

241497

UNITED STATES
DEPARTMENT OF TRANSPORTATION
SURFACE TRANSPORTATION BOARD

ENTERED
Office of Proceedings
September 15, 2016
Part of
Public Record

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, Became Effective August 13, 2016**

COMMENTS
SUBMITTED BY THE
TRANSPORTATION INTERMEDIARIES ASSOCIATION

1625 Prince Street, Suite 200

Alexandria, Virginia 22314

703-299-5700

www.tianet.org

Robert A. Voltmann

President and CEO

August 29, 2016

The Transportation Intermediaries Association (TIA) submits these comments in support of the Transportation and Logistics Council, Inc. (TLC) and the National Shippers Strategic Transportation Council (NASSTRAC) filed petitions imploring the Agency to immediately suspend and investigate amendments to the Uniform Straight Bill of Lading and accompanying contract terms and conditions issued on July 14, 2016 by the National Motor Freight Traffic Association (NMFTA). The amended terms and conditions became effective on August 13, 2016.

For reasons set forth in more detail below, TIA submits the following comments in support of TLC and NASSTRAC and implores the Agency to take immediate action to suspend these outreaching, unnecessary and harmful amendments.

IDENTITY AND INTEREST OF THE TRANSPORTATION INTERMEDIARIES ASSOCIATION

TIA is the professional organization of the \$160 billion third-party logistics industry. TIA is the only U.S. organization exclusively representing transportation intermediaries of all disciplines that conduct business in domestic and international commerce. The third-party logistics industry employs more than 126,000 people with a total annual payroll in excess of \$7.5 billion. TIA is the voice of the third-party logistics industry to shippers, carriers, government officials, and international organizations.

TIA members include approximately 1,600 motor carrier property brokers, surface freight forwarders, international ocean transportation intermediaries (ocean freight forwarders and non-vessel-operating common carriers), air freight forwarders, customs brokers, warehouse operators, logistics management companies, intermodal marketing companies, and motor carriers.

TIA is also the U.S. member of the International Federation of Freight Forwarders Associations (FIATA), the worldwide trade association of transportation intermediaries representing more than 40,000 companies in virtually every trading country.

TIA CONCERNS WITH THE PROPOSED RULE

The changes to the bill of lading were made without notice to the public, nor were shippers given any opportunity to comment, or to protest the changes. TIA understands that the NMFTA is not necessarily required to make changes open to public comment, but it is good

business practice to properly vet an amendment as impactful as this one prior to publishing a notice making it the law of the land. Additionally, industry stakeholders are attempting to understand why the changes were necessary to begin with. As the voice of the third-party logistics industry, TIA firmly believes the amendments made will have serious consequences on 3PLs and severely disadvantage shippers and 3PLs. The amendments disregard long established laws, rules and procedures for dealing with the liability of common carrier for loss, damage and delay to the goods entrusted to it for transportation.

The Uniform Straight Bill of Lading and the Straight Bill of Lading - Short Form are widely used by shippers, freight forwarders, brokers and 3PL's that tender freight to motor carriers. Unless other arrangements are made between the parties, such as a formal transportation contract, carriers that are participants in the NMFC are required to use these bills of lading, which incorporate the provisions of the Classification, as well as the carrier's rate and rules tariffs by reference, and are generally binding on the parties. NMFC Item 362-B states:

Unless the shipper and carrier have an effective prior written agreement to use another bill of lading, all motor carriage performed by carriers participating in this tariff shall be subject to the bill of lading terms and conditions of the Uniform Straight Bill of Lading shown in NMF 100-X and successive issues.

TIA has strong concerns over the following issues outlined previously by the TLC and NASSTRAC in their filed petitions, respectively submitted on July 28, 2016 (TLC) and August 1, 2016 (NASSTRAC).

Responsible Party:

Section 1. (a) of the "old" bill of lading provided as follows:

Sec. 1. (a) The carrier or the party **in possession** of any of the property described in this bill of lading shall be liable as at common law for any loss thereof or damage thereto, except as hereinafter provided. Section 1. (a) of the "new" bill of lading provides as follows: Sec. 1. (a) The carrier shown as transporting the property described in this bill of lading shall be liable as common law for any loss or damage to the shipment, except as provided herein.

Section 1. (a) of the "new" bill of lading provides as follows:

Sec. 1. (a) The ***carrier shown as transporting the property*** described in this bill of lading shall be liable as at common law for any loss or damage to the shipment, except as provided herein.

Comment: The old language made it clear that the carrier "in possession" of the goods would be liable for loss or damage. The new language only refers to the carrier "shown" on the bill of lading, which raises the question: What if the actual carrier in possession of the goods at the time of the loss or damage is not the carrier "shown" on the bill of lading? This could be because the name of the actual carrier was not inserted in the space on the face of the bill of lading (often shippers insert the name of the broker or intermediary), or if the loss or damage occurs while the goods are in the possession of a connecting or delivering carrier on an interlined shipment. The new language would imply that a carrier that is not "shown" on the bill of lading would not have liability for loss or damage.

Burden of Proof:

Section 1. (b) of the "old" bill of lading provided:

(b) No carrier shall be liable for any loss or damage to a shipment or for any delay caused by an Act of God, the public enemy, the authority of law, or the act or default of shipper. Except in the case of negligence of the carrier or party in possession, the carrier or party in possession shall not be liable for loss, damage or delay which results: when the property is stopped and held in transit upon request of the shipper, owner or party entitled to make such request; or from faulty or impassible highway, or by lack of capacity of a highway bridge or ferry; or from a defect or vice in the property; or from riots or strikes.

The burden to prove freedom from negligence is on the carrier or the party in possession.

Section 1. (b) of the "new" bill of lading contains the most egregious of the changes, which change the legal burdens of proof:

(b) No carrier shall be liable for any loss or damage or for any delay caused by an Act of God, the public enemy, the authority of law, the act or default of the shipper,

riots or strikes, or any related causes. Except in the case of negligence of the carrier, the carrier shall not be liable for loss, damage or delay which results: when the property is stopped and held in transit upon request of the shipper, owner or party entitled to make such request; or from faulty or impassible highway, or by lack of capacity of a highway, bridge or ferry; or from a defect or vice in the property. **The burden to prove carrier negligence is on the shipper.**

Comment: There are two significant changes in the new language. First, it adds "riots or strikes or any related causes" to the list of the common law defenses to carrier liability. But, more importantly it shifts the carrier's burden for proving freedom from negligence, to the shipper who now must prove that the carrier was negligent.

These changes are contrary to over a century of law involving the interpretation and application of the "Carmack Amendment", now codified at 49 USC 14706. As the Supreme Court stated in *Missouri Pacific R.R. Co. v. Elmore & Stahl*, 337 U.S. 134 (1964).

The reasoning for not requiring the shipper to prove negligence is obvious. When the shipper tenders his goods to the carrier he does not travel with the carrier. The shipper has no way to know what the carrier does with the goods, so it would be virtually impossible for the shipper to prove that the cause of the loss or damage was the carrier's "negligence", for example, which party may have caused an accident or whether the carrier failed to adequately protect the goods from theft by a third party.

Moreover, the addition of a negligence standard runs counter to the strict liability standard implemented by the Carmack Amendment (i.e., good condition at origin, damaged condition at destination and the amount of damages). Indeed, one of the core principles behind the enactment of the Carmack Amendment was to do away with forcing shippers to prove a carrier was negligent for the reasons stated above. As such, this new provision is unconscionable and clearly contrary to the Carmack Amendment.

Reasonable Dispatch Standard:

Section 1. (b) of the "old" bill of lading provided:

Sec. 2. Unless arranged or agreed upon, in writing, prior to shipment, carrier is not bound to transport a shipment by a particular schedule or in time for a particular market, but is responsible to transport with **reasonable dispatch**. In case of physical necessity, carrier may forward a shipment via another carrier.

Section 2. of the "new" bill of lading provides:

Sec. 2. Unless arranged or agreed to in writing or electronically, prior to shipment, carrier is not bound to deliver a shipment by a particular schedule or in time for a particular market, but will transport the shipment **in the regular course of its providing transportation services**. In the case of physical necessity while in transit, carrier may forward the shipment via another carrier.

Comment: Here the NMFTA has changed the established standard, recognized and applied by the courts for a century, which define the carrier's duty to deliver with "reasonable dispatch." As the Supreme Court stated in *New York, P. & N.R. Co. v. Peninsula Produce Exch. Of Maryland* 240 U.S. 34 (1916):

...It is said that there is a different responsibility on the part of the carrier with respect to delay from that which exists where there is a failure to carry safely. But the difference is with respect to the measure of the carrier's obligation; the duty to transport with reasonable dispatch (sic) is none the less an integral part of the normal undertaking of the carrier."

Timeframe for Filing Claims:

Section 3. (b) of the "old" bill of lading provided as follows:

(b) Claims for loss or damage must be filed within nine months after the delivery of the property (or, in the case of export traffic, within nine months after delivery at the

port of export), except that claims for failure to make delivery must be filed within nine months after a *reasonable time for delivery has elapsed*.

Section 3. (b) of the "new" bill of lading provides:

(b) Claims for damage must be filed with the carrier not more than nine (9) months from the date of delivery (or in the case of export traffic, not more than nine (9) months after delivery at the port of export, or in the case of import traffic, not more than nine (9) months after pickup at the place of tender). Claims for loss must be filed with the carrier **not more than nine (9) months from the date of the bill of lading**.

Comment: This change shortens the time for filing a claim for a "loss", which could be a "shortage" or a "non-delivery", because it runs from the "date of the bill of lading" rather than the date of delivery. The change also raises additional questions such as what is the "date of the bill of lading"? Is it the date the shipment was picked up? Or is it the date the bill of lading was generated? This change is unreasonable since a shortage or non-delivery would not normally be identified until "a reasonable time for delivery has elapsed."

CONCLUSION

TIA respectfully requests that; the board immediately suspend the proposed changes to the Uniform Straight Bill of Lading and the terms and conditions on the reverse side thereof. As well as the rules in Item 360-B, as set forth in Supplement 2 to NMF 100-AP. Finally, TIA implores the Board to initiate an investigation or proceeding as may be appropriate in the circumstances.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Robert A. Voltmann", followed by a horizontal line and a small dash.

Robert A. Voltmann

President & CEO

TIA

CERTIFICATE OF SERVICE

I hereby certify that I have this 14th day of September, 2016, caused copies of the foregoing document to be served on all parties of record by first-class mail or by electronic means.

A handwritten signature in black ink, appearing to read "Robert A. Voltmann", followed by a horizontal line and a small dash.

Robert A. Voltmann