appendix 1.

Dated: October 3, 2016

Respectfully submitted,



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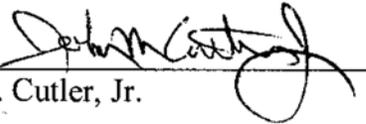
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CERTIFICATE OF SERVICE

I hereby certify that I have this 3d day of October, 2016, caused copies of the foregoing document to be served on all parties of record by first-class mail or by electronic means.


John M. Cutler, Jr.