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SURFACE TRANSPORTATION BOARD

DOCKET NUMBER ISM 35008

PETITION FOR SUSPENSION AND INVESTIGATION
NMFC 100-AP SUPPLEMENT 2

AMENDMENTS TO THE UNIFORM STRAIGHT BILL OF LADING
AND ACCOMPANYING CONTRACT TERMS AND CONDITIONS
ISSUED JULY14, 2016, TO BECOME EFFECTIVE AUGUST 13, 2016

SUPPLEMENTAL PLEADING OF THE TRANSPORTATION & LOGISTICS COUNCIL

ON BEHALF OF

THE TRANSPORTATION & LOGISTICS
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Dated: September 12, 2016

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SUPPLEMENTAL PLEADING OF THE TRANSPORTATION & LOGISTICS COUNCIL

COMES NOW the Transportation and Logistics Council, Inc. and hereby files this Supplemental Pleading in support of its Petition for Suspension and Investigation of the National Motor Freight Traffic Association's proposed modification of the Uniform Straight Bill of Lading as set forth in the National Motor Freight Classification.

In its decision served August 12, 2016 in this proceeding, the Board identified certain questions as to its jurisdiction to investigate the changes adopted by the National Motor Freight Traffic Association ("NMFTA") to the terms and conditions of the Uniform Straight Bill of Lading as published by NMFTA in Supplement 2 to its National Motor Freight Classification ("NMFC"), STB NMF 100-AP. In particular, the Board invited further comment on the following points:

(1) Whether 49 U.S.C. § 13703(a)(5)(A) or 49 U.S.C. § 14701 provides the Board with jurisdiction to investigate tariff provisions, like the NMFC provisions at issue, that are collectively made and implemented by carrier groups (i.e., the NMFTA) pursuant to an agreement that was not approved by the Board?

(2) How the Board's decision in *Motor Carrier Bureaus—Periodic Review Proceeding*, EP 656 (STB served May 7, 2007) impacts the Board's jurisdiction in this proceeding to investigate the proposed changes to the Uniform Straight Bill of Lading?

I. JURISDICTION OF THE BOARD

A. Jurisdiction under 49 U.S.C. 13703

The Board clearly has jurisdiction to investigate any tariff provision that is collectively made by a group of carriers pursuant to 49 U.S.C. 13703. Accordingly, the Board has jurisdiction to investigate the changes implemented by the NMFTA to the Uniform Straight Bill of Lading in the NMFC, which is a collectively made tariff.

Subsection 13703(a)(1) allows carriers to "enter into an agreement" with each other, such as the one that establishes and operates the NMFTA, to collectively establish rates, classifications, rules, etc. 49 U.S.C. 13703(a)(1). Pursuant to this agreement, the NMFTA publishes the NMFC which establishes, among other things, certain rules, terms and conditions in accordance with § 13703(a)(1)(E).

The term "agreement" as used in section 13703(a)(1) does not state that it must be "approved" by the Board. Indeed, subsection 13703(a)(2) allows, but does not require, carriers to submit such an agreement to the STB for approval which, if approved, would give the carriers antitrust immunity. It was those approvals and concomitant antitrust immunity that were terminated in 2007 in *Motor Carrier Bureaus—Periodic Review Proceeding*, EP 656 (STB served May 7, 2007), see *infra*.

But § 13703(a)(5) makes clear that approved agreements and antitrust immunity are not the only subjects covered by § 13703. Subsection 13703(a)(5)(A) empowers the STB to "suspend and investigate the reasonableness of any rate, rule, classification, or rate adjustment of general application made pursuant to an agreement under this section." It is critical to note that subsection 13703(a)(5)(A) is not limited to an "approved" agreement. This distinction is confirmed by the wording of Subsection 13703(a)(5)(B) that is specifically limited to "an agreement approved under [§ 13703]." Thus, any tariff rule implemented by a group of carriers pursuant to an agreement, whether the agreement is "approved" or not, is subject to the Board's jurisdiction.

Applying the foregoing to the instant proceeding leads to one conclusion – the STB has jurisdiction to investigate the changes to the bill of lading in the NMFC that were implemented by the NMFTA pursuant to § 13703(a)(5)(A). The NMFC bill of lading rules, terms, and conditions were collectively established and agreed to by the member carriers pursuant to a § 13701(a)(1) agreement. Accordingly, the STB has power and authority the suspend, investigate, and craft appropriate remedies regarding these bill of lading rules, terms and conditions, even though these changes were not made under the auspices of a § 13703(a)(2) "approved" agreement.

B. Jurisdiction under 49 U.S.C. 14701

Under 49 USC § 14701, the Board has general authority to consider and investigate complaints regarding alleged violation of any requirements under Subtitle IV. If the Board finds a violation has occurred, § 14701 empowers the Board to craft a remedy by taking "appropriate action to compel compliance."

The Council maintains that the changes to the Uniform Straight Bill of Lading rules, terms and conditions published in the NMFC by the NMFTA are unreasonable under 49 U.S.C. 13701(a)(1)(C) and thus constitute a violation within the purview of § 14701. As such, the STB has the jurisdiction and the power to investigate and take appropriate action pursuant to 49 U.S.C. § 14701.

C. Other Jurisdictional Considerations

The Council further submits that the Board has jurisdiction to investigate under 49 U.S.C. § 1321. The NMFTA, in Section I of its reply, asserted that Section 1321 applies "exclusively to procedures pertaining to the reasonableness of rail rate cases". The NMFTA's interpretation of this statutory provision is wrong.

Subsection 1321(a) states:

> (a) In General.-The Board shall carry out this chapter and subtitle IV. Enumeration of a power of the Board in this chapter or subtitle IV does not exclude another power the Board may have in carrying out this chapter or subtitle IV. The Board may prescribe regulations in carrying out this chapter and subtitle IV.

This section refers to the Board's powers with respect to "Subtitle IV" - essentially the re-codification of the Interstate Commerce Act. Subtitle IV, which is entitled "Interstate Transportation," is divided into three parts – Part A applies to rail carriers, Part B applies to motor carriers, water carriers, brokers and freight forwarders, and Part C applies to pipelines.

Clearly this language applies to **all** carriers under Subtitle IV of Title 49, including Part B (which includes Chapters 131 through 149) governing motor carriers. If Congress had intended § 1321(a) to apply only to rail carriers it would have said "Subtitle IV Part A". The STB's powers under § 1321(a) are in addition to all other powers the Board has under either Chapter 13 or under any of the Chapters in Subtitle IV.

Subsection 1321(b) gives the STB the power and authority to:

> (b) Inquiries, Reports, and Orders.-The Board may-
>
> (1) inquire into and report on the management of the business of carriers providing transportation and services subject to subtitle IV;
>
> (2) inquire into and report on the management of the business of a person controlling, controlled by, or under common control with those carriers to the extent that the business of that person is related to the management of the business of that carrier;
>
> (3) obtain from those carriers and persons information the Board decides is necessary to carry out subtitle IV; and
>
> (4) when necessary to prevent irreparable harm, issue an appropriate order without regard to subchapter II of chapter 5 of title 5 [the Administrative Procedure Act].

Subsection 1321(b) provides power and authority for the STB to investigate the carriers and the NMFTA. "Management of the business" is broad enough to encompass the carriers' business practices and the agreements, organizations, and mechanisms they are using to carry out those practices. The STB's power to inquire extends to "a person . . . controlled by . . . carriers to the extent that the business of that person is related to the management of the business of that

carrier." That language extends the STB's inquiry authority to NMFTA that is controlled by the member carriers.

All of the information sought in the requested STB investigation and suspension is necessary to carry out the Board's duties under Subtitle IV as contemplated in §1321(b)(3). For example, the Board has an obligation under the congressionally mandated Transportation Policy in § 13101(a)(2)(C):

> (2) in overseeing transportation by motor carrier, to promote competitive and efficient transportation services in order to . . . (C) meet the needs of shippers, receivers, passengers, and consumers;"

Clearly, Section 1321 section preserves the power of the Board to exercise its general equity jurisdiction and to craft remedies that are appropriate in situations that do not involve rail carriers and "rail rate cases". A suspension order is authorized in order to prevent irreparable harm to shippers, receivers, consumers, freight forwarders (who wear a shipper hat when they engage the services of a motor carrier), and freight brokers.

It should be noted that there is precedent for the Board to exercise jurisdiction in this matter. The Board has in fact exercised its jurisdiction in at least two prior occasions involving the reasonableness of provisions in the Uniform Straight Bill of Lading - Docket 35000 in 1996 and Docket 35002 in 1997, when the issue was replacing the former "lawfully filed tariffs" language.

Lastly, it should be observed that Section 13501 delineates the scope of the Board's general jurisdiction "as specified in this part," i.e. in all the chapters in Part B of Subtitle IV. The fact that there may not be any specific provision in Chapter 135 governing the terms and conditions of the bill of lading does not limit this jurisdiction.

II. IMPACT OF THE BOARD'S DECISION IN EP 656

The STB's decision in *Motor Carrier Bureaus—Periodic Review Proceeding*, EP 656 (STB served May 7, 2007) was focused on whether the STB should continue to approve 13703 agreements among carriers in order to allow the rate bureaus to continue enjoying anti-trust immunity. The Board determined that continued approval of such agreements was not necessary.

The Board's decision to terminate the then-existing approvals had no effect other than "as related to application of the antitrust laws referred to in subsection (a)." 49 U.S.C. § 13703(c)(1)(D). As stated by the Board:

> Our decision terminating approval of the bureau agreements does not prohibit carriers from entering into agreements with each other to engage in collective activities related to ratemaking, classification or any other subjects enumerated in section 13703(a)(1)(A)-(G). Section 13703(a) expressly provides carriers with

> "authority to enter" into such agreements, and does not require that agreements be submitted to the Board. The statute also explicitly states that termination of Board approval of a bureau agreement "has effect only as related to the application of the antitrust laws." 49 U.S.C. 13703(c)(1).

EP 655 at 11.

Thus, the Board clarified that carriers may still enter into agreements, with or without STB approval exempting them from the operation of the antitrust laws referred to in § 13703(a)(6). However, if they enter into such agreements without approval, the carriers do not enjoy antitrust immunity. But, nothing in the Board's decision limited or impacted the Board's jurisdiction to investigate tariff provisions implemented pursuant to unapproved agreements in accordance with 13703(a)(5), see discussion *supra*.

III. SECTION BY SECTION ANALYSIS OF THE PROPOSED CHANGES TO THE UNIFORM STRAIGHT BILL OF LADING

Section 1.(a)

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

> Sec. 1. (a) The carrier or the party *in possession* of any of the property described in this bill of lading shall be liable as at common law for any loss thereof or damage thereto, except as hereinafter provided.

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

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

The "Carmack Amendment", as codified at 49 U.S.C. 14706 - Liability of carriers under receipts and bills of lading, provides:

> (a) GENERAL LIABILITY-
> (1) MOTOR CARRIERS AND FREIGHT FORWARDERS- A carrier providing transportation or service subject to jurisdiction under subchapter I or III of chapter 135 shall issue a receipt or bill of lading for property it receives for transportation under this part. That carrier and any other carrier that delivers the property and is providing transportation or service subject to jurisdiction under subchapter I or III of chapter 135 or chapter 105 are liable to the person entitled to recover under the receipt or bill of lading. The liability imposed under this paragraph is for the actual loss or injury to the property caused by (A) the receiving carrier, (B) the delivering carrier, or (C) another carrier over whose line or route the property is transported in the United States or from a place in the United States to a place in an adjacent foreign country when transported under a through bill of lading and,

> except in the case of a freight forwarder, applies to property reconsigned or diverted under a tariff under section 13702. Failure to issue a receipt or bill of lading does not affect the liability of a carrier. . . .

Comment:

While the statute requires a receiving carrier to "issue a receipt or bill of lading", it also says that "Failure to issue a receipt or bill of lading does not affect the liability of a carrier".

The Carmack Amendment as originally enacted, placed liability on the receiving carrier, and subsequent amendments extended the liability to intermediate and delivering carriers, so that claimants would not have to search out the carrier actually responsible for the loss or damage.

As currently codified the liability imposed by the statute applies to loss of damage caused by "(A) the receiving carrier, (B) the delivering carrier, or (C) another carrier over whose line or route the property is transported in the United States or from a place in the United States to a place in an adjacent foreign country when transported under a through bill of lading."

Thus it is clear that the carrier's liability does NOT depend on whether it is the carrier "shown" on the bill of lading, but upon whether it is in the possession of the goods at the time of the loss or damage.

As a practical matter, bills of lading are often prepared by shippers that insert the name of a broker or intermediary in the space for the name of the carrier. Sometimes the intended carrier is not the one that actually picks up and receives the goods for transportation. And often the loss or damage occurs while the goods are in the possession of a connecting or delivering carrier on an interlined shipment.

The new language would imply that a carrier that is not "shown" on the bill of lading would not have liability for loss or damage, which is clearly contrary to the Carmack Amendment.

Section 1.(b)

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

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

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

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

Comment: There are two significant changes in the new language.

First, the new UBOL changes Section 1.(b) include the addition of "riots or strikes, or any related causes" to the list of common law defenses. "Riots or strikes" have never been included in the common law defenses. In addition "any related causes" invites a myriad of new defenses never contemplated or recognized at common law and most certain to invite litigation.

Second, the new UPOL adds the sentence at the end of Section 1.(b) - "The burden to prove carrier negligence is on the shipper"

The Carmack Amendment reflects the common law that the carrier is strictly liable and is essentially an "insurer" of the goods. These changes are contrary to over a century of law involving the interpretation and application of the "Carmack Amendment", now codified at 49 USC 14706. As the Supreme Court stated in *Missouri Pacific R.R. Co. v. Elmore & Stahl*, 337 U.S. 134 (1964)

> . . .a carrier, though not an absolute insurer, is liable for damage to goods transported by it unless it can show that the damage was caused by '(a) the act of God; (b) the public enemy; (c) the act of the shipper himself; (d) public authority; (e) or the inherent vice or nature of the goods...' 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. *Thereupon, the burden of proof is upon the carrier to show both that it was free from negligence and that the damage to the cargo was due to one of the excepted causes relieving the carrier of liability*. .

In other words, under Carmack and the common law, except for the five common law defenses, loss or damage resulting from any other event, that might or might not be caused by circumstances beyond the carrier's control, would NOT be a defense and the carrier would be liable regardless of whether or not it was negligent.

The reasoning for not requiring the shipper to prove negligence is obvious. When the shipper tenders his goods to the carrier he doesn't "ride shotgun" with them. He has no way to know what the carrier does with the goods, so it would be virtually impossible for the shipper to

prove that the cause of the loss or damage was the carrier's "negligence", for example, which party may have caused an accident or whether the carrier failed to adequately protect the goods from theft by a third party.

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

It was anticipated that NMFTA might claim that the new language could be construed to only change the carrier's burden of proving freedom from negligence for the listed bill of lading contractual exceptions to liability ("when the property stopped and held in transit upon request of shipper, owner or party entitled to make such request; or from faulty or impassible highway, or by lack of capacity of a highway, bridge or ferry; or from a defect or vice in property"). However, it is clear from NMFTA's August 5th Response to the Council's Petition that this is not claimed.

The problem is that this new sentence at the end of Section 1.(b) is so ambiguous that it is virtually certain to be construed both by carriers and the courts as changing the burden of proof for any and all defenses, excuses or claimed exceptions to the carrier's liability for loss or damage to goods in its possession, and to nullify the language of Section 1.(a).

Section 2

Section 2 of the "old" bill of lading provided:

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

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

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

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

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

Section 3.(b)

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

> (b) Claims for loss or damage must be filed within nine months after the delivery of the property (or, in the case of export traffic, within nine months after delivery at the port of export), except that claims for failure to make delivery must be filed within nine months *after a reasonable time for delivery has elapsed*.

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

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

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

There is also a problem with the added language in Sec. 3.(b) in the case of import traffic requiring a claim to be filed not more than 9 months “after pickup at the place of tender”. The claim filing period on import traffic starts to run at the time of pickup rather than the time of delivery. While the start time for claim filing is not specified in §14706, this change represents a major departure in standard practice. It also treats import freight differently from export freight, which could be a big problem for intermodal operators and users.

Potential Impact of Changes

Virtually all of the major "less-than-truckload" carriers in the U.S. are "participants" in the NMFC, and many of the "truckload" carriers are also participants.

NMFTA says that the use of the provisions in the NMFC, including the Uniform Straight Bill of Lading, is "entirely voluntary". While participation in the NMFC may be "voluntary",

once a carrier is a participant the rules in the NMFC make these provisions binding and mandatory for the following reasons.

1. Freight charges that are based on the classification of articles in the NMFC require the use of the UBOL, i.e., it is a mandatory condition for the use of class rates, see Item 360-B, Sections 1 a) and (b):

> Sec.1.Issuance and Requirements.
> Sec. 1 (a) .Carrier rates subject to the provisions of this Classification are conditioned upon the use of the appropriate bill of lading required by this rule, whether in printed or electronic form. . . .
> Sec. 1 (b). When property is transported subject to the provisions of this Classification, either domestic or export, the acceptance and use of the Uniform Straight Bill of Lading or the Straight Bill of Lading-Short Form is required. ...See Item 362.

2. Even if a shipper wants to use its own bill of lading it must comply with the provisions of the UBOL, including all of the terms and conditions, see Item 360-B, Section 1(h) and Note 1:

> Sec.1 (h). Consignors may elect to furnish their own bills of lading, provided all requirements of Sec.1 (a) through Sec. 1 (c) and Sec.2 of this Item are observed (see Note 1). (See also, 49 U.S.C. Sections 80110, 80111 and 80113.)
>
> Note 1-Consignor provided short form bills of lading need not be in any particular format, but must bear the title 'Shipper Provided Short Form Bill of Lading-Not Negotiable', as long as the information requirements of Sections 1 and 2 of this Item and Item 359 are observed. Bills of lading must be complete when tendered by the shipper to the carrier for signature. Bills of lading not conforming to the provisions found in this Item are subject to NMFC Items 362 and 365.

3. Even when the freight charges are not based on the classification of articles, such as mileage or point-to-point rates, Item 362-B says that all services performed by the participating carriers are subject to the UBOL and its terms and conditions:

> ITEM 362-B - APPLICATION OF BILLS OF LADING
> Unless the shipper and carrier have an effective prior written agreement to use another bill of lading, all motor carriage performed by carriers participating in this tariff shall be subject to the bill of lading terms and conditions of the Uniform Straight Bill of Lading shown in NMF 100-X and successive issues.

4. In addition to freight charges that are based on the class of an article, many carriers now base their liability limitations on the NMFC classification. In other words, the limitation of liability for loss or damage is "tied" to the class of the article.

NMFTA says it has 656 participants in the NMFC, which probably accounts for the motor carriers that transport 90% of the nation's freight. These participants - and therefore the shippers that use their services - are bound by the provisions in the NMFC, including the UBOL and its terms and conditions.

The Council recognizes that there may be some large shippers that have attorneys experienced and knowledgeable about transportation law, and have the clout to negotiate contract terms that protect them from these unreasonable practices. However, the rest of the shipping public are "captive shippers" since the rules established by the NMFTA are essentially the "only game in town".

Conclusion:

The wave of legislation deregulating the transportation industry that started in the late 1970's was intended to free the industry from economic regulation of carrier rates and charges by the federal and state governments. The former anti-trust exemptions for collective rate were essentially eliminated, although as part of ICCTA, 49 U.S.C. 13703 retained limited immunity for motor carriers to enter into agreements to collectively establish rates, classifications, mileage guides, rules and rate adjustments for general application based on industry average carrier costs. These agreements were initially subject to review and approval by the STB, but in 2007 the Board said that it no longer needed to review them, and terminated its approval of the agreements of the remaining rate bureaus and the National Classification Committee of NMFTA.

The Board has jurisdiction under 49 U.S.C. 13703 to investigate collectively made tariff provisions such as those at issue in this proceeding even when implemented through an unapproved agreement. The Board's decision to terminate approvals had no impact or effect on the Board's jurisdiction in this regard.

Surely it was not the intent of Congress in passing deregulatory legislation, nor of the Board in deciding it would no longer need to review approve collectively made agreements, to deprive the shipping public of any means to remedy blatantly unreasonable practices promulgated through the collective actions of carriers participating in an organization like NMFTA. Clearly the intervention of the Board is needed to "prevent irreparable harm".

Respectfully submitted,

George Carl Pezold

AMENDED CERTIFICATE OF SERVICE

I hereby certify that I have on this 12th day of September, 2016, served a true and correct copy of the foregoing Supplemental Pleadings of the Transportation & Logistics Council, Inc. in Docket ISM 35008 by first class mail, postage prepaid, and by electronic means, on counsel for the National Motor Freight Traffic Association, Inc. and NASSTRAC, Inc., and by first class mail, postage prepaid on Dave Giblin, ODW LTS, 345 High Street, Suite 600, Hamilton, OH 45011.

George Carl Pezold