



## **SPECIAL REPORT**

### **UPDATE: NMFTA CHANGES THE UNIFORM STRAIGHT BILL OF LADING**

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On July 14th, the National Motor Freight Traffic Association (NMFTA), publishers of the National Motor Freight Classification (NMFC), issued Supplement 2 to NMFC 100-AP, effective August 13, 2016. This Supplement contains changes to the bill of lading forms - the Uniform Straight Bill of Lading, including the Terms and Conditions on the reverse side, and the Straight Bill of Lading- Short Form, as well as to the NMFC rules in Item 360 - Bills of Lading, Freight Bills and Statements of Charges.

Details of the changes to the bill of lading and the Council's analysis of their impact were explained in TLC's Special Report that was sent to all members.

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

On August 12th the STB issued a decision which stated: "Based on the record currently before the Board, the request to suspend or enjoin the effective date of NMFTA's amendments to the Uniform Straight Bill of Lading will be denied." However, the Board opened the proceeding for additional input from the parties. Supplemental pleadings are due by September 12th, with replies due by October 3rd.

The filings are identified as STB Docket number ISM 35008, and complete copies are available on the Council's website, [www.TLCouncil.org](http://www.TLCouncil.org).

## **What does this mean?**

First, the changes to the bill of lading go into effect on August 13th. Anyone - whether a shipper, broker, freight forwarder or 3PL - that ships under some version of the Uniform Straight Bill of Lading or the Straight Bill of Lading- Short Form will be bound by these changes to the bill of lading. This is because of the language that incorporates the Classification and the terms and conditions of the Uniform Straight Bill of Lading.

## **The potential impact cannot be understated:**

1. Virtually all of the major motor carriers that provide "less-than-truckload" and/or "truckload" service in the U.S. are "participants" in the NMFC.

2. Freight charges that are based on the classification of articles in the NMFC require the use of the Uniform Straight Bill of Lading, 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.

3. Even if a shipper wants to use its own bill of lading it must comply with the provisions of the Uniform Straight Bill of Lading, 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. Bill 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.

4. 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.

5. 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 Uniform Straight Bill of Lading and its terms and conditions.

### **The most egregious change is to the burden of proof**

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 contains the most egregious of the changes, which change the legal burdens of proof:

(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.*

This change shifts the carrier's burden for proving freedom from negligence to the shipper who now must prove that the carrier was negligent! It is 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.*** .

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".

Some examples of that the change means:

Shipper's goods are damaged when trailer is involved in an accident. Now the shipper would have to prove that the carrier's driver negligently caused the accident.

Shipper's goods are stolen, or trailer is hijacked. Now the shipper would have to prove the carrier's driver was negligent, e.g., for failing to adequately protect the goods from theft by a third party while making a delivery or at a truck stop.

Shipper's goods are damaged by fire, water, noxious odors, insects or vermin, etc. Now the shipper would have to prove that the damage was caused by the carrier's negligence.

The change to 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.

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 there is only "one game in town".

August 18, 2016

If you want to let the STB know how you feel about these changes you can send your comments to:

Chief, Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E. Street, SW  
Washington, DC 20423

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