



August 5, 2016

Surface Transportation Board
395 E Street, SW
Washington, DC 20423

RE: STB Docket No. ISM 35008, FD 36053
Response of National Motor Freight Traffic
Association, Inc. to the Petition of The
Transportation & Logistics Council, Inc. and the
Reply of NASSTRAC, Inc. in Support Thereof

The National Motor Freight Traffic Association, Inc. (NMFTA) is a nonprofit membership organization headquartered in Alexandria, Virginia. Its membership is comprised of motor carriers based in the United States and Canada operating in interstate, intrastate and foreign commerce. NMFTA publishes the National Motor Freight Classification (NMFC), a voluntary standard that provides a comparison of commodities moving in commerce, and minimum packaging requirements to ensure that goods are adequately protected and can be handled and stowed in a manner that is reasonably safe and practicable so as to withstand the normal rigors of the less-than-truckload environment. It also contains various rules that govern and otherwise relate to the classification and/or packaging of commodities as well as the Uniform Straight Bill of Lading, including its Terms and Conditions. The licensed participants in the NMFC, of which there are presently 656, may use its provisions at their discretion when they negotiate transportation services with their shipper customers. No other carriers may use its provisions.

In a petition dated July 28, 2016, The Transportation & Logistics Council, Inc. requests that the Surface Transportation Board (STB) suspend the changes to the Uniform Straight Bill of Lading, and the Rules in Item 360-B, published in Supplement 2 to NMF 100-AP, which is scheduled to become effective on August 13, 2016. National Motor Freight Traffic Association, Inc. (NMFTA) respectfully submits that their allegations are without merit substantively or procedurally.

I. The Transportation & Logistics Council, Inc. (Council) Misstates the STB's Power to Suspend the Contested Provisions

The Council cites 49 U.S.C. Section 721(b)(4) and 49 U.S.C. Sections 13703(a)(1)(C), (E), and 13703(a)(5)(A) as statutory authority for the STB's jurisdiction to grant the action it seeks. Those provisions are inapposite.

Initially, 49 U.S.C. Section 721(b)(4), which has been renumbered as 49 U.S.C. Section 1321, *et seq.*, applies exclusively to procedures pertaining to the reasonableness of rail rate cases, which plainly are not in issue here.

Similarly, as is acknowledged in NASSTRAC, Inc.'s (NASSTRAC) Reply in Support of the Council, this is not a matter arising under Section 13703 of 49 U.S.C., as collective ratemaking and classification-making agreements were terminated by the STB some nine years ago. See, 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, decision served on May 7, 2007. Contrary to the Council's contention there is no so-called Section 5a Agreement on file with the agency which places the subject matter of its petition under the STB's jurisdiction. Apparently recognizing the Council's incorrect reliance on statutory provisions not applicable to this requested proceeding, NASSTRAC attempts to cast this matter as one falling within the STB's general powers under 49 U.S.C. Section 13501. However, as pertinent, those general powers are related to carrying out the responsibilities committed to the jurisdiction of the agency under Chapter 135 governing motor carrier transportation. As noted, neither the Council, nor NASSTRAC, have identified provisions within Chapter 135 governing the terms and conditions of the bill of lading. Indeed, pursuant to Section 13710(a)(4) of 49 U.S.C., which was promulgated pursuant to the Trucking Industry Reform Act of 1994, "any tariff on file with the Interstate Commerce Commission on August 26, 1994, and not required to be filed after that date is null and void beginning on that date." Therefore, motor carrier tariff provisions and procedures, including those published within the National Motor

Freight Classification, which are not subject to the filing requirement, are not within the STB's purview.

II. The Council's and NASSTRAC's Objections to the Bill of Lading Changes Are Unfounded

Although there have been substantial changes in the body of laws governing motor carrier transportation, the terms and conditions in the Uniform Straight Bill of Lading (BOL) have not kept pace with those changes, and the terms and conditions of the BOL have long required revisions. Those changes are not inconsistent with existing law as the Council and NASSTRAC contend.

The Council objects to the revisions to Section 1. (a), which is reworded to remove the "party in possession", and to reference the carrier shown as transporting the property. Reference to the "party in possession" as having the so-called common law liability of a motor carrier has caused considerable confusion. There are various circumstances in which a carrier, in possession of the goods, does not have the same liability as exists under the common law. Such exceptions are found in Section 1. (b), which involves force majeure situations and other circumstances beyond the carrier's control, or involving shipper misconduct. Further, Section 4 addresses the circumstance where goods are in storage with the carrier which is then designated as a warehouseman with regards to liability issues. By removing the "party in possession" the liability issue as pertains to common law liability is properly focused on the carrier in its capacity as a carrier.

Moreover, that revision is consistent with the language in Section 14706(a)(1) of 49 U.S.C. which deals with the liability of carriers under receipts and bills of lading. That provision, in addressing carrier liability specifically refers to and requires that: "A carrier providing transportation or service under ... subchapter III of chapter 135 shall issue a receipt or bill of lading for property it receives for transportation under this part." Designating the carrier to whom the freight is to be tendered in no way diminishes the liability of other carriers which may be involved in the transportation. As Section 14706(a)(1) further provides: "That carrier

and any other carrier that delivers the property and is providing transportation or service subject to jurisdiction under subchapter ... III of Chapter 135 ... are liable to the person entitled to recover under the receipt or bill of lading.” The concerns of the Council and NASSTRAC that carrier liability is changed under revised Section 1. (a) is in error¹.

What the Council alleges is the “most serious of the new terms and conditions” is simply a correct statement of the law. In Section 1. (b), the “burden to prove freedom from negligence” was imposed on the carrier. Thus, for example, if the damage or loss resulted from improper packaging or loading by the shipper, or from the inherent vice or defect of the goods, the carrier was required to prove it was somehow not negligent. That was an improper shifting of the burden of persuasion to the carrier.

It is basic hornbook law that the party making a claim has the ultimate burden of persuasion. That burden never shifts to the other party. What does shift can be the burden of going forward with evidence. As the Council recognizes, to establish a damage claim under the Carmack Amendment, the claimant must show “good condition at origin, damaged condition at destination and the amount of damages.” That showing is deemed adequate to make a *prima facie* showing that the carrier is liable. At that point the burden of going forward with evidence that it is not at fault shifts to the carrier. If it does not do so, the shipper prevails. If the carrier establishes an exculpatory cause, the burden of discrediting that evidence must be shown by the shipper in order to meet its ultimate burden of persuasion. Properly identifying the shipper as having that burden of proof is an entirely correct statement of the law as to damage claims.

The force majeure, and other provisions in Section 1. (b), are exculpatory causes that relieve a carrier from liability when the identified conditions are present. They are predicated on the contract doctrine of impossibility of performance. Riots or strikes, and related causes, are well recognized conditions preventing performance by carriers, and are not uncommon in

¹ The Council’s contention that often brokers or intermediaries are designated as the carrier highlights the problem with the present language. Brokers do not have Carmack liability. Merely stating a person in possession of the goods has that liability creates confusion as to the actual extent of that person’s liability.

force majeure provisions. For that reason they have been appropriately included in Section 1. (b).

The Council criticizes the deletion of the term “reasonable dispatch” in Section 2, and its replacement with the phrase “regular course of its providing transportation services.” The reason for that revision is the absence of any definitive definition of “reasonable dispatch.” As the STB is aware, the Interstate Commerce Commission itself was unable to do so. To facilitate a determination as to when a timely delivery was not made, it was concluded that a better measure would be the normal timeframes the carrier takes in making comparable deliveries, *e.g.*, those experienced in the “regular course of its providing transportation services.” It is believed that is a fairer and more readily ascertainable standard than “reasonable dispatch.”

Complaint is also made that in the revised Sections 3. (b), the period for filing a claim, and 3. (c) , the period for initiating a suit, are unreasonable. The revisions are entirely consistent with the legal requirements for filing claims or initiating a lawsuit. Section 14706(e) of 49 U.S.C. states that: “A carrier may not provide by rule, contract, or otherwise, a period of less than 9 months for filing a claim against it under this section and a period of less than 2 years for bringing a civil action against it under this section.” In the absence of a delivery receipt, what is “a reasonable time for delivery” is open to dispute. The bill of lading identifies a date certain, and nine months from that date is in keeping with the statutory minimum, and more than a reasonable timeframe to recognize a loss or shortage and to file a claim.

Section 3. (c) previously stated that “suits for loss, damage, injury or delay shall be instituted against any carrier no later than two years and one day from the day when written notice is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts of the claim specified in the notice.” Inasmuch as no rationale was found for inclusion of the additional day, the timeframe for filing suit was restated to comply with the two-year minimum period specified in Section 14706(e).

NASSTRAC further contends that Section 5. (a), regarding released rates, deviates from the statute. That is clearly incorrect. The revised provisions state that a lower value than the actual value of the property can be “established in the carrier’s tariff upon which the rate to be

charged is based...” As will be demonstrated, a carrier’s establishment of a released value in its tariff is entirely consistent with the requirements of Section 14706(c)(1)(B) of 49 U.S.C.

Substantial changes in the establishment of released rates are evidenced in Sections 14706(c)(1)(A) and (B) of 49 U.S.C. Released rates originally only could be established and maintained by order of the ICC. The value had to be declared by the shipper or agreed to in writing between the shipper and the carrier. In addition to the released rate, the carrier was required to maintain a full value rate. Remnants of that regulatory structure are found in Section 14706(c)(1)(A). However, that section specifically notes that its provisions are “subject to the provisions of subparagraph (B).” Subparagraph B governs released rates “if the motor carrier is not required to file its tariff with the Board,” which is the case with the motor carrier members of NMFTA. The requirements there are that the carrier “shall provide under section 13710(a)(1) to the shipper, on request of the shipper, a written or electronic copy of the rate, classification, rules and practices upon which any rate applicable to a shipment or agreed to between the shipper and the carrier is based.”

Plainly, subsections A and B differentiate between tariffs subject to STB jurisdiction and those which are not. Under subpart B it is recognized that motor carriers can establish released rates in their tariffs, but those rates are to be provided to the shipper upon request. As NASSTRAC acknowledges, Note (2) on the face of the Uniform Straight Bill of Lading indicates that: “Liability Limitation for loss or damage on this shipment may be applicable.” Shippers using the bill of lading are fully informed that a limitation of liability may apply.

NASSTRAC’s contention that NMFTA seeks to evade the requirements of Section 14101(b) by not having a written agreement expressly waiving rights and remedies provided under the Act, is wrong. First and foremost, as has been demonstrated throughout this reply, none of the revisions challenged by the Council or NASSTRAC alter any of the legal rights and remedies afforded to parties to the transportation arrangement. Rather, the provisions are updated to reflect changes established in the current law, revise timeframes to be consistent with the statutory requirements, and reword provisions to redraft service standards which require clarification.

Further, NASSTRAC's contention that Section 14101(c) "explicitly gives federal courts exclusive jurisdiction over disputes arising out of written contracts provided for in Section 14101 (b)" is wrong. That provision states that: "The exclusive remedy for any alleged breach of a contract entered into under this subsection shall be an action in an appropriate State court or United States district court, unless the parties otherwise agree." The shipper and the carrier are free to use mediation, arbitration, or any other method to resolve a dispute they so choose. So too, to the extent the bill of lading is to act as the contract of carriage, the shipper is free to accept or reject the terms and conditions as it so chooses, or negotiate different provisions with the carrier.

The NMFC clearly indicates that use of the provisions contained therein, including the Uniform Straight Bill of Lading, is entirely voluntary. Indeed, the Notice of General Application found on page 1 of the NMFC states "This publication contains voluntary standards for the classification of commodities moving in interstate, intrastate and foreign commerce, including associated rules and packaging definitions, specifications and requirements...Participants are neither constrained nor compelled to use or abide by these provisions, as they always have the free and unrestrained right of independent action." The Council's contention that carriers are "required to use" the Uniform Straight Bill of Lading is wrong. Also incorrect is the assertion that the terms and conditions are "generally binding on the parties." This is evident from NASSTRAC's acknowledgement that: "In practice, shippers usually issue bills of lading..." As it states, shippers are free to develop their own bills of lading.² Concomitantly, carriers are free to adopt their own bills of lading, and many do.

III. Conclusion

Neither the Council nor NASSTRAC have identified any legal basis for the action that they seek which would warrant the Surface Transportation Board's initiating a proceeding reviewing the revisions made in the Uniform Straight Bill of Lading. The Council inappropriately

² GS1 US is an organization consisting of 300,000 businesses in 25 industries. It administers the GS1 US Bill of Lading (formerly the VICS bill of lading), which is used in acquiring transportation services from less-than-truckload and truckload carriers for the movement of apparel and general merchandise.

seeks the institution of a proceeding under 49 U.S.C. Section 721(b)(4), which is now found at 49 U.S.C. Section 1321, *et seq.*, which deals exclusively with the reasonableness of rail rate cases and is not vaguely related to the motor carrier provisions at issue. It then erroneously contends that this is a matter arising under various provisions of a collective ratemaking or classification-making agreement under Section 13703 of 49 U.S.C. Motor carrier collective ratemaking and classification-making agreements were terminated by the STB some nine years ago, a fact acknowledged by NASSTRAC. The Uniform Straight Bill of Lading, therefore, is not subject to STB jurisdiction pursuant to those statutory provisions.

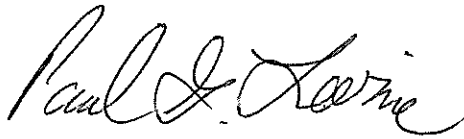
NASSTRAC, apparently recognizing the lack of merit of the jurisdictional grounds asserted by the Council, seeks to invoke the STB's general powers under Section 13501. But it identifies no statutory provisions conferring jurisdiction over the subject matter in question. It does note that, unlike rail bills of lading, motor carrier bills of lading are not prescribed by the STB, evidencing that the STB does not have regulatory responsibility for those bills of lading. Contrary to NASSTRAC's allegation, merely because parties voluntarily submitted questions regarding the Uniform Straight Bill of Lading to the agency in the past does not establish STB jurisdiction under the current regulatory scheme. NASSTRAC's statement that the 2007 STB decision dealing with the Section 5a Agreements "was unclear about the law applicable to NMFTA and its carrier members" is self-serving and irrelevant. That proceeding had nothing to do with NMFTA or its members, and was not intended to do so.

Unable to demonstrate valid jurisdictional grounds for the action it seeks, NASSTRAC attempts to rely on "prudential considerations" as justifying STB intervention. That contention cannot substitute for a demonstrated lack of any jurisdictional basis for the action it is requesting the agency to take.

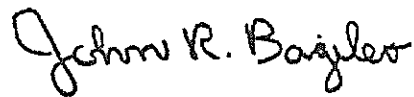
NMFTA has shown that the revisions of the outdated and inaccurate terms in the Uniform Straight Bill of Lading, which the Council and NASSTRAC both recognize have not been changed in many years, are entirely consistent with the statutory provisions in the Act, and correct or improve provisions that required clarification or modification. There was no attempt to burden shippers or diminish their rights and remedies under the Act's provisions, and that is not the result of the changes.

For the foregoing reasons, NMFTA requests that the pleadings submitted by the Council and by NASSTRAC be denied or dismissed as failing to state a claim for which relief can be granted.

Respectfully submitted,



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I hereby certify that I have on this 5th day of August, 2016, served a copy of the foregoing document by first-class mail, with postage prepaid, and by electronic means, on counsel for The Transportation & Logistics Council, Inc. and NASSTRAC.



Paul G. Levine