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Before The
Surface Transportation Board

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Section 5a Application No. 61 (Sub-No. 6)

National Classification Committee - Agreement



PETITION

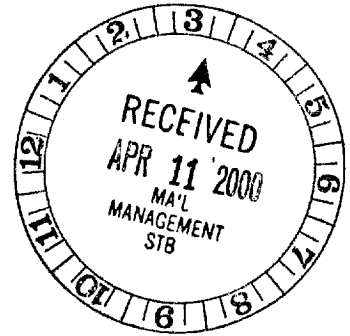
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Due and Dated: April 11, 2000

**Before The
Surface Transportation Board**



**Section 5a Application No. 61
National Classification Committee - Agreement**

PETITION

The National Classification Committee (NCC) through counsel requests that the Surface Transportation Board (STB) remove the first full paragraph on page 7 of its Decision served February 11, 2000, beginning with the words "However, we will be sensitive to." This petition is patterned in part on a petition filed by the National Small Shipments Traffic Conference, Inc. (NASSTRAC) May 26, 1998, which sought to remove, two paragraphs from the STB's Decision served December 24, 1997, in ISM-35002 - Amend the Uniform Straight Bill of Lading and Accompanying Contract Terms and Conditions. In support of this request, the following is stated.

Background

The NCC is in agreement with the STB's determination that the Uniform Bill of Lading (UBOL) will continue to be regarded as part of the NMFC and covered by the carriers' Sec. 5a antitrust immunity. This will allow the section 5a Application No. 61 (Sub. No. 6) proceeding to focus narrowly on the shippers' opportunity to effectively participate in the NCC's classification process. Curiously, however, the STB's declaration that immunity for the UBOL would no longer be an issue, is immediately followed by a paragraph that appears to be out of place (see Appendix A). It addresses extraneous matters out of context

and raises completely new issues that call into question the reasonableness of the UBOL.¹

The paragraph proceeds to abandon the STB's commitment to neutrality in regard to a crucially important issue of another proceeding, i.e., whether the carriers' must provide shippers "actual notice" of their liability limitations. And, without any discussion or basis, it reverses the determination that was rendered on this issue in the STB's December of 1997 decision in ISM-35002. It is apparent that the reasonableness of the UBOL and the carrier's notice of liability limitation are matters that are unrelated to the NCC's collective process and have never been issues in this proceeding. Nevertheless, the first full paragraph on Page 7 of the STB's decision served February 11th 2000, in this proceeding introduces this extraneous matter stating as follows:

However, we will be sensitive to any challenge that may be raised about any particular bill of lading that NCC may develop. HPCDC /NASSTRAC have identified several provisions in NCC's UBL that are of concern to their members. We have recognized in the past that any liability limitations imposed by a bill of lading should be affected in a way that gives the shipper actual notice of the arrangement being undertaken. We intend to allow continued collective action on bills of lading, but we will remain available to address complaints about the terms of any bill of lading that NCC may produce (emphasis added).

While it is apparent that the paragraph in question is irrelevant to the NCC's section 5a agreement, the issues it raises are closely related to the joint shipper/carrier development of the UBOL and to the STB's proceeding entitled ISM-35002—a proceeding that was initiated by the Transportation Consumer Protection Counsel's (TCPC) protest of the NCC's new UBOL. On December 24, 1997, the STB served its decision declining to suspend or investigate the proposed new UBOL. The December 24th Decision included two key

¹These are issues that cannot be resolved in this proceeding which is devoted exclusively to the NCC's 5a Agreement.

paragraphs providing the reasons for the action taken. Subsequently, however, in response to a late-filed (by four months) petition by NASSTRAC, a nonparty to the proceeding, the STB withdrew or drastically modified the two paragraphs contending they were not necessary to the decision and that it preferred to maintain a neutral position on these issues that should be resolved by the courts.

A. Having Co-authored The New UBOL And Urged Its Approval By The NCC, NASSTRAC Cannot Now Legitimately Object To Its Provisions

The paragraph on Page 7 makes a vague reference to several provisions of the UBOL that are allegedly of concern to NASSTRAC's members, but it fails to recognize that this shipper organization was equally responsible for drafting the very same provisions that they subsequently objected to. Moreover, the new UBOL was created over a five-month period by an ad hoc committee consisting of six carrier members of the NMFTA and six shipper members representing NASSTRAC. It was first approved by NASSTRAC's Board and then by its members before being placed on the National Motor Freight Classification (NMFC) Docket for consideration during the course of the NCC's October 1997, meeting. In that meeting, the NCC's members voted to approve the new bill of lading after hearing NASSTRAC's representatives strongly urge them to do so. It would seem a bit disingenuous for NASSTRAC now to complain to the STB about the provisions of a document that they co-authored with NMFTA members and urged the NCC to approve. The circumstances surrounding the new Uniform Bill of Lading were explained in detail in the NCC's reply to protest submitted to the STB in ISM-35002 and they are known to the STB.

B. The STB's Determination That A Carrier Must Provide Actual Notice Of Its Liability Limitations Is Refuted By The Precedent It Cites For Support

The involved paragraph on Page 7 resurrects the core issue of ISM 35002 when it states:

we have recognized in the past that any liability limitations imposed by a bill of lading should be affected in a way that gives the shipper actual notice of the arrangement being undertaken. (emphasis added)

The determination of whether or not "actual notice" is required depends on an interpretation of 49 C.F.R. §14706(c), of the ICC Termination Act of 1995 (the Carmack Amendment). As authority, the paragraph at issue specifically cites the STB's interpretation of this statutory provision in its December 24th, 1997, Decision in ISM-35002. However, the referenced decision actually provides precisely the opposite interpretation, i.e., that actual notice is not required.

After being approved by the NCC in October of 1997, the new UBOL was published in the next supplement to the NMFC and was then the subject of a December 8, 1997, protest by the Transportation Consumer Protection Counsel, Inc. (TCPC). One of TCPC's principal arguments for suspension was that the proposed UBOL would permit carriers to impose liability limitations on shippers without first giving them "actual notice" as required by §14706(c).² However, the STB disagreed and, in its decision served December 24, 1997, in ISM-35002, declined to suspend or investigate the UBOL. In two key paragraphs of this decision, the STB explained the reasons for its rejection of TCPC's argument. It pointed out

² For example, on Page 3 of its protest, TCPC contended that under §14706(c) shippers were entitled to actual notice of the carriers' liability limitations. It argued :

[T]his traffic is not subject to the "filed rate doctrine" and the law no longer implies constructive notice of carriers' tariffs. Congress specifically intended this result in enacting TIRRA and more recently, ICCTA.(emphasis added) If the proposed changes are permitted to become effective, the carriers will have succeeded in circumventing the will of Congress by re-creating a new "unfiled rate doctrine" through incorporation of tariffs by reference in the bill of lading. This would subject shippers to rates and charges, liability limitations, restrictions and other unfiled tariff provisions, of which they have no prior notice unless they are sophisticated enough to request a copy of the carriers tariffs before shipping. (emphasis added)

that the new UBOL, and particularly its note 2, would satisfy the applicable requirements of §14706(c), in regard to notice of liability limitations. It explained:

NMFTA's bill of lading would prominently disclose to the shipper in note 2 the fact that limitations on liability may exist and that information regarding these and other non-filed-tariff provisions is available. (The full text of this short decision is included as Appendix B).

It is important to recognize that the notice that is presently provided on the face of the UBOL and which the STB found to satisfy the applicable requirements of §14706(c) is constructive and not actual notice.³ Significantly, the two paragraphs of ISM-35002 cite the Conference Report that accompanied the ICC Termination Act of 1995 [H.R. Rep. No. 422, 104th Cong., 1st Sess. 222-23 (1995)], as authority for this interpretation of §14706(c). The *Conference Report* leaves no doubt that, under §14706 (c), only constructive notice is required. It points out that, prior to the demise of the filed rate doctrine in 1994 and 1995, carriers were not required to provide the shipper with actual notice of liability limitations or any other tariff provisions, but rather, it was the shippers' obligation to determine the content of the carriers tariffs -- usually through employing a watching service. Further, the Report emphasized that, to the extent possible, Congress intended to restore this pre- TIRRA obligation of shippers. It states:

By signing a bill of lading, which incorporated by reference to tariff, the shipper was deemed to have agreed to the tariff and its conditions and terms. However, the carrier was under no obligation to specifically notify the shipper of the conditions or terms of the tariff. It was the responsibility of the shipper to take an affirmative step to determine what was contained in the tariff -- usually through the retaining of a tariff watching service. ... This provision is intended to return to the pre-TIRRA situation where shippers were responsible for determining the conditions imposed on the transportation of a shipment. (See Appendix C for the full text of this section of the Conference Report)

³ See, Louisville & N.R.R. Co. v. Maxwell, 237 U.S. 94 and Fedders-Quigan Corp. v. Long Transp.Co., 644 M.C.C. 581,587

Clearly, the paragraph, that appears on page 7 of the decision, is incorrect when it cites the STB's December 1997, Decision in ISM 35002, as authority for concluding that the carrier must provide its customer actual rather than constructive notice of the applicable liability limitation. It is undeniable that, in the cited decision, the STB's interpretation of §14706(c) was in agreement with the carrier's position on this issue, i.e., that the law required constructive and not actual notice. Until its February 11th Decision in the instant proceeding, the STB has never disavowed that interpretation.

C. The STB's Re-Interpretation Of §14706(c) To Require Actual Notice Abandons Its Prior Commitment To Neutrality On This Issue

In May of 1998, five months after the new UBOl was permitted to go into effect and long after ISM-35002 became administratively final, NASSTRAC, a non-party to the proceeding, filed a petition requesting the STB to remove the two explanatory paragraphs from its December 24th, decision (Key provisions of NASSTRAC's petition are reproduced in Appendix D). NASSTRAC's awareness of this issue was revealed in its public comments that carriers nationwide were citing the STB's interpretation of §14706(c) as authority supporting their position that the law did not require actual notice of their liability limitations. The shipper group emphasized (at p. 4) that STB had done the shippers a great disservice by taking the carriers' side on this very important issue. NASSTRAC requested the STB to "amend its decision in ISM-35002 by removing the offensive two paragraphs [interpreting the notice requirements of §14706(c)] and leave the interpretive issue to the court's which have jurisdiction over cases arising under this provision of the statute" (see Appendix D). NASSTRAC further suggested that, in deciding ISM 35002, the STB had only to "deny the protest and allow the new bill of lading to go into effect."

In reply to NASSTRAC's petition, NCC urged the STB not to remove its valuable explanation as to why Protestant TCPC was incorrect in arguing that the carrier was obliged to provide actual notice for its customers. Nevertheless, in its decision of August 4, 1998, (see Appendix E) the STB extracted the crucial rationale from these two paragraphs, finding that the explanation they provided was unnecessary to the decision and stating that it preferred to avoid taking sides in regard to the controversial issue of liability limitation so that it could be left to the courts. It stated:

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. (emphasis added)

The paragraph on page 7 of the February 11th decision expresses an admonition that is critical of the NCC based on determinations that are completely unrelated to the issues of this proceeding. More importantly, however, by reinterpreting §14706(c) to require actual notice, the paragraph abandons the STB's commitment not to take sides in a critical dispute between shippers and carriers, and, while purporting to follow the interpretation of §14706(c) that is provided in the STB's December 24th decision in ISM 35002, it actually reverses the STB's previous interpretation and does so without explanation. As set forth in the paragraph on page 7, the STB's position has actually gone through a 180 degree change to now agree with NASSTRAC, as well as the arguments of TCPC that it had previously rejected⁴. This unexplained reversal is at odds with the pertinent legislative history that the STB cited as

⁴ It is obvious that the previous interpretation had favored the carriers position. If the decision had taken the shippers side of this issue with a determination that required actual notice of any liability limitations, there would have been no reason for NASSTRAC to have requested removal of the two paragraphs. In fact, it was precisely because this decision interpreted 14706 to require only constructive rather than actual notice that NASSTRAC petitioned the STB.

authority in its December 1997 decision in ISM-35002 (i.e. the *Conference Report*); and it is contrary to numerous judicial interpretations of §14706(c).⁵

**D. The STB's Interpretation Of 14706(c) Constitutes
Rulemaking, Contrary To §553 of the APA**

As explained, in ISM 35002, the STB's December 1997, determination of the notice requirement associated with liability limitations came naturally in conjunction with its consideration of the reasonableness of the NCC's UBOL. In fact, the STB's declination to suspend the new UBOL was largely a consequence of rejecting TCPC's erroneous interpretation that §14706(c) requires actual notice. In contrast, the instant proceeding, where the NCC's section 5a Agreement is the sole issue, does not include a context, an explanation or even a discussion of the STB's reinterpretation of §14706(c). And while it is represented as merely a reminder of a past pronouncement made in connection with ISM 35002, in reality, the reinterpretation stands, without precedent, as a complete departure from the STB's previous interpretation of this provision.

From a practical point of view, the reinterpretation of §14706(c) to require actual notice could result in motor carriers' having to abandon their use of valuable tariff provisions known as "inadvertence clauses" that the industry has employed successfully for many years. In the typical circumstances in which the actual notice requirement becomes an issue, the involved transportation is not under contract so that notice of liability limitations is not something that the shipper and carrier can specifically consider and agree to in advance. And the actual transaction involving the bill of lading takes place between the motor carrier's

⁵ See Hollingsworth & Vose Co. V. A-P-A Trans. Corp., 158 F.2d 617 (1st Cir. 1998), Jackson v. Brook Ledge, Inc., 991 F. Supp 640, (E.D. Ky. 1997), and Atwood v. U.W. Freight Line, Inc. and Roadway Express, Inc., Case No. CV 98-0229-S-BLW (D.Id. 1999)

driver and the shipper's dock personnel and not between authorized representatives of either party. The motor carrier's "inadvertence clauses" apply on movements of various commodities which, for any of a number of reasons, the carrier is unable to transport at full value. Typically, the inadvertence clause states that the shipment will not be taken unless the shipper provides a written release of the carrier's liability on the bill of lading, but if the shipper fails to supply the required release and the carrier inadvertently accepts the shipment, then a specified liability limitation will apply. The new requirement for actual notice of liability limitations would disallow the use of inadvertence clauses, resulting in significant alterations in carriers' business practices.

We would note also that the matters of the of inadvertence clauses and required notice of liability limitations are the subject of a very fractious ongoing public dispute between shippers and carriers. The significance of the new rule to motor carriers is heightened by the context in which it was announced. In the first full paragraph on Page 7, in sentences which proceed and follow STB's contention that "HPCDC/NASSTRAC have identified several provisions in NCC's UBL that are of concern to their members." STB twice admonishes the NCC that it will be "sensitive to any challenges that may be raised" to the new UBOL. This context gives the distinct impression that, despite allowing the new UBOL to become effective a little over two years ago, STB would now be very receptive to the complaint that the UBOL is unreasonable because this collectively determined provision is being used to thwart the perceived actual notice requirement. The NCC recognizes that (as NASSTRAC pointed out in its petition) enforcement of the actual notice requirement in the context of a loss and damage case is theoretically beyond the STB's jurisdiction. Nevertheless, as the agency having expertise and jurisdiction over the general subject matter of tariff provisions,

particularly those that are collectively determined, its pronouncements are significant because they are likely to be widely cited as authority on this issue and to be given considerable deference by the courts.

Not only is the STB's reinterpretation of §14706(c) contrary to judicial precedent as well as the legislative history of the involved statute, it is incompatible with the carriers' longstanding use of inadvertence clauses, thus resulting in the need for substantial changes in their business practices. For this reason, the reinterpretation constitutes rulemaking so that, under § 553 of the Administrative Procedure Act (49 U.S.C. §553), the NCC and other interested persons should have been given notice and an opportunity to participate in the process by which the new interpretation was reached⁶. The promulgation of the new requirement is not exempt from §553 as an interpretive rule that functions merely to clarify or explain §14706(c). Rather, for the reasons discussed previously, the "actual notice" rule is subject to §553 because, in the words of Judge Bazelon, it "effectively enunciates a new requirement heretofore nonexistent for compliance with the law and thereby brings about a significant change in the practices of affected persons." Chamber Of Commerce Of the United States v. O.S.H.A. 636 F. 2d 464, 472 (1980).

F. The Designated Paragraph Should Be Removed

The NCC's request for removal of the designated first full paragraph on Page 7 of the STB's decision on the NCC's Sec 5a Agreement is compelling for a variety of reasons. First, it involves essentially the same subject matter as the NASSTRAC Petition in ISM-35002.

⁶ A rule is defined as "an agency statement of general or particular applicability and future effect designed to implement, interpret or prescribe law or policy." 5 U.S.C. § 551(4).

And, it is supported by the same rationale that NASSTRAC offered and the STB accepted as justification for its removal/revision of two key paragraphs from the its December 1997, decision in ISM-35002. However, this request is also supported by a number of additional and equally persuasive reasons. The rationale supporting this request includes the following:

1. The STB's rationale for revising its December 1997, Decision in ISM-35002 responsive to NASSTRAC's Petition is clearly applicable to the designated paragraph in the STB's February 11, 2000 Decision in Section 5a Application No. 61 because:

 - The subject matter of the paragraph is substantially similar to the subject matter of the two paragraphs that were removed/modified on behalf of NASSTRAC
 - The subject matter of the paragraph is neither necessary nor relevant to the STB's decision.⁷
 - The subject matter of the paragraph is of great importance to motor carriers.
2. Other Reasons Strongly Supporting The Removal of The Identified Paragraph On Page 7 Of the Decision
 - a) Without justification or explanation and while failing to recognize that the UBOL is unchanged since NASSTRAC co-authored it and urged its approval the paragraph calls into question the reasonableness of the new UBOL, citing only unspecified "concerns" of NASSTRAC's members.
 - b) Without explanation, it provides a new interpretation of the notice requirement associated with §14706(c) that:
 - Is incorrectly described as being supported by the STB's December 1997 decision in ISM 35002.
 - Reverses the interpretation that STB previously rendered in ISM 35002.
 - Contradicts the Conference Report [H.R. Rep. No. 422, 104th Cong. 1st Sess. 222-23(1995)] that the STB's December 1997 decision in ISM 35002 cited as a guiding authority regarding Congressional intent.

⁷ This stands in contrast to ISM 35002, where the interpretation of §14706(c) was determined to be irrelevant to the decision even though it explained the reasons for the STB's rejection of Protestant TCPC's arguments.

- Abandons the STB's commitment, in ISM 35002, to avoid taking sides in regard to the issues involving actual notice of liability limitations.
 - Constitutes rulemaking that was conducted contrary to 49 U.S.C. §553 i.e. without giving the NCC or other interested persons notice or an opportunity to participate.
- c) In contrast to NASSTRAC's petition in ISM 35002, the instant petition is filed by a party to this proceeding.

CONCLUSION

For the reasons specified herein, the NCC respectfully requests that the first full paragraph on Page 7 of the STB's decision served February 11, 2000, in Sec. 5a Application No. 61, be removed from the decision. This paragraph contains matter that is unrelated to the issues of this proceeding, unnecessary to the decision, unsupported by the record, erroneous, contrary to the Board's commitment to neutrality on a controversial issue, reverses STB precedent without explanation, takes a position that is highly prejudicial to the interests of motor carriers and finally, it constitutes rulemaking, contrary to the requirements of 5 U.S.C. §553.

Respectfully submitted,

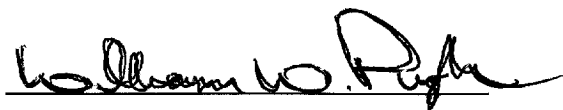


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing petition has been served on all parties of record, postage prepaid, this 11th day of April, 2000.

A handwritten signature in black ink, appearing to read "William W. Pugh", written over a horizontal line.

William W. Pugh

APPENDIX A

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SERVICE DATE - FEBRUARY 11, 2000

This decision will be printed in the bound volumes of the printed reports at a later date.

~~SURFACE TRANSPORTATION BOARD~~

DECISION

Section 5a Application No. 61

NATIONAL CLASSIFICATION COMMITTEE — AGREEMENT

Decided: February 9, 2000

The Surface Transportation Board grants, in part, reconsideration of its prior decision announcing an intention to approve renewal of the bureau agreement of the National Classification Committee only if the agreement is amended to provide for more effective shipper participation

BY THE BOARD:

In our prior decision in this proceeding, we announced that we intended to approve the bureau agreement of the National Classification Committee (NCC) only if (1) the agreement is amended to provide for more effective shipper participation and (2) the authority for collective publication of a standard bill of lading (which NCC describes as the "Uniform Bill of Lading" or "UBL") is deleted from the agreement. Petitions for reconsideration were filed by the American Trucking Associations, Inc. (ATA), and by NCC. Replies in opposition to the petitions for reconsideration were filed by The National Industrial Transportation League (NITL); jointly by the Health and Personal Care Distribution Conference, Inc., and the National Small Shipments Traffic Conference, Inc. (HPCDC/NASSTRAC); and by the Transportation Intermediaries Association. In this decision, we grant the petitions for reconsideration insofar as the bill of lading issue is concerned, but otherwise deny them.

BACKGROUND

The provisions of 49 U.S.C. 13703(d) and (e), as adopted by the ICC Termination Act of 1995 (ICCTA), Pub. L. No. 104-88, 109 Stat. 803, limited rate bureau approvals to three years and provided that existing motor carrier rate bureau agreement approvals would expire on December 31, 1998, unless they were extended by the Board. To implement section 13703, we initiated a proceeding in a notice published in the Federal Register on November 13, 1997, at 62 FR 27653. After reviewing the extensive public comments filed in response to the November

Given this discussion, which took place early in the legislative process, and which was not negated later in the process, we will grant the request of ATA and NCC that we allow NCC's agreement to continue to contain provisions for collective consideration of its UBL.¹³

However, we will be sensitive to any challenge that may be raised about any particular bill of lading that NCC may develop. HPCDC/NASSTRAC have identified several provisions in NCC's UBL that are of concern to their members. We have recognized in the past that any liability limitation imposed by a bill of lading should be effected in a way that gives the shipper actual notice of the arrangement being undertaken.¹⁴ We intend to allow continued collective action on bills of lading, but we will remain available to address complaints about the terms of any bill of lading that NCC may produce.

SUMMARY

In summary, except as to the bill of lading issue, we find that reconsideration is not warranted, and we will initiate the proceeding contemplated in the NCC Decision.¹⁵

¹³ We disagree with petitioners' argument that we are statutorily precluded from terminating antitrust immunity for the collective establishment of bills of lading. Petitioners note that, under the motor carrier exemption provision of 49 U.S.C. 13541(e)(1), we may not exempt from regulation carriers' activities relating to loss and damage, or to procedures that we approve under section 13703. Petitioners then draw the inference that section 13541(e)(1) limits the activities as to which we may deny antitrust immunity under section 13703. But as HPCDC/NASSTRAC note, granting or denying an exemption and continuing, modifying or discontinuing antitrust immunity for collective actions are separate and distinct functions under the statute. A lack of authority to exempt an activity from regulation provides no basis for a finding that we must grant or continue antitrust immunity. Rather, what the statute says is that we may not condition our approval on continued compliance with laws, regulations, or orders under section 13703 and then turn around and exempt the carriers from those requirements under section 13541.

¹⁴ Amend the Uniform Straight Bill of Lading and Accompanying Contract Terms and Conditions, STB Docket No. ISM 35002 (STB served Dec. 24, 1997).

¹⁵ We believe that our action here, which will further the goal that classification actions be fair and reasonable by promoting participation in the classification process by affected shippers, advances the relevant NTP factors. Because the statute expressly requires classifications to be reasonable, our decision should not have an improper adverse affect on those NTP considerations relating to carrier profits. And to the extent that our action facilitates the publication of reasonable classifications, it should affirmatively encourage competition and

(continued...)

APPENDIX B

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SERVICE DATE - DECEMBER 24, 1997

SURFACE TRANSPORTATION BOARD

DECISION

STB DOCKET NO. ISM 35002

AMEND THE UNIFORM STRAIGHT BILL OF LADING AND ACCOMPANYING
CONTRACT TERMS AND CONDITIONS
(National Motor Freight Classification)

Decided: December 19, 1997

In Supplement 3 to Tariff STB NMF 100-X, the National Motor Freight Classification (NMFC), issued by the National Motor Freight Traffic Association, Inc. (NMFTA), Agent, an amendment to the Uniform Straight Bill of Lading is proposed to become effective December 27, 1997.¹ The amendment is proposed pursuant to an approved collective action agreement. A protest requesting suspension and investigation of the amendment was filed by the Transportation Consumer Protection Council, Inc. (TCPC). NMFTA filed a reply to the protest.

TCPC contends that, if the proposed changes are permitted to become effective, carriers will have created a new "unfiled rate doctrine" through incorporation of unfiled tariffs by reference in the bill of lading. TCPC also contends that the proposal will result in unreasonable practices contrary to the public interest, in that (1) carriers will be collectively establishing liability limitations published in the NMFC in violation of 49 U.S.C. 14706(c)(1)(C); (2) the statute does not permit carriers to incorporate liability limitations in unfiled tariffs absent written agreement of the shipper; and (3) a large percentage of the shipping public lacks sufficient expertise or personnel to request and review tariffs from carriers before shipping. TCPC contends that the common law requires a carrier to obtain the shipper's informed written consent, before shipping, in order to limit its liability.

In its reply, NMFTA states that the proposed bill of lading is the result of a cooperative effort between NMFTA and the National Small Shipments Traffic Conference (NASSTRAC), and that it is intended to reflect changes implemented by the Trucking Industry Regulatory Reform Act of 1994 and the ICC Termination Act of 1995, as well as to simplify, modernize and streamline the provisions of the prior version. NMFTA indicates that the proposed bill of lading has received public support from shippers as well as carriers, and that TCPC's protest is motivated by TCPC's pecuniary interest in a competing bill of lading that it is aggressively marketing to potential buyers.

¹ The effective date was postponed from December 20, 1997, to December 27, 1997, by Supplement 4.

After giving careful consideration to the issues raised in the protest and reply, we find that the amendment should not be suspended and investigated. It will, therefore, be permitted to become effective as proposed.

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, without any further written agreements with shippers. We recognize that section 14706(c)(1)(A) provides that released rates generally are triggered by an express declaration or agreement of the shipper. However, that general provision is subject to the language of paragraph (B), which permits carriers to establish released rates in documents they maintain at their facilities, so long as they provide those documents to shippers on request. Unless carriers are allowed to incorporate provisions from other sources, the sheer volume of provisions that they would have to include in bills of lading would likely render them unusable in their current form. Nevertheless, in the absence of filed tariffs and the "filed rate doctrine," carriers clearly have a greater responsibility to ensure that shippers are made aware of the applicable provisions, and courts may well disallow attempts to enforce incorporated provisions where it can be shown that the carrier failed to provide adequate notice of such provisions to shippers. See H.R. Rep. No. 422, 104th Cong., 1st Sess. 222-23 (1995) (Pending completion of Department of Transportation Study, intent of statute is to permit motor carriers to establish released rates, so long as they provide to shippers, on request, "the rate, classification, rules, and practices upon which any rate applicable to a shipment is based."). We believe NMFTA's amendment to the Uniform Straight Bill of Lading assists in alerting shippers to the carriers' responsibility of disclosure.

NMFTA's bill of lading would prominently disclose to the shipper in note 2 the fact that limitations on liability may exist and that information regarding these 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.

Finally, we do not believe that the amendment runs afoul of the statutory prohibition against collective discussion of rules to limit liability. In our view, the amendment relates

simply to ways of incorporating provisions into the bill of lading from other sources, and the fact that certain of the incorporated provisions might relate to liability limitations contained in individual carriers' rules does not constitute collective discussion of rules to limit liability.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

APPENDIX C

Taken From the Conference Report Accompanying the
Interstate Commerce Commission Termination Act of 1995
Explanation For Changes In §14706(c)

LIABILITY

House Bill

Sec. 14706. Liability of carriers under receipts and bills of lading. This section preserves the current liability provisions, which makes carriers and freight forwarders fully liable for loss or damage except to the extent there is a prior agreement between the carrier and shipper limiting the carrier's liability or if the carrier maintains a schedule of rules and rates which is provided to the shipper upon request. The Secretary is directed to submit to Congress within 18 months a report on whether any modifications or reforms should be made to the loss and damage provisions of this section.

Senate amendment

Sec. 14706 (Liability of carriers under receipts and bills of lading) preserves in Part B of the "Carmack Amendment" contained in 49 U.S.C. 11707, which makes carriers and freight forwarders fully liable for loss or damage except to the extent the parties agreed in advance to limit the carriers' liability.

CONFERENCE SUBSTITUTE

The Conference adopts the House provision with modifications. The language in subsection (c)(1) has been revised to clarify that carriers may, subject to the provision of this chapter (including the requirements of Section 13710(a)), establish rates under which the liability of the carrier is limited to a value established by written or electronic declaration of the shipper or by written agreement between the carrier and shipper if that value would be reasonable. If the motor carrier does not file a tariff with the Board, it shall provide under Section 13710(a) to the shipper, upon request, the rate, classification, rules, and practices upon which any rate applicable to a shipment, or agreed to, is based. The new subsection also prohibits discussion, consideration or approval as to rules to limit liability on the part of carriers acting under an agreement approved pursuant to section 13703. The conference agreement includes the Senate provision that the review by the Secretary on whether modifications or reforms should be made to the cargo loss and damage provision should be completed within 12 months.

The intention of this conference agreement is to replicate, as closely as possible, the practical situation which occurred prior to the enactment of the Trucking Industry Regulatory Reform Act of 1994 (TIRRA), which repealed the requirement that tariffs be filed with the ICC for individually determined rates. Prior to the enactment of TIRRA, carriers had the ability to limit liability as a part of the terms contained in the tariff. By signing a bill of lading which incorporated by reference the tariff, the shipper was deemed to have agreed to the tariff and its conditions and terms. However, the carriers was under no obligation to specifically notify the shipper of the conditions or terms of the tariff. It was the responsibility of the shipper to take an affirmative step to determine what was contained in the tariff—usually through the retaining of a tariff watching service. An unintended and unconsidered consequence of TIRRA was that, when the tariff filing requirement was repealed, carrier lost this particular avenue as a way of limiting liability. This provision is intended to return to the pre-TIRRA situation where shippers were responsible for determining the conditions imposed on the transportation of a shipment. (emphasis added).

The provision continues an existing provision from section 10730, but substitutes a reference to new section 13710 for the old law's reference to section 10702. In the TIRRA, the Congress eliminated most individual tariff filings (provided for under 10702) and substituted a regime (contained in Section 13710) where carriers would maintain schedules of rates, classifications, rules and practices and make such schedules available to shippers upon request. H.R. Rep. No. 104-422, 104th Cong., 1st. Sess. (1995) at page 223.

APPENDIX D

**Before the
SURFACE TRANSPORTATION BOARD**

STB DOCKET NO. ISM 35002

**AMEND THE UNIFORM STRAIGHT BILL OF LADING AND
ACCOMPANYING CONTRACT TERMS AND CONDITIONS**

PETITION

**National Small Shipments Traffic Conference, Inc.
Health and Personal Care Distribution Conference, Inc.**

**By: Daniel J. Sweeney
1750 Pennsylvania Avenue N.W.
Washington, DC 20006**

**McCarthy, Sweeney & Harkaway
Of Counsel**

Dated: May 26, 1998

In the discussions between NASTRAC and NMFTA leading up to the compilation of this new bill of lading, the single most difficult issue addressed was the appropriate language for Note 2 . The amicable decision reached was to simply make reference on the bill to the statutory section embracing the Carmack Amendment in ICCTA. Thus was crafted this compromise language which was designed simply to give notice of the statute on the bill, without injecting the interpretation of either shippers or carriers onto the bill, thereby leaving it up to the courts to interpret Carmack in the context of a real dispute, if and when an appropriate loss and damage case should arise.

In other words, the new bill of lading was not intended to resolve a dispute as between shippers and carriers as to whether a carrier, by placing a general released value rule in its tariff, can defeat the statutory right of a shipper to decide whether to agree to release the value of its shipment to substantially less than the actual value. For example, a shipper makes an unreleased shipment of 500 pounds with an actual value of \$50 per pound and the carrier loses it (most likely, if it is "lost", the shipment was stolen enroute). The carrier has a rule in a tariff in its office stating that it does not accept shipments with actual value over \$5.00 per pound and, if a shipment is not agreed by the shipper in writing to be released to a \$5.00 per pound maximum value, the rule declares it to be so released. The shipper files for \$25,000 damages for the actual loss it suffered and the carrier responds with only \$2,500, based upon its "released" value rule. Under these circumstances, using the STB Decision's interpretation, the carrier can leave the shipper holding the bag for \$22,500 or ninety percent of its actual loss.

It may be argued that a carrier should not be required to be the insurer of extremely high value freight, since it sometimes has no knowledge of the value of the

freight it is tendered, and that it should be allowed to set some limit. But that is precisely the issue which Congress found it appropriate to turn over to the Secretary of Transportation for a recommendation in Section 14706(g) of the ICCTA Act of 1995. If Congress had resolved to turn over an unbridled right to self-limit liability to each carrier, with some carriers setting their own limit at \$2.00 per pound and others at \$5.00, \$10.00, \$25.00 or \$50.00 per pound, then the assignment given to the Secretary would be wholly unnecessary to protect the carriers.

There was no warrant for the Board to go any further than to simply deny the protest and allow the new bill of lading to take effect, including its Note 2:

NOTE (2) Liability Limitation for loss and damage on this shipment may be applicable. See 49 U.S.C. §14706(c)(1)(A) and (B).

By its language, the note simply refers the shipper and the carrier to the terms of the statute. At that point, it is a matter for the courts to apply and interpret the statutory language in the context of an actual loss and damage claim. The carriers and the shippers knew that when they acquiesced in the language of Section 14706(c) as adopted by Congress in the ICCTA Act.

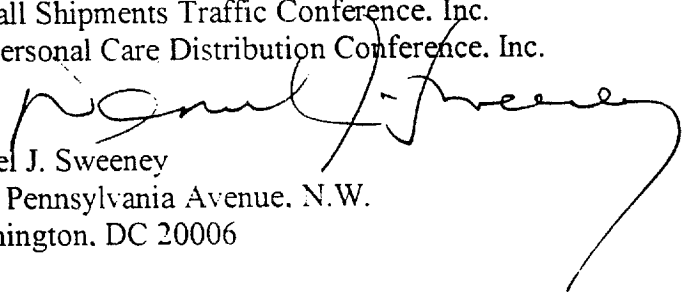
The Board has no jurisdiction to decide loss and damage claims or to award damages, however measured, for loss and damage. It is particularly inappropriate (as well as totally unanticipated) for the Board to issue, in effect, a declaratory order over a potential dispute as to which it would have no jurisdiction. It is akin to a court in a foreign country undertaking to issue a declaratory order as to a potential cause of action in the United States over which it would have no jurisdiction. More importantly, it was not necessary for the Board to insert a discussion of the interpretation of Note 2 into its

CONCLUSION

By inserting a gratuitous discussion of a questionable interpretation of Section 14706 in a suspension decision, the Board has done a substantial disservice to all shippers. By quoting that dicta, carrier claims agents can begin rejecting the claims of shippers who did not declare a value or agree to a released value in writing. Whether or not the Board agrees with the shippers' interpretation of this section of the ICCTA, an interpretation of the loss and damage provision of the statute is unnecessary to the decision and takes the Board into an area beyond its jurisdiction. These Shipper Conferences are not requesting that the Board reverse its language and come forward with an interpretation consistent with the shippers' view. All that is required is for the Board to amend its decision by removing the two offensive paragraphs and leave the interpretive issue to the courts which have jurisdiction over cases arising under this provision of the statute.

Respectfully submitted,

National Small Shipments Traffic Conference, Inc.
Health and Personal Care Distribution Conference, Inc.

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APPENDIX E

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EB

SERVICE DATE - AUGUST 4, 1998

SURFACE TRANSPORTATION BOARD

DECISION

STB DOCKET NO. ISM 35002

AMEND THE UNIFORM STRAIGHT BILL OF LADING AND ACCOMPANYING
CONTRACT TERMS AND CONDITIONS

Decided: July 29, 1998

In a decision served December 24, 1997, the Board declined to suspend and investigate an amendment to the Uniform Straight Bill of Lading proposed to become effective December 27, 1997, in Supplement 3 to Tariff STB NMF 100-X, issued by the National Motor Freight Traffic Association, Inc. (NMFTA), Agent. The National Small Shipments Traffic Conference, Inc. (NASSTRAC), and the Health and Personal Care Distribution Conference, Inc., (together, Shipper Conferences) filed a joint petition requesting the Board to reopen the proceeding for the limited purpose of striking certain language that they contend is gratuitous, harmful to the interests of all shippers, and not necessary to the issuance of the decision. Filings in support of the petition were made by the Transportation Consumer Protection Council, Inc., and the National Industrial Transportation League (NITL). Replies in opposition to the petition were filed by NMFTA, and the Distribution and LTL Carriers Association.¹

Shipper Conferences contend that a decision denying a suspension is traditionally limited to stating that the petition for suspension is denied and that, since there is no judicial appeal allowable from a suspension decision, an opinion or rationale is not necessary. They state that, with the completion of motor carrier deregulation by the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995) (ICCTA), there is very little in that Act which affords shippers any protection as to motor freight shipments, and that the Carmack Amendment, as brought forward therein, is its single most important provision for the protection of shippers of motor freight. According to Shipper Conferences, the gratuitous language in the Board's decision, reading 49 U.S.C. Section 14706 as allowing carriers to set unilateral value limits on recovery for loss and damage without a written declaration or agreement by the shipper, would strip away that protection. They argue that the Board should level the playing field by removing that language from its decision.

Shipper Conferences state that NASSTRAC was one of the architects of the revised bill of lading, and that it would not have agreed to including a "Note (2)" on the bill of lading that it interpreted as taking away the option of the shipper as to whether or not to release the value of its freight. In Shipper Conferences' view, the provision was designed to simply give notice on the

¹ NMFTA filed a separate reply in response to the NITL filing.

bill of lading of the statutory section embracing the Carmack Amendment in the ICCTA, without injecting the interpretation of either shippers or carriers, thereby leaving it up to the courts to interpret the Carmack Amendment in the context of a real dispute, if and when an appropriate loss and damage case should arise.

In its reply, NMFTA raises procedural issues with Shipper Conferences' petition, contends that the Board's rationale has been customarily included as an integral and necessary part of all of its decisions on protests (particularly those involving the Uniform Bill of Lading), and argues that the cited language in the Board's decision is completely consistent with applicable law and the clearly expressed intent of Congress. NMFTA disputes Shipper Conferences' assertion that the language in "Note (2)" was intended merely to make reference to the statute, and contends that the carrier members of the Ad Hoc Committee were absolutely adamant in insisting that "Note (2)" must continue to perform its intended purpose of notifying shippers of the presence of inadvertence clauses in the carriers' tariffs.

The parties on both sides of the issue present extensive arguments supporting their positions. An extensive review of these arguments is not necessary for our purposes, however, because our rationale for not suspending and investigating the amendment to the Uniform Bill of Lading was not based upon whether the failure to declare a value on the bill of lading could or could not result in the application of released value rates. To the contrary, our rationale was based on our conclusions that the amendment (1) alerted shippers to the possibility of incorporated provisions and provided that such provisions were available to shippers on request, and (2) did not run afoul of the statutory prohibition against collective discussion of rules to limit liability.²

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.

It is ordered:

1. The second and third paragraphs on page 2 of our decision in this docket served on December 24, 1997, are revised to read as follows:

² An earlier NMFTA proposal was suspended by the Board on the grounds that (1) it "may be an unreasonable practice to subject bills of lading to non-filed-tariff provisions . . . without ensuring . . . that information regarding such provisions is readily available to shippers", and (2) it "may violate the statutory prohibition against collective establishment of rates relating to limitation of liability."

"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. Unless carriers are allowed to incorporate provisions from other sources, the sheer volume of provisions that they would have to include in bills of lading would likely render them unusable in their current form. We believe NMFTA's amendment to the Uniform Straight Bill of Lading assists in alerting shippers to incorporated provisions and the carriers' responsibility to make them available upon request."

2. This decision is effective on the date of service.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

