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TO THE  
SURFACE TRANSPORTATION BOARD

DOCKET NUMBER 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

SUPPLEMENTAL REPLY OF THE TRANSPORTATION & LOGISTICS COUNCIL

ON BEHALF OF

THE TRANSPORTATION & LOGISTICS  
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Dated: October 3, 2016

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SUPPLEMENTAL REPLY OF THE TRANSPORTATION & LOGISTICS COUNCIL

COMES NOW the Transportation and Logistics Council, Inc. and hereby files this Supplemental Reply to the Opening Comments of National Motor Freight Traffic Association, Inc., filed on September 12, 2016.

The subject of the Board's jurisdiction over NMFTA's changes to the Uniform Straight Bill of Lading has been thoroughly addressed by the Council, as well as by NASSTRAC and NITL, in their supplemental pleadings filed on September 12th, and is also addressed in the Supplemental Reply of NASSTRAC and The National Industrial Transportation League to be filed on this date. As such, it will not be discussed again here.

As the sign in the pottery shop says, "You Break It, You Pay For It". Shippers of freight, especially inexperienced individuals and small shippers, universally believe that this same principle applies to carriers, and expect carriers to be responsible when their shipments are lost or damaged. Even large and sophisticated shippers are often shocked and dismayed to find that bona fide claims are declined because of language buried in the terms and conditions of a bill of lading, or in a tariff or classification that has been incorporated by reference through the bill of lading.

What must be realized is that the bill of lading is essentially a "contract of adhesion". As Justice Frankfurter stated in *United States v. Atlantic Mutual Ins. Co.*, 343 U.S. 236, 244 (1952):

The carriers sought to avoid these obligations by special contracts or stipulations in bills of lading, relieving them of liability which they would incur under the rules laid down by the courts in the absence of such agreements. Although the courts upheld some such efforts, they reserved the right to refuse

to enforce contractual exemptions from liability which trenched upon judicial notions of public policy.<sup>2</sup> The most important limit thus set to the power of the carrier to contract out of his common law liability was the rule that courts would strike down any stipulation which relieved the carrier for hire from liability for damage caused by its own negligence. Applied first by this Court to the railroad, *Railroad Co. v. Lockwood*, 17 Wall. 357, the doctrine was extended to carriers by sea a few years later in *Liverpool & Great Western Steam Co. v. Phoenix Ins. Co.*, 129 U.S. 397. Underlying the decision was the premise that such an agreement, if enforced, would tend to relax the vigilance and care in seamanship which the threat of liability encouraged. See *Railroad Co. v. Lockwood*, *supra*, at 371, 377-378.

\* \* \*

<sup>2</sup>/ The courts based this reservation upon the observation that such contracts were not in fact consensual agreements. The shipper had little choice but to accept the carriers' terms. See e.g., *Railroad Co. v. Lockwood*, 17 Wall. 357, 359; *Liverpool & Great Western Steam Co. v. Phoenix Ins. Co.*, 129 U.S. 397, 441. This circumstance did not necessarily void the agreement, since many stipulations were upheld. But it provided justification for refusing to enforce those which offended judicially pronounced public policy.

NMFTA says that the courts have exclusive jurisdiction over the Uniform Straight Bill of Lading, and suggests that only a court has the power to interpret a contract of carriage and to determine whether or not a particular provision or defense is enforceable. As has been explained elsewhere, this is not only wrong, but ignores reality. First, the cost of litigation coupled with the congestion of the judicial system makes it virtually impossible to litigate smaller claims. Second, the courts generally say that if the shipper either prepares the bill of lading, or accepts the carrier's bill of lading, the shipper is presumed to be aware of, and to accept, the terms and conditions of the bill of lading, as well as the tariffs or classifications that are incorporated by reference therein. See e.g., *Siren, Inc. v. Estes Express Lines*, 249 F.3d 1268 (11<sup>th</sup> Cir. 2001).

Moreover, NMFTA ignores the reality that even shippers that draft or prepare their own bill of lading invariably use the UBOL as a template. They do so, largely because most shippers are under the impression that the terms and conditions in the UBOL are "required by law" to be included in the bill of lading. Thus, shippers will unwittingly create their own bill of lading to mirror the UBOL, resulting in a bill of lading that contains terms and conditions that are, in many respects, unfavorable to the shipper's interests. If the new provisions to the UBOL implemented by the NMFTA are allowed to remain, this will only put shippers at a further disadvantage.

NMFTA points out that shippers can enter into transportation agreements with carriers pursuant to 49 USC 14101(b), and that the Council recommends that shippers do so. While this is true, it is only the large volume and more sophisticated companies that have such contracts, and many of those that we have seen actually specify the use of the Uniform Straight Bill of Lading (and, of course, its terms and conditions). Even the VICS bill of lading, which is required by major retailers, has this recommended language for LTL shipments:

RECEIVED, subject to individually determined rates or contracts that have been agreed upon in writing between the carrier and shipper, if applicable, otherwise to the rates, classifications and rules that have been established by the carrier and are available to the shipper, on request; and all the terms and conditions of the NMFC Uniform Straight Bill of Lading.

NMFTA says that "The UBOL has no application to the overwhelming majority of motor carriers operating in interstate commerce due to their non-participation in the NMFC." While the preamble to the NMFC does state that "Carriers and other transportation companies whose rates, charges or terms of transportation are based on, or reference the National Motor Freight Classification must participate," it is our experience that most of these "non-participants" disregard that language and do, in fact, use the Uniform Straight Bill of Lading and/or reference the NMFC.

In conclusion, while it is understandable that carriers would want to limit or avoid liability, particularly for large losses, the changes made by NMFTA further exacerbate these "traps for the unwary" and mandate that the Board exercise its jurisdiction to investigate and suspend NMFTA's changes to the Uniform Straight Bill of Lading.

Respectfully submitted,

  
George Carl Pezold

**CERTIFICATE OF SERVICE**

I hereby certify that I have on this 3<sup>rd</sup> day of October, 2016, served a true and correct copy of the foregoing Supplemental Reply of the Transportation & Logistics Council, Inc. in Docket ISM 35008 on all parties of record by electronic means and/or first class mail, postage prepaid.

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