

BEFORE THE
SURFACE TRANSPORTATION BOARD

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STB DOCKET NO. ISM 35008

PETITION FOR SUSPENSION AND INVESTIGATION
NMFC 100-AP SUPPLEMENT 2
AMENDMENTS TO THE UNIFORM STRAIGHT BILL OF LADING
AND ACCOMPANYING CONTRACT TERMS AND CONDITIONS
ISSUED JULY 14, 2016 TO BECOME EFFECTIVE AUGUST 13, 2016

REPLY OF NASSTRAC, INC. IN SUPPORT OF PROTESTANT
TRANSPORTATION AND LOGISTICS COUNCIL, INC.

I. INTRODUCTION

NASSTRAC, Inc., also known as the National Shippers Strategic Transportation Council, hereby replies in support of the Petition for Suspension and Investigation filed July 29, 2016 by the Transportation & Logistics Council (“TLC”) in this docket.

NASSTRAC is an association whose regular members are shippers of freight, and intermediaries which arrange shipments of freight, primarily by motor carrier. For over 60 years, NASSTRAC has participated in ICC, STB and court proceedings on behalf of its members. NASSTRAC has frequently raised concerns about collective motor carrier actions affecting rates and service. See, e.g., STB Docket ISM 35006, decision served September 30, 1999.

NASSTRAC was also an active participant in STB Ex Parte No. 656, Motor Carrier Bureaus, Periodic Review Proceeding, and STB Ex Parte No. 656 (Sub-No.1), Investigation of Practices of the National Classification Committee. In its decision served May 7, 2007, in those dockets, the Board terminated antitrust immunity for collective ratemaking based on collective action by the National Classification Committee (“NCC”), an affiliate of the National Motor

Freight Traffic Association, or NMFTA, and by various regional motor carrier rate bureaus operating subject to agreements approved by the STB under 49 USC 13703.

Because this proceeding has as its focus issues relating to changes in the “Uniform Straight Bill of Lading” (hereafter “USBOL”) published by NMFTA in the National Motor Freight Classification (“NMFC”), it involves issues of broad importance left unclear in the Board’s 2007 decision in EP 656 and EP 656 (Sub-No. 1).

II. IMPORTANCE OF THIS PROCEEDING

This appears to be the first proceeding involving collective motor carrier action since 2007, and it is important because NMFTA has apparently decided, with no notice to or input from shippers, to revise the USBOL provisions in NMFC Item 360, as well as the verbiage printed on the back of the USBOL. (That verbiage is made applicable to shipments using the USBOL by the “RECEIVED, subject to” preamble on the front of the USBOL.) Many of these revisions significantly alter the status quo between motor carriers and their shipper customers, to shippers’ disadvantage, and many changes also amount to revisions of shipper protections adopted by Congress in the Act.

Unlike rail bills of lading governed by 49 CFR Part 1035, motor carrier bills of lading are not prescribed by the STB, though the agency has adjudicated disputes over bill of lading terms over the years. In 1997, representatives of the NCC and representatives of NASSTRAC worked together to develop a modified version of the USBOL, as discussed at page 4 of TLC’s July 29, 2016 filing. Shippers are free to develop their own bills of lading, and carriers may adopt relevant provisions in individual tariffs.

Nevertheless, the USBOL is the most important bill of lading for shippers and motor carriers. Many shippers today are unaware of any other bill of lading, and are unaware that they are not required to use the USBOL. Many shippers who know that they have the right to negotiate with carriers for different bills of lading, and have exercised that right, still report that many of their shipments, such as shipments from vendors, and shipments arranged by brokers and other intermediaries, move subject to the USBOL.

Under 49 USC 14706, the current version of the Carmack Amendment, a motor carrier subject to STB jurisdiction is required to “issue a receipt or bill of lading for property it receives

for transportation”. See 49 USC 14706(a). In practice, shippers usually issue bills of lading containing information about the commodities shipped, shipper name, carrier name, shipment origin, destination, etc., but the bill of lading is the USBOL in the vast majority of cases.

In a report entitled “Cargo Liability Study” issued in August 1998 pursuant to 49 USC 14706(g), DOT concluded that the main importance of the bill of lading is as a document evidencing the carrier’s receipt of the shipper’s goods. DOT went on to say that bills of lading are best restricted to that function, with other terms and conditions left to provisions of the Act and other federal and state laws, carrier tariffs, and contracts negotiated by shippers and carriers. NASSTRAC supports that recommendation, but the USBOL contains many other provisions, including provisions setting forth significant rights and obligations of shippers and carriers. In the absence of a superseding contract executed by the shipper and carrier, many courts regard the bill of lading (generally the USBOL), as a “contract of carriage” by which carrier tariffs are incorporated by reference.

Until NMFTA published its most recent changes to the USBOL, NASSTRAC was reasonably comfortable with the USBOL and its verbiage. However, the latest version alters the old balance between carriers and shippers that has lasted almost two decades, and that reflects provisions going back much further in time. Shippers will be worse off under the new USBOL, losing many rights they currently expect and are entitled to under the Act. Relatively few shippers will know about the new changes to their detriment, or how to protect themselves from these “stealth” changes.

III. OBJECTIONABLE CHANGES

TLC’s Protest in this proceeding mentions a number of problems with the new USBOL. NASSTRAC shares these concerns and would add several observations. At page 5 of its Protest, TLC points out that the old version of Section 1.(a) on the back of the USBOL permits cargo claims to be filed against “the carrier or the party in possession of any of the property”, i.e., any carrier that participates in a shipment. In contrast, the new version of Section 1.(a) would limit carrier cargo liability to “the carrier shown as transporting the property”, suggesting that cargo claims can be filed only against the carrier whose name is on the front of the bill of lading. See page 25 of the TLC Protest, where both versions are provided.

As TLC explains, this can lead to problems where a different carrier is at fault, or is a more appropriate party to process a shipper's loss and damage claim. If the carrier named on the front of the bill of lading goes out of business after loss or damage to a shipment, under what authority would the new USBOL permit a claim to be filed with another participating carrier?

More fundamentally, 49 USC 14706(a) assigns cargo liability to the carrier issuing the receipt or bill of lading, but also to any other participating carrier, whether picking up, delivering or connecting. In limiting liability to the carrier named in the bill of lading, NMFTA is not just overturning decades of precedent under the Carmack Amendment supporting shippers' right to file claims with any participating carrier, but it is rewriting 49 USC 14706(a).

Another objectionable provision, beyond those cited by TLC in its protest, is new Section 5.(a) on the back of the bill of lading, relating to released value agreements.¹ The old and new versions of this verbiage are provided in TLC's Protest at page 27. The old version states that where a cargo value "has been stated by the shipper or has been agreed upon in writing as the released value", such value shall cap the carrier's cargo liability exposure.

This language generally tracks 49 USC 14706(c)(1), which permits a waiver of the general rule of full "actual loss or damage", as provided for in Section 14706(a), as the measure of carrier liability. However, a released value under Section 14706(c)(1) must be a "value established by written or electronic declaration of the shipper or by written agreement between the carrier and shipper if that value would be reasonable under the circumstances surrounding the transportation."

In other words, absent a shipper's declaration of value, e.g., "\$2.50 per pound per package", on the front of the bill of lading, there would need to be shipper agreement in writing to the lower value, and the lower value would need to be reasonable. This requirement has been controversial (even though limits on carrier cargo liability have been common in contracts for years), with carriers and shippers arguing back and forth about the extent to which shipper agreement may be presumed. Compare Toledo Ticket Co. v. Roadway Express, 133 F.3d 439 (6th Cir. 1998), with Hollingsworth & Vose Co. v. A-P-A Transportation Corp., 158 F.3d 617 (1st Cir. 1998). For more recent authority, see Exel, Inc. v. Southern Refrigerated Transport, 807

¹ Under released value agreements, shippers may declare or agree to relatively low values for shipments, capping carriers' cargo liability at the lower values, and this is often done to get lower freight rates than the carriers would charge if their cargo liability were unlimited.

F.3d 140, 149-54 (6th Cir. 2015), in which the court held that shippers cannot be held to have agreed to caps on cargo liability where they had no choice but to accept the carrier's cap.

This controversy over the need for shipper agreement has been before the Board in an earlier case involving NMFTA, NASSTRAC and the USBOL, STB Docket No. ISM 35002, Amend the Uniform Straight Bill of Lading and Accompanying Contract Terms and Conditions. See the Board's decision in that docket served August 4, 1998. The Board there declined to resolve the controversy ("it is preferable we take no position on either side of the issue at this time"), but approved language on the front of the USBOL alerting people to the issue in a Note saying "Liability Limitation for loss or damage may be applicable". Shippers and carriers could thus take their respective positions, with recourse to the courts in the event a particular shipper and carrier could not resolve the dispute.

Now, in contrast, NMFTA has adopted a new Section 5.(a) on the back of the USBOL that decides this issue in favor of carriers. Under the new verbiage, "where a lower value than the actual value of the property has been stated in writing by the shipper on the bill of lading, or is established in the carrier's tariff upon which the rate is to be based, such value shall be the maximum amount recoverable for loss or damage". No shipper agreement is needed as per Section 14706(c), nor need shippers be given a choice of liability levels and rates per Exel, nor does the "reasonable under the circumstances" test apply. Carriers are free to cap their own cargo liability in their tariffs.

NASSTRAC is well aware of 49 USC 14101(b), under which shippers and carriers may waive statutory rights and remedies (other than statutory "provisions governing registration, insurance, or safety fitness"). Section 14101(b) is often used when shippers and carriers negotiate provisions they prefer to statutory provisions, including cargo claim provisions in 49 USC 14706.

However, in permitting such deviations from the statute, Congress was clear in requiring a written contract including an express waiver of statutory rights. Absent contracts under Section 14101(b), Congress provided for reasonable transportation services, subject to STB jurisdiction, in 49 USC 14101(a). The NMFTA's new USBOL, in contrast, would bypass the requirement of an express written contract. Rather, the new USBOL would deprive shippers of their statutory rights, and effectively rewrite provisions of the Act to favor carriers and disfavor shippers, through the device of altered verbiage on the back of the USBOL.

Millions of shipments would be affected by these, and other, unilateral changes in what has always been regarded as a neutral, and possibly even “standard” or “approved” basic shipping document.

Such outcomes are often defended by carriers as fair for “sophisticated” shippers. However, the USBOL is used by thousands of small businesses and individuals whom no one would consider knowledgeable. These days, fewer and fewer shippers are sophisticated in the sense of having experienced logistics experts, well-versed in Title 49, on staff. And, as noted at the outset, there are many shippers who are careful but who may not be able to protect themselves as to all shipments.

IV. STB AUTHORITY

NMFTA may argue that the issues presented here are controlled by the Board’s 2007 decision in EP 656 and EP 656(Sub-No. 1), essentially ending antitrust immunity for motor carrier collective ratemaking. If this were a case involving collective ratemaking by the NCC (or its successor, the Commodity Classification Standards Board (CCSB)), and the regional rate bureaus, NASSTRAC would be exploring remedies under the antitrust laws.²

This case, however, involves the NMFTA, not the NCC or rate bureaus, and it involves not commodity class ratings and corresponding class rates in rate bureau class rate tariffs, but involves rather the USBOL, service issues, and the extent to which the provisions of the Act will continue to apply to motor carrier freight transportation. As noted above, there is precedent (admittedly prior to 2007) for Board action in disputes concerning the USBOL.

Such precedent aside, the Act gives the Board jurisdiction over motor carriers (including motor carrier members of NMFTA) in 49 USC 13501. The agency has a long history of dealing with bill of lading and even released value issues under the Carmack Amendment. See, e.g., National Motor Freight Traffic Ass’n. v. ICC, 590 F.2d 1180 (D.C. Cir. 1978). While 49 USC 14101(c) explicitly gives federal district courts exclusive jurisdiction over disputes arising out of written contracts provided for in Section 14101(b), here the NMFTA, acting for motor carriers,

² So far as we can tell no relevant Business Review Letter was ever filed with the Department of Justice by NCC or NMFTA, even though plans for such a step were cited in NCC’s and NMFTA’s May 16, 2007 Request for an Extension of Time in EP 656 and EP 656(Sub-No.1).

has attempted to evade Section 14101(b) by using the USBOL to impose carrier substitutes for statutory provisions under circumstances in which Section 14101(a), not 14101(b), applies.

The Board's 2007 decision was unclear about the law applicable to NMFTA and its carrier members (along with other carriers that use the USBOL). NASSTRAC also questions whether the Board anticipated circumstances like those here, which have such broad nationwide scope and involve unilateral revisions to provisions of the Act entrusted to Board jurisdiction and Board expertise.

Prudential considerations also militate in favor of Board action here. The Department of Justice and courts familiar with litigation under the antitrust laws are not familiar with Title 49 or transportation law, and are not well suited to reasonableness issues. Antitrust cases are costly and time-consuming to pursue, and do not lend themselves well to issues such as "reasonable dispatch", or where shippers may file cargo claims under 49 USC 14706(a), or which party should bear the burden of proving carrier negligence, or what standards apply to carrier liability in the absence of shipper agreement to values that are reasonable under the circumstances. It is also worth noting that the Board itself considers antitrust principles in many contexts.³

Such issues are also not easily dealt with in individual court actions by individual shippers against individual carriers, after an unsuspecting shipper learns that the law as set forth in the Act and as understood for decades has been changed unilaterally by carriers operating through NMFTA, inserting new, anti-shipper verbiage on the back of the USBOL.

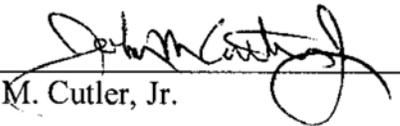
If the Board does not act, but leaves shippers to their remedies in the courts, other provisions of 49 USC 13101, et seq., will be vulnerable to similar evasion through unilateral NMFC and USBOL changes. Contract carriage agreements negotiated at arms length by shippers and carriers, providing for specified rates under specified conditions, as contemplated by Congress in Section 14101(b), may be replaced by USBOL changes imposed on shippers by carriers acting together. Why seek changes through contract negotiations, which require agreement by the other party, when carriers can change the terms and conditions of carriage using USBOL changes like those challenged here?

³ See, e.g., the Board's decision served January 11, 2012 in Docket No. MC-F 21035, Stagecoach Group PLC, at page 6, n. 10.

V. CONCLUSION

For the foregoing reasons, NASSTRAC supports the Protest of TLC in this proceeding, and urges the Board to suspend and investigate the challenged NMFTA revisions to NMFC Item 360 and the Uniform Straight Bill of Lading as published in the NMFC.

Respectfully submitted,



John M. Cutler, Jr.

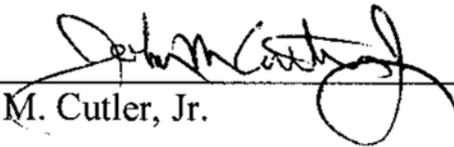
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CERTIFICATE OF SERVICE

I hereby certify that I have this 1st day of August, 2016, caused copies of the foregoing document to be served, by first-class mail, postage prepaid, and by electronic means, on NMFTA and TLC and their counsel.



John M. Cutler, Jr.