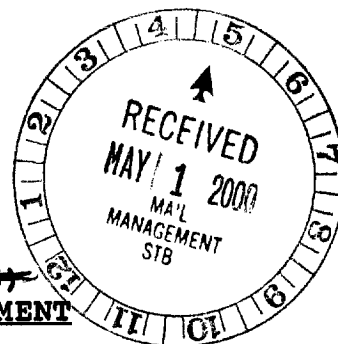


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BEFORE THE
SURFACE TRANSPORTATION BOARD



SECTION 5a APPLICATION NO. 61 ~~(Sub-No. 6)~~
NATIONAL CLASSIFICATION COMMITTEE -- AGREEMENT

REPLY OF NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC. AND
THE HEALTH AND PERSONAL CARE DISTRIBUTION CONFERENCE, INC.
IN OPPOSITION TO PETITION OF NATIONAL
CLASSIFICATION COMMITTEE

On April 11, 2000, the National Classification Committee (NCC) filed a document entitled "Petition," in addition to the Comments it filed in accordance with the Board's February 11, 2000 decision in Section 5a Application No. 61 (Sub-No. 6). In its Petition, the NCC asks the Board to delete certain language from another decision served February 11, 2000 -- the Board's decision denying in part and granting in part reconsideration in STB Docket Section 5a Application No. 61. National Small Shipments Traffic Conference, Inc. ("NASSTRAC") and The Health and Personal Care Distribution Conference, Inc. ("H&PCDC") (collectively, the "Shipper Conferences") hereby reply in opposition to the NCC Petition.

I. PROCEDURAL POSTURE OF NCC'S PETITION

The NCC Petition refers to Section 5a Application No. 61 (Sub-No. 6), i.e., the NCC reform proceeding, on its cover, and was

filed on the deadline for comments in the Sub-No. 6 docket, but it refers to Section 5a Application No. 61 on page 1, and appears to seek reconsideration of the Board's February 11, 2000 decision on reconsideration in the lead docket. As a request for reconsideration, it was untimely filed (see 49 C.F.R. § 1110.1), but timely filed if intended as an additional comment in Sub-No. 6.^{1/}

Under the circumstances, the Shipper Conferences were not sure whether replies to the NCC's Petition were due on May 1, 2000, in accordance with 49 C.F.R. § 1104.13(a), or May 11 in accordance with the Sub-No. 6 procedural schedule. After learning from NCC that the Sub-No. 6 designation in the caption on the cover was inadvertent, and that the NCC did not intend for its Petition to be considered in the Sub-No. 6 proceeding, the Conferences are filing this reply on May 1 under 49 C.F.R. § 1104.13(a).^{2/} Of course, 49 C.F.R. § 1104.13(c) prohibits the filing by NCC of a reply to this reply.

II. NCC'S PETITION SHOULD BE DENIED

The NCC is effectively seeking reconsideration of the Board's February 11, 2000 decision denying in part and granting in part the

^{1/} As the NCC points out, a late-filed NASSTRAC petition (on which the NCC Petition is said to be patterned) was entertained by the Board in 1998. The Shipper Conferences do not ask the Board to reject the NCC's petition because it is untimely, although we do urge the Board to deny the Petition on other grounds.

^{2/} The Conferences will respond in opposition to the Comments and Motion of the American Trucking Associations filed in the Sub-No. 6 proceeding in the Conferences' reply comments in that proceeding, which will be filed on May 11, 2000.

petitions filed by the NCC and ATA seeking reconsideration of the Board's December 18, 1998 decision in the lead docket. Ironically, the NCC's challenge is directed to the one part of their petition for reconsideration that was successful.

In its December 18, 1998 decision, the Board had announced its intention to terminate NCC antitrust immunity with respect to publication in the National Motor Freight Classification ("NMFC") of the so-called Uniform Bill of Lading.^{3/} In light of a colloquy between Chairman Shuster and Representative Rahall in conjunction with floor debates on H.R. 2679, the Board changed its mind, and decided not to terminate antitrust immunity for collective consideration of the NMFC bill of lading. February 11, 2000 Decision at 5-6.

In obtaining this concession from the Board, NCC may have received more than it deserved. The colloquy in question was clearly intended to help carriers, but H.R. 2679 was superseded by H.R. 3419, and it is the latter bill, reflecting "a negotiated compromise between the House and Senate on two bills (S. 1501 and H.R. 2679)," that became the Motor Carrier Safety Improvement Act of 1999. See Cong. Rec. S.15206, Nov. 19, 1999.

Notably, neither that Act nor the legislative history of H.R. 3419 contains any indication that Congress intended the NMFC bill

^{3/} The Shipper Conferences prefer the term NMFC bill of lading because the bill of lading in question is not prescribed by the Board, is not supposed to be used by carriers that are not participants in the NMFC, and is in fact not used by many shippers and carriers, who prefer other bills of lading. Calling the NMFC bill of lading "Uniform" suggests an official or mandatory quality the document does not warrant.

of lading to continue to be covered by antitrust immunity. On the contrary, the full Congress plainly approved the Board's announced intention to conduct its NCC and rate bureau reform proceedings. See Section 227(c)(2) of the Act, and new 49 U.S.C. § 13703(e)(2).

Not content with its victory, the NCC asks the Board to revise its February 11, 2000 decision to delete the following paragraph:

However, we will be sensitive to any challenge that may be raised about any particular bill of lading the 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 arrangements 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.

Decision at 6-7, footnote omitted.

By its Petition, the NCC evidently seeks not just to preserve antitrust immunity for the collective consideration of the NMFC bill of lading, but also to foreclose any consideration of whether conditions should be imposed on the NCC's exercise of that immunity. In effect, the NCC asks that the bill of lading be eliminated from consideration in the STB's Sub-No. 6 proceeding. The NCC offers several arguments in support of its extraordinary request, none of which has any merit.

First, the NCC claims that the bill of lading and carrier notice of liability limitations are "unrelated to the NCC's collective process and have never been issues in this proceeding."

Petition at 2. This is nonsense. That the bill of lading has been an issue in this proceeding was demonstrated most recently by the Board's December 18, 1998 decision and the NCC's petition for reconsideration of that decision.

The NCC goes on to argue (id.) that the issues raised by the paragraph quoted above are "irrelevant to the NCC's Section 5a agreement," but this claim makes a mockery of the NCC's own original reconsideration petition. In that petition, the NCC stated, inter alia: "The UBL is indisputably part and parcel of the NCC's approved activities under the Section 5a Agreement." January 27, 1999 Petition of the National Classification Committee for Reconsideration at page 14.

The NCC cannot have it both ways. If the NMFC bill of lading is "irrelevant" to its Section 5a Agreement, there should be no antitrust immunity for carrier collective action, as the STB held in 1998. If, however, antitrust immunity is to be preserved for collective consideration of the bill of lading, the issue of whether the Board should impose conditions under 49 U.S.C. § 13703(a)(3) is an appropriate issue for consideration in the Sub-No. 6 proceeding.^{4/}

The NCC's second argument (Petition at 3) is that NASSTRAC cannot object to the NMFC bill of lading's provisions because several NASSTRAC members and representatives participated in the negotiations leading to development of the document. This

^{4/} Assuming the Shuster-Rahall colloquy on H.R. 2679 is relevant, it contains no suggestion that including bill of lading issues in the NCC reform proceeding is inappropriate.

contention, too, is unavailing. While NASSTRAC regards the NMFC bill of lading as an improvement over its predecessors, the carrier representatives who participated in those discussions rejected many of NASSTRAC's suggestions. And it was made absolutely clear in the negotiations that NASSTRAC would not accept a vow of silence as the price of the progress the bill of lading represented. NASSTRAC reserved the right to press for further reform in the important area of limitations of carrier liability.^{5/}

The NCC's third argument (Petition at 4-7) is that further action on the bill of lading and on liability issues in the Sub-No. 6 proceeding is precluded by the Board's action in STB Docket No. ISM 35002, either because the Board there agreed with the carrier position on notice to shippers of liability limitations or because the Board pledged to remain neutral on this issue.

The first of these contentions is not supported by the Board's decision. On the contrary, the language from the decision, provided in Appendix B to the NCC Petition, notes that the DOT Study had not been completed, and that "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." The DOT Study has now come out, calling for bills of lading to operate as receipts, and for limitations on carrier liability, if any, to be negotiated in the free market. Moreover, some courts have disallowed carrier limitations of

^{5/} NASSTRAC representatives have continued to meet informally with carrier representatives during the pendency of this proceeding, and those meetings are ongoing.

liability based on inadvertence clauses incorporated by reference into bills of lading. See the Shipper Conferences' April 11, 2000 Opening Comments in the Sub-No. 6 proceeding at 43-52, quoting from Toledo Ticket Co. v. Roadway Express, Inc., 133 F.3d 439 (6th Cir. 1998).

The Conferences and the NCC obviously disagree about the extent and type of notice of carrier liability limitations that should be provided to shippers. To the Conferences, and to other shipper interests, the NCC's preferred approach is a trap for the unwary, made worse where adopted collectively with antitrust immunity. If the NCC wants to defend the status quo, it should do so in its comments, not through a Petition designed to preempt comments on the consideration of the relevant issues.

It is true that the Board said in its July 29, 1998 decision in ISM 35002 that "it is preferable that we take no position on either side of this issue at this time." It does not follow that the issue should be eliminated from the Sub-No. 6 proceeding. ISM 35002 was a suspension decision, and it is well established that such a decision "carries little, if any, precedential weight." See Regulations for Payment of Rates and Charges -- Penalty Charges for Nonpayment, 4 I.C.C. 2d 340, 345 (1988). In any event, the Board should decide whether neutrality is wise on the merits in the Sub-No. 6 proceeding, rather than summarily based on the NCC's Petition.

The final argument in the NCC's Petition (at 8-10) is that the disputed language from the Board's February 11, 2000 decision on

reconsideration constituted rulemaking in violation of the APA. Evidently, the NCC reads that language as if it established a regulation prohibiting inadvertence clauses. The Shipper Conferences believe the language in question is better understood as signalling a willingness by the Board to consider whether there are aspects of the NMFC bill of lading, and other collective carrier actions relating to carrier liability limitations, that may warrant remedial action in the context of the Sub-No. 6 proceeding.

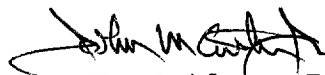
Needless to say, the Shipper Conferences hope the Board will provide guidance on these issues in that proceeding, in which the NCC will have every opportunity to make its arguments. And, since the Sub-No. 6 proceeding does provide for notice and comment and since the Board's February 11 decision does alert the NCC and other interested parties as to shipper and Board concerns about bills of lading, APA requirements have been met.

III. CONCLUSION

As the NCC points out, there is language in the ICCTA Conference Report expressing support for pre-TIRRA treatment of liability limitations. On the other hand, the statute itself does not eliminate the need for shipper agreement to released values, or for the values to be reasonable, and Congress also directed DOT to study these issues. In addition, Congress and the Board expected free market solutions to prevent abuses, but that expectation is thwarted when carriers act collectively and with antitrust immunity to impose "inadvertence" clauses on unsuspecting shippers through cryptic language in a bill of lading that purports to be "Uniform."

The Shipper Conferences oppose concealed liability limitations, imposed through clauses purporting to transform a shipper's election not to declare or agree to a released value into acceptance of the carrier's released value, when the carrier "inadvertently" accepts the shipper's freight. However, as the NCC states in its Petition, these matter are "the subject of a very fractious ongoing public dispute between shippers and carriers." Petition at 9. The Shipper Conferences submit that, at a minimum, the Board should consider all the comments filed in the Sub-No. 6 proceeding before deciding what position to take. Accordingly, the NCC's Petition should be denied.

Respectfully submitted,



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National Small Shipments
Traffic Conference, Inc.

The Health and Personal Care
Distribution Conference, Inc.

Dated: May 1, 2000

CERTIFICATE OF SERVICE

I hereby certify that I have this first day of May, 2000, caused the foregoing document to be served on all parties of record by first class mail, postage prepaid.



John M. Cutler, Jr.