

SURFACE TRANSPORTATION BOARD

DECISION

No. 41826

NATIONAL ASSOCIATION OF FREIGHT TRANSPORTATION  
CONSULTANTS, INC. -- PETITION FOR DECLARATORY ORDER

Decided: April 9, 1997

On June 7, 1996, we issued a declaratory order interpreting the motor carrier billing dispute provisions of 49 U.S.C. 13710(a)(3). Carolina Traffic Services of Gastonia, Inc. -- Petition for Declaratory Order, STB No. 41689 (June 7, 1996) (CTS). As explained in more detail in CTS, that section requires, *inter alia*, that shippers "contest the original bill or subsequent bill within 180 days of the receipt of the bill in order to have the right to contest such charges." 49 U.S.C. 13710(a)(3)(B).<sup>1</sup>

In CTS, we concluded: (1) that the 180-day rule applies to all original freight bills issued on or after August 26, 1994 (the date of TIRRA's enactment), and to rebillings issued on or after January 1, 1996 (the effective date of ICCTA, which clarified the applicability of the 180-day rule to rebillings by carriers); (2) that, despite the separate statute of limitations on court actions for overcharges (49 U.S.C. 14705), to perfect its right of action, a shipper must notify a carrier that it contests a billing or rebilling within 180 days of receipt of the contested billing, but that it need not request a Board determination within that time period, or at all, in order to preserve its right of action; and (3) that there is no statutory prohibition against carriers paying shipper claims, even if the shippers have failed to comply with the 180-day rule.

On June 17, 1996, the National Association of Freight Transportation Consultants, Inc. (NAFTC) (which represents the interests of companies that audit freight bills for shippers), filed a petition for declaratory order asking the Board to resolve a number of other issues relating to the 180-day rule. We initially planned to address NAFTC's claims at a voting conference. However, shortly before the conference, the Transportation Consumer Protection Council (TCPC) filed a statement in this case raising additional issues. The Regular Common Carrier Conference (RCCC) filed comments essentially supporting our decision in CTS, and responding to NAFTC's and TCPC's contentions. In order to consider those additional issues, we removed the matter from the conference agenda.

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<sup>1</sup> This provision was enacted in the Transportation Industry Regulatory Reform Act of 1994 (TIRRA), Pub. L. No. 103-311, § 206(c)(4), 108 Stat. 1683, 1685 (1994), and reenacted by the ICC Termination Act of 1995 (ICCTA), Pub. L. No. 104-88, § 1103, 109 Stat. 803, 876-77 (1995). A companion carrier-notification provision [49 U.S.C. 13710(a)(3)(A)], which requires carriers to rebill within 180 days of the receipt of the original freight bill in order to collect any amounts in addition to those originally billed and paid, was also enacted in TIRRA and reenacted in the ICCTA. Further background concerning these provisions is set forth in CTS.

In a decision served November 26, 1996, we invited interested parties to comment on the issues raised by petitioner and by TCPC and RCCC. Comments were filed by 45 parties, whose names are listed in the Addendum.

POSITIONS OF THE PARTIES

Petitioner.

NAFTC, supported by several transportation consultants and some individual shipper-commenters, seeks to limit the application of the 180-day rule. It raises several issues, which we will summarize in turn.

1. First, NAFTA contends that the rule does not apply to billing "errors," but only to billing "disputes." It attempts to draw a distinction between erroneous billings based on factual, arithmetical or clerical mistakes, on the one hand, and, on the other, disputes over, for example, which of two or more rates should apply or the reasonableness of the rate applied. NAFTA points to the descriptive heading of section 13710(a)(3) ("Billing disputes") and relies on the legislative history of TIRRA.<sup>2</sup> It also cites Duplicate Payments of Freight Charges, 350 I.C.C. 513 (1975), in which the ICC ruled that duplicate payments, because they are made in response to bills issued in error, are not subject to the statute of limitations on court actions for overcharges.<sup>3</sup>

2. NAFTA also challenges our conclusion in CTS that, rather than imposing a time limit within which shippers must bring actions before the Board, the 180-day rule imposes on shippers the duty to notify carriers of billing disputes within that time in order to perfect their claims. NAFTA's position is that, when read as a whole, section 13710(a)(3)(B) merely sets a time limit for filing overcharge complaints with the Board.

3. Consistent with its position as to the purpose of the 180-day rule, NAFTA further contends that the 180-day rule applies only to billings for transportation that is subject to the tariff filing requirements administered by the Board. It states that, because the Board's general jurisdiction does not extend to any other type of rate, it cannot consider disputes concerning unfiled rates.

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<sup>2</sup> Petitioner cites the comments of Representatives Mineta and Shuster, on the floor of the House of Representatives, indicating that the 180-day rule should facilitate resolution of carrier billing problems relating to rate "challenges" and "disputes." 140 Cong. Rec. H8442 (section-by-section analysis), H8445-46 (daily ed. Aug. 16, 1994).

<sup>3</sup> In its reply comments, NAFTA asserts that it is unfair to require shippers (who do not have access to carrier rate information) to assert overcharge claims within the same 180-day period that applies to carrier assertions of undercharge claims. Because section 13710(a)(3), on its face, plainly imposes that same limitation on both carriers and shippers, we will not address this contention further.

4. Petitioner also argues that carriers should be required to accept fax notification of overcharge claims and claims filed by mail, as long as they are postmarked by the 180th day after receipt of the bill, and that the parties should be free to extend the 180-day time limit by contract.

5. Finally, NAFTC expresses concern that carriers may be engaging in concerted action by uniformly declining to pay overcharge claims received after the 180-day period, based on advice from the General Counsel of the National Motor Freight Traffic Association (NMFTA). It suggests that such action may constitute a violation of the antitrust laws.

#### Shipper Interests.

Organizations representing shipper interests generally support NAFTC, but take slightly different positions on some issues. Though the National Industrial Transportation League supports NAFTC's position on some points, it agrees with our determination in CTS that a shipper's failure to contest a bill within 180 days of receipt bars it from pursuing overcharge claims either in court or before us (comments at 5).

TCPC points to what it considers to be a possible inconsistency between section 13710(a)(3)(B), which provides that shippers must "contest [a carrier's] original bill or subsequent bill within 180 days of the receipt of the bill in order to have the right to contest such charges," and certain applicable limitations provisions. In particular, it notes that section 14705(b) allows a shipper to "begin a civil action to recover overcharges within 18 months after the claim accrues," or within three years after the claim accrues if it is against a carrier providing transportation subject to Chapter 135 of Title 49 and the shipper has elected to file a complaint under 49 U.S.C. 14704(c)(1). It points out that section 14705(d) extends those limitations periods "if a written claim is given to the carrier within those limitation periods." According to TCPC, our interpretation of the 180-day rule in CTS, disallowing all claims for overcharges as to bills that are not contested within 180 days, conflicts with these provisions.

TCPC contends that, in order to reconcile these provisions, the second sentence of section 13710(a)(3)(B) (which imposes the 180-day notification requirement) must be read in conjunction with the first sentence of that subsection (which, in TCPC's view, refers only to contesting billed, but as-yet-unpaid, charges and not to charges which have been paid). Its position is based on the first sentence's reference to "billed" charges and the fact that it allows shippers to request a ruling from us as to "whether the charges billed must be paid." In TCPC's opinion, the fact that the first sentence appears to refer to bills that have not been paid limits the 180-day rule to bills that have not yet been paid. Once a bill is paid, according to TCPC, the only time limitation on a shipper's ability to subsequently challenge the charges are those embodied in section 14705(b) and (d).<sup>4</sup>

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<sup>4</sup> TCPC raised two other issues, neither of which requires extended consideration. First, it asserts that the requirement

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in section 13710(a)(3)(A) that a carrier must rebill within 180 days in order to collect additional charges does not bar a carrier from seeking to collect its originally-billed rates at any time before the expiration of the 18-month statute of limitations contained in section 14705(a). As we indicated in our November 1996 decision, we believe that the plain language of the statute supports TCPC's contention, and no commenter has voiced disagreement with that conclusion. Second, TCPC contends that, even if the 180-day rule were deemed to bar overcharge claims contested more than 180 days after receipt of a bill, it could not apply to duplicate payment claims, because those claims seek recovery of a second payment made on an uncontested freight bill. Our decision in CTS reached essentially that same conclusion, and no commenter disputed it.

The National Small Shipments Traffic Conference, Inc., and Health and Personal Care Distribution Conference, Inc. (NSSTC/HPCDC) jointly raise concerns about the impact of the 180-day shipper notification rule on undercharge suits brought against shippers by carriers and their successors-in-interest. They assert that the 180-day rule should not be interpreted to cut off a shipper's right to defend against an undercharge claim filed by a carrier or its successor-in-interest merely because it did not make that defense known within 180 days of billing or rebilling. NSSTC/HPCDC therefore suggest that we should limit the application of the 180-day rule to cases brought before the Board (comments at 6).

#### Carrier Interests.

RCCC urges us to reaffirm our interpretations in CTS. It contends that the 180-day rule applies broadly to all billing disputes, including those arising from errors and disputes involving challenges to the reasonableness or applicability of the rate, and regardless of whether or not the shipper has paid the charges originally billed. In RCCC's view, the 180-day rule works in unison with, rather than in conflict with, the longer statute of limitations provisions of 49 U.S.C. 14705, by simply imposing a precondition to any court action by the shipper to collect overcharges. RCCC likens this two-step process to that which governs loss and damage claims under section 14706(e), under which a carrier must give a shipper at least 9 months in which to assert its claim, even though the shipper has a longer limitation period in which it may bring a court action. RCCC also agrees with our holding in CTS that the 180-day rule is not a time limit for bringing disputes before us, but instead applies to any effort to contest a bill, whether the shipper pursues it before the Board or in a court. Finally, RCCC argues that the 180-day rule applies to all billings, not just those for transportation that is subject to the tariff filing requirements administered by the Board.<sup>5</sup>

NMFTA agrees with the conclusion we reached in CTS that notification within 180 days is a condition precedent to any shipper action to recover overcharges. In particular, it disputes TCPC's contention that our conclusion in CTS creates a conflict between the 180-day rule and section 14705(d)'s extension of the statute of limitations in the event a carrier declines a claim. It sees the extension period as merely allowing a shipper more time in which to prepare its lawsuit and not as a signal that Congress intended the longer statute of limitations to defeat the 180-day rule.

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<sup>5</sup> RCCC agrees with NAFTC and with our view, set forth in CTS and reaffirmed here, that carriers and shippers may mutually agree to waive the 180-day rule. Under 49 U.S.C. 14101(b)(1), parties may contract away rights under the statute. See also Tapper v. Comm'r of Internal Revenue, 766 F.2d 401, 403 (9th Cir. 1985) (statutes of limitations are generally subject to waiver). RCCC asserts that the parties must do so expressly and in writing. RCCC cites no authority for the latter proposition, but we believe it would be a good business practice for carriers and shippers to put agreements of this type into writing.

Roadway filed a motion for permission to reply to NSSTC/HPCDC's contention that the 180-day shipper notification rule does not limit a shipper's defenses in undercharge lawsuits.<sup>6</sup> It contends that shippers not only lose their ability to seek overcharges if they fail to contest the charges within 180 days, but that they also lose the ability to defend against carrier undercharge claims if they do not contest the carriers' claims within 180 days of billing or rebilling. Roadway claims that undercharges, which it apparently conceives to be limited to undercharges based on the difference between a filed rate and a negotiated rate, are no longer a problem for shippers in light of TIRRA and the Negotiated Rates Act of 1993, Pub. L. No. 103-180. In its view, there are no pending or potential undercharge cases to which the 180-day rule could apply. Motion at 3.

#### DISCUSSION AND CONCLUSIONS

Initially, we must point out that our purpose in issuing CTS, and in issuing this decision, is merely to provide our opinion regarding the Congressional intent in enacting the 180-day rule. Our role regarding motor carrier regulation under the ICCTA is quite limited. Thus, we intend here only to provide guidance, which we hope will assist parties in resolving billing disputes without unnecessary regulatory intrusion. Because courts, rather than the Board, have the authority to require payment of overcharges [section 14705(b)], it is ultimately up to the courts to apply the 180-day rule in individual cases. We will, of course, apply the rule in the manner outlined here as to cases presented to us for our opinion.

We will now address, in order, the issues raised by NAFTA and the other parties.

**1. In our view, the 180-day rule applies to all billing errors and billing disputes.**

The rule does not distinguish between substantive disputes and clerical mistakes. The plain language of section 13710(a)(3)(B) conditions a shipper's right to challenge a bill on its contesting it within the prescribed time period, without limitation as to the nature of the claim. The fact that the heading of section 13710(a)(3) uses the term "dispute" is not determinative of the coverage of that provision. Minnesota Transp. Regulation Bd. v. United States, 966 F.2d 335, 339 (8th Cir. 1992) ("Section . . . titles cannot alter the plain meaning of a statute"), citing Brotherhood of Railroad Trainmen v. Baltimore & Ohio R.R., 331 U.S. 519, 528-29 (1947). In any event, "disputes" can arise concerning errors of either a clerical or a substantive nature.

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<sup>6</sup> Roadway also moved to strike portions of NAFTA's reply, contending that they contain objectionable material. NAFTA replied to the motion. We will grant Roadway's motion to reply. We will not, however, strike the requested portions of NAFTA's reply, as those portions do not affect our conclusions.

NAFTC cites the legislative history, which is ambiguous at best.<sup>7</sup> The legislative history declares that the 180-day rule should apply to billing "disputes," but it does not define "disputes" and does not suggest a distinction between disputes over clerical and those over substantive billing errors.<sup>8</sup>

Finally, the ICC's Duplicate Payments ruling does not support petitioner's assertion. In that case, the ICC contrasted duplicate payments (which are made in response to bills issued in error) with "disputes concerning the propriety of charges assessed on any [individual] bill" [350 I.C.C. at 519-20]. The upshot of its ruling was that a challenge to a bill that should never have been issued would not be subject to the usual statute of limitations; by contrast, a challenge to an individual bill containing erroneous charges -- whether the error is "clerical" or "substantive" -- would be.

**2. The 180-day rule is not simply a limit on the time within which shippers can seek Board review of the dispute.**

The plain language of the statute provides that a shipper must "contest" the original bill within 180 days "in order to have the right to contest such charges." It does not require that the shipper "contest" the bill before the Board. See CTS at 5-6. Petitioner advances nothing to call into question our conclusion in CTS that the plain language of the statute means what it says. Though the first sentence of section 13710(a)(3)(B) gives shippers the option of obtaining a ruling from us, the second sentence does not refer to a Board proceeding. Nor does it imply that its clear requirement applies only to actions brought before us or that the word "contest" is equivalent to a request to the Board.

**3. The 180-day rule applies to both tariff-based and non-tariff-based billings.**

The ICCTA repealed the tariff filing requirement for most motor carrier transportation. Nevertheless, the plain language of section 13710(a)(3) continues to provide a means for carriers to seek additional charges and for shippers to contest charges, regardless of whether the charges were tariff-based.<sup>9</sup> There is

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<sup>7</sup> In any event, the plain meaning of the statute cannot be altered by resort to legislative history. Burlington N. R.R. v. Oklahoma Tax Comm'n, 481 U.S. 454, 461 (1987).

<sup>8</sup> Commenter Athearn Transportation Consultants, Inc., contends that, given Rep. Mineta's background in transportation, his characterization of the term "contest" as a "challenge" necessarily means that he was referring only to disputes regarding the reasonableness or lawfulness of rates, and not to clerical billing errors. Athearn comments at 4. However, we cannot read so much into the use of such a general term. Had Congress intended to so limit the term "contest" to disputes over billing errors, it could have done so in the legislation itself.

<sup>9</sup> This same language appears to govern accessorial charges and any other non-tariff-based common carriage charge. Thus, NAFTA's separate contention that the 180-day rule does not apply

no basis on which to limit the application of the plain statutory language as NAFTC seeks to do.

**4. Contests may be accomplished by facsimile or mailing.**

The statute requires the shipper to "contest" a bill within 180 days. It does not specify the manner of notification or require that the carrier have received the document by which the shipper contests the charges within that period. A document that is faxed or postmarked on the 180<sup>th</sup> day, in our view, is timely. Additionally, in our view, parties can extend or otherwise waive the 180-day period by mutual agreement.

**5. We will not determine whether the conduct of NMFTA's counsel, or the actions of individual carriers in response to counsel's advice, violated the antitrust laws.**

This agency does not enforce the antitrust laws. We can, of course, address allegations of anticompetitive behavior in the setting of rates or the implementation of an agreement approved under 49 U.S.C. 13703. The activity of which NAFTC complains here, however – reliance on the advice of counsel in declining to pay a claim – has nothing to do with collective ratemaking or any other activity subject to our jurisdiction. Therefore, petitioner should direct its concern that carriers may be engaging in concerted action by uniformly declining to pay overcharge claims received after the 180-day period, based on advice from the General Counsel of the NMFTA, to the Antitrust Division of the United States Department of Justice.<sup>10</sup>

**6. Contrary to TCPC's contention, the 180-day rule applies to both paid and unpaid bills.**

As we explained in CTS (at 5), TIRRA did not alter the time frame for bringing an action in court to recover overcharges. Thus, the 180-day rule does not affect the statute of limitations for court actions contained in 49 U.S.C. 14705(b), or the six-month extension provided by 49 U.S.C. 14705(d). However, 49 U.S.C. 13710(a)(3)(B) does impose the additional requirement

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to accessorial charges is also inconsistent with the statute.

<sup>10</sup> NMFTA, for its part, asserts, without asking that we revisit the question, that it is proper for its counsel to warn carriers not to pay overcharge claims they receive after the 180-day period. NMFTA Comments at 6-10. It asserts that carriers that discriminate among their customers in paying such claims are acting imprudently, because such conduct might violate the ICCTA or other federal laws that prohibit unreasonable discrimination. We adhere to our view that carriers are not prohibited from paying such claims. CTS at 7-8. The only billing provision of ICCTA that NMFTA cites is 49 U.S.C. 13708(a), which requires carriers to disclose on their bills the identity of persons to whom they have granted an allowance. Surely the failure to disclose on a bill an "allowance" that has not yet been granted – the honoring of an overcharge claim received more than 180 days after billing – does not violate that section. NMFTA has cited no provision of law and no case authority that would cause us to reconsider the conclusion we reached in CTS on this point.

that, to perfect its right to recover, a shipper must notify the carrier that it contests the charges within 180 days after receipt of the challenged bill. Thus, any shipper suing under 49 U.S.C. 14704(c)(1) is subject to the otherwise applicable statute of limitations, but it also must include, as a basic allegation in its complaint, the fact that it contested the charge within 180 days after it received the bill. We perceive no conflict between the 180-day rule and the statutes of limitations.

Additionally, we see no statutory basis for the distinction drawn by TCPC between paid and unpaid bills. As we indicated earlier, the first sentence of section 13710(a)(3)(B) gives shippers the ability to seek a Board ruling, while the second sentence imposes a time limit on contesting bills without reference to whether the shipper chooses to ask us for a ruling. Although the first sentence of section 13710(a)(3)(B) refers to charges "billed" without including the word "paid", we see no rational basis for imputing to Congress an intention to limit the 180-day provision to those bills that have not yet been paid.

**7. Shippers do not forfeit defenses to undercharge lawsuits for failure to alert the carrier to them within 180 days of billing.**

Although we read section 13710(a)(3)(B) to prohibit shippers from affirmatively contesting charges if they have not contested the bill within 180 days, the rule has no effect on the ability of shippers to assert any available defenses in response to undercharge suits by carriers. As evidenced by its heading, subsection (B) of section 13710(a)(3), places restrictions on actions "initiated by shippers," not on shipper defenses to actions initiated by carriers. In this case, the language of the title confirms the plain language of the statute and helps clarify the applicability of each subsection. Thus, we see no evidence that Congress intended to limit shipper defenses in undercharge lawsuits to those to which it alerts the carrier within 180 days of billing or rebilling. *Cf. Reiter v. Cooper*, 507 U.S. 258, 264-65 (1993)(statute of limitations on shipper actions for damages not applicable when claim is "presented in response to the carrier's suit"). Likewise, carriers retain all defenses to overcharge suits, whether or not they issue balance due bills for undercharges within 180 days of the original bill, under section 13710(a)(3)(A).

SUMMARY

Although the ICCTA has sharply limited our jurisdiction over motor carrier issues, we have sought to respond to the many inquiries concerning the meaning of the 180-day rule. In this decision and in *CTS*, we have not adopted the position of the petitioning freight bill auditor and the shippers on all of the issues. It is unfortunate that some shippers, under their current auditing practices, are sometimes unable to detect problems until after the 180-day period for contesting claims has passed, but Congress decided to impose a 180-day notification period nonetheless. On the other hand, we do share the views of the shippers and their auditors on two very important issues. First, we agree that the law does not preclude carriers from voluntarily paying shipper claims, or from forgoing claims that they have brought against shippers, even if the shipper has not

complied with the 180-day requirement. Second, we agree that the 180-day rule does not apply to shippers' ability to defend themselves against undercharge claims. The right to settle cases and the right to a defense in a lawsuit are significant, and we hope our action here in protecting those rights will facilitate the resolution of disputes.

It is ordered:

1. The petition is granted to the extent set forth above.
2. This decision is effective on April 21, 1997.

By the Board, Chairman Morgan and Vice Chairman Owen.

(SEAL)

Vernon A. Williams  
Secretary

Addendum

List of Commenters

Mele Manufacturing Co., Inc.  
Industrial Traffic Consultants, Inc.  
Traffic Consultants  
Allied Traffic & Auditing, Inc.  
Public Service Traffic Bureau, Inc.  
ABB Air Preheater, Inc.  
Warner Lambert Company  
USX Corporation, U.S. Steel Group  
Carolina Traffic Services  
Cotter Associates  
D & J Associates, Inc.  
Smith & Hawken  
Shop-Vac Corporation  
Continental Traffic Company  
SCM Chemicals  
Traffic Services of Cinti  
Freight Service  
Bird Machine Company  
Robert L. Piper  
Atlas Traffic Consultants Corp.  
Traffic Service Bureau, Inc.  
Transportation Accounting Network, Inc.  
ATC Freight Services  
Tamaqua Cable Products Corporation  
Equitable Bag Company  
Cost Management Systems, Inc.  
Commercial Traffic  
Lever Brothers Company  
Continental Office Furniture Corp.  
Basic Vegetable Products  
Rubenstein Logistics Services, Inc.  
Athearn Transportation Consultants, Inc.  
National Association of Freight Transportation Consultants, Inc.  
National Small Shipments Traffic Conference, Inc./ Health and  
Personal Care Distribution Conference, Inc.  
National Industrial Transportation League  
USF Holland Motor Express, Inc.  
Roadway Express, Inc.  
National Motor Freight Traffic Association  
Regular Common Carrier Conference  
Transportation Consumer Protection Council, Inc.  
Agway Agricultural Products  
Eder Bros., Inc.  
Huntsman Corporation  
BASF Corporation  
American Woodmark Corporation