

Before The  
SURFACE TRANSPORTATION BOARD

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Docket No. ISM 35008

PETITION FOR SUSPENSION AND INVESTIGATION

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Reply Comments of  
NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC.

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Due and Dated October 3, 2016

## I. Prefatory Comment

The August 12, 2016 decision of the Surface Transportation Board (STB or agency) requested that the Parties address the issue of whether the agency has authority to undertake an investigation into the involved Uniform Straight Bill of Lading (USBOL) provisions. Specifically, it was requested that the Parties address whether 49 U.S.C. Section 13703(a)(5)(A), where there is not an approved Section 13703 agreement, or 49 U.S.C. Section 14701, provide the agency with such jurisdiction. The Parties also were requested to address any effect the STB's prior decision in Motor Carrier Bureaus-Periodic Review Proceeding, EP 656 (STB served May 7, 2007), would have on whether the agency should investigate the changes to the USBOL. (See STB's August 12 decision, at p. 2.)

It appears that on September 16, 2016, the Transportation & Logistics Council, Inc. (TLC) advised its members of the proceeding and the agency's action denying its petition for suspension and investigation of the USBOL contract terms and conditions, which became effective on August 13, 2016 (see Appendix 1). Additionally, it advised that:

The proceedings before the STB will continue to remain open for further replies and comments until October 3<sup>rd</sup>. Parties wishing to submit replies or comments should file them electronically or by mail to: [STB Office of Proceedings address provided].

Apparently, ODW Logistics, Inc. (ODW LTS) and Briggs & Stratton Corporation, and perhaps others, have or will submit such pleadings. Those filings are not submitted by persons which have properly intervened in this proceeding and do not meet the procedural requirements which have been established by the STB. This is not the "open" proceeding referenced by TLC in its notice. More importantly, those submissions are not responsive to the agency's direction as to the jurisdictional issues identified in its August 12 decision. Rather, they simply reiterate or support TLC's contentions regarding the involved revisions to the USBOL's terms and conditions, which the STB has not suspended or investigated, and are not in issue here. Those submissions, therefore, are neither relevant nor material to this proceeding, and are not entitled to any weight in this matter. The same would be true of any other solicited filings submitted which are procedurally deficient and address matters not at issue.

Similar deficiencies are presented by the filings submitted by the Transportation Intermediaries Association (TIA), dated August 29, but served on September 14, 2016, and by Daniel G. McDermott, Esq., dated September 8, but served on September 15, 2016. Neither TIA nor Mr. McDermott has filed petitions to become parties to the proceeding and both have failed to address the issues which the STB has specified are to be the subjects of the pleadings. TIA repeats the alleged concerns expressed by TLC in its initial Petition and Mr. McDermott takes issue with the "burden of proof." Those contentions are not relevant or material to the

jurisdictional or regulatory questions which are under consideration by the STB in this proceeding, and are not entitled to any weight concerning those matters properly before the agency.

## II. Comments of the Transportation & Logistics Council, Inc.

### 1. Section 1321 of 49 U.S.C.

TLC continues to argue that Section 1321(a) confers broad powers over motor carriers on the STB. (See TLC Comments, pp. 3-4) In so doing, it is evident TLC has failed to review the legislation renumbering Section 721(b)(4) of 49 U.S.C to Sections 1321 to 1324 of 49 U.S.C. That transition was made in the Surface Transportation Board Reauthorization Act of 2015, Public Law 114-110, Dec. 18, 2015. The limitation of those provisions to rail matters clearly is identified. As is indicated, the table of contents describes the agency powers conferred therein. Section 13, which contains Sections 1321 to 1324, and is relied upon by TLC, identify those provisions as pertaining solely to the “Arbitration of Certain Rail Rates and Practices Disputes.” The provisions therein relate exclusively to rail matters, principally rail rate cases, and do not include any motor carrier matters, rate-related or otherwise. TLC’s effort to interpret Section 1321(a) as conferring authority on the STB on the involved motor carrier matters is entirely misplaced.

Equally wide of the mark is TLC’s effort to include motor carriers under Section 1321(b) because of the reference to Subtitle IV of the Interstate Commerce Act. That reference must be read in conjunction with Section 1321, *et seq.*, which unequivocally applies to rail carrier matters. As TLC conceded, Subtitle IV Part A governs rail carriers, and confers certain duties and powers on the STB with reference to rail carriers. Section 1321(b) provides that authority to the STB to carry out its responsibilities in governing rail carriers which have been conferred upon it regarding rail rate cases and practices under those provisions, as well as its governance over those rail matters found in Subtitle IV.

TLC’s attempt to interject Section 13101(a)(2)(C) of the Transportation Policy is incorrect. The policy referenced relates to the STB’s administration of the authority vested in it under Subtitle B, Part IV of the Act pertaining to the regulation of motor carriers. As pointed out in NMFTA’s Opening Comments, the USBOL is not a matter committed to the agency’s jurisdiction under the Interstate Commerce Act. Moreover, neither TLC, nor any other Party to this proceeding, has pointed to a specific provision in the Act regulating motor carrier bills of lading, whether established individually, or offered in the National Motor Freight Classification for NMFTA’s participating motor carriers, which can individually and voluntarily decide to utilize the USBOL’s terms and conditions, or parts thereof, in transactions with its customers.

TLC argued in its Petition for Suspension and Investigation that Section 721(b)(4) of 49 U.S.C., which had been renumbered as Section 1321(a) in the Surface Transportation Reauthorization Act of 2015, conferred jurisdiction on the STB to suspend and investigate the terms and conditions in the USBOL which were then scheduled to become effective on August 13, 2016. Not only did the STB deny TLC's petition, but the agency properly did not recognize that provision as having any bearing on its authority to govern the contract terms and conditions of the USBOL. TLC's belated efforts to bootstrap its rejected argument by a strained and wrong interpretation of Section 1321 regarding the regulation of rail matters, and the Transportation Policy, do not demonstrate any error on the STB's part in giving no validity to that contention.

## 2. Section 13703 of 49 U.S.C.

In arguing that the terms and conditions of the USBOL are subject to the agency's authority which covers "any rule" established by carriers "collectively" under a Section 13703 agreement, TLC fails to recognize that the USBOL does not involve "rules" within the purview of Section 13703; and there is no Section 13703 agreement involved here.

As was pointed out in NMFTA's Opening Comments, it has long been established what matters can, and cannot be, the subjects of a Section 13703 agreement. The contract terms and conditions of the USBOL, designated as "rules" by TLC, are not within any of those limited categories of subjects. In Charge for Shipments Moving on Order-Notify Bills, 367 I.C.C. 330, 333, (1983), the nature of the rules properly within the scope of a Section 13703 agreement was addressed. In defining the matters that could be the subject of such an agreement, and the specific rules that could be included, the Interstate Commerce Commission concluded that:

Because of our own jurisdictional limitations, we could not have granted respondent immunity to promulgate general rules and regulations unrelated to classification. Our jurisdiction is neither unlimited nor coextensive with all the possible kinds of collective carrier activity which might form an antitrust violation. Under former section 5a(2) of the Interstate Commerce Act only six substantive areas were specifically approved for collective carrier activity. As the following quotation from section 5a(2) demonstrates, a rate bureau's authority to adopt rules and regulations is strictly an ancillary power:

\*\*\* rates, fares, classifications, divisions, allowances, or charges between carrier and compensation paid or received for the use of facilities and equipment, or rules and regulations pertaining thereto, or procedures for the joint consideration or establishment thereof \*\*\*.  
(Footnote omitted.)

The use of the phrase "pertaining thereto" clearly indicates that the power to make rules and regulations is only to be used in conjunction with any of the six substantive areas properly the subject of collective ratemaking agreements. Accordingly, we could not have authorized a general power to make rules and regulations unrelated to classification.

Unequivocally, the terms and conditions of a bill of lading are not one of the six, and only six, substantive areas that can be the subject matter of a Section 13703 agreement. So too, the terms and conditions of the USBOL, even if they could be construed to be “rules,” are unrelated to any subject that can be included in a Section 13703 agreement, and would not, and could not, pertain to any of the six substantive areas. Under no construction are the USBOL’s terms and conditions proper subject of an agreement, approved or not, or subject to the STB’s jurisdiction under Section 13703.

Finally, the very heading of Section 13703; namely, Certain collective activities; exemption from antitrust laws, dispels any contention that NMFTA motor carriers publishing updated USBOL contract terms and conditions did so within the purview of that statutory agreement. There is not present any agreement presented to or before the agency seeking antitrust immunity. The subject matter at hand is not one that can be approved by the STB in a Section 13703 agreement. The involved USBOL contract terms and conditions are subject to the voluntary choice of the participating motor carriers to accept shipper bills of lading, to prescribe individual bills of lading, or to use or not use any or all of the USBOL terms and conditions. Even if somehow equated to “rules”, they are not pertaining to any of the limited substantive areas which can be the subjects of an agreement. Under no reasonable construction of Section 13703 can the agency’s recognized jurisdictional limitations under that provision be expanded to include the USBOL.

### 3. Section 14701 of 49 U.S.C.

TLC argues that the agency’s general powers under Section 14701 to take “appropriate action to compel compliance” is present here because the USBOL is somehow subject to Section 13703, and falls under the agency’s authority pursuant to Section 13701(a)(1)(C). That argument is wrong in both respects and is contradicted by TLC’s own contention that there is no “approved” agreement at issue here.

Section 13701(a)(1)(C) applies to “rates, rules, and classifications made collectively by motor carriers” under a Section 13703 agreement. As established above, the involved contract terms and conditions of the USBOL are not among the six substantive areas that can be included in a collective agreement that is within the agency’s limited jurisdiction.<sup>1</sup> Additionally, that authority under Section 13701(a)(1)(C) only applies to “agreements approved pursuant to section 13703.” As TLC has acknowledged and argued at length in erroneously attempting to justify STB jurisdiction under Section 13703(a)(5) as an unapproved agreement, there is no

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<sup>1</sup>The contentions of the parties objecting to the specified contract terms and conditions of the USBOL relate solely to alleged negative effects that will result for the pursuit of loss and damage claims by shippers. Those allegations, in addition to being incorrect, have nothing to do with classifications or rates, or rules pertaining thereto.

approved agreement involved here. Inasmuch as the cited provision only applies to rates, rules and classifications made collectively pursuant to approved agreements, TLC must concede that its contention that Section 13701(a)(1)(C) invokes the agency's authority under Section 14701 is, by TLC's own argument that Section 13703 is applicable to an unapproved agreement, wrong.

#### 4. Motor Carrier Bureaus-Periodic Review Proceeding, EP 656.

TLC seemingly argues that the agency's decision in Motor Carrier Bureaus-Periodic Review Proceeding somehow acknowledges that, apart from agreements approved by the agency granting antitrust immunity to the collective activities conducted under the agreement's procedures, there are "agreements involving collective activities" not approved which are subject, nonetheless, to the STB's authority. However, its apparent reliance on Section 13703(a)(5) as establishing jurisdiction over such unapproved agreements regarding collective motor carrier activities is undercut by the provisions in Section 13701(a)(1)(C) which plainly indicates that the STB's authority over the reasonableness of rates, rules and classifications pertains to rate and classification matters "made collectively by motor carriers under agreements approved pursuant to section 13703." The agency's decision does clearly indicate that only those collective agreements approved by it are subject to the agency's continuing jurisdiction under Section 13703(d) and the reasonableness requirements of Section 13701(a)(1)(C). The revisions of the USBOL are not the result of such an agreement and are not subject to the agency's jurisdiction.<sup>2</sup>

The remainder of TLC's comments are a restatement of the contentions it made in its Petition for Suspension and Investigation regarding the USBOL contract terms and conditions published in Supplement 2 to NMF 100-AP, which, because of the STB's denial of that petition, became effective on August 13, 2016. Those matters are not responsive to the STB's decision instituting this proceeding and require no response here.

### III. Joint Comments of NASSTRAC and the National Industrial Transportation League (NITL)

#### 1. Motor Carrier Bureaus-Periodic Review Proceeding, EP 656.

Inasmuch as NASSTRAC and NITL admit that "the Board's principal focus in its 2007 decisions was clearly collective ratemaking," which the USBOL unequivocally is not, and they

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<sup>2</sup> In their joint comments, NASSTRAC and the National Industrial Transportation League, contrary to TLC's position about the alleged relevance of that decision, state that:

These concerns involve issues other than the collective ratemaking made subject to the antitrust laws in EP 656 and EP 656 (Sub-No. 1). Moreover, the Board's 2007 decisions involved actions by rate bureaus, including the NCC, operating under agreements subject to STB approval under 49 USC 13703. This proceeding involves actions by NMFTA, not NCC or its successor, CCSB. Accordingly, it is by no means clear that the 2007 decisions are apposite. (Joint Comments, at page 4.)

question whether the decisions are even “apposite” because NMFTA is the Party here and was not involved in those decisions (Joint Comments, pp. 3-4), they apparently agree the decision in Motor Carrier Bureaus-Periodic Review Proceeding is not relevant here. Nevertheless, a number of the misstatements as to the law and facts advanced by NASSTRAC and NITL in their comments must be addressed.

NASSTRAC and NITL state that as to cargo claims “the ICC and STB have always shared jurisdiction with courts...” (Joint Comments, at page 2.) That is in error. Rather, jurisdiction as to the interpretation or application of the Carmack Amendment rests exclusively with the courts and is not a shared jurisdiction with the ICC or the STB. As was concluded in STB Docket No. ISM 35002, Amend the Uniform Straight Bill of Lading and Accompanying Contract Terms and Conditions, served December 24, 1997:

NMFTA’s bill of lading would prominently disclose to the shipper in note 2 the fact that limitations on liability may exist and that the information regarding those and other non-filed-tariff provisions is available. We assume that carriers will fully and promptly respond to all shipper requests for copies of the relevant provisions. Although the courts have ultimate responsibility for resolving such issues, we believe that, should any carrier fail to provide shippers with the full notice required by law, they should be barred from enforcing those limitations against the shipper. (At page 3.) (Emphasis added.)

While the STB and the former ICC certainly could express their opinion as to statutory provisions in the Act regarding the requirements related to the Carmack Amendment, it was clear that the ultimate responsibility for claims arising under that Act rested with the courts and was not shared with the agency as indicated by NASSTRAC and NITL.

Given the concluding comment of NASSTRAC and NITL that the STB decision in Motor Carrier Bureaus-Periodic Review Proceeding involved rate bureaus and not NMFTA, which is not a rate bureau, and that “it is by no means clear that the 2007 decisions are apposite”, their lengthy and inaccurate discussion of the state of regulation at the time of the 2007 decision is perplexing. (Joint Comments, pp. 2-4.) They have pointed to nothing in the decision which would create agency authority to investigate the USBOL contract terms and conditions and essentially disclaim that the decision has any relevance regarding that inquiry.

It must be noted, however, that the effort to equate the classification and ratemaking is wholly incorrect and has long been distinguished as an entirely separate and distinct function. As the ICC concluded in Charge for Shipments Moving on Order-Notify Bills, *supra*, at pp. 335-36,

The classification tariff and the class tariff, although complimentary, serve entirely different purposes. While the classification is designed to reflect the characteristics of the commodity transported, the class tariff reflects the characteristics of the haul. Specifically, the class tariff

establishes the rate relationship between the localities based upon weight and distance. Use of the classification in conjunction with the class tariff has made it possible for carriers to publish charges for transporting any article in commerce between any two points in the United States without the necessity of publishing millions of separate and distinct rates. (Footnote and citation omitted.)

Therefore, the effort of NASSTRAC and NITL to characterize the classification as a ratemaking device is wrong.

Also, NASSTRAC and NITL misstate the relationship of the classification ratings and the class rates at the time of the agency's 2007 decision. (Joint Comment, p.2) With the advent of carrier discounting of the class rates, classification ratings had little relationship to the class rates applied on shipper traffic. Furthermore, under the Trucking Industry Regulatory Reform Act of 1994, any motor carrier tariffs on file with the ICC on August 26, 1994, and not required to be filed after that date, were declared to be null and void. (See 49 U.S.C. Section 13710 (a)(4).) Additionally, with the enactment of the Interstate Commerce Commission Termination Act of 1995, the sanctioning of motor carrier/shipper contracts further diminished the role of class rates in the transportation marketplace. (See 49 U.S.C. Section 14101(b).) Therefore, the class rating/class rate relationship which NASSTRAC and the NITL allude to simply did not exist in 2007.

Further, rather than addressing the jurisdictional issues identified by the STB as the basis for this proceeding, NASSTRAC and the NITL seek to reargue the contract terms and conditions of the USBOL. In particular, they focus on the Carmack Amendment alleging that, in effect, NMFTA has rewritten the law. (Joint Comments, pp. 4-7.) As the STB recognizes, if, indeed, that is the result of the revisions to the pertinent USBOL contract terms and conditions, that is a question of law for the courts to decide, and not the agency.

However, certain circumstances involved in the 52-year old decision of the Supreme Court in Missouri Pacific R. Co. v. Elmore & Stahl, 377 U.S. 134 (1964), cited by NASSTRAC and NITL as authority for imposing the burden of proof regarding negligence of the motor carrier for loss or damage to a shipment, requires comment. Because of changes in motor carrier legislation, substantial differences exist between the Carmack Amendment as applied in the Missouri Pacific R. Co v. Elmore & Stahl decision, and the current application of that law to motor carriers. In that rail case it was found that:

The Carmack Amendment of 1906 [footnote omitted] §20 (11) of the Interstate Commerce Act, makes carriers liable "for the full actual loss, damage or injury caused by" them to property they transport and declares unlawful and voids any contract, regulation, tariff, or other attempted means of limiting their liability [footnote omitted]. 377 U.S. at 137.

Substantial legislative changes have occurred in Subtitle IV, Part B of the Interstate Commerce Act pertaining to motor carriers which have eliminated various restrictions on their ability to limit their liability.

Under the provisions of Section 14706(c)(1)(A), motor carriers and their shippers can limit the carriers' liability by a written agreement between the carrier and the shipper. Under 14706(c)(1)(B), a motor carrier not required to file its tariff with the STB can limit its liability in its tariff and, upon request of the shipper, provide 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. Under Section 14101(b) a shipper and a carrier can enter into a contract and, in writing, expressly "waive any or all rights and remedies" under Subtitle IV for transportation provided under the contract. Contrary to the state of the law at the time of the decision in Elmore & Stahl, contracts and tariffs now can and do lawfully limit a carrier's liability.

NMFTA's position on the burden of proof in a claim for loss and damage is misstated by NASSTRAC and NITL in alleging that it "supports shifting from a burden on carriers to prove freedom from negligence to a burden on shippers to prove the existence of carrier negligence." (Joint Comments, p.6.) As was held in Missouri Pacific R. Co. v. Elmore & Stahl:

Accordingly, under federal law in an action to recover from a carrier for damage to a shipment, the shipper establishes his prima facie case when he shows delivery in good condition, arrival in damaged condition, and the amount of damages. (337 U.S. at 138.)

A prima facie case is one "such as will suffice until contradicted and overcome by other evidence." (See Black's Law Dictionary, 4<sup>th</sup> Ed. (1951).) Thus, the burden is on the carrier when a prima facie is made by a shipper to come forward with evidence demonstrating that the damage was the result of a force majeure, the fault of the shipper, or inherent vice or defect of the goods. Once that is demonstrated the shipper has the burden of demonstrating that the carrier's contention is incorrect, and the failure to do so results in the shipper's not meeting its burden of proof (persuasion) as to the validity of its claim for loss or damage. The burden of proof (persuasion) is ultimately that of the shipper.

## 2. NASSTRAC and NITL Fail to Establish STB Jurisdiction Under the Referenced Statutory Provisions.

NASSTRAC's and NITL's contention that NMFTA is seeking to "evade" Section 14101(b) is wrong. (Joint Comments, p.8.) That contract provision is referenced by NMFTA as one of various ways in which the original impact of the Carmack Amendment has been modified. Not surprisingly, they make no mention of Section 14706(c)(1)(B) which, as acknowledged by the STB, authorizes carriers which do not have to file tariffs with the agency, the ability to establish released valuation provisions in their tariffs. NMFTA never suggested that a Section 14101(b)

contract is not required to expressly waive any right or remedy contained in the Act. That is the clear requirement of that provision. However, that requirement has no application regarding the USBOL which plainly is not a Section 14101(b) contract.

As the STB stated in its December 24, 1997 decision in STB Docket No. ISM 35002, Amend the Uniform Straight Bill of Lading and Accompanying Contract Terms and Conditions: “In our view, the statute permits carriers to establish rates, rules and regulations applicable to shipments tendered to them in common carriage under bills of lading such as the one proposed.” (At page 2.) Although that language subsequently was removed pursuant to a further decision in that proceeding, issued on August 4, 1998, in response to objections by NASSTRAC, NITL and the TLC that it was “gratuitous,” the STB, as is particularly pertinent to this proceeding, concluded:

As we noted in our December 24 decision, disputes regarding motor carrier liability, and the enforcement of incorporated provisions must be resolved by the courts. In these circumstances, we believe it is preferable that we take no position on either side of the issue at this time. We will, therefore, modify our December 24, 1997 decision to limit the discussion to our rationale for not suspending and investigating the proposed amendment to the Uniform Straight Bill of Lading. (At page 3.)

Essentially, NASSTRAC and NITL argue that they do not object to changes in the USBOL provided they agree to them. (Joint Comments, p.8.) What they fail to acknowledge, for obvious reasons, is that motor carriers are not required to seek shipper permission to establish terms and conditions pertaining to liability for loss or damage in their tariffs or the USBOL, or by carriers in their individual bills of lading. Just as shippers can establish the contract terms and conditions deemed appropriate in their bills of lading, without carrier input, as the STB has concluded so can motor carriers. If shippers or their associations believe that the carriers’ provisions are in violation of the law, their recourse is to the courts.

In the absence of any justification under the involved statutory provisions for the STB having jurisdiction in this matter, and candidly acknowledging that the agency’s decision in Motor Carrier Bureaus–Periodic Review Proceeding is inapposite, NASSTRAC and NITL engage in a series of self-serving and unsubstantiated allegations of purported consequences of the USBOL’s contract terms and conditions. These range from enabling the carriers to revise provisions in Subtitle IV of the Act; to being a trap for the “unwary” affecting millions of shipments and tens of thousands of shippers; to creating “less safe transportation.” (Joint comments, pp.8-10.) These wholly conjectural and groundless allegations evidently are intended to convince the agency that these are matters within the purview of the Transportation Policy of Section 13101. That section does not give rise to agency authority to investigate matters not otherwise specified under Subtitle IV of the Interstate Commerce Act. Rather, as stated in Section 13501, the agency’s jurisdiction over motor carriers is “as specified

in this part ....” The policies identified in Section 13101 (a)(2), pertaining to motor carriers, refer to the objectives to be achieved or observed by the STB in the exercise of the authority entrusted to it under Subtitle IV. The USBOL’s contract terms and conditions are not matters committed to the jurisdiction of the agency but rests with the courts, and NASSTRAC and NITL have failed to evidence otherwise.<sup>3</sup> In fact, they confirm that the STB has already recognized that bill of lading disputes rest with the courts to resolve. (Joint Comments, p.11.)

### 3. Section 1321 of 49 U.S.C.

NASSTRAC and NITL, having failed to establish statutory authority in the provisions identified by the STB for comment in this proceeding, by selectively excising language from Section 1320 attempt to have it appear that provision is a “general directive” to regulate motor carrier under Subtitle IV. (Joint Comments, p.11.) That contention is devoid of any merit. As discussed above, Sections 1321-1325 were renumbered in the Surface Transportation Board Reauthorization Act of 2015. Sections 11, 12 and 13 make it abundantly clear that those provisions apply exclusively to rail matters. The reference to Subtitle IV unquestionably references the companion rail provisions found there; namely, Sections 10501-11908. The efforts of NASSTRAC and NITL to expand those provisions to include motor carriers are illogical and inconsistent with the statutory framework of those provisions.

## IV. Conclusion

The Surface Transportation Board’s decision instituting this further proceeding requested that the Parties address whether the agency had jurisdiction over the contract terms and conditions of the Uniform Straight Bill of Lading. The Parties were requested to address whether Sections 13703(a)(5)(A) or 14701 confers authority on the STB to undertake an investigation into the contract terms and conditions of the USBOL. Moreover, it was requested that the Parties address any impact its 2007 decision in Motor Carrier Bureaus-Periodic Review Proceeding might have on the agency’s investigation of the changes to the contract terms and

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<sup>3</sup> The referenced decision by the STB in Docket No. FD 35582, Rail-Term Corp.-Petition for Declaratory Order, decided December 30, 2014 involves a rail matter and is inapposite in this motor carrier proceeding. The Act vests the agency with expansive jurisdiction over rail carriers which is absent with respect to motor carriers. For example, under Section 10701 the STB has the authority to set standards for rail rates, classifications, through routes, rules, and practices. Under Section 10705 the STB has the authority to prescribe rail through routes, joint classifications, rates, and divisions. So too, Section 11101 the agency has jurisdiction over the transportation, services and rates of the rail carriers. Moreover, under Section 11323 the STB has jurisdiction over the consolidation, merger, and acquisition of control of rail lines. As relevant to the cited decision, under Section 11326 the agency has authority over employee protective arrangements in transactions involving rail carriers. Many other provisions regarding the STB’s jurisdiction in rail matters which involve the objectives of the rail Transportation Policy are evident and do not apply to motor carriers. Importantly, it should also be noted that under Section 10709 authority exists in the STB over rail contracts between rail carriers and the purchasers of their services. No such jurisdiction exists as to motor carrier contracts.

conditions of the USBOL. TLC did respond to those specific inquiries. However, its contentions are in error. First, it fails to recognize that there is no NMFTA agreement, approved or not, which falls within the agency's authority under Section 13703(a)(5)(A). Second, the USBOL is not one of the six substantive areas which can be the subject of a Section 13703 agreement, and, accordingly, the STB's jurisdictional limitations regarding those provisions would not govern the USBOL. Thus, Section 13703(a)(5)(A) is not relevant here.

TLC next contends that the STB's authority regarding approved collective activities in Section 13701(a)(1)(C) gives rise to the STB's general authority under 14701 to investigate the contract terms of the USBOL. That analysis is wrong. TLC defeats its own argument in that it recognized that there was no approved NMFTA agreement, as it contended that the absence of the word "approved" in Section 13703(a)(5)(A) established that the STB somehow still is vested with authority over the NMFTA's actions. Yet, it fails to address the fact that Section 13701(a)(1)(C) specifically covers "agreements approved pursuant to section 13703", which it has conceded does not exist. Additionally, as pointed out the USBOL contract terms and conditions cannot be the subject of an approved agreement under Section 13703.

Further, TLC contends that Section 1321 confers authority over motor carriers. As shown, that provision, as well as the accompanying sections, relate exclusively to rail matters. Subtitle IV of the Interstate Commerce Act, Part A, contains the regulatory provisions pertaining to rail carriers and sets forth the authority of the STB relating to the administration of its statutory responsibilities. It is only logical that Section 1321 would reference Subtitle IV of the Act because, collectively, those provisions identify the STB's authority over rail carriers. It is not logical to conclude that Part B of Subtitle IV, which relates to motor carriers, water carriers, brokers, and freight forwarders, or Part C, which pertains to pipeline carriers, can be included within Section 1321(a). The STB's investigative powers there pertain entirely to rail matters.

TLC's argument that the STB's decision in Motor Carrier Bureaus-Periodic Review Proceeding has relevance in this proceeding is wrong. NMFTA is not a bureau, and the contract terms and the agency's findings in that decision pertaining to ratemaking and classification have no bearing on the legal issues involved here.

At the outset, it is noted that NASSTRAC and NITL appropriately did not join TLC's argument that the STB's decision in Motor Carrier Bureaus-Periodic Review Proceeding has any relevance here. Noting that different issues were presented there, they stated that "it is no means clear that the 2007 decisions are apposite." Also, NASSTRAC and NITL do not ascribe to TLC's contentions regarding Section 13703, or Section 13701(2)(1)(C). As noted above, those provisions have no bearing on the USBOL's contract terms and conditions. While NASSTRAC and NITL belatedly sign on to TLC's contention that Section 1321 confers investigative powers on the STB, they do not address that those powers are to be exercised in the context of rail

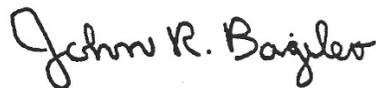
matters, or that reference to Subtitle IV was necessary to include the agency's jurisdiction over rail carriers. Significantly, although the Section 1321 contention was presented by TLC in its Petition for Suspension and Investigation, which was denied, the STB did not include it in the statutory provisions to be addressed in this proceeding.

Finally, NASSTRAC and NITL seek to create jurisdiction in the STB by referencing provisions in the Transportation Policy and contending that they are matters which fall within the agency's general investigatory powers under Section 14701(a). In so doing they list a number of unfounded and self-serving allegations which have not been shown to have any basis whatsoever in fact. Without a scintilla of evidence that there would be reduced cargo liability under the terms and conditions of the USBOL, they make the equally serious and unfounded contention that less safe transportation would result. There is no rational basis for that allegation. Nonetheless, their strained efforts to create matters identified in Section 13101(a)(2) is misplaced. Those policies are to be the guides by which the agency administers the provisions of Act applicable to motor carriers in Part B of Subtitle IV and subject to the STB's authority. Importantly, the contract terms and conditions of the USBOL are not subject to the STB's jurisdiction in Part B of Subtitle IV. Thus, the USBOL is not subject to the agency's general investigative authority under Section 14701(a). NASSTRAC and NITL essentially admit as much in their acknowledgment throughout their comments that jurisdiction of the Carmack Amendment and carrier liability issues reside in the courts. They have not identified how any of the statutory provisions identified in the STB's September 12, 2016 decision for comment change that fact, and have conceded that the STB's decision in Motor Carrier Bureaus-Periodic Review Proceeding has no impact in this proceeding.

Respectfully submitted,



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Due and Dated: October 3, 2016

## Appendix 1



### **SPECIAL REPORT**

#### **NMFTA Changes the Uniform Straight Bill of Lading - Round Two**

By George Carl Pezold

Executive Director

As previously reported, on July 14th, the National Motor Freight Traffic Association (NMFTA), publishers of the National Motor Freight Classification (NMFC), issued Supplement 2 to NMF 100-AP, effective August 13, 2016 which contained a number of changes to the Uniform Straight Bill of Lading, including the Terms and Conditions on the reverse side, as well as to the NMFC rules in Item 360 - Bills of Lading, Freight Bills and Statements of Charges.

On July 29th the Council filed a Petition for Suspension and Investigation with the Surface Transportation Board (STB) in opposition to the proposed changes to the Uniform Straight Bill of Lading. The National Shippers Strategic Transportation Council (NASSTRAC) filed its comments in support of the Council on August 1st.

On August 12th, the STB issued a decision in which the Board refused to suspend the changes to the bill of lading, but identified certain questions and invited further comment as to its jurisdiction to investigate or suspend the changes, as well as related matters.

In response to the Board's decision, on September 12th, the parties each filed supplemental pleadings. NMFTA continues to argue that the STB lacks jurisdiction over collectively-made changes to the bill of lading. The Council addressed the Board's jurisdiction and the potential impact of the changes on carrier liability for cargo loss and damage, and NASSTRAC, joined by the National Industrial Traffic League (NITL), filed supplemental pleadings in support of the Council's position. In addition, the Transportation Intermediaries Association (TIA) has now filed its comments in support of the Council. Copies of the following supplemental pleadings are available on the Council's website; [www.TLCouncil.org](http://www.TLCouncil.org):

[TLC Supplemental Pleading \(Filed 9-12-16\)](#)

[NASSTRAC Supplemental Pleading \(Filed 9-12-16\)](#)

[NMFTA Supplemental Comments \(Filed 9-12-16\)](#)

[NITLeague Petition to Intervene \(Filed 9-12-16\)](#)

[TIA comments to STB \(Filed 9-15-16\)](#)

It remains to be seen what action will be taken by the STB. Since the STB was created following the ICC Termination Act of 1995, it has been primarily involved in railroad rate cases and other rail matters. In fact, the last time it exercised jurisdiction over issues involving the Uniform Straight Bill of Lading was in 1997, some 19 years ago.

If allowed to remain in place, the new rules in the Uniform Straight Bill of Lading have the potential to seriously impact shippers' ability to recover freight loss and damage claims against carriers. Accordingly, the Council urges shippers or anyone responsible for filing and recovering freight loss and damage claims to submit comments in support of the Council's position in this important matter.

The proceedings before the STB will continue to remain open for further replies and comments until October 3rd. Parties wishing to submit replies or comments should file them electronically or by mail to:

Chief, Section of Administration  
Office of Proceedings

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

And refer to: Docket Number ISM 35008, Transportation and Logistics Council - Petition for  
Suspension and Investigation

Dated: September 16, 2016

STAY CONNECTED:



Transportation and Logistics Council,  
120 Main St., Huntington, NY 11743

Sent by [diane@transportlaw.com](mailto:diane@transportlaw.com) in collaboration with



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CERTIFICATE OF SERVICE

I hereby certify that I have this 3<sup>rd</sup> day of October, 2016, served a true and correct copy of the Reply Comments of National Motor Freight Traffic Association, Inc. by first class mail, postage prepaid and/or by electronic means, upon the following parties of record in this proceeding as listed by the Surface Transportation Board:

Karyn A. Booth  
Chris Burroughs  
John M. Cutler, Jr.  
Dave Giblin  
Daniel McDermott  
George Carl Pezold  
Robert A. Voltmann

A handwritten signature in cursive script that reads "Paul G. Levine".

---

Paul G. Levine