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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB DOCKET NO. ISM 35008

PETITION FOR SUSPENSION AND INVESTIGATION
NMFC 100-AP SUPPLEMENT 2
AMENDMENTS TO THE UNIFORM STRAIGHT BILL OF LADING
AND ACCOMPANYING CONTRACT TERMS AND CONDITIONS
ISSUED JULY 14, 2016 TO BECOME EFFECTIVE AUGUST 13, 2016

SUPPLEMENTAL PLEADING OF NASSTRAC, INC. AND THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

In its decision served August 12, 2016 in this proceeding, the Board identified fundamental threshold questions as to its jurisdiction over the changes adopted by the National Motor Freight Traffic Association ("NMFTA") in verbiage on the back of the Uniform Straight Bill of Lading ("UBOL") published by NMFTA in the National Motor Freight Classification ("NMFC"). The Board also requested further comments on the implications of its decision served May 7, 2007 in Docket No. EP 656, Motor Carrier Rate Bureaus – Periodic Review Proceeding.

As NASSTRAC and NITL read the Board's decision, the question presented is primarily legal, relating less to whether the Board should investigate the disputed UBOL changes than whether the Board can investigate here. We believe the Board can and should address the important issues raised in this proceeding.

Though NMFTA's actions may also be vulnerable to challenge under the antitrust laws, the Board has the authority to provide guidance to the parties and the public by virtue of its authority to interpret the statute it is charged with administering. This proceeding presents novel issues with potentially unprecedented significance for motor carriers, their shipper and broker customers, and consumers.

The fact that the disputed NMFTA actions largely involve cargo claims, as to which the ICC and STB have always shared jurisdiction with courts, adds complexity but does not change our position that an investigation, or at least a declaratory order, is needed here.[1]

The Board's 2007 Decisions

The Board issued a number of decisions in 2007 in EP 656, supra, and EP 656 (Sub-No. 1), Investigation into Practices of the National Classification Committee. That the Board would seek further discussion of those proceedings in this one is understandable. In its 2007 decisions, the STB terminated its approval of agreements under 49 USC 13703 under which many motor carriers had, for decades, engaged in collective ratemaking.

This involved a two-step process, under which the National Classification Committee would assign class ratings to shippers' goods, and regional rate bureaus would publish class rate tariffs containing class rates corresponding to NCC-developed commodity class ratings. Both class-ratings and class rates rose steadily over the years, with the latter often subject to across-the-board general rate increases, in ways many shippers (including NASSTRAC and NITL) criticized as unreasonable and anticompetitive.

Collective ratemaking was defended by carrier rate bureaus (including NCC) as efficient and justifiable despite features of cartel-style pricing, due to individual carriers' right of independent action, and due to widespread discounting producing actual rates lower, for most shippers, than full undiscounted class rates.

At the time, shippers pointed out that, these factors notwithstanding, there can be little doubt that such practices would be price-fixing in violation of the antitrust laws, but for the fact that motor carrier rate bureaus enjoyed antitrust immunity based on STB approval of their Section 13703 agreements.

During the years leading up to the Board's 2007 decisions, various reforms short of loss of antitrust immunity were implemented. However, in 2007, with the support of the Department of Justice and Department of Transportation, the STB concluded that ending antitrust immunity for

[1] We are reluctant to disrupt an ongoing proceeding by adding a formal request for a declaratory order, but we are prepared to pursue that step, and pay the required filing fee, if other Board action such as an investigation is not taken.

the motor carriers collective ratemaking was "necessary and appropriate to address the public interest as articulated in 49 USC 13101", i.e., the National Transportation Policy adopted by Congress for U.S. Code Title 49, Subtitle IV, Part B, covering regulation of motor carriers, brokers and freight forwarders. See the decision served May 7, 2007 at 17. The Board went on to say (id.):

> The public interest in fair competition and reasonable rates [section 13101(a)(2)(B)] is paramount here and should not conflict with other national policies regarding motor transportation. Maximizing competition in the motor carrier industry should not lead to destructive competition or predatory pricing [section 13101(a)(2)(D). Collective ratemaking does not advance service to small communities [section 13101(a)(2)(G)], as rate bureaus are not authorized under section 13703(a)(1) to address service, individual markets, or the way that carriers respond to one another's rates.
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> Nor do we believe that collective ratemaking is supported by the public's interest in motor carrier efficiency [section 13101(a)(2)(B) and (F)], as the bureaus suggest…. Almost all prices in our economy are set without a reference to a baseline price, and, like DOJ and DOT, we see no reason why trucking should be an exception.

The Board's principal focus in its 2007 decisions was clearly collective ratemaking. Despite the expectation of the Board (and NASSTRAC, NITL and other shipper interests) that loss of the shield of antitrust immunity would lead to greater competition in motor carrier ratemaking, the changes were incomplete. The NCC, which was the forum for commodity classification by motor carrier members (taken from the membership of NMFTA), reorganized itself to preserve most if not all of the status quo ante.

The successor to the NCC, known as the Commodity Classification Standards Board, or CCSB, is now run by many of the Staffers who formerly worked for the NCC's carrier members, and similar practices are followed. There is also a "Classification Resource Committee", consisting of up to 100 motor carrier representatives, who "provide information and resources to the Commodity Classification Standards Board." See the NMFTA website, www.nmfta.org.

Shippers had hoped for an end to the cycle of commodity class rating increases that drive up motor carrier rates. However, we believed the Board was no longer in the business of regulating motor carrier ratemaking, so further efforts to introduce more competitive pricing may require challenges under the antitrust laws.

Over the last 9 years, NASSTRAC and NITL have therefore not come to the STB with complaints about motor carrier collective action. The reason for NASSTRAC's recent return to motor carrier collective action issues, and NITL's decision to join in, is simple. Alerted by the Transportation & Logistics Council ("TLC"), we learned that NMFTA had adopted changes to the verbiage on the back of the UBOL that make numerous changes in carrier practices under the Carmack Amendment that undermine decades of settled law accepted by shippers and carriers.[2]

TLC has provided a comprehensive discussion of the ways in which NMFTA is tilting the scales to favor motor carriers with respect to carrier liability for loss and damage to freight entrusted to their care. NASSTRAC and NITL support TLC's analysis.

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.

Significance of the Issues for the Public

As an example of the seriousness of these issues, compare the changes the NMFTA has made to Section 1(b) on the back of the UBOL with virtually universal understandings of valid defenses under the Carmack Amendment to carrier liability.

Legal research, as well as simply Googling "Carmack Amendment liability" or "loss and damage liability of motor carriers" will turn up numerous court decisions and websites reciting the widespread understandings of shippers and carriers that after a shipper files a timely claim

[2] NITL (The National Industrial Transportation League) is moving to intervene, and NASSTRAC and NITL are filing jointly in the expectation of NITL becoming a party to this proceeding.

asserting a claim with requisite details as to shipments not arriving, or arriving damaged, then the following rules apply.

The burden is on the carrier to establish first, that it was not negligent in any way; and second, that the loss was due to one of five recognized causes, namely (a) an act of God; (b) an act of the public enemy; (c) the act of the shipper or consignee; (d) an act of government or public authority; or (e), the inherent nature or vice of the goods shipped.

This recitation, and many others like it, tracks the leading case of Missouri Pacific R.R. v. Elmore & Stahl, 377 U.S. 136-37 (1964), which continues to be cited in court cases. Compare the foregoing understanding of Carmack Amendment liability with the new UBOL Section 1(b), as changed by NMFTA (emphasis added):

> No carrier shall be liable for any loss or damage or for delay caused by an Act of God, the public enemy, the authority of law 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 the request of the shipper, owner or party entitled to make such request; or from faulty or impassable 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 negligence is on the shipper.

This recitation goes much farther to limit carriers' cargo liability than the pre-existing rules, and reflects two notable new changes that became effective August 13, 2016. First, NMFTA added "or any related causes". Even the inclusion of riots and strikes was an expansion beyond the "five recognized defenses", but "any related causes" is open-ended, and therefore worse. At common law, which was codified in the Carmack Amendment as the Court recognized in Elmore & Stahl, simple force majeure was not a defense to carrier liability. Carriers were virtual insurers, but the tradeoff was preemption of other claims. Are expanded defenses to cargo claims to be accompanied by reduced preemption?

Second, the burden of proof as to negligence is shifted to the shipper, and it is not clear exactly what the shipper is expected to prove. Under the pre-existing rule, which almost everyone still believes is applicable, the carrier was required to prove that its negligence was not

at all a factor in the loss or damage. If carrier negligence was a factor, the claim would need to be paid (subject to a reasonable released value agreement, if applicable), regardless of the presence of acts of God or other recognized causes as other factors. The version of UBOL Section 1(b) in effect prior to NMFTA's recent changes was similar, stating "The burden to prove freedom from negligence is on the carrier or party in possession".

In its August 5 filing in this proceeding, NMFTA argues that shipper concerns are overblown, and that "basic hornbook law" supports shifting from a burden on carriers to prove freedom from negligence to a burden on shippers to prove the existence of carrier negligence.

There are several problems with this contention, beginning with the fact that it amounts to overturning the Supreme Court's decision in Elmore & Stahl. In that decision, the Court rejected precisely the argument that NMFTA offers here, saying "We are not persuaded that the carrier lacks adequate means to inform itself of the condition of the goods at the time it received them from the shipper, and it cannot be doubted that, while the carrier has possession, it is the only one in a position to acquire the knowledge of what actually damaged a shipment entrusted to its care. 377 U.S. at 144.

In adding new defenses to carrier cargo liability beyond the established five, and simultaneously imposing a largely insurmountable burden on many shippers of proving carrier negligence if the carrier points the finger of blame elsewhere, NMFTA has significantly rewritten Carmack Amendment law. Shippers may know what happens when carriers pick up shipments (though some shipments are picked up after hours, with no shipper personnel present), and some consignees may know what happens at delivery (though some shipments are dropped off after hours). However, few shippers or consignees know what happens in transit, and they may not even know what carriers were involved.

Compounding the problem, NMFTA took this action on behalf of the hundreds of carriers making up its membership behind closed doors, essentially hiding this and other changes in fine print on the back of a ubiquitous but mundane shipping paper most shippers and carriers take for granted.

Most shippers derive their knowledge of carrier cargo liability from past experience, internet searches, or (for in-house counsel) from case law. All of these sources are now unreliable as the

result of "stealth" revisions by NMFTA to fundamental shipper-carrier relationships, as discussed in current and prior filings by NASSTRAC, NITL and TLC.

STB Jurisdiction to Act

These are service issues, not rate issues, and as the Board has stated, "rate bureaus are not authorized under section 13703(a)(1) to address service." See the Board's EP 656 decision, supra, at page 17. It is true that the Board's 2007 decisions also discussed, in passing, functions other than ratemaking in which rate bureaus, including NCC, might engage once their antitrust immunity was gone. However, the issues raised in this proceeding do not involve NCC or other rate bureaus. Rather, they involve NMFTA, which must be seen as acting for its members, all of which are believed to be motor carriers operating in interstate commerce subject to STB jurisdiction.

NASSTRAC and NITL are aware that the statute permits motor carriers and shippers to waive provisions of the Act, other than "provisions governing registration, insurance, or safety fitness". 49 USC 14101(b)(1). But the statutory waiver provision is intended for individual carriers and shippers who enter into written contracts expressly waiving rights under the Act for transportation covered by the contract.

In Federated Mutual Insurance Co. v. Con-Way Freight, Inc., 2015 WL 2194863, Fed. Carr. Cas. P 84,828 (D. Minn. 2015), the court held that the statute requires a written contract waiving the Carmack Amendment for there to be an effective waiver under Section 14101(b). In that case, "the only writing between the shipper and carrier is the bill of lading, which lacks any language expressing a waiver of jurisdiction." See also MidAmerica Energy Co. v. Start Enterprises, Inc., 437 F. Supp. 2d 969, 972-73 (S.D. Iowa 2006), and Celadon Trucking Services, Inc. v. Titan Textile Co., 130 S.W. 3d 301 (Tex. App. 2004). And see Gaines Motor Lines, et al. v. Klaussner Furniture Industries, et al., 734 F. 3d 296 (4th Cir 2013), finding that "private contracts" under Section 14101(b) are alternatives to tariffs.

NASSTRAC and NITL have no objection to modification of Carmack Amendment liability through private contracts under Section 14101(b), negotiated by individual shippers and individual carriers. In such a contract each party will give things and get things, producing preferable outcomes. Moreover Section 14101(b)(2) clearly states that federal and state courts have jurisdiction over disputes under such contracts.

But that is not what we are dealing with here. Rather, NMFTA is trying to evade Section 14101(b) and create a carrier advantage over shippers where no contract exists, imposing waiver through one-sided UBOL provisions adopted unilaterally by a large motor carrier group. The resulting trap for the unwary is certain to affect millions of shipments and tens of thousands of shippers.

Making matters worse is that the NMFC includes provisions under which provisions of shippers' own bills of lading that do not contain the objectionable provisions of the UBOL would effectively be replaced with the revised UBOL verbiage, which does. As detailed in the contemporaneous filing of TLC, NMFC Item 360 provides that carrier rates subject to NMFC class ratings "are conditioned on" use of the UBOL, and when such goods are transported, use of the UBOL is required. Shipper-furnished bills of lading must also comply with UBOL provisions, and NMFC Item 362 states that "all services performed by the participating carriers are subject to the UBOL".

The claim by NMFTA that the challenged UBOL changes are consistent with existing law, and were lawfully adopted, is false. However, it does not necessarily follow that the STB is required to address shippers' legitimate concerns. For the reasons set forth below, however, it can and should.

Some of the issues presented by the NMFTA changes could be the subject of litigation in the courts over rejected cargo claims, but this is an expensive, inefficient, piecemeal approach, and one that favors carriers. Different issues would be raised at different times before different courts, virtually guaranteeing conflicting decisions, confusion and uncertainty. And while many shippers have contracts that neutralize the recent UBOL changes, many more will not. Tens of thousands of shippers will therefore face rejection of formerly valid claims, with small shippers faring worst.

An antitrust challenge is also a possibility, but the costs and burdens will be great, involving data gathering, analysis, legal research into the antitrust laws, and the complexities of the rule of reason. Moreover, to the extent that provisions of and precedents under the Interstate Commerce Act and amendments thereto are implicated, the views of the STB will be beneficial to all concerned.

Another powerful reason for STB involvement is the risks attendant on a decision by the Board not to act. The current NMFTA changes amount to rewriting existing laws as to cargo claims by means of UBOL changes. If this turns out to be a successful way for a motor carrier group to modify decades of law under the Carmack Amendment, what would prevent similar revisions to any other provisions of Part B of Subtitle IV in Title 49?

Instead of risking STB complaints or court litigation by violating other provisions of 49 USC Section 13101, et seq., NMFTA could simply draft and adopt different provisions favorable to carriers, or provide for waiver of existing provisions, using the back of the UBOL as the vehicle. Shippers who used the modified UBOL would arguably have agreed to NMFTA's changes. Carriers might make zero liability the default rule, compelling shippers to negotiate for carrier liability, or self-insure. Statutes of limitation might be modified, or payment provisions changed. As in years before the 2007 decisions, individual carriers negotiating with individual shippers could shift blame by arguing that NMFTA was responsible for the UBOL verbiage.

Of course, even if the Board is concerned about such scenarios, its ability to act is constrained by its jurisdiction, but NASSTRAC and NITL urge the Board to consider such possibilities in assessing its jurisdictional limits. The Board should not lightly conclude that it is sidelined by its governing statute, or by the 2007 decisions. As discussed above, those decisions dealt primarily with the ratemaking practices challenged by shipper parties, including NASSTRAC and NITL. The Board's discussion of other issues did not, in our judgment, close the door to further STB involvement under appropriate circumstances.

As for the Act, there are multiple sources of jurisdiction, and many supportive precedents. First, see the Transportation Policy of 49 USC 13101, and note the charge to the Board by Congress in Section 13101(b): "This part shall be administered and enforced to carry out the policy of this section and to promote the public interest."

Specific subsections supporting STB jurisdiction include 13101(a)(1)(D), "to encourage… reasonable rates for transportation, without…unfair or destructive competitive practices"; 13101(a)(2)(C), "to meet the needs of shippers, receivers, passengers, and consumers"; and 13101 (a)(2)(D), " allow a variety of quality and price options to meet changing market demands and the diverse requirements of the shipping and traveling public". Allowing UBOL verbiage to implement new limits on cargo liability exposure for a large part of the trucking industry does not serve these policies.

See, in this regard, the Board's decision served December 30, 2014 in Docket No. FD 35582, Rail-Term Corp. – Petition for Declaratory Order. The Board there responded to a challenge that it had exceeded its authority as follows (decision at 13):

> We disagree. To be sure, the Board has not been delegated authority to implement the railroad pension, disability, and unemployment laws administered by the RRB. But the Rail Transportation Policy enacted by Congress requires the Board, in regulating the rail industry, "to encourage fair wages and safe and suitable working conditions in the railroad industry." 49 USC §10101(11). Among the Interstate Commerce Act's "primary purposes are to ensure fair shipping rates, safety, fair wages and working conditions and efficiency in transportation, and to discourage monopolistic practices and labor strikes." Cedarapids, Inc. v. Chi., Cent. & Pac. R.R., 265 F. Supp. 2d 1005, 1010 (N.D. Iowa 2003). When interpreting our statute, We cannot ignore the real-world implications of our holdings.

As noted above, 49 USC 14101(c) eliminates STB jurisdiction over private written contracts with explicit waiver provisions under Section 14101(b), but no such contracts exist here. Absent such contracts, Section 14101(a) requires carriers subject to jurisdiction under Chapter 135 to provide transportation or service on reasonable request, and to provide "safe and adequate service, equipment and facilities". Jurisdiction under Section 13501 includes "transportation by motor carrier and the procurement of transportation" in interstate commerce. The likely result of reduced cargo liability due to NMFTA's UBOL revisions will be less safe transportation.

NASSTRAC and NITL are aware that NMFTA is not a motor carrier, but its hundreds of members are, and they include many of the largest LTL carriers. The UBOL is used by those carriers, as well as by many more carriers that are not members of NMFTA. A focus solely on

NMFTA's own status as a non-carrier would mean allowing these groups of carriers to accomplish indirectly what they could not accomplish directly.

Another source of jurisdiction is 49 USC 1321 (formerly 721). Section 1321 is a general directive to the STB to "carry out this chapter and Subtitle IV", part B of which covers regulation of motor carriers, and Section 1321(b) gives the Board broad investigatory authority. In addition, Section 1302 (former 702) states that, except as otherwise provided in the Act, the Board will perform all functions previously carried out by the ICC. See also the discussion of Section 1321 and Section 13703 in the September 12, 2016 filing by TLC, which NASSTRAC and NITL support. A more expansive statement of STB investigatory authority is found in 49 USC 14701.

As for the Carmack Amendment, the Board has a less extensive role than the ICC had, and actual claims cases continue to be for courts to resolve.[3] However, the Board has addressed disputes on Carmack issues and related bill of lading disputes, as in Docket No. ISM 35002, Amend the Uniform Straight Bill of Lading and Accompanying Contract Terms and Conditions, decisions served December 24, 1997 and August 4, 1998. In the second of those decisions, the Board elected to be neutral, and leave to the courts, an issue regarding released values that the UBOL changes would now make subject to carrier tariffs. In addition, the Board's ability to issue declaratory orders provides an alternative to a formal investigation. The issues presented here are important, may affect most motor freight transportation in the US, and could lead to further controversy over the boundaries of STB authority under 49 USC 13101, et seq.

Conclusion

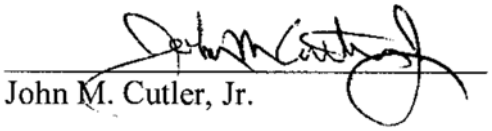
NASSTRAC and NITL anticipate NMFTA arguments to the effect that, regardless of shipper concerns, the recent changes in the legal verbiage on the back of the UBOL fall into a "regulatory gap" which the STB is powerless to address. For the reasons set forth above, we disagree. We recognize that the Board has a full plate of important rail proceedings pending and coming up, and it may not be eager to add motor carrier regulation to its burdens. However, it is

[3] See, e.g., National Motor Freight Traffic Ass'n. v. ICC, 590 F.2d 1180 (D.C. Cir. 1978).

incumbent on the Board to deal with the public interest implications of letting NMFTA use the UBOL to delete or rewrite provisions of the Act that are disliked by its motor carrier members.

Dated: September 12, 2016

Respectfully submitted,



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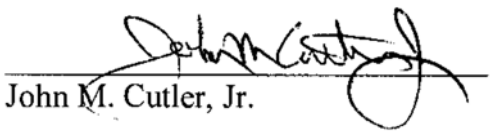
CERTIFICATE OF SERVICE

I hereby certify that I have this 12th day of September, 2016, caused copies of the foregoing document to be served on all parties of record by first-class mail or by electronic means.



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