HEARINGS

BEFORE THE

SUBCOMMITTEE ON SURFACE TRANSPORTATION

OF THE

COMMITTEE ON COMMERCE

UNITED STATES SENATE

NINETIETH CONGRESS

FIRST SESSION

ON

S. 858

TO AMEND SECTION 20, PARAGRAPH 11, OF THE INTERSTATE COMMERCE ACT, AND FOR OTHER PURPOSES

JULY 17, 18, AND AUGUST 25, 1967

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MONDAY, JULY 17, 1967

U.S. SENATE,
COMMITTEE ON COMMERCE,
SUBCOMMITTEE ON SURFACE TRANSPORTATION,
Washington, D.C.

The subcommittee met at 9:10 a.m. in Room 457, Old Senate Office Building, Hon. Frank J. Lausche, chairman of the subcommittee, presiding.

Senator LAUSCHE. The meeting will come to order.

OPENING STATEMENT BY THE CHAIRMAN

This hearing is being held before this Surface Transportation Subcommittee of the Committee on Commerce on S. 858, introduced by Senator Magnuson.

S. 858 proposes to amend paragraph 11 of section 20 of the Interstate Commerce Act to provide for recovery of reasonable attorney's fees in the case of successful maintenance of an action for recovery of damages sustained in the transportation of property.

There will be inserted in the record at this point a copy of S. 858 and the report of the Comptroller General dated February 24, 1967, pertaining to this bill.

(The bill and the report referred to follow:)

[S. 858, 90th Cong., first sess.]

A BILL To amend the Interstate Commerce Act, with respect to recovery of a reasonable attorney's fee in case of successful maintenance of an action for recovery of damages sustained in transportation of property

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That paragraph 11 of section 20 of the Interstate Commerce Act (49 U.S.C., sec. 20, par. 11) is amended by inserting at the end of the fifth proviso and immediately before the sixth proviso the following: "*And provided further,* That if the plaintiff shall finally prevail in any action, he shall be allowed a reasonable attorney's fee, to be taxed and collected as part of the suit:".

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, D.C., February 24, 1967.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate.

DEAR MR. CHAIRMAN: We refer to your letter of February 14, 1967, asking for our comments on S. 858.

The bill would amend paragraph 11 of section 20 of the Interstate Commerce Act, 49 U.S.C. 20(11), to provide for recovery of a reasonable attorney's fee in case of successful maintenance of an action for recovery of damages sustained in the transportation of property in interstate commerce. Similar proposals were

Staff member assigned to this hearing: Stanton P. Sender.

made in S. 3741, 89th Congress, 2nd Session; S. 1606, 88th Congress, 1st Session; S. 2963, 87th Congress, 2nd Session; S. 3820, 85th Congress, 2nd Session; and S. 2418, 84th Congress, 1st Session.

Sections 8 and 16(2) of the Interstate Commerce Act, 49 U.S.C. 8, 16(2), now permit the recovery of a reasonable attorney's fee by successful plaintiffs in certain kinds of actions arising under Part I of the Act. See, also, 49 U.S.C. 908(b) and (e), pertaining to recovery of an attorney's fee in actions against common carriers by water. And see 49 U.S.C. 322(b)(2) pertaining to motor carriers, and 49 U.S.C. 1017(b)(2), pertaining to freight forwarders, where the allowance of attorney's fees in certain kinds of actions is confided to the discretion of the court.

The question whether a successful plaintiff, suing to recover the value of property lost or damaged in transit, is entitled to recover also a reasonable attorney's fee seems to be one primarily of policy for resolution by the Congress. See, for example, the case of *Thompson* v. *H. Rouw Co.*, Tex. Civ. App. 1951, 237 S.W. 2d 662, holding that the measure of damages adopted by the Congress in the present enactment of section 20(11) does not permit allowance of an attorney's fee.

It would seem, however, that such allowance would be equitable in those instances where a carrier fails or refuses to settle a just claim and the property owner is forced to exercise his judicial remedy. Such allowance also is in harmony with the other provisions of the Act and with court decisions permitting recovery of an attorney's fee in other kinds of actions. See, for example, the case of *Strickland Transp. Co.* v. *Harwood Trucking, Inc.*, Mo. App. 1961, 348 S.W. 2d 581, where, in an action by one carrier against another under section 20(12) of the Act, to resolve liability for the loss of part of an interstate shipment, the court permitted recovery of a reasonable attorney's fee.

We believe the amendment is equitable and we offer no objection to favorable consideration of S. 858 by your Committee.

Sincerely yours,

FRANK H. WEITZEL,
Assistant Comptroller General
of the United States.

Senator LAUSCHE. The first witness this morning is Mr. John H. Frazier, Jr., of the National Grain & Feed Dealers Association.

Mr. Frazier.

STATEMENT OF JOHN H. FRAZIER, JR., GRAIN AND FEED DEALERS NATIONAL ASSOCIATION, WASHINGTON, D.C., ACCOMPANIED BY ROD KOBER, LOUIS DREYFUS CORP., NEW YORK, N.Y.

Mr. FRAZIER. Good morning.

Mr. Chairman, Senator Pearson: I am John H. Frazier, Jr. I am the third vice president of the Grain and Feed Dealers National Association and chairman of the National's Transportation Committee. With me is Rod Kober, chairman of the subcommittee charged with pursuing the attorney's fees bill. I am with Bunge Corp. and Mr. Kober is with Louis Dreyfus Corp.

I appear here today on behalf of the Grain and Feed Dealers National Association in strong support of S. 858.

The Grain and Feed Dealers National Association is nationwide and industrywide in scope, representing every segment of the industry from the smallest country elevator to the largest grain and feed complexes, including processors. Forty-two of our State and regional associations affiliated with the national, representing about 15,000 grain and feed firms, have specifically endorsed this statement. I would like to have the names of these associations included in the record.

I would like to say now the Ohio Grain and Feed Fertilizer Association has specifically endorsed it and also the Kansas City Board of Trade has specifically endorsed it, and the Kansas Grain and Feed Dealers Association.

Senator LAUSCHE. The copy will be printed in the record.
Mr. FRAZIER. Thank you.
(The list referred to follows:)

AFFILIATED ASSOCIATIONS ENDORSING THE STATEMENT OF THE GRAIN AND FEED DEALERS NATIONAL ASSOCIATION ON S. 858

American Dehydrators Association
Arkansas Drier & Warehouseman's Association
California Warehousemen's Association
Colorado Grain and Feed Dealers Association
Distillers Feed Research Council
Eastern Federation of Feed Merchants, Incorporated
Eastern Shore Grain and Feed Dealers Association
Farmers Grain Dealers Association of Illinois
Farmers Grain Dealers Association of North Dakota
Farmers Elevator Association of Minnesota
Farmers Elevator Association of South Dakota
Georgia Feed Association
Grain Elevator and Processing Superintendents
Illinois Grain, Feed and Fertilizer Association
Indiana Grain and Feed Dealers
Iowa Grain and Feed Association
Kansas Grain and Feed Dealers Association
Kentucky Feed and Grain Association, Inc.
Louisiana Gran and Feed Dealers Association
Michigan Bean Shippers Association
Michigan Grain and Agri-Dealers
Midsouth Soybean & Grain Shippers Association
Minneapolis Grain Commission Merchants Association
Mississippi Feed and Grain Association
Missouri Grain and Feed Association
Nebraska Grain and Feed Dealers Association
New Mexico Grain and Feed Dealers Association
Northwest Country Elevator Association
Northwest Feed Manufacturers Association
Northwest Retail Feed Association, Inc.
Ohio Grain, Feed and Fertilizer Association, Inc.
Oklahoma Grain and Feed Dealers Association
Omaha Cash Grain Commission Merchants Association
Oregon Feed, Seed and Suppliers Association
Pacific Northwest Grain Dealers Association
Panhandle Grain and Feed Dealers Association
Pennsylvania Millers and Feed Dealers Association
Texas Grain and Feed Association
Utah Feed Manufacturers and Dealers Association
West Virginia Feed Dealers Association
Wisconsin Feed, Seed and Farm Supply Association
Wyoming Grain, Feed & Seed Dealers Association

S. 858—the attorney's fee bill—is one of the most important pieces of legislation on which our national association has testified in recent years. Because of this and since we are speaking for so many organizations, we would like to explain our position in some detail. Also, since we are one of the first witnesses, our statement will lay the groundwork for other witnesses that follow.

Mr. Chairman, I would like to discuss the practical application of the need for this legislation to our industry and then have Mr. Rod Kober discuss the legal justification. I am confident that when we conclude our testimony you will appreciate the need to our industry for S. 858.

Grain, feed, and grain products collectively constitute one of the largest commodities shipped in the United States. Some of the equip-

ment which we receive for these shipments is in a poor state of repair; but, because of shortages, we are forced to use the marginal equipment. Furthermore, the railroads insist that we load each car to full capacity and to what many consider over capacity. These conditions, together with the vibrations over the roadbed, cause losses of grain. However, when the car is at rest and is inspected, there is no grain leaking and the car is then known as a "clear record" car.

Losses occur for other reasons such as theft, pilferage, and paper grain doors. Instances have been known where holes in the bottom of grain cars have been repaired in transit after a partial loss of lading with the car showing no evidence of loss to the grain inspector at the time of arrival. When the car is weighed, the amount of loss can be determined by a comparison with original weight. These losses occur when the carrier is in complete control of the lading. The shipper or receiver submits a claim for his loss. The carrier may offer a settlement which the claimant may accept or reject. The claimant knows, however, that if he rejects the offer of settlement, his only recourse is to file a suit where his attorney's fees may equal or exceed his recovery. The carriers are also aware of this situation and many offers of settlement are reduced accordingly.

This situation, with the grain shipper in an inequitable bargaining position regarding claims, became extremely aggravated when on April 1, 1966, the Traffic Executives Association—Eastern Railroads—adopted a new policy regarding claims on "clear record" cars. We were shocked by this announcement because we had been consulting with the Southern Freight Association over a period of 2 years on a similar type policy which the Southern Freight Association had finally rejected. We had had no consultation with the Traffic Executives Association—Eastern Railroads—and received information of the policy change only in mimeograph notice. This new policy on settlement of claims for losses on "clear record" cars arbitrarily reduced claims under differing conditions by 50 percent, 75 percent, or 100 percent.

Senator PEARSON. Let me ask you a question.

I have a little experience in this. Is it the policy of the railroads that on different classifications of loss they arbitrarily set a percentage that they will allow a given claim on a "clear" car—75 percent on a leaking door and on another type of loss it is another percent?

Mr. FRAZIER. Well, in this particular case, Senator, this was based on whether you had official weights at either end and only covered what is called a "clear record" car, a car—what we are talking about here is clear record cars, cars which showed no leaking at the time of arrival.

Senator PEARSON. Let me be more specific. I have to rely on my own experience.

I filed some claims for grain people and I found out in dealing with one of the carriers that there are different classifications for losses and in those classifications they just set a given percent that they will allow.

Mr. FRAZIER. Yes, sir.

Senator PEARSON. Is this nationwide with all of the carriers? Do they adhere to sort of a standard, or does it vary from carrier to carrier?

Mr. FRAZIER. When the policy was adopted as of April 1, 1966, it was adopted first by the Eastern Railroads and then spread coast to coast all the way—the Santa Fe had turned some claims down which were filed with them on the part of the U.S. Department of Agriculture, so this was—this policy quickly spread from the east coast to the west coast.

Senator PEARSON. What is a clear car?

Mr. FRAZIER. A clear car is one where the inspector, on arrival, finds no leakage——

Senator PEARSON. Finds a loss but doesn't know where, is that right?

Mr. FRAZIER. Yes, sir.

Senator PEARSON. What are the other types of losses? Is there such a thing as a door——

Mr. FRAZIER. Yes. Leaking through or over the grain door, leaking through the side, through the bottom, you can have all different types of leaks in a car. Or you can have——

Senator PEARSON. Tell me of a classification such as clear door—what are the others? I forget what they are.

Mr. FRAZIER. We have leaking through the grain door, leaking around the grain door. You have a "clear record" car, a leaking car and these would be the two main types. You would classify them one way or the other. But there are different types——

Senator PEARSON. What is the percentage on clear car? Seventy-five percent?

Mr. FRAZIER. On April 1 when they adopted this policy in the eastern railroads they put three different percentages: 50, 75 or 100 percent reduction. In other words, either nothing, 25 or 50. No claim would be paid for more than 50 percent no matter what.

Senator PEARSON. As I understand it, from the legal standpoint of the common carrier, they have absolute liability for loss.

Mr. FRAZIER. We believe so, sir.

Senator PEARSON. Thank you, Mr. Chairman.

Senator LAUSCHE. What type of case would come within the arbitrary rule that the claim will be limited to 50 percent?

Mr. FRAZIER. Where you had official weights at both ends.

Senator LAUSCHE. I don't hear you.

Mr. FRAZIER. Where you had official weights at both ends. For example, sir, a shipment——

Senator LAUSCHE. Where you had official weights at both ends, point of loading and point of unloading?

Mr. FRAZIER. Yes, sir.

Senator LAUSCHE. There, whatever your claim is, the railroads put an arbitrary limitation of 50 percent upon what they will pay?

Mr. FRAZIER. Yes, sir.

Senator LAUSCHE. All right.

Does it make any difference how the loss occurred in that official weight category? Whether it was by floor, door, or otherwise?

Mr. FRAZIER. In this case, where we could prove that there was a leak through the side of the car rather than through the grain door, it would have made a difference, yes, sir. There would be no payment through the door or through the grain door or over the grain door. There would have been no payment.

Senator LAUSCHE. What factors are considered in the arbitrary rule of paying 50 percent? One you said was where there is official weighing both at the loading and unloading. What other factors are in that category?

Mr. FRAZIER. What part of the car was leaking?

Senator LAUSCHE. Any other?

Mr. FRAZIER. Probably many.

Senator LAUSCHE. What about the 75 percent rule?

Mr. FRAZIER. The 75-percent rule was normally where there was one official weight and this is a 75 percent reduction. It would be only 25 percent.

May I read—I have with me a memorandum on these with the basis on which they settled—this is what their change was.

First, clear record boxcars with two official weights, as we discussed. Fifty percent maximum settlement.

Senator LAUSCHE. You touched on that.

Mr. FRAZIER. Secondly, clear record cars with one official and one unofficial weight, 25 percent maximum settlement. Formerly these had been on a 25- to 75-percent spread.

Three, boxcars with leaking grain doors which doors were installed by the shipper, 50 percent maximum settlement.

Four, boxcars with grain reported to be trapped behind the car lining claimed to be declined in its entirety unless the claimant can show the lining to have been defective. In other words, zero payment.

Five, clear record boxcars with no official weights, the claim would be declined in its entirety.

Senator LAUSCHE. All right. Proceed now.

Senator PEARSON. Let me ask one more question.

How soon does a claim have to be filed?

Mr. FRAZIER. Within 9 months.

Senator PEARSON. Let me ask counsel a question.

Generally speaking, this is difficult but from State to State and jurisdiction to jurisdiction, do you have to file a separate count for every car you have a claim on?

Mr. KOBER. Not necessarily.

Senator PEARSON. In some jurisdictions—would you just hazard a guess as to whether or not you could lump all of your claims in a single count or do you have to set them out count by count?

Mr. KOBER. I believe that the general rule is that given the same route of movement, given the same commodity and given some continuity in time, you can group certain claims together and file a suit based on the group claim, if you will, under those circumstances.

Senator PEARSON. All right. Continue.

Mr. FRAZIER. Mr. Chairman, this new policy was an annual $10 million shock to our industry. We consulted with the railroads; we engaged legal counsel to advise us; and we asked Senator Magnuson to introduce legislation which would put the shipper in an equitable position with the carriers when claims were presented for settlement. Senator Magnuson introduced a bill in the 89th Congress identical to S. 858. We were happy when he reintroduced the bill in the 90th Congress, and we are most appreciative of your conducting these hearings.

Many of the railroads have reverted to their former policy with regard to settlement of claims which, as I pointed out before still

leaves us in an inequitable position. However, some have retained the April 1, 1966, policy; and we are fearful that without this important legislation others will adopt or readopt it and it will spread like a cancerous growth. The fact is that our national association has contemplated for some time the need for the legislation proposed in S. 858; and the claims policy adopted by certain railroads on April 1, 1966, accentuated the dire need for such legislation.

Particularly harmed by this unbalanced bargaining position is the small country elevator or small receiver who is on one railroad line which is his only practical mode of transportation. He is completely at the mercy of that railroad and is in no position to sue for losses, recognizing that he will almost always end up with some loss even when he wins. In a legal suit the attorney's fees can wind up to be more than the recovery on the claim. I would not want to imply that any of us can completely avoid the bad bargaining position—everyone in our industry is hurt by it—but the larger shipper can ship by those lines or those modes which give him good service and fair treatment. It is probable that the smaller the shipper the more he is hurt percentagewise.

I would be remiss at this point if I failed to recognize that some grain and feed firms have been guilty of poor loading and weighing practices. As chairman of the national transportation committee, I have met with railroad officials to work out ways in which we can reduce grain losses. More importantly, I have appeared on the convention programs of many of our affiliated associations to discuss the causes for grain losses and to encourage the best possible loading and weighing procedures. This subject was a highlight of our national convention in New York in March of this year and our executive committee last month discussed the possibility of developing an educational film for use by all in our industry.

Mr. Chairman, we want losses of grain to be reduced; we want meritorious claims to be settled in full; and we want unjust claims discarded. We firmly believe that enactment of S. 858 would accomplish these objectives by awarding attorney's fees in meritorious cases while continuing to deny them in unjust cases.

Some will claim that S. 858 will result in an enormous number of law suits. We do not believe this to be the case because we believe that with each side in an equal bargaining position compromise on both sides would take place and meritorious claims settled in an equitable manner. Nonmeritorious claims would not result in law suits as the claimant would know he would have to pay his attorney's fees himself.

In summary, Mr. Chairman, enactment of S. 858 would relieve the shipper from being at the mercy of the carriers in claims settlement, would encourage the just settlement of meritorious claims without going to court, and would allow the successful plaintiff to recover reasonable attorney's fees if suit is necessary. We strongly urge the enactment of S. 858.

With your permission, I would now like to again introduce Mr. Rod Kober so that he may speak to the legal aspects of S. 858. Mr. Kober.

Senator LAUSCHE. Certainly.

Mr. KOBER. Mr. Chairman, Senator Pearson: The legal remedy available to a grain dealer dissatisfied with efforts to settle a freight

loss claim with a carrier is set forth in section 20(11) of the Interstate Commerce Act. Although that section provides at length for the disposition of loss and damage claims, it makes no provision for the award of attorney's fees and other costs to a successful plaintiff in a freight loss or damage suit. This omission has been construed to be fatal to any efforts to collect the expenses of litigation as a part of the award of damages in such suits. See e.g., *Missouri Pac. R. Co.* v. *Harper*, 201 F. 671, and *Thompson* v. *Rouw Co.*, Tex. Civ. App. 1951, 237 S.W. 2nd 662.

Provision for the award of attorney's fees is not a novel concept under the Interstate Commerce Act. Sections 8 and 309(b) cover reparation awards for violations of the act by rail carriers and water carriers, respectively. Sections 16(2) and 308(e) provide for the judicial enforcement of reparation orders. Each of these sections provide specifically for the recovery of a reasonable counsel's fee by a successful plaintiff, which fee shall be awarded and collected as part of the costs in the case.

Senator LAUSCHE. Let me interrupt at this point. Is there any specific element that has to be present when attorney's fees are awarded? By this I mean: Must there be willful or gross negligence or malice?

Mr. KOBER. No, sir.

Senator LAUSCHE. All right, proceed.

Mr. KOBER. Perhaps the most convincing statutory argument for the amendment proposed in S. 858 is to be found in section 20(12) of the act. A shipper or receiver by rail is given the option under section 20(11) of suing either the originating or delivering carrier for loss or damage in the movement of a particular shipment. The carrier selected for suit by the shipper or receiver may not have been responsible, in whole or in part, for the loss or damage sustained. Section 20(12) seeks to apportion responsibility for money damages awarded under section 20(11) among the various carriers participating in a particular movement; and it provides:

> That the common carrier, railroad, or transportation company issuing such receipt or bill of lading, or delivering such property so received or transported, shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained, the amount of such loss, damage, or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof, and the amount of any expense reasonably incurred by it in defending any action at law brought by the owners of such property.

Senator LAUSCHE. Just one moment. Are you able to state what the reason was for the Congress, in this specific class of cases, requiring that attorney's fees be taken?

Mr. KOBER. No, sir; I am not.

Senator LAUSCHE. The general rule is that in litigation, unless malice or sometimes willfulness is shown, attorney's fees are not paid by the losing party. Why did the Congress, in this particular case, say that one carrier that is required to sue another carrier, if he prevails, shall be entitled to compensation?

Mr. KOBER. I am not familiar with the purpose. It is something that I have wondered about——

Senator LAUSCHE. Do you agree with me that attorney's fees are not generally allowed except where malice is an element in the proceeding?

Mr. KOBER. I would think that would be the general rule, yes.

Senator LAUSCHE. Now this seems to be another category so my question is: What were the specific reasons why Congress said that in this specific classification, attorney's fees shall be allowed?

Mr. KOBER. My reading of the legislative history in back of sections 20(11) and 20(12) has revealed no reason to me, sir.

Senator LAUSCHE. All right, proceed.

Mr. KOBER. Under sections 20(11) and 20(12) the following situation could easily result. A receiver of grain, failing to effect a reasonable settlement of his loss in transit claim, could sue the delivering rail carrier for the amount of the commodity lost in transit. A court could find for the plaintiff and award damages based only on the market value of the commodity shown to have been lost in transit. No award could be made to such plaintiff on the basis of his cost of litigation, including his counsel's fee. The defendant rail carrier, however, could claim against all other participants in the routing and movement of the particular shipment involved; and it could collect under section 20(12) not only the judicial award to the owners of the lost goods but also the expense, including counsel's fee, in defending the law suit. We sincerely feel that allowing recovery of reasonable counsel's fees to rail defendants in loss or damage actions, but precluding recovery of such expenses to successful plaintiffs in such actions, is not an equitable statutory arrangement. Enactment of S. 858 would eliminate this inequity, and would afford owners of property shipped by rail the same measure of economic protection in prosecuting meritorious loss or damage actions as is provided rail carriers as defendants in such cases.

Allowance of reasonable expenses including attorney's fees is also permitted to motor carrier and freight forwarder defendants in loss or damage actions under the terms of section 219 and 413 of the act, respectively. In fact, these sections make the provisions of sections 20(11) and 20(12) specifically applicable to the resolution of loss and damage claims between owners of goods, on the one hand, and on the other, motor carriers and freight forwarders.

Senator PEARSON. Let me interrupt you a moment. Isn't the answer to Senator Lausche's question that a common carrier has absolute liability for loss?

Mr. KOBER. That is correct; he does.

Senator PEARSON. Well, Mr. Kober, under the law a common carrier has absolute liability for loss and refuses to pay the loss, then there are peculiar circumstances existing which would make fair the allowance of attorney fees. Do you agree with that? I don't know. I am just throwing it out.

Mr. KOBER. This is the problem we are faced with.

Senator PEARSON. Isn't that the answer?

Mr. KOBER. Sir?

Senator PEARSON. Isn't that the answer?

Mr. KOBER. Let me see if this is satisfactory: The law would seem to impose absolute liability upon the carrier provided the plaintiff——

Senator PEARSON. Between carriers and between shippers and carriers, isn't that right?

Mr. KOBER. Correct, providing we are talking about a shipper prosecution is claimed, the shipper feels his economic interest would best be served by pursuing the matter in a court of law. Under the present

setup, if we were to pursue that and his claim, although the carrier may be absolutely liable, the claim may be so small that his attorney's fee would completely negate any economic recovery he might receive as a consequence of this imposition of absolute liability in a court of law.

It is the economic onus of the nonrecoverability of attorney's fees that is at the basis of this. The law seems clear with regard to the claim itself but there are many claimants who if they went to court might recover and most cases seem to bear this out where they have been reported. However, his attorney's fees may completely negate any recovery he may make on the claim itself. This is the problem.

Senator PEARSON. How many of these cases are actually litigated?

Mr. KOBER. Very few, sir; apparently because of the fact that most claims are rather small—I would say under $200—and the attorney's fees would so negate any recovery up to $200 that pursuing the matter at law is not advisable economically?

Senator PEARSON. Go ahead.

Senator LAUSCHE. Proceed.

Mr. KOBER. In at least one instance a rail carrier might appear as a plaintiff in a claim action, the act provides that such plaintiff is entitled to the award of a reasonable attorney's fee. Section 15(9) deals with liability of rail carriers for their disregard without lawful cause of the routing specified in a bill of lading. The carrier or carriers disregarding such routing instructions shall be jointly and severally liable to the carrier deprived of its right to participate in the line-haul movement, and "in any judgment which may be rendered the plaintiff shall be allowed to recover against the defendant a reasonable attorney's fee to be taxed in the case." Of course, the important element here is the allowance of a reasonable attorney's fee to a successful rail plaintiff in a claim action brought under the provisions of section 15(9) of the act. The proposed legislation would secure an analogous right of recovery to a successful loss or damage claimant under section 20(11) to that provided rail claimants under sections 15(9) and 20(12) of the act.

At this point, I should like to reiterate Mr. Frazier's observation that the proposed legislation is not likely to lead to a multiplicity of doubtful actions. The proposed legislation would provide fuller economic relief only to those claimants whose causes of action are meritorious. The unsuccessful plaintiff would not benefit as a result of the proposed legislation. Doubtful loss or damage claims would confront potential plaintiffs with the onus of unsuccessful prosecution and, thus, the full expense of those litigations. This prospect should control in large measure the filing of loss or damage suits. On the other hand, the statutory provision for the award of reasonable attorney's fees to loss or damage claimants holding meritorious claims should ensure an equitable offer of settlement thereby reducing the necessity for suing for recovery for loss or damage.

It is our view that S. 858 is supported by any notion of elemental commercial equity and by the disposition of the attorney's fee issue in analogous circumstances under the Interstate Commerce Act. S. 858 provides for recovery of reasonable fees, and the court would be able to exercise its judgment based upon the characteristics of each proceeding. This arrangement would reflect the same delegation of judi-

cial discretion where the act presently provides for the award of reasonable attorney's fees.

We can foresee no constitutional bar to the amendment proposed by S. 858. We believe that the existent statutory scheme, relevant to the issue of the award of a reasonable counsel's fee, suggests beyond real question that the proposed legislation would meet all pertinent tests of constitutionality.

In conclusion, the Grain and Feed Dealers National Association strongly supports S. 858.

Senator LAUSCHE. Senator Pearson, any questions?

If this amendment is adopted, what would the status of the law be with respect to the right of the defendant being allowed reimbursement for attorney's fees expended?

Mr. KOBER. Sir, I think that issue is already covered by the language of section 20(12) which says——

Senator LAUSCHE. Would the law permit the defendant to be granted attorney's fees, Mr. Kober?

Mr. KOBER. If he could show the other participant in a particular movement were wholly or partially liable for the loss incurred, yes, sir.

Senator LAUSCHE. I am now talking of shipper A sues railroad B. Shipper A prevails. He is allowed attorney's fees. In the same case shipper A fails. Is the railroad entitled to attorney's fees?

Mr. KOBER. They would not under this legislation, and we feel that wherever the issue of attorney's fees has been handled in the act, this aspect of reciprocity has not been provided. In other words, if the defendant shall prevail, there is no reciprocal requirement that his—that is that the defendant's attorney's fees shall be paid by the plaintiff.

Senator LAUSCHE. Why shouldn't there be? If you allow attorney's fees to one why shouldn't you allow it to the other litigant?

Mr. KOBER. Well, the only thing—may answer there would be directed to the state of the act as it presently is written. I don't know the reason for not providing it under the present act but wherever the issue has been handled, for whatever reason was felt to be pertinent at that time, the defendants weren't permitted recovery of attorney's fees. We seek here, I think, an amendment which would reflect the present statutory scheme.

Senator LAUSCHE. Now, of course, you might say the railroad is powerful and large and the plaintiff is weak and small and therefore there shall be a different rule of justice applicable to each, but I don't think that that can logically and justly be argued.

You speak of reciprocity according to each litigant an equal rule of justice. Now if reciprocity is to prevail, I am quite sure you have to demonstrate some real reason why the railroad should pay the attorney's fees when it loses and the plaintiff shipper should not pay them when it loses.

Mr. KOBER. Well, to require the plaintiff shipper to pay attorney's fees under those circumstances, again I realize I am representing myself, would not comport with other provisions which speak to this very issue in the act.

Senator LAUSCHE. That is these items you mention?

Mr. KOBER. That is correct.

Senator LAUSCHE. All right.

Mr. FRAZIER. Mr. Chairman, may I speak a moment?

Senator LAUSCHE. Surely.

Mr. FRAZIER. The way that we as receivers and shippers used to settle claims with the railroads is, as Senator Pearson was getting at a little while ago, a car would come in and it would be short and we would file a piece of paper on that particular car and we would show what was put in the car and what was taken out of the car and then we would file a claim. And then the claims would pile up and pretty soon a claim adjuster from the railroad would come into the office and then we would sit down around the table. He would say, well this fellow's weights aren't so good. I don't think we really ought to pay a hundred percent on that. These are not so bad. How about if we pay 75 percent on that one? And we would go through amicably settling these things out. Nobody got exactly what he thought he should have, but the railroad made a compromise and the shipper and receiver made a compromise and we would wind up friends.

As I say, nobody was completely satisfied, but nobody was completely dissatisfied either.

If there was some particular shipper that had a very bad record, he would say, boy we will just have to tell that fellow we can't pay any more of his claims. But in the recent year and a half or so, all of a sudden we get this kind of policy laid down where they arbitrarily on this type of thing we won't pay any claim.

Sir, we think that is wrong. We think claims should be settled on an individual basis and the railroad, as Senator Pearson pointed out, being a common carrier, does have responsibility and he should be responsible for the protection of this lading.

The situation now with the railroads getting extremely tough on the settlement of these claims puts especially this little fellow we referred to in a very, very bad situation. It doesn't put anybody in a good one, but it puts the little fellow especially in a very bad one and he just won't survive through it.

I don't know, maybe this clarifies a bit the reason for this.

Senator LAUSCHE. I am approaching the subject from a basic concept. I am a firm believer in the principle there must be equal justice to all litigants who come before a court and the posing of my question does not at all indicate that I am hostile to your cause, but I am quite certain that lawyers would argue.

Well, why not impose upon defendants in automobile accident cases the responsibility of paying the plaintiff's attorney's fees when the proof was clear that the defendant was negligent, the damages were clearly established, and yet the plaintiff had to pay his own attorney's fees.

It goes far beyond this case unless your argument is sound that this is a special field. That is what I would want to look into.

Mr. FRAZIER. But, sir, the railroad is receiving payment for the transportation of the goods. They are getting paid for this service. He is doing this, we hope, at a profit.

Senator LAUSCHE. I never heard of such a rule before that when one is paid there is a different rule of justice with regard to attorneys. Are you a lawyer?

Mr. FRAZIER. No, sir.

Mr. KOBER. Mr. Chairman, if I may make just this observation: If the Interstate Commerce Act where it deals with attorney's fees had

imposed a reciprocal requirement on the unsuccessful maintenance of any claim by a plaintiff, our position would be a very difficult one concededly. However, we are dealing only with the act as we find it. I don't know personally or through any other source the reasons why the act is written the way it is, but the clear truth is that wherever the act does deal with attorney's fees, a reciprocal requirement which, as you expressed, would be equal justice under the law is not made and the purpose for this, again I don't know, and all we seek really here is equal justice within the context of the act.

Perhaps it all should be amended. We are not suggesting that.

Senator PEARSON. I am sympathetic to this bill although I must say Senator Lausche's question makes a great deal of sense to me. I think I know one of the practical reasons why you don't provide for reciprocal attorney's fees. That is, that every railroad has its staff of lawyers and an army of them, so to speak, that will be there to handle a dozen different types of situations. A great deal of it is claim work, as I gather that—let me ask you this first:

When you leave the country elevator or the terminal elevator, who does the job of making the weight determination there? Is it the State, Federal Government, or what?

Mr. FRAZIER. It may be done by the State, the local chamber of commerce, the Federal Government, or if it is a very small shipper, the shipper himself. I shouldn't say—excuse me, sir. Federal Government, no. State government, board of trade exchange, not the Federal Government.

Senator PEARSON. This is agreed to by the railroad in the way it is done?

Mr. FRAZIER. Yes, sir.

Senator PEARSON. Now when you get into Kansas City and Chicago you have another weigh-in there. Who does that, Mr. Frazier?

Mr. FRAZIER. In Chicago, the weights are supervised by the Chicago Board of Trade weighing inspection. There is a State inspection service there also.

Senator PEARSON. This is acceptable to the railroad?

Mr. FRAZIER. Oh, yes. It is either the State of Kansas or the Kansas City Board of Trade in the State of Kansas.

Senator PEARSON. So if you have a situation really where the elevator is on a railroad line, he has to use that line, doesn't he?

Mr. FRAZIER. That is correct?

Senator PEARSON. You have a weight-in when you leave and a weigh-in when you get there?

Mr. FRAZIER. Yes.

Senator PEARSON. Absolute liability on the part of the carrier?

Mr. FRAZIER. That is what we say. They don't agree all the time.

Mr. KOBER. I might say this to Senator Pearson with regard to some of his earlier questions. Aside from this policy of April 1, 1966, it has been my experience that all carriers have internally, not necessarily collectively but have internally and individually maintained a policy of arbitrary settlements regarding certain types of claims. Specifically I am talking about claims where you would have one official weight at either origin or destination and an unofficial weight, a weight that was not supervised by an independent agency at either origin or destination.

This kind of policy of April 1, 1966, represented a solidification of

these individual policies but they existed prior thereto on each individual railroad with regard to the settlement of certain loss in transit claims.

Senator PEARSON. If you have an unofficial weight at either end, I can understand the railroad's position in the matter, frankly.

Mr. KOBER. Well, the situation with regard to an unofficial weight at one end or the other—I was going to make the observation that the situation with regard to an unofficial weight at one end or the other usually reflected that railroad confidence in the validity of the weight being produced by the unofficial weigher and the settlements in that case were accordingly.

Senator PEARSON. Except until the time claims were filed, is that correct?

Mr. KOBER. That is right.

Senator LAUSCHE. All right, thanks very much.

Senator LAUSCHE. Our next witness is Mr. Durward Seals, United Fresh Fruit & Vegetable Association, Washington, D.C.

Mr. Seals, you may proceed.

STATEMENT OF DURWARD SEALS, TRAFFIC MANAGER, UNITED FRESH FRUIT & VEGETABLE ASSOCIATION, WASHINGTON, D.C.

Mr. SEALS. Thank you sir.

My name is Durward Seals. I am traffic manager of the United Fresh Fruit & Vegetable Association. This is a national trade association, with headquarters at 777 14th Street N.W., Washington, D.C. 20005, having nearly 2,600 members, residing in nearly all of the States, who are engaged in growing, packing, shipping, and distributing fresh fruits and vegetables, as well as providing goods and services to the industry. In the aggregate, they handle approximately 75 percent of the Nation's tonnage of fresh fruits and vegetables.

I am appearing also for the Idaho Grower Shippers Association, Inc., Post Office Box 1100, Idaho Falls, Idaho, and the Texas Citrus and Vegetable Growers and Shippers, 306 East Jackson, Harlingen, Tex. 78550.

At its annual convention in January 1967, our association endorsed this legislation and urged the rail carriers to resume dependable rail service and to acknowledge their legal liability and responsibility in the transportation of our highly perishable products. The resolution reads as follows:

> The United Fresh Fruit and Vegetable Association is on record by resolution, urging the railroads of this country to consider fully the subject of strict adherence to their legal liability and responsibility connected with the transportation of fresh fruits and vegetables to market and to reestablish recognized schedules, not only for delivery time but cutoff hours, in the interest of orderly marketing in our industry.
>
> With the discontinuance of recognized schedules by the railroads, service deteriorated markedly, and despite assurance of improvement, the performance record is dismal.
>
> We are disappointed that generally the eastern carriers arbitrarily and summarily continue to decline to participate in the settlement of valid claims for delay, thereby refusing to recognize their statutory and common law liability as carriers as universally enforced.

Senator LAUSCHE. Let me interrupt. May I ask that the two previous witnesses remain until we are through with Mr. Seals? Continue please.

Mr. SEALS [continuing]:

Therefore, this industry urges the rail carriers again to assume their full responsibility in maintaining prompt and dependable schedules for delivery and recognition of their legal responsibility for prompt payment of valid claims for losses resulting from delay in transit and delivery.

If prompt remedial action is not taken by the rail carriers to assume their full responsibility, the shippers and receivers should take appropriate action, including litigation if necessary, to insure that the carriers recognize their responsibilities to this industry.

Legislation should be supported to amend the Interstate Commerce Act in order to provide recovery by successful claimants of reasonable attorney's fees incident to litigation to enforce the carriers' obligation for loss and damage in transit.

This Association should take appropriate action to coordinate the efforts of its members and to insure that there be a resumption of dependable rail service and the fulfillment of carriers' obligations with respect to valid loss and damage claims.

In furtherance of this resolution, I am offering this statement in support of S. 858.

For many years the American railroads, including the eastern carriers, maintained so-called guaranteed schedules from various producing areas in the Southwest and West to the principal produce markets. Claims for delay to shipments of fresh fruits and vegetables were paid on the basis of a guaranteed schedule. Some railroads published their guaranteed schedules and others, while not publishing the schedules, paid claims on the basis of schedules quoted in their solicitation of traffic.

On April 30, 1964, the principal eastern railroads announced that on and after 12:01 a.m. on June 1, 1964, they would "* * * not undertake to deliver at destination at or within any particular time or in time for any particular market or otherwise than with reasonable dispatch." The fresh fruit and vegetable industry, including this association, vigorously opposed the cancellation of these guaranteed schedules. Despite numerous conferences with eastern railroad officials, the rail carriers refused to rescind their order, and the schedules were canceled on June 1, 1964. Since that time service and delivery performances at many of the eastern markets, particularly those located east of Buffalo, N.Y., have deteriorated and it has been extremely difficult to provide for the orderly marketing of highly perishable fresh fruits and vegetables in this area or to collect claims for delay from eastern carriers.

Senator Magnuson, who introduced this bill on February 6, 1967, succinctly and clearly stated the need for S. 858 when he said:

The purpose of the bill which I am today introducing is to provide a financial responsibility or burden for failure of a railroad to maintain its schedules. A shipper or receiver sustaining damage because of a railroad's failure to carry out a scheduled delivery could recover a reasonable attorney's fee in court.

Shippers of perishable fruit and vegetables desire a reliable schedule for orderly marketing rather than lawsuits to collect damages because of in-transit damage or delay. Apparently, certain eastern railroads are more interested in forestalling damage claims than in maintaining or improving their present schedules for fruit and vegetable transportation. I am advised that eastern lines to date have remained adamant in their position that they will not guarantee schedules and that they will not pay delay claims unless negligence is proven by the carrier or receiver.

The eastern railroad's apparent policy of hiding behind the assertion that the shipper or a receiver must prove negligence and continuing to decline claims without respect to their legal liability by asserting that delivery was with "reasonable

dispatch" no matter how late, falls hardest upon the small shipper. To a small shipper, the amount involved in most cases is not sufficient to justify the litigation of his individual claim. The legal costs and attorney's fees count exceed the amount of the recovery.

If eastern carriers are required to pay reasonable attorney's fees an economic incentive would be provided not only to honor legitimate claims whether they be large or small, but also to provide dependable schedules which permit orderly marketing. By establishing meaningful financial responsibility for delay, carriers performance will improve, which, in turn, could lessen the amount of such claims.

We endorse and support the above statement. Although the United and other representatives of the fresh fruit and vegetable industry have held numerous meetings with the eastern carriers, to date they have remained adamant in their position that they will not guarantee schedules and that they will not pay delay claims unless negligence is proven by the shipper or receiver. Except in unusual circumstances, the shipper or receiver rarely has knowledge of what occurs to a particular shipment in transit. Therefore, he would find it difficult, if not impossible, to prove that the carrier was negligent. Moreover, there is no justification in the position of the eastern carriers in attempting to force claimants to prove carrier negligence. The law requires that lading be transported with reasonable dispatch. For over thirty years the rail carriers have accepted their operating schedules as a standard of delivery performance and have paid valid delay claims if they failed to adhere to these schedules. This policy is still being followed by most rail carriers. The eastern carriers, however seem determined to continue their policy of refusing to accept responsibility for transit delays unless the receiver or shipper, with no knowledge of transportation failures in transit or access to carriers' transit records, can prove to them that the delay was negligently caused. If the eastern carriers continue to refuse to pay these claims for delay, then it will be necessary for the claimant to seek relief in the courts. S.858 would aid the claimant in recouping a portion of his total litigation costs.

There is ample precedent in the Interstate Commerce Act for providing a reasonable attorney's fee to shippers or receivers where they successfully maintain an action. In Senator Magnuson's statement of February 6, referred to above, mention is made of a ruling by the Assistant Comptroller General of the United States with respect to S. 3741, an identical bill to S. 858. In favorably commenting on S. 3741 the Assistant Comptroller General said:

Such allowance also is in harmony with other provisions of the Act permitting recovery of attorney's fees in other kinds of actions.

Section 8, part 1, of the Interstate Commerce Act permits recovery of a reasonable attorney's fee in an action for damage sustained as a result of a violation of the provisions of part 1 of the act by a common carrier. The attorney's fee is to be taxed and collected as a part of the costs in the case.

Section 16(2), part 1, of the Interstate Commerce Act permits recovery of a reasonable attorney's fee in an action brought to enforce an order of the Commission for payment of money. The fee to be taxed and collected as a part of the costs in the suit.

We already pursued section 20(12) with the previous witness and my response would be substantially the same. Now, referring to section 20(12) part 1, under this section the initial or delivering carrier can recover from an intermediate or connecting carrier, on whose line the loss, damage or injury occurred, not only the amount of the loss,

damage or injury, but also the amount of any expense reasonably incurred by the initial or delivering line in defending any action at law brought by the owners of the property. We believe similar protection should be extended to the users of transportation—the carriers' customers. The enactment of S. 858 would be of great assistance to shippers and receivers in the collection of valid claims for delay.

The opponents of S. 858 probably will argue that the passage of this bill will encourage unnecessary and unjustifiable litigation. We do not agree. The average claim for delay on a carlot shipment of fresh fruits and vegetables if about $200. Generally, to litigate such a claim requires 2 to 4 days pretrial preparation on the part of an attorney and 2 to 3 days of actual trial. In addition to this, the claimant and some of his key personnel are likewise required to spend a like amount of time in preparation and trial. Even if he is able to recover a reasonable attorney's fee in the ultimate settlement, the claimant is not likely to incur this additional expense unless he has a valid claim. On the contrary, we believe the passage of S. 858 would have a salutary effect on the claim departments of the carriers, and will stimulate their efforts to seek an amicable settlement of claims that otherwise would be litigated.

Rail transportation plays an important part in the transportation of fresh fruits and vegetables from the distant producing areas to the large urban consuming markets. Approximately 500,000 carloads are shipped by rail each year. The phenomenal growth of piggyback, the development of the large mechanical refrigerator car, and the publication of incentive rates all have contributed, for the first time in many years, to reverse the down-trend of the railroads' relative share of the fresh fruit and vegetable tonnage. In 1966 the railroads carried about 37 percent of fresh product and the trucks about 63 percent, compared to 34 percent and 66 percent respectively in 1965. While this may appear to be a small increase, it is significant in that it clearly shows a reversal of the downward trend and indicates that technological improvements have contributed to the rails' ability to recover some of the traffic lost to other modes of transport. If this trend is to continue, however, the rail carriers must reestablish and maintain schedules, dependable service, and prompt and just settlement of valid claims.

The arbitrary and adamant position of the eastern carriers in the settlement of claims falls heavily on the small shipper and receiver who cannot afford to litigate his claims because it is economically not feasible to do so. The passage of S. 858 would provide a measure of relief and would reduce the necessity for litigation. We wholeheartedly endorse and support S. 858 and respectfully urge your approval of this bill.

Mr. Chairman, we appreciate the opportunity afforded us to present our views on this bill.

Senator LAUSCHE. Senator Pearson, do you have any questions?

Senator PEARSON. Tell me this, Mr. Seals, have there been arbitration agreements entered into by those people that you represent and the carriers?

Mr. SEALS. No, sir; not to my knowledge.

Senator PEARSON. Not to your knowledge?

Mr. SEALS. No. The industry has what we call a National Fruit and Vegetables Claims Committee, which is composed of the National

Fresh Fruit and Vegetable Association and a number of local associations. We meet once or twice a year with the freight claim agents of the railroads in an attempt to resolve these differences.

Senator PEARSON. But this is policy. You don't have an arbitration agreement whereby the shippers and carriers, rather than go to court on these claims, submit them to a specified type of arbitration?

Mr. SEALS. I know of none like that at the present time.

Senator PEARSON. Thank you.

Senator LAUSCHE. Should the subcommittee, or the whole committee decide to approve this bill, but adding to it that an unsuccessful plaintiff shall be obligated to pay attorney's fees to the successful defendant, what would be the attitude of your association?

Mr. SEALS. Mr. Chairman, we would prefer to be treated the same way as the carriers are treated in section 20(12). If the judgment of this committee is that you pass it as you suggested, we would accept it.

Senator LAUSCHE. You would accept it—that is if the committee should conclude that there must be reciprocity and if you make the defendant pay the attorney's fees when the plaintiff wins, you ought to make the plaintiff pay the attorney's fees when the defendant wins. I would accept that, would you?

Mr. SEALS. Reluctantly, yes, sir. Thank you very much.

Senator LAUSCHE. Mr. Frazier, I put the same question to you. Would your association approve of a bill of the type I just mentioned?

Mr. FRAZIER. No, sir; I don't believe so.

Senator PEARSON. Why?

Mr. FRAZIER. We don't think that is exactly fair, as I was pointing out before. We feel that the common carrier has the liability to protect the lading from the time he receives it until the time it is delivered.

Senator PEARSON. I thought so too but I just asked counsel and he said under section 210 or whatever section it was that that absolute liability had been chipped away at through the years.

Mr. FRAZIER. Yes, sir; it has been chipped away at and in fact there is a tariff which states that it isn't so, but we don't believe it, we don't agree with it and it has not been litigated yet. And it will be litigated.

Senator LAUSCHE. Doesn't your position lead to this: You want the Congress to declare that every claim filed against the railroad company should be paid and unless it pays it, it will have to pay the attorney's fees of the plaintiff who sues?

Mr. FRAZIER. No, sir.

Senator LAUSCHE. If he wins?

Mr. FRAZIER. Only if he wins. So if he wins, he is right.

Senator LAUSCHE. But if he loses, he is wrong.

Mr. FRAZIER. But if he loses, it will cost him more money anyway, probably, than the claim was worth in the first place. As was just pointed out by——

Senator LAUSCHE. I can understand that the poor plaintiff who has a smaller claim and has to hire a lawyer may find himself paying more for the lawyer than he obtains in the winning of the case.

Mr. FRAZIER. Yes, sir.

Senator LAUSCHE. All right. That is all.

Next witness is Mr. Burrows, executive vice president of the International Apple Association.

STATEMENT OF FRED BURROWS, EXECUTIVE VICE PRESIDENT, INTERNATIONAL APPLE ASSOCIATION, INC., WASHINGTON, D.C.

Mr. BURROWS. Mr. Chairman, Senator Pearson, My name is Fred W. Burrows, and I am executive vice president of the Interiational Apple Association and we very much appreciate the opportunity of presenting the views of this organization on this particular legislation.

The International Apple Association is a nonprofit membership organization serving the fruit industry with emphasis on apples and winter pears. Our membership encompasses every segment of the industry, from the producer through the retailer, including packers, shippers, processors and distributors. Our members produce, handle, sell, buy and/or distribute in excess of 75 percent of the United States commercial apple and winter pear crops, and represents a fairly substantial tonnage of Florida citrus marketed fresh. Our members are directly concerned and involved in all modes of transportation and, therefore, are deeply interested in the outcome of S. 858.

In brief, we wholeheartedly support S. 858.

The remarks of the bill's sponsor, Senator Warren G. Magnuson, when he introduced S. 858, and the accompanying statement by Mr. Ernest Falk, secretary-manager, Northwest Horticultural Council, Yakima, Wash., which appeared in the Congressional Record of February 6, 1967 (pages S1544–1546), very clearly outline the background, the problem and the vital need for the legislation for our industry. We assume that the Senator's remarks and Mr. Falk's statement will be made part of the hearing record. If our assumption is in error, we would strongly recommend that they be made part of the record.

Senator LAUSCHE. It is already made part of the record inasmuch as it was incorporated in the paper presented by Mr. Seals. Am I correct, Mr. Seals?

Mr. SEALS. Not the whole statement.

Senator LAUSCHE. Then the whole statement will be put in the record.

AMENDMENT OF THE INTERSTATE COMMERCE ACT

Mr. MAGNUSON. Mr. President, I introduce, for appropriate reference, a bill to amend the Interstate Commerce Act to provide for the recovery of a reasonable attorney's fee in the case of successful maintenance of an action to recover damages sustained in the transportation of property.

The Senator from Florida will be interested in this matter.

Many years past, western shippers of apples, lettuce, melons, and other fruits and vegetables expected their products to reach the big eastern consumer markets in 10 days.

In recent years housewives in the Northeast and in other sections of the country which do not raise these crops have had the advantage of a shorter delivery time from Florida, and from the west coast.

Western perishables now arrive for fifth morning delivery in Chicago, and east coast delivery 2 days later. The western railroads have been working to develop fourth morning delivery in Chicago, which could put western fruits and vegetables in eastern supermarkets on the sixth morning after they begin their transcontinental journey.

These orderly railroad marketing schedules for the transportation of perishables are important to our quality-conscious Nation's housewives. Recent developments, however, are producing a deterioration of railroad schedules for the movement of perishables. This deterioration could decrease the quality of fruits and vegetables in our Nation's supermarkets, and, since the consumer ultimately pays the cost of spoiled perishables due to in-transit delay, could increase the price of perishable foods.

On April 30, 1964, the eastern railroads served notice that effective June 1, 1964 they "will not guarantee delivery of perishable freight at destinations to meet previously agreed cutoff times for the various markets located in our system."

That means that they have sought to avoid the financial responsibility or burden for the failure of a railroad to maintain the schedules it gives to the fruit shipper.

Mr. HOLLAND. Mr. President, will the Senator yield?

Mr. MAGNUSON. I yield.

Mr. HOLLAND. I am not conversant with this matter; but it occurs to me that the railroads, who have been complaining so vigorously because truck transportation has taken over so much of the movement of perishable fruits and vegetables, are simply playing further into the hands of motor transportation if they take this kind of shortsighted position.

I am glad that the Senator has placed this matter in the record. I confess that I had not heard of it.

Mr. MAGNUSON. We wish to take a look at the whole matter. It affects the small shipper very much, because if he has a small damage claim, he cannot afford to hire a lawyer and go into court, because such action is often too expensive even if he prevails. This bill would make it easier for him to realize justice when justice is due.

After the 1964 action by the eastern lines, representatives of the fruit and vegetable industry met with the eastern carriers on a number of occasions, but all to no avail. Subsequent to the eastern railroad's actions in 1964, I am advised that service deteriorated on western perishables moving to eastern markets.

The purpose of the bill which I am today introducing is to provide a financial responsibility or burden for failure of a railroad to maintain its schedules. A shipper or receiver sustaining damage because of a railroad's failure to carry out a scheduled delivery could recover a reasonable attorney's fee in court.

Shippers of perishable fruit and vegetables desire a reliable schedule for orderly marketing rather than lawsuits to collect damages because of in-transit damage or delay. Apparently, certain eastern railroads are more interested in forestalling damage claims than in maintaining or improving their present schedules for fruit and vegetable transportation. I am advised that eastern lines to date have remained adamant in their position that they will not guarantee schedules and that they will not pay delay claims unless negligence is proven by the carrier or receiver.

The eastern railroad's apparent policy of hiding behind the assertion that the shipper or a receiver must prove negligence and continuing to decline claims without respect to their legal liability by asserting that delivery was with "reasonable dispatch," no matter how late, falls hardest upon the small shipper. To a small shipper, the amount involved in most cases is not sufficient to justify the litigation of his individual claim. The legal costs and attorney's fees could exceed the amount of the recovery.

If eastern carriers are required to pay reasonable attorney's fees an economic incentive would be provided not only to honor legitimate claims whether they be large or small, but also to provide dependable schedules which permit orderly marketing. By establishing meaningful financial responsibility for delay, carriers performance will improve, which, in turn, could lessen the amount of such claims.

There is ample precedent for providing reasonable attorney's fees to shippers where they are successful in maintaining an action. In favorably commenting on an identical bill which I introduced on August 18, 1966, S. 3741 of the 89th Congress, the Assistant Comptroller General of the United States noted:

"Such allowance also is in harmony with other provisions of the Act permitting recovery of attorney's fees in other kinds of actions."

I have recently received letters from the Wenatchee Valley Traffic Association, the United Fresh Fruit and Vegetable Association, and the International Apple Association, Inc., advising that the conditions necessitating such legislation still exist, and recommending the reintroduction of this measure in the 90th Congress.

I ask unanimous consent that there be printed in the Record the remarks of Mr. Ernest Falk, secretary-manager, Northwest Horticultural Council, Yakima, Wash., presented at the annual convention of the United Fresh Fruit & Vegetable Association in Washington, D.C., on January 31, 1967, outlining the history and the difficulties involved with great clarity.

The PRESIDING OFFICER. The bill will be received and appropriately referred; and, without objection, the remarks will be printed in the Record.

The bill (S. 858) to amend the Interstate Commerce Act, with respect to recovery of a reasonable attorney's fee in case of a successful maintenance of an action for recovery of damages sustained in transportation of property, introduced by Mr. Magnuson, was received, read twice by its title, and referred to the Committee on Commerce.

The remarks ordered to be printed in the Record are as follows:

"GUARANTEED SCHEDULES, CLAIMS AND REASONABLE DISPATCH

"(By Ernest Falk)

"For many years, through 1961, American railroads paid claims for delay in shipment of perishables on the basis of a 'guaranteed schedule.' A few railroads published guaranteed schedules but most railroads paid on the basis that they had voluntarily assumed this liability because of the competitive solicitation of freight. To attract business, or to meet competition, railroads voluntarily assumed a liability greater than that imposed upon them by the common law or the contractual clauses of the bill of lading.

"The standard bill of lading provides that 'No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch'. Reasonable dispatch has been interpreted by the courts as 'without unreasonable delay'. The following statement from 13 Corpus Juris Secundum, Page 395, Section 194, is a standard text statement of the law:

" 'What is a reasonable time is not susceptible of being defined by any general rule, but the circumstances of each particular case must be adverted to in order to determine what is a reasonable time in that case; this rule stated in Corpus Juris has often been quoted and cited with approval. The mode of conveyance, the distance, the season of the year, the character of the weather, the ordinary facilities for transportation, and the volume of traffic are to be considered in determining whether in the particular case there has been an unreasonable delay. So also in determining what is a reasonable time for transportation the character of the freight shipped is a very important consideration; it is obvious that what would be a reasonable time for the transportation of one kind of freight would not be for another kind.'

"Reports of a January 11, 1962 meeting of the Traffic Executive Association stated that the following program was adopted to become effective March 1, 1962 on perishable traffic:

" '1. The Eastern carriers will not assume liability unless there is proof of negligence.

" '2. The so-called cut-off time will no longer be considered proof of negligence and the railroads will not assume liability.

" '3. All Eastern railroads will advise interested customers (shippers and receivers) accordingly. Also, connecting line railroads delivering these perishables to us will be notified of our program.

" '4. Railroad freight claim agents will be instructed to disregard cut-off time performance in their consideration of claim payments and be governed solely in their decisions by the conditions of the goods on arrival and the question of whether or not the rail carrier was in any way negligent in performing its common carrier function.'

"Under date of February 1, one of the large Eastern railroads issued a 'Notice to whom it may concern' stating that after March 1, it 'will not undertake to deliver at destination at or within any particular time or in time for any particular market or otherwise than with reasonable dispatch.

" 'Liability for delay will not be admitted in the absence of proof of negligence on the part of the _____ Railroad, notwithstanding published schedules.'

"Following these announcements, representatives of the fresh fruit and vegetable industry met with representatives of the Eastern railroads on March 12, the railroads having agreed to postpone the effective date of the above-notice to April 1. Following is a portion of my report of the March 12 meeting:

" 'At the meeting on March 12 we stressed the need of the industry for orderly marketing and pointed out the importance of guaranteed schedules in this particular. Our primary concern was not with collecting claims but was to assure regular receipts and orderly marketing of our commodities. After presentations by industry representatives we asked the railroads what they were trying to accomplish by the notices. The railroads explained that there have been many claims filed where a car missed the cut-off time (for delivery) by a very few

minutes and a claim was filed for decline of market because of delay. The principal difficulty involved a railroad delivering vegetables to the New York market. They had only 2½ hours in the winter and 1½ hours when daylight saving time was effective between the scheduled arrival of the train in New York and the cutoff time for delivery in the yard. This, particularly due to the attitude of yard switchmen, was not adequate to assure meeting of the cut-off time. One railroad paid claims of over $500,000 annually for market decline due to this one local situation. Other railroads had similar problems to a lesser degree.

" 'The railroad representatives explained that the financial position of the Eastern railroads was very bleak; that they were confronted with (a) obtaining additional revenue and/or (b) effecting savings. Claims for delay represented one area where savings could be effected. Their committee felt that they must plug this loophole on claims.

" 'The fruit industry representatives urged that these abuses should be corrected but that the entire claims policy should not be changed.

" 'In answer to specific questions, the Eastern roads said they would continue to pay claims for delays enroute on the basis of negligence the same as they have done in the past. They have no intention of forcing the shipper to prove negligence in each case but would make their investigation and pay claims following the same principles as in the past. The Eastern railroads all stated they do not intend to change schedules or relax performance.'

"The Eastern railroads thereafter agreed to rescind the action taken at the January 11 meeting.

"Meetings were held the following year between representatives of the National Fruit & Vegetable Claims Committee and the Freight Claim Agents of the major Eastern railroads. The following summarizes a press release issued on April 30, 1963 by L. A. Stronberg, Chairman of the National Fruit & Vegetable Claims Committee:

"The Eastern railroads agreed to pay their share of freezing claims filed with the originating carriers when accepted by the originating carriers covering shipments December 11, 1960 to March 1, 1961. This meant that freezing claims will be paid in exactly the same manner as in the past.

"Market decline claims for the same period, due to storm, weather conditions and/or the Maritime strike, will not be paid. 'However, claims for market decline will be recognized where actual carrier negligence, such as bad order cars, wrecks, derailments, etc., not caused by weather or strike, is found to exist'. The carriers freight claim agent group included representatives of the NYC, Penn, B&O, Erie, Nickel Plate and the New Haven.

"The truce which resulted from the 1962 meetings was shattered by the issuance on April 30, 1964 of notices by the Eastern carriers stating that effective June 1, 1964 the railroad 'will not guaranteee delivery of perishable freight at destinations to meet previously agreed cut-off times for the various markets located on our System.'

" 'We wish to assure our patrons that every effort will be made to maintain and even to improve our present schedules. However, we cannot be responsible for meeting specific market cut-off times when shipments are handled with reasonable dispatch.'

"The Eastern railroads apparently took the position they would not pay delay claims unless negligence was proved and have not receded from this position. The Western railroads have taken a much more reasonable position. They met with Pacific Coast shippers in March of 1965 and agreed that they would continue their claims policy to their destinations. They further agreed that on shipments to Eastern destinations where the Western lines' delay was two days or more they would make settlements where the Eastern lines would not admit negligent delay. The Western lines in such cases would pay the percentage of the claim that Western lines delay bore to the total delay.

"After the 1964 action by the Eastern lines, representatives of the fruit and vegetable industry met with the Eastern carriers on a number of occasions, but all to no avail. Eastern lines to-date have remained adamant in their positions that they will not pay delay claims unless negligence is proven by the shipper or receiver. At these meetings representatives of the Western shippers have consistently maintained that their concern is to have a reliable schedule established. We stated that our primary concern was not claims but that we have reliable schedules to enable orderly marketing.

"Subsequent to the carriers' action in 1964, it is reported that the railroad service has deteriorated and that claims are being declined where there were delays of as much as five days.

"Most Western shippers have reached the conclusion that Eastern carriers will not make the necessary effort to make deliveries on time unless there is a financial responsibility or burden for failure to maintain the schedules.

"In September 1966 representatives of the fruit industry, including both shippers and market receivers, met with representatives of two Eastern lines to discuss the situation. Shippers reiterated their view that their primary concern was a reliable schedule for orderly marketing rather than collection of claims. Representatives of the market receivers expressed the view that when the carriers were paying claims they made strenuous efforts to get a car delivered in time for the intended market but that in the last few years the policy has changed for the worse.

"It would appear that some Eastern carriers apparently automatically decline delay claims. At least, this is the way it appears to shippers in the Northwest.

"One example: a car of apples shipped from Washington state arrived at Chicago on schedule but was not available at New York until after a delay of four days. Claim was filed with the origin carrier who declined the claim stating that the Eastern carrier 'will not admit of any delay.' The shipper wrote to a vice president of the Eastern carrier, outlining the situation in detail; then the claim was paid. In another case, a shipper shipped two cars for the New York auction on the same day. One car was available for sale on the due date; the other was delayed, I believe, two days. The Western carrier reported the Eastern carrier rejected the claim; and the Western carrier declined the claim because there was no delay on the Western line. It would seem obvious that when the one car was delivered in accordance with the normal schedule, the failure to deliver the other car at the same time was not reasonable dispatch.

"I have been told of another instance where a car consigned to New York, was not delivered on time. The car was traced, located in Massachusetts, delivered several days late, and the Eastern carrier declined liability, saying the car was delivered with reasonable dispatch. Western shippers who file claims with their origin carriers are consistently told that the Eastern carriers will not accept liability and that therefore their claims involving delay on Eastern lines are declined. It appears obvious to me that either there is a breakdown of communications between the Eastern and Western carrier or Eastern carriers refuse to accept their legal obligation and automatically decline claims on the premise that they can get by with this high-handed approach.

"The law is reasonably clear. Lawyers for the railroads and the fruit and vegetable industry should be able to reach substantial agreement. While there is no exact standard for 'reasonable dispatch,' cases have consistently stated that 'reasonable dispatch' means delivery without 'unreasonable delay'. The carrier is not responsible if the delay is excused. Many, many cases have held that a delay of one day (or even less) constitutes an unreasonable delay and that thereupon the burden is placed upon the carrier to prove that the delay was attributable to a cause excepted by the bill of lading. The burden is on the railroad to prove that it was not negligent.

"In 1964 the United States Supreme Court, in the Elmore & Stahl case, involving deterioration in transit, held that the burden is on the carrier to prove 'both its freedom from negligence and that the damage to the cargo was due to one of the excepted causes relieving the carrier of liability'. Many State courts have established the same rule and have uniformly (with one exception) held that in delay cases where a shipment was 'unreasonably delayed' the burden was upon the railroad to show that its negligence did not contribute to the delay. While the carriers published schedule is not an absolute yardstick of the reasonable time within which delivery should be made, the courts have consistently admitted the schedules into the evidence and have held that where a shipment was not delivered within the usual, ordinary time that the burden of proof was placed upon the carrier. There is no justification in the decisions for the carriers attempt to force claimants to prove the carrier was negligent.

"Unless the carriers recede from their apparent position that the shipper who, of course, has no knowledge of what occurred during transit, must prove negligence, it would appear that we have no remedy except to go to court, and court, and court.

"The obvious first step is to try to get the railroads to clearly establish and advise us of their position, and to have their legal departments advise their claim agents of their legal liability for delayed delivery. Perhaps today's program may be helpful in that connection, but if the claim agents continue to hide behind the assertion that the shipper or a receiver must prove negligence and continue to decline claims without respect to their legal liability by always asserting

delivery was reasonable dispatch no matter how late, we would appear to have no alternative except to go to court.

"The amount involved in most cases is not sufficient to justify the expense for litigation of that individual claim. The legal costs, including attorney's fees, usually are disproportionate to the amount involved. The only basis under which the fruit and vegetable industry can protect itself would be for the industry to join together, nationally or regionally, to underwrite the costs of litigation so that the claimant in any individual case would not bear the entire brunt of the cost. If enough actions are brought, the Eastern railroads may decide that a policy of denying all claims is ill-advised and may accept their legal liability.

"If the Eastern carriers are responsible for the current situation, Western shippers should recognize that the legal expense imposed upon Western carriers by bringing suit at the point of origin will have little, if any, pressure or effect upon the Eastern carriers. They should seriously consider suing the Eastern lines at point of origin if jurisdiction can be obtained or, at some place where the carriers do not have staff counsel. When the carriers recognize that their unfair and unlawful policy will cost them money, or business, they may decide to honor their legal obligations.

"For a number of years bills have been introduced in Congress to amend the ICC Act to authorize the courts to allow reasonable attorney's fees to litigants who successfully prosecute claims against the railroads. To-date, the fruit and vegetable industry has not actively supported these proposals. I think we should take a good, hard look at this legislation for it will present one way for the fruit and vegetable industry to recoup part of the costs of litigation which cannot be avoided if the carriers will not accept their legal obligations.

"I, for one, do not suggest that we should go back to the guaranteed schedule days. I do not think a carrier should be required to pay every claim where there is a delay of only a few minutes, causing a shipment to miss a market where there is a minimum of time between the scheduled arrival and the cut-off time. Most shippers in the West feel that it was proper for the carriers to take some action to eliminate what we were told were sharp practices and abuses which cost the carriers substantial money. I do feel that the carriers should accept their full legal liability. Furthermore, if there is financial responsibility for delay, the carriers performance will improve.

"To summarize, the Western shippers are apparently unanimous in the view that they want dependable schedules to permit orderly marketing and are not primarily concerned with collecting claims. They also feel that the only way they can get dependable schedules is if the carriers must pay when they fail to deliver 'with reasonable dispatch', i.e., within the usual, ordinary, reasonable time.

"DELAY CLAIMS PAID BY RAILROADS

	"1961	1962	1963	1964	1965
Freshfruit, except citrus	$618,437	$570,441	$520,558	$466,967	$522,914
Fresh citrus	169,756	142,518	144,522	165,567	182,152
Melons	313,563	275,402	174,808	166,298	151,222
Vegetables, fresh	1,276,129	1,228,150	1,010,751	1,051,697	1,064,120
Subtotal of 4	2,377,885	2,216,511	1,850,639	1,850,529	1,920,408
Total, all carloads	3,008,525	2,992,092	2,372,994	2,520,456	2,665,308
Total, carloads and less-than-carload lots	3,025,685	3,018,994	2,408,000	2,542,551	2,695,015
Percent delay to total freight claims	2.6	2.5	1.8	1.7	1.8
Total freight loss and damage	$117,575,871	$123,109,624	$135,492,110	$145,546,207	$149,806,262

"Note:
"The 1961 data for 102 carriers representing 92.2 percent of United States, Canadian, and Mexican mileage.
"The 1962 data for 101 carriers representing 92.4 percent of United States, Canadian, and Mexican mileage.
"The 1963 data for 99 carriers representing 92.1 percent of United States, Canadian, and Mexican mileage.
"The 1964 data for 100 carriers representing 92.3 percent of United States, Canadian, and Mexican mileage.
"The 1965 data for 94 carriers representing 95.2 percent of United States, Canadian, and Mexican mileage.

"Source: Association of American Railroads. Prepared by Ernest Falk, Jan. 17, 1967."

Mr. BURROWS. Thank you.

In view of the foregoing—and in the interest of time and taxpayers' dollars—it is not our intention to belabor the record relative to the background, the problem or the need for the legislation.

Additionally, we have had the opportunity of reading the very excellent and logical statement of the New York branch of the United Fresh Fruit & Vegetable Association, and the concise, factual statement of Mr. D. W. Ward, general manager, Philadelphia Terminals Marketing Association, in support of S. 858. We completely endorse both statements.

If they don't appear in person we would hope counsel and members of the committee would particularly refer to these two statements because they are very excellent and we would completely endorse both statements.

We would like to stress a few points and make a recommendation.

First, the shippers and distributors are not in the claim business. Claims mean disorderly marketing and red ink. Therefore, claims mean red ink to both the shipper and distributor—and we might add the carrier.

Perishables demand orderly marketing, and this can only be achieved when deliveries are made as planned—and as proposed by carrier schedules. Any disruption can extend over quite a lengthy period.

Second, the facts of the case are crystal clear. The eastern carriers have taken the arbitrary position not to pay delay claims unless carrier negligence is proved. In our opinion, this is contrary to law. Further, to prove carrier negligence means legal action, which is economic suicide, because of the dollar amounts of most delay claims. You could win the battle—that is, the legal action—but lose the war by going bankrupt paying the legal costs.

Third, evidence has been, or will be, presented to the subcommittee covering the deterioration of service of the eastern carriers since June 1, 1964. This deterioration is readily understandable and in line with human nature. With the penalty incentive gone—that is, payment of delay claims—the natural reaction is to let up, especially if doing the job right costs a little more money.

The fresh produce industry must have the best carrier service possible to achieve orderly marketing. While S. 858 is not the entire answer to the problem, we believe passage of the bill will provide the carriers with an economic stimulus to do a better job and thereby enhance the possibility of orderly marketing of perishables.

On this point of lack of service, we do have a number of glaring, and not isolated, examples and would be happy to submit them to the subcommittee, if they so desire.

At this point I would like to interject that we have been keeping you personally informed on the embargo action on perishables by the New York Central, B. & O. out of the Port of New York. That embargo is still on. It was supposedly put on to prevent accumulation. The reason is long gone. We have a letter from Chairman Tucker of the Commission who indicates they recognize this is temporary. They hesitate to butt in and we think this will become a way of life simply because their share, it cost them more money to lighter this freight to the piers. This is another example of lack of service is what I am trying to point out.

Another point concerns shortages. We are finding more and more with apple and pear shippers in the Northwest that they are encountering shortages of 10 or 20 boxes of fruit and nobody knows where they went to. This bill would help in that aspect.

Our fourth point of emphasis concerns precedence for this kind of legislation. On this point we quote, in part, a letter from Frank H. Weitzel, Assistant Comptroller General of the United States, to Senator Magnuson, under date of August 26, 1966, relative to S. 3741—a bill introduced in the 89th Congress by the Senator, which was identical to S. 858.

I won't read it. It has been commented on and covered by previous witnesses.

While S. 858, if enacted, may not prove to be the complete answer to solving our orderly marketing program, we strongly believe that it will be of tremendous help in that direction. Certainly, it will be of material benefit to the thousands of small businessmen in our industry in collecting their legal delay claims—claims which are now being arbitrarily and practically automatically rejected on the basis of reasonable dispatch and nonnegligence regardless of the amount of delay.

Additionally, we recommend that Congress give serious consideration to amending the Interstate Commerce Act to require the carriers to file reasonable schedules for perishables with the Commission, and that failure to meet these schedules would be prima facie evidence in collecting damages, unless the carrier can prove nonnegligence; that is, act of God, act of the public enemy, or act or default of the shipper or owner.

Mr. Chairman, we appreciate very much the opportunity of presenting our views here today.

Senator LAUSCHE. Senator Pearson?

Senator PEARSON. I have a question but I don't know whether it really applies to this witness. I am wondering about, where is the point in determination as to what is paid by the shipper? The point of origin or the point of termination?

Mr. BURROWS. You mean the claim paid to the shipper?

Senator PEARSON. Excuse me, let me ask the grain people back here.

The freight charge. Where is that established? At the point of origination?

Mr. FRAZIER. In Philadelphia, it is normally at the point of destination.

Senator PEARSON. Destination?

Mr. FRAZIER. Normally. It hasn't always been normal.

Senator PEARSON. That is all I have.

Senator LAUSCHE. Anything further from Mr. Burrows?

I have no questions, Thank you.

Next is Charles E. Blaine, commerce specialist from Phoenix, Ariz.

STATEMENT OF CHARLES E. BLAINE, TRAFFIC MANAGER, CHARLES E. BLAINE & SON, PHOENIX, ARIZ.

Mr. BLAINE. Mr. Chairman and members of the committee, my name is Charles E. Blaine. I am senior partner in Charles E. Blaine & Son, Luhrs-Central Building, Phoenix, Ariz. I am traffic manager, American National Cattlemen's Association, and its State affiliates, which position I have held since January 1929, and numerous other persons, firms, and corporations, including the Western States Meat Packers

Association, Inc., since 1946. I appear here in behalf of the two associations just named in support of S. 858.

Prior to 1929 I was employed by sundry railroads from Ohio to the Pacific coast in various capacities for 18 years, following which I was engaged as industrial traffic manager for a number of industries from May 1916 through January 1929, including a short period in 1920, as traffic representative of the Arizona Corporation Commission, herein termed the "commission." I was admitted by the Interstate Commerce Commission as a class B (nonlawyer) practitioner on August 12, 1929, and have appeared in numerous formal and informal proceedings before said commission, the Arizona commission, and California Public Utilities Commission. Our firm is not employed by or connected with any media of public transportation whatsoever; our employment and work is for shippers who pay and/or bear the transportation charges.

American National Cattlemen's Association, hereinafter termed "ANCA" is a voluntary nonprofit organization of approximately 250,000 livestock producers, feeders, and shippers throughout the United States with executive office and post office address at 801 East 17th Avenue, Denver, Colo. 80218.

Western States Meat Packers Association, Inc., hereinafter termed the "WSMPA," is a voluntary nonprofit organization, under the laws of the State of California, with principal office and post office address at 604 Mission Street, San Francisco, Calif. 94105, and its membership composes independent meatpackers engaged in slaughtering livestock and processing meat and meat products in 13 westernmost States of the continental United States, and western Texas.

The ANCA and WSMPA, two of the supporters of S. 858, ship or cause to be shipped by railroad and/or highway throughout the United States livestock on which they pay and/or bear the transportation charges as they cannot pass on such charges or other costs to other parties, nor fix the prices they receive for their livestock or the prices that they pay for materials and supplies used in their livestock operations as long recognized and stated by the commission in "Livestock—Western District Rates, 176, ICC 1 (1931)," page 82:

> Agriculture, one of our great basic industries, is probably unique in that it cannot set the prices at which its product is sold with relation to the cost of production. The price it receives for its product is fixed largely by forces outside its control.

Thus, there is a wide line of demarcation between these two supporters of S. 858 and the transportation agencies concerned.

POSITION OF ANCA AND WSMPA, SUPPORTERS OF S. 858

That the proposed amendment is required by the farmers, producers, shippers, and consignees of livestock, fruits, vegetables, and other perishable commodities, to insure the payment of the full actual loss, damage, or injury, to property in trransportation caused by any common carrier, railroad, or transporation company as provided in paragraph 11 of section 20 of the Interstate Commerce Act, hereinafter termed the act. In support of such amendment we respectfully say that paragraph 11 of section 20 constitutes the Carmack amendment, enacted as part of the Hepburn Act of June 29, 1906, as amended by the first Cummins amendment of March 4, 1915, the second Cummins

amendment of August 9, 1916, the Transportation Act, 1920, the act of July 3, 1926, the Newton amendment of March 4, 1927, the act of April 23, 1930, U.S. Code, August 9, 1935; 34 Stat. 595; 38 Stat. 1197; 39 Stat. 441; 44 Stat. 1450; 44 Stat. 1448; 46 Stat. 251; 49 Stat. 543, and 54 Stat. 919.

That while paragraph 11 of section 20 definitely provides the liability of any common carrier, railroad, or transportation company—shall be the full actual loss, damage or injury, to property caused by it or them, and further provides time for filing claims and instituting suits, unlike sections 8 and 16 of the act, it is silent as to reasonable attorney's fee in such suits.

That section 8, and paragraph 2 of section 16 of the act, each contain provision respecting reasonable attorney's fee, substantially the same as here proposed to be added to paragraph 11 of section 20.

That the U.S. Supreme Court in *Atlantic Coast Line R. Co.* v. *Riverside Mills*, 219 U.S. 186 (1911) held:

> Section 8 of the act, providing for the taxing of an attorney's fee as part of the costs, applies to cases where the cause of action is the doing of something made unlawful by some provision of the act, or the omission to do something required by the act, and threre is a recovery of damages sustained in consequence of such violation of the act, but does not apply to cases where, as here, the loss or damage is in no way traceable to the violation of any provision of the act.

That the Court in *Meeker* v. *Lehigh Valley R. Co.*, 236 U.S. 412 (1915), further held, in substance:

> The services for which an attorney's fee is to be taxed and collected, as provided in sections 8 and 16 are those in Court action, involving violation of some provision of the Act, in which the recovery is had and not those in the proceeding before the Interstate Commerce Commission, hereinafter termed the Commission.

That as loss, damage, or injury, to property in transportation is not traceable to the violation of any provision of the act, as stated by the Court in *Atlantic Coast Line R. Co.*, supra, the shipping public, under the present act, cannot recover reasonable attorney's fee as a part of the costs of the suit.

Anomalous and we think Indefensible Situation under the Present Law Confronting Livestock and other Perishable Traffic for Illustration, using the same Shipment:

That when rates and charges on livestock or other perishable traffic, are assailed before the Commission as unreasonable under section 1 of the act, and reparation is sought, after an investigation by the Commission, and it finds for complainant and awards reparation, complainant brings suit to effect payment thereof, and the court, as is usual in such case, enters judgment for the plaintiff, under section 16(2) of the act, reasonable attorney's fee is taxed and collected from defendant as a part of the costs of the suit.

That, to the contrary, if the same shipment is partly lost, damaged, or injured in transit, and the owner files a claim, which the carrier refuses to pay in whole or in part, and the owner reasonably institutes suit, and sustains the burden of proof on the trial of the case, and the court enters judgment in favor of the owner for the full actual loss to the shipment, the owner must pay and bear the reasonable fee of his attorney because the present law governing such loss and damage suits estops the court from including such fee as part of the costs of the suit. The owner is out the amount of the attorney's fee.

That common carriers, railroads, or transportation companies, have been and are fully cognizant of the foregoing facts, and proceed accordingly. Rarely do they pay more than 50 percent of the full actual loss, if anything, account loss, damage, or injury, to livestock or other perishable traffic. Consequently, the owners of such traffic have been and are being deprived of millions of dollars annually to which they are rightfully entitled and thus subjected to unjust discrimination, undue and unreasonable prejudice and disadvantage. Thousands of such transactions could be cited. However, the following quotations are taken from representative claim files, and show carriers trumped-up defense.

1. Amount claim $406.50:

The additional investigation conducted has developed time of loading origin, equipment was inspected and found to be mechanically okay and cars were freshly bedded. The shipment was handled in accordance with the contemplated schedule and was stopped for the normal times for F.W. & R. while enroute. You, of course, can appreciate the natural droppings from calves after being confined to cars for approximately eight days would of course contribute considerably to condition of bedding at time of arrival destination. Also, we have been advised that this condition was not reported to the carrier until approximately two days after arrival at which time it was noted that calves were developing "shipping fever". As you know, shipping fever is a disease which increases in virulence and is a condition over which the carriers would have no control nor be responsible for due to the inherent weakness or natural propensity of the animals, * * *, therefore, have no alternative than to confirm disallowance of claim.

2. Amount claim $2,402.16:

Shipment was handled in accordance with the contemplated schedule, being stopped at * * * and * * * for feed, water and rest. Stock was unloaded at * * * with one dead being noted at that point. Upon arrival at destination, at time of unloading four head dead, seven down and five sick. Veterinarian was called, diagnosed sickness as being hemorrhagic septicemia, basing diagnosis on autopsy. Mr. * * * was notified and local veterinarian was authorized to treat the animals on the approval of Mr. * * *, delivering carrier's agent. This being a clear record case, have no choice than to advise you claim for 11 dead * * *, from Hemorrhagic septicemia is respectfully disallowed. However, and so as to concede all possible doubt in favor of the claimant, I do offer to adjust for 50% the average value of one head dead * * *, plus $45.00 salvage realized from sale of one animal at * * *, or $145.09, and would like to have your permission to so adjust. Other than amount offered claim being respectfully disallowed.

3. Amount claim $375.58:

Now find that this shipment was loaded at * * *, received by the * * * from the * * * and arrived at stock yards, * * *, and unloaded. Reloaded at * * *, unloaded * * *, reloaded at * * * and unloaded * * *, reloaded and arrived destination same date, and unloaded. In view of the detailed service record, and in accordance with the uniform and consistent practice, and so as to concede all possible doubt in your favor, offer is made to adjust for 50 percent the average value of two head, or $187.79 and would like your permission to do so. Other than the foregoing offer, balance of claim is respectfully disallowed.

That the following is a rare exception to the prevailing policy of the carriers to either deny any payment or to pay only 50 percent of the full actual loss, damage, or injury:

4. Amount claim $250.80:

Investigation has also developed there was no carrier negligence, or mishandling, per copy of the movement attached. It is apparent the animals died of natural causes, or from getting down in the car and suffocating. This would make the average value of the lambs to be $21.24 each, or a total of $233.64. In line with the uniform and consistent practice, am willing to adjust this claim

on a basis of 75 percent of the $233.64, or $175.23. I am therefore willing to adjust this claim for 75 percent of $233.64, the value of the 11 head of sheep, plus $18.20 refund on the feed at * * *, or a total of $193.43, and request your permission to do so. Any amount over the proposed offer of settlement is respectfully disallowed.

I named four cases which we are convinced are representative of hundreds of claims filed since 1929.

Senator LAUSCHE. The first claim amounts to $406.50. The second to $2,402.16. The third is $375.58 and the fourth is $250.08?

Mr. BLAINE. Yes, sir. This material is taken from their letters in which they refuse or deny full payment. Attention is directed to No. 4 which is in the livestock business an exception to the 50-percent theory. There they went up to 75 percent of the actual damage.

In addition, we know that attorney's fees must be paid by the owner. That fact is being taken advantage of by the carriers. We had a case in Wyoming, the loss was a little over $1,500, and the claimant told them he was going to file suit. The claim agent said, "understand that you will have to pay your attorney's fees if you file suit. Yes but I will file it. Well what is your attorney's fee? What will it be?" He said, "I don't have an attorney by the year like you people have, so I will have to go and see one of them." So he went to a gentleman and asked him. He told him what the fee would be. He went back and told them.

The carrier said, "well I will tell you what we will do. We will pay the full amount of your damage less the amount of your attorney's fee." Now, that to us meant just what we had been thinking, that they took the action arbitrarily in denying payment of legitimate claims on the basis that you would rather take something than nothing.

Senator LAUSCHE. What railroad was involved?

Mr. BLAINE. Union Pacific.

Senator LAUSCHE. The claimant was where?

Mr. BLAINE. At a point in Wyoming. I just don't know his——

Senator LAUSCHE. How did the matter come to your attention?

Mr. BLAINE. As traffic manager for the American National—it was known as the Livestock Association at that time, it was referred to me.

Senator LAUSCHE. This particular shipper has some contact with the American Livestock Association?

Mr. BLAINE. He was a member.

Senator LAUSCHE. All right.

Mr. BLAINE. And he referred it to me. He had filed a claim and prosecuted.

Senator LAUSCHE. Where in Wyoming did it happen, do you recall?

Mr. BLAINE. It was between Cheyenne and Laramie. I don't know the name——

Senator LAUSCHE. Could you supply for the record the name of the claimant?

Mr. BLAINE. I can by going to my office, yes.

Senator LAUSCHE. By letter.

Mr. BLAINE. Yes. We tried to refrain, in our testimony from naming specific railroads or parties because it is a general proposition. I don't know of any railroad that doesn't refuse to pay more than 50 percent at the first offer.

Before leaving the office I abstracted 28 claims. The loss and damages on those ranged from $15.01 up to 3,000-odd dollars. The aggregate amount of the claims was $12,314.90. However, the carriers

refused to pay on an average more than 45 percent or $5,542.80. Hence, the claimants lost $6,772.10 because they felt that the amount of the claims was such that if they went and got a good lawyer, which you need in cases like this, that they would pay out more as a fee than the amount of those claims. And they have been talking about schedules here this morning.

I had a matter that came up and was on my desk before I left the office. The distance between two points was 221 miles. Shipment of sheep on which one double-deck and 20 single-deck cars were used. The carriers stated the loading was completed at 1:30 p.m. on October 5, 1966, and shipment delivered to the S.P. at Phoenix at 7:25 a.m. on October 6, and arrived at Chandler, just 17 miles from Phoenix, at 2 p.m.

Now, they don't maintain schedules anymore. This is an example of movement between two class-one railroads, one where there is a branch line involved.

We believe the enactment of S. 858 is required in order to give the shippers of line stock and perishable products a square deal which they haven't been getting and are not now getting.

Therefore, we ask S. 858 be enacted into law at an early date. I thank the committee on behalf of my principals and myself for your kindness and I urgently request that S. 858 be promptly passed.

You will observe from my statement that this is about the seventh bill that Senator Magnuson has introduced since 1954.

Senator LAUSCHE. Mr. Blaine, I want to explore with you the subject of reparations allowed by the Commission when a carrier charges in excess of what the rate should be.

Have you had experience in matters of that type?

Mr. BLAINE. Yes, sir.

Senator LAUSCHE. I assume that you have by the recitation of your background. I merely want to be familiarized. The term "reparations," does it apply to those cases that are brought before the Commission by a claimant alleging that the charges made by the carrier were in excess of what was legally allowable?

Mr. BLAINE. Unjust and unreasonable under section 1; yes, sir.

Senator LAUSCHE. Now, then, whenever such a claim is made and the Interstate Commerce Commission investigates and allows reparation, the carrier has the power to pay or not to pay?

Mr. BLAINE. Correct.

Senator LAUSCHE. Then the aggrieved party must go into court if he wants the reparations collected, is that correct?

Mr. BLAINE. Yes, sir. The order of the Commission awarding the reparations and stating the amount thereof is prima facie evidence in any court in the United States.

Senator LAUSCHE. Under section 16(2) of the act, the court, in those instances, after the Commission has awarded reparations, is allowed to grant the plaintiff's attorney's fees.

Mr. BLAINE. And does; yes, sir. Yes, and does.

Senator LAUSCHE. Are there other instances that you have in mind clearly where attorney's fees are allowable as being fixed to a victorious litigant?

Mr. BLAINE. Under section 8——

Senator LAUSCHE. What type of cases does that deal with?

Mr. BLAINE. Section 8 involves—provides for the taxing of an attorney's fee as part of the cost which applies to cases where the cause of action is the doing of something made unlawful by some provision of the act or the omission to do something required by the act and there is a recovery of damages sustained in consequence of such violation of the act but does not apply to cases where, as here, the loss or damage is in no way traceable to the violation of any provision of the act.

Senator LAUSCHE. Now, section 8 covers situations in which the carrier has violated a specific provision of the act resulting in damages suffered by the shipper?

Mr. BLAINE. Yes, sir.

Senator LAUSCHE. In those instances where it is shown that there was a violation of a specific provision of the act in doing what the act prohibited or not doing what the act mandated, then the court can allow attorney's fees.

Mr. BLAINE. And does.

Senator LAUSCHE. And does; yes.

Now, the case of *Atlantic Coast Line* v. *Riverside Mills* and the case of *Meeker* v. *Lehigh Valley Railroad Co.* is illustrative of what you have just sought to tell me.

Mr. BLAINE. That is correct.

Senator LAUSCHE. Thank you very much.

Next is Mr. John F. Donelan.

STATEMENT OF JOHN F. DONELAN, GENERAL COUNSEL, NATIONAL INDUSTRIAL TRAFFIC LEAGUE, WASHINGTON, D.C., ACCOMPANIED BY LESTER J. DORR, EXECUTIVE SECRETARY, NATIONAL INDUSTRIAL TRAFFIC LEAGUE

Mr. DONELAN. Mr. Chairman, members of the committee, and staff:

I am general counsel of the National Industrial Traffic League and senior partner in the law firm of Donelan, Cleary & Caldwell, of Washington, D.C.

I would like to introduce Mr. Lester J. Dorr, whom I am sure is known to you, the executive secretary of the National Industrial Traffic League.

We have prepared and submitted a statement of the views of the league with respect to S. 858. If it will contribute to the processes of the committee I will be glad to summarize the position.

Senator LAUSCHE. Your entire statement will be printed in the record. You may proceed to summarize.

Mr. DONELAN. Thank you.

First, with respect to the National Industrial Traffic League, this is an organization of shippers, small, medium, and large, located throughout the United States and in addition associations of shippers, boards of trade, and other entities of a similar nature. Carriers are not eligible to become members of the league.

The league has been in existence for over 60 years and has very frequently availed itself of the privilege of presenting its views before the Congress.

With respect to the present bill, S. 858, it is to be seen in the background of the very broad liability imposed upon carriers with respect to loss, injury, or damage to the lading attended to them by shippers.

Under the present state of the law the Interstate Commerce Commission has expressly disclaimed by decision any jurisdiction with respect to claims of this latter. In other words, the shipper must proceed by action in court. There are court decisions to the effect that the shipper is not entitled, if he prevails, to the recovery of reasonable attorney's fees.

The league is concerned that particularly with respect to the smaller shippers and with respect to shipments of modest value that a very major temptation is presented to the carriers to feel that they have excessive leverage out of the recognition that a shipper who goes to court to enforce what might be recognized as a valid claim has to recognize that if he prevails, he may recover the x dollars covered by his complaint.

Senator LAUSCHE. A moment ago you said that the ICC refuses to take jurisdiction in these claims, Mr. Donelan.

Mr. DONELAN. That is correct.

Senator LAUSCHE. What would define these claims?

Mr. DONELAN. Claims for loss, injury, or damage to the lading in transportation.

Senator LAUSCHE. And would that loss, damage, or injury normally be the consequence of negligence or delay caused by negligence as distinguished from the violation of a specific provision of the act?

Mr. DONELAN. That is right, Mr. Chairman. Those would be two categories.

Senator LAUSCHE. All right. Proceed.

Mr. DONELAN. We are deeply concerned that the carriers, being human, recognize they have a lever here in that to enforce one's rights in court involves obviously the paying of counsel who represents you in such cases, and particularly in the very modest claims, you may recover x dollars and find yourself obligated to pay a good and conscientious counsel $2x$ for his services so that you end up in a deficit position.

Under the circumstances, it is——

Senator LAUSCHE. May I interrupt you?

Mr. DONELAN. Yes.

Senator LAUSCHE. The story of the man who went to court to regain his cow and by the time it got through it cost him so much he lost his cow and his barn.

[Laughter.]

Mr. DONELAN. One of the possibly major benefits of this particular legislation in the applicable area of loss or damage or injury is that that sort of situation would be sharply minimized.

Now, as is apparent from the legislation, the plaintiff will only recover if he prevails and we think that that consideration is going to impede the careless—the arbitrary, the mushrooming kind of filing of claims.

We think further it will contribute to what is the more desirable situation of a settlement of claims on a mutual and voluntary basis.

The chairman has adverted earlier to the provisions of section 8 of the Interstate Commerce Act and section 16, subsection 2 of the Interstate Commerce Act where provisions are made for the taxing of attorney's fees. In other words, while not necessarily perfect precedents, this indicates that the proposal in the subject bill is not a matter of totally breaking new ground for the first time.

Under all the circumstances, the National Industrial Traffic League supports favorable action by your committee and enactment by the Congress of S. 858.

Senator LAUSCHE. Does your associate desire to speak?

Mr. DORR. No, sir.

Senator LAUSCHE. You have appeared here before; have you not?

Mr. DONELAN. I had the honor of appearing before you but not on this bill. Mr. Dorr could answer for the league.

Mr. DORR. The league has not.

Senator LAUSCHE. I have no questions.

Mr. SENDER. Previous witnesses have largely confined their testimony to problems involving the railroad mode of transportation.

Does the league policy extend to provision for the recovery of reasonable attorney's fees in connection with other modes?

Mr. DONELAN. Yes, it does, Mr. Sender.

Senator LAUSCHE. It covered the whole gamut of transportation.

Mr. DONELAN. That is right.

Senator LAUSCHE. Does the bill, as it is now written, cover all modes of transportation except waterlines?

Mr. DONELAN. That is our understanding.

Senator LAUSCHE. Thank you.

(The statement follows:)

STATEMENT OF JOHN F. DONELAN, GENERAL COUNSEL, THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE

Mr. Chairman, Members of the Committee and Staff:

My name is John F. Donelan. I appear in behalf of The National Industrial Traffic League, of which I am General Counsel. I am also Senior Partner in the law firm of Donelan, Cleary and Caldwell with offices in the Washington Building, 15th Street and New York Avenue, N.W., Washington, D.C. 20005.

IDENTITY AND INTEREST OF THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE

The National Industrial Traffic League (which I shall sometimes refer to as the League) is a voluntary organization of shippers, shippers' associations, boards of trade, chambers of commerce and other entities concerned with rates, traffic and transportation. The members of The National Industrial Traffic League, are located throughout the United States, consist of enterprises large, medium and small, and use all modes of transportation, by land, sea and air. Carriers are ineligible for membership in the League.

BACKGROUND OF THE PROBLEM

The matter here before us pertains to the critical subject of appropriate remedy for shippers of freight via interstate common carriers by railroad or motor carrier in a case of loss, damage or injury to property in the course of transportation.

This subject is covered by Section 20(11) of the Interstate Commerce Act which in pertinent part provides as follows:

> "That any common carrier . . . subject to the provisions of this part receiving property for transportation . . . shall issue a receipt or bill-of-lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier . . . to which such property may be delivered . . . and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier . . . from the liability here imposed; and any such common carrier . . . shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage or injury to such property caused by it . . . notwithstanding any limitation of liability or limitation of the amount of recovery or representation or

agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is hereby declared to be unlawful and void . . ."

This also applies to interstate common carriers by truck pursuant to Section 219 and to interstate freight forwarders pursuant to Section 413 of the Interstate Commerce Act.

A reading of the above statutory language gives the impression of substantial protection to the shipper using common carriers in interstate transportation. The fact is there are major limitations. First, it must be recognized that the Interstate Commerce Commission itself has held it has no jurisdiction over claims for loss or damage to shipments in transit by interstate carriers. See *S. Landow & Co., Inc.* v. *Boston & M. R.*, 208 I.C.C. 669 at 670; *Fuel Sales Corp.* v. *Delaware L. & W. R. Co.*, 225 I.C.C. 288 at 289. To pursue the remedy for loss, damage or injury to property the shipper must resort to the courts.

This brings us to the nub of the problem. Shipments, of course, vary in size and in value. The more modest the shipment, particularly in value, the more complex the problem of resorting to the courts in the case of loss, injury or damage to property transported. There is a practical side to the question. If a shipper does recover but in the process incurs substantially greater expense for legal services than the amount involved his victory is a dubious one.

The natural question which arises is whether the successful shipper plaintiff can also recover a reasonable attorney's fee in connection with the litigation. There is legal authority to the effect he cannot. *Thompson* v. *H. Rouw Company*, Tex. Civ. App., 237 S.W. 2nd 662; *Missouri Pac. R. Co.* v. *Harper*, 201 F. 671.

It takes no imagination, in this practical world of ours, to recognize the inordinate temptation presented to the carriers to resist the more modest claims entirely, or to exact settlements which are in fact grossly inequitable, because they realize the expense to which a shipper claimant will be put in incurring attorney's fees which may well be larger, and often undoubtedly will be larger, than the amount of the claim itself.

S. 858 MAKES A DESIRABLE CONTRIBUTION TO SOLVING THE INSTANT PROBLEM

S. 858 would insert immediately prior to the sixth proviso of Section 20(11) an additional proviso:

". . . That if the plaintiff shall finally prevail in any action, he shall be allowed a reasonable attorney's fee, to be taxed and collected as part of the suit:".

The League is of the view that this is desirable legislation. It will tend to balance more evenly the scales of justice between the shipper, on the one hand, and the carrier, on the other. It will greatly minimize the temptation, to which we have adverted, now present to the carrier to resist the more modest claims because the shipper claimant is confronted with the hazards of litigation and the necessity for incurring the expense of legal services to advance his claim.

If the court finds the claim without validity the shipper must incur the expense of the legal services involved. On the other hand, if the court finds that the shipper's claim is meritorious and upholds it, the plaintiff is allowed a reasonable attorney's fee, to be taxed and collected as part of the suit.

There is precedent for this approach, to be found in Section 8 of the Interstate Commerce Act which provides as follows:

"That in case any common carrier subject to the provisions of this part shall do, cause to be done, or permit to be done any act, matter, or thing in this part prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this part required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this part, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case."

If it is asked why the shipper does not have the very remedy he seeks in Section 8, we point to the court decisions previously cited. By the addition of the amendment proposed in S. 858, the remedy available to the shipper for loss, damage or injury to property will be clear. There will be an end to the disability confronting shippers, particularly with respect to shipments of small or medium value, where under the present circumstances as a practical matter they

are without remedy when the carrier assumes an arbitrary position in denying the validity of claims.

The proposed bill will constitute an advance in the field of transportation law and The National Industrial Traffic League supports its enactment.

We very much appreciate the opportunity to present these views before this Committee.

Senator LAUSCHE. Next is Matt Triggs of the American Farm Bureau Federation.

STATEMENT OF MATT TRIGGS, ASSISTANT LEGISLATIVE DIRECTOR, AMERICAN FARM BUREAU FEDERATION, WASHINGTON, D.C.

Mr. TRIGGS. The American Farm Bureau Federation respectfully recommends the approval of S. 858 authorizing shippers to recover reasonable attorney's fees in case of successful legal action to recover indemnity for damages to goods sustained in the course of transportation.

Although section 20(11) of the Interstate Commerce Act affirms the common law rule that a carrier has generally an absolute liability as insurer for the delivery of goods entrusted to him, this liability can in fact be avoided by simply denying part or all of claims filed by shippers. In many such cases, and particularly in the case of the small shipper, the shipper will not pursue the remedy available to him because the legal costs involved in such action may equal or exceed the adjustment that may be obtained.

We do not have information concerning the extent to which carriers avoid responsibility by rejecting or reducing claims filed by shippers; but we are advised by some of our members and affiliated cooperatives that this practice is becoming more common.

There are many precedents for authorizing recovery of attorney's fees. Thus, section 8 of the Interstate Commerce Act allows attorney's fees where a successful action is brought for damages for an injury sustained in consequence of violation of the provisions of the act by a common carrier. Section 16 provides that attorney's fees may be collected by a plaintiff against a common carrier where the liability is based upon a determination by the Commission that the complainant is entitled to an award of damages. Section 20(12) provides that a carrier who has paid a shipper's claim, may recover attorney's fees, where such carrier successfully sues a second carrier because damages were incurred when the shipment was in the custody of the second carrier.

Our support of the bill is not based on any expectation that its enactment will result in a large volume of legal actions for damages—but rather that it will result in more adequate and prompter settlement of justified claims filed by shippers against carriers. We also believe that the carrier liability for attorney's fees should encourage more effective action by carriers to prevent damages.

We appreciate this opportunity to support the enactment of S. 858.

Senator LAUSCHE. Mr. Triggs, I observed that you have enumerated three classifications of situations in which attorney's fees were allowed under the present law.

One, when the injury sustained is in consequence of the violation of the provisions of the act, is that correct?

Mr. TRIGGS. Yes.

Senator LAUSCHE. Two, under section 16 which provides that attorney's fees may be collected by a plaintiff against a common carrier where the liability is based upon a determination by the Commission that the complainant is entitled to an award of damages, does that deal with what I have spoken of as reparations being allowed by the Commission?

Mr. TRIGGS. That is my understanding of the major import of this section.

Senator LAUSCHE. No. 3, section 20(12) provides that a carrier who has paid a shipper's claim may recover attorney's fees where such carrier successfully sues a second carrier who was also involved in the transportation.

Mr. TRIGGS. Yes, sir.

Senator LAUSCHE. Have you studied the matter adequately to say whether there are any other situations under the act in which attorney's fees are allowable?

Mr. TRIGGS. I have not personally. Other witnesses this morning have made reference to other sections of the act.

Senator LAUSCHE. I think the only three thus far mentioned this morning are these three. I would like to have the record show whether there is any other class of cases in which attorney's fees are allowed. Well, we will get to that later. The staff will explore that and see to it that an answer is put in the record. I have no questions.

Mr. KOBER. In order to clarify the record, such provision is also made under section 15(9) of the act which has been referred to in my statement on behalf of the association.

Senator LAUSCHE. What type of cases does that deal with?

Mr. KOBER. That is where one carrier disregards routing instructions in a bill of lading as specified by the shipper in an action for damages by the deprived carrier against the carrier disregarding instructions in the bill of lading.

Senator LAUSCHE. Does that involve actions between two carriers or may it also involve a shipper and a carrier?

Mr. KOBER. No, sir; that would involve an action of one carrier against another carrier.

Senator LAUSCHE. That is the same category then.

Mr. KOBER. That is correct.

Senator LAUSCHE. All right, Mr. Triggs, thanks very much.

Is there any other witness here to testify?

The hearings will be continued with a session at 9 a.m. tomorrow morning in the same hearing room.

We stand recessed.

(Whereupon, at 11 a.m., the hearing was recessed, to reconvene at 9 a.m., Tuesday, July 18, 1967.)

RECOVERY OF REASONABLE ATTORNEY'S FEES

TUESDAY, JULY 18, 1967

U.S. SENATE,
COMMITTEE ON COMMERCE,
SUBCOMMITTEE ON SURFACE TRANSPORTATION,
Washington, D.C.

The subcommittee met at 9 a.m. in room 457, Old Senate Office Building, the Honorable Frank J. Lausche, chairman of the subcommittee, presiding.

Senator LAUSCHE. The meeting will come to order.

The first witness this morning is Mr. William H. Tucker, Chairman of the Interstate Commerce Commission.

Mr. Tucker, you may proceed.

STATEMENT OF HON. WILLIAM H. TUCKER, CHAIRMAN, INTERSTATE COMMERCE COMMISSION

Mr. TUCKER. Good morning, Mr. Chairman.

I have with me the associate general counsel on my right, Mr. I. K. Hay, and on my left Mr. Thomas Delaney, chief of the Motor Carrier Unit in the Bureau of Operations.

My name is William H. Tucker. I am the Chairman of the Interstate Commerce Commission and have served in that capacity since January 1, 1967.

On behalf of the Commission, I wish to thank the subcommittee for this opportunity to present our comments in support of S. 858, introduced by Senator Magnuson, which amends section 20(11) of the Interstate Commerce Act so as to permit the recovery of a reasonable attorney's fee as a part of a successful action by a shipper for recovery of damages sustained in the transportation of property.

Section 20(11) of the act relates to the liability of railroads and other carriers subject to part I of the act for the loss; damage or injury to property resulting from the act or omission of the carriers involved. By sections 219 and 413 of the act, the provisions of section 20(11) are made applicable to motor carriers and freight forwarders, respectively. Since liability for loss and damage to property by water carriers is covered by the Harter Act, 46 U.S.C. 181–196, these carriers are not subject to section 20(11) and would, therefore, not be affected by this legislation.

The Commission has no power to settle loss and damage claims between shippers and carriers; thus, in the absence of a voluntary settlement, a shipper's only recourse is a civil action in either a State or Federal court.

At the present time, no provision in the Interstate Commerce Act permits the recovery of a reasonable attorney's fee by a successful

plaintiff in such an action, although in some instances, or perhaps a few, the recovery of a reasonable attorney's fee is permitted by State law. While section 8 of the act permits the recovery of reasonable attorney's fees in a successful action against a carrier for violations of the Interstate Commerce Act, it has been held that this provision has no application in an action for damages by a shipper under section 20(11) since the Commission has no jurisdiction over the subject matter. *Missouri Pacific Railroad Co.* v. *Harper Bros.*, 201 F. 671 (C.C.A. 7th Cir. 1912). In this circumstance, a shipper having a contested claim is faced with a dilemma, particularly on smaller claims. If he sues on the claim, his recovery in many cases may be less than his attorney's fees. If he chooses not to sue, he may be faced with writing off the uncollected portion of his claim. This situation contrasts sharply with the provision of section 20(12) which governs the settlement of loss and damage claims between the carriers themselves. This section provides that a carrier may recover from another carrier any amounts paid out to a shipper on the second carriers' behalf and the "amount of any expense reasonably incurred by it in defending any action at law . . ." by a shipper which presumably would include the recovery of the first carrier's attorney's fees.

The provisions of S. 858 would remove this inequity in the present law by inserting between the fifth and sixth provisos of section 20(11) a further proviso stating that if the plaintiff shall finally prevail in any action for recovery of damages, he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of his suit.

Although we have no jurisdiction to settle disputed loss and damage claims, many of these matters are brought to our attention in our day-to-day work in sufficient numbers for us to appreciate the fact that prompt settlement of loss and damage claims is a serious matter to the shipper, particularly in the case of relatively small claims. For this reason, we support the objectives of this legislation.

Since this legislation applies only to successful actions in court, it will provide the carriers an incentive to settle meritorious claims expeditiously out of court. For the same reason, however, some shippers could very well abuse the judicial process and harass the carriers with unnecessary litigation over claims which could be easily and fairly settled by the parties involved.

In this connection, it would be pointed out that the industry as a whole appears to be handling these matters fairly in the majority of cases. For example, the ATA National Freight Claim Council reported that in 1966, the motor carrier industry paid some $25 million in freight claims, 73.9 percent of which were settled in 30 days or less and 91 percent in 60 days or less. Since a judicial action cannot, in most instances, be completed within this time, these figures suggest that the carriers and shippers have been able to handle most of these claims on a voluntary basis. For these reasons, the subcommittee may wish to consider the following amendment, which we suggest:

Insert after "suit" on line 9 of S. 858:

And provided further that no such fees shall be taxable except upon a showing that the plaintiff has filed a claim with the carrier or carriers against whom the action has been brought and, that such claim has not been paid by the carrier within 90 days of the receipt of the claim by such carrier or carriers.

This amendment would not preclude a shipper from exercising his right to have a disputed claim adjudicated in court in the first instance if he so desired. In our opinion, however, it is only fair that the carriers first be given the opportunity to settle a claim on a voluntary basis without having to contend with vexing and perhaps unnecessary litigation which this bill, absent our proposed or a similar amendment, would generate.

This concludes my testimony, Mr. Chairman. I will answer any questions you might want.

Senator LAUSCHE. Mr. Tucker, based on the testimony that was offered yesterday there seemed to be three categories of cases in transport matters in which courts may allow reasonable attorney's fees. One, in cases where damages result from the violation of specific provisions of the Transportation Act. Is that your understanding?

Mr. TUCKER. That is correct, Mr. Chairman.

Senator LAUSCHE. Secondly, in cases where one carrier sues another carrier, both of whom jointly carried the cargo and damages resulted which one had to pay and the other refused to contribute his share. Is that correct?

Mr. TUCKER. That is correct, Mr. Chairman.

Senator LAUSCHE. And the third is in cases where claims are filed by a shipper with the Commerce Commission alleging that excessive rates were charged by the carrier, the Commission investigates and makes a finding that the allegations made by the complainant were true and that excessive rates were charged. The carrier refused to abide by the finding of the Commission. The shipper goes to court asking that the judgment of the Commission awarding reparations be executed. The finding of the Commission is presumptive evidence of its correctness subject to rebuttal by the defendant carrier. Is that the third classification?

Mr. TUCKER. Yes, Mr. Chairman, and that would apply only to carriers subject to parts I and III of the act.

Senator LAUSCHE. What carriers are they?

Mr. TUCKER. That would be the railroads and the water carriers, Mr. Chairman. Railroad and water carriers.

Senator LAUSCHE. Now do you know of any other category in transportation matters where attorney's fees are allowed to a plaintiff who successfully maintains his suit?

Mr. TUCKER. No; the Chairman has generally described some seven or eight specific portions of the act in those three categories, and I believe that description would reflect those sections of the act which permit attorney fee recoveries.

Senator LAUSCHE. Now then, my question to you is in these three categories are there found abnormal or unusual circumstances which induced the Congress to write a law allowing attorney's fees to be collected?

Mr. TUCKER. It is my personal judgment that there are abnormal circumstances in each category.

Senator LAUSCHE. Are you a lawyer?

Mr. TUCKER. Yes, I am, Mr. Chairman. I was.

Senator LAUSCHE. I don't construe that to mean that you are trying to run away from what I am going to ask.

Mr. TUCKER. No, sir.

Senator LAUSCHE. Do you know as a lawyer what the general principle is in the common law in the allowance of attorney's fees to successful litigants?

Mr. TUCKER. In my experience, Mr. Chairman, there usually is some sort of abnormal circumstance involved of the nature the chairman described, and I must observe that I haven't found many situations where attorney's fees are permitted in a lawsuit.

Senator LAUSCHE. Well, my recollection is that in the normal suit under common law attorney's fees are not allowed to either litigant except under extraordinary circumstances. One of the general circumstances which is used as a predicate for the allowance of attorney's fees is actions in which the defendant has been charged with malice or fraud, punitive damages are allowed, and with the punitive damages go reimbursement for attorney's fees expended.

Mr. TUCKER. I want to say, Mr. Chairman, I agree with that. There is one category in my experience that doesn't exactly relate itself to the abnormal violation of law, and that is I recall in some States, Mr. Chairman, attorney's fees by law can be added to the amount of an unpaid bank note due to a lending institution.

Senator LAUSCHE. Yes, but that is by contract.

Mr. TUCKER. Well, yes, I suppose it is, Mr. Chairman.

Senator LAUSCHE. That is, you sign a promissory note and the lender gets you by the neck and says "if you don't pay on time an action must be brought to recover the prinicpal of the note. The defendant shall have to pay the cost of storage of the mortgaged goods, the cost of repairing them, the cost of court proceedings, and attorney's fees."

Now there my be statutes in some States which hold that even in the absence of a contract to pay attorney's fees in a court action the court can do so. But there are very, very few.

Now, Mr. Tucker, you said that especially in actions involving small sums of money or in claims involving small sums of money the claimant is put at a great disadvantage because he knows that if he sues sometimes the cost, the attorney's fees, will be greater than the amount he collects. What do you construe a small claim to be?

Mr. TUCKER. Well, I would construe that by way of our testimony, Mr. Chairman, as something around $100 or less.

Senator LAUSCHE. Well, that would be exceedingly small these days, wouldn't it? It is pretty hard to get a lawyer for $100.

Have you given any thought about the soundness of a law that would impose the obligation to pay attorney's fees reciprocally? That is, if the plaintiff succeeds he shall be paid, if he fails he shall have to pay.

Mr. TUCKER. I would favor that personally, Mr. Chairman. In other words, it would be my own viewpoint that the defendant should be allowed recovery of attorney's fees if the defendant prevailed.

That matter hasn't been part of the Commission's testimony which I rendered, but my own view is that the defendant should be allowed attorney's fees if the defendant prevails.

Senator LAUSCHE. If you base your judgment that attorney's fees ought to be allowed to a plaintiff solely in those cases where the amount claimed is small, what would be the advisability of writing an amendment into the law making attorney's fees payable in claims up to a certain amount?

Mr. TUCKER. Well, I don't know as I want to make a suggestion on that, Mr. Chairman, without taking a good look at the claim statistics. Our suggestion that the small claim was a difficult one was only related to the fact that the claimant doesn't want to hire a lawyer for a $150 case.

Senator LAUSCHE. Well, yesterday's proof was to the effect that the carriers are conscious of the fact that when a claim is small they can be adamant in denying the claim because they know the claimant will not hire a lawyer, the cost of hiring a lawyer being greater than the amount claimed.

Mr. TUCKER. We find that to be the case in many instances, Mr. Chairman, and I guess that applies also in other industries as well as transportation.

Senator LAUSCHE. Mr. Sender, we passed a law last year where the obligation to pay attorney's fees was imposed on both, depending on who won. What was that law?

Mr. SENDER. It is the anti-illegal carriage legislation, Public Law 89–170, and the section the Chairman is referring to is the section providing for——

Senator LAUSCHE. Read it.

Mr. SENDER (reading):

> If any person operates in clear and patent violation of any provisions of section 203(c) 206, 209, or 211 of this part, or any rule, regulation, requirement, or order thereunder, any person injured thereby may apply to the district court of the United States for any district where such person so violating operates, for the enforcement of such section, or of such rule, regulation, requirement, or order. The court shall have jurisdiction to enforce obedience thereto by a writ of injunction or by other process, mandatory or otherwise, restraining such person, his or its officers, agents, employees, and representatives from further violation of such section or of such rule, regulation, requirement, or order; and enjoining upon it or them obedience thereto. A copy of any application for relief filed pursuant to this paragraph shall be served upon the Commission and a certificate of such service shall appear in such application. The Commission may appear as of right in any such action. The party who or which prevails in any action may, in the discretion of the court, recover reasonable attorney's fees to be fixed by the court, in addition to any costs allowable under the Federal Rules of Civil Procedure. * * *

Senator LAUSCHE. Now it is my recollection that when the bill was before us out of which came this act it had provisions for the allowance of attorney's fees only to the plaintiff. Am I correct in that, and that we then changed it?

Mr. SENDER. I would have to check, sir.

Senator LAUSCHE. I think that's all.

Senator Pearson.

Senator PEARSON. Mr. Chairman, I missed your testimony, but I skimmed your statement, and you say "many of these matters are brought to our attention in our day-to-day work in sufficient numbers for us to appreciate the fact that prompt settlement of loss and damage claims is a serious matter." From the information that you received has it appeared that carriers have failed to pay a great number of small claims merely because of the situation that the litigation is expensive?

Mr. TUCKER. Well, Senator, I have some statistics in the statement on that. I wouldn't say that it has been our experience that carriers have failed to pay in great numbers. We have had substantial amount of correspondence with claimants who have failed to collect.

Perhaps Mr. Delaney, who handles this work on a day-to-day basis,

would like to give you a little bit of his experience. Perhaps you can give the statistics.

Mr. DELANEY. I don't have any statistics. We get in our particular office on a big day, maybe a half dozen complaints of failure to pay. Our field staff perhaps would get 20 or 30 in a day. That would be probably a normal day. Maybe more than that. But those as against the thousands and thousands of shipments that are moving every day of every kind, hundreds of thousands, are mighty small.

Senator PEARSON. Well, it isn't just the small claim. Really in the aggregate a lot of small claims and a lot of cars can run up to a substantial figure, but the percentage of the 75, 50, or 25 percent allowed constitutes a problem, and even if a shipper has a claim of $1,000, $2,000, he still has got substantial cost of litigation for attorney's fees, for court costs, and other factors facing him, isn't that so.

Mr. DELANEY. Right.

Senator PEARSON. Well, now I am sympathetic to this bill, and because that is so I have been trying to think about it from the other side. Is it possible that if we allow plaintiffs to have attorney's fees that we will end up where the carriers are faced with the very thing the shipper is faced with now, and that is when claims are presented to him and the proposition is put to the carrier I am going to take you to court and you are not only going to pay the claim, but you are going to pay attorney's fees, too, isn't the carrier going to end up probably with a little bit of coercion against him or it that the small claimants may have now?

Mr. TUCKER. Well, that is the principal problem we see in the bill, and we did suggest that amendment which would require the carrier sender to present the bill or the claimant to present the claim, and would not permit any attorney's fees with suit brought before 90 days following the claim.

Senator PEARSON. You can file a claim in 2 years, as I recall yesterday, and I recall from personal experience those claims were filed in 2 years.

Mr. TUCKER. But under our amendment the claim would be in a situation——

Senator PEARSON. You couldn't file an action for 90 days after the period the claim was filed.

Mr. TUCKER. No, you could file suit but no attorney's fees would be recoverable. If I could go back to the Chairman's question, if the committee considered authorizing attorney's fees to the prevailing party, even the defendant, I certainly would think, or it would be my view that it should be in the discretion of the court such as was in the legislation passed last year which Mr. Sender read. In other words, I think that situation, too, might help the problem that the Senator is now raising.

Senator PEARSON. Do I understand your suggestion would be that instead of the bill providing that the plaintiff shall receive attorney's fees or attorney costs, that it be in the sole discretion of the court?

Mr. TUCKER. Well, in the discretion along the lines of the context of the statute passed last year, that attorney's fees be allowed but that they be allowed to the prevailing party in the discretion of the court. The reason that I suggest that, and I suppose that is why that portion was included last year, was that there are borderline cases in any type of litigation where perhaps attorney's fees shouldn't be allowed.

Senator PEARSON. Thank you.

Senator LAUSCHE. I will read the pertinent part of the statute dealing with the act just discussed. "The party who or which prevails in any such action may in the discretion of the court recover reasonable attorney's fees."

That would mean if the claim is made, let's say, for $200, the railroad says "we will pay you $100," a suit is filed and $120 is collected, under the language in the bill before us reasonable attorney's fees would be mandatorily allowed. And that, to me, obviously is not equitable, because the giving of $120 on a claim of $200 would indicate that there was some correctness in thinking on the part of the carrier.

Senator PEARSON. If the Chairman will yield, as a practical matter I submit to you that if a claim for $200 is made and $100 is offered and suit is filed, I rather imagine the carrier will contend no liability whatsoever and a recovery of $100 would have the same result that you mentioned.

Senator LAUSCHE. Well, I have in mind what was said yesterday, this automatic rule that they allow 50 percent, 75 percent.

Senator PEARSON. But I rather imagine the answer to any litigation would be no liability.

Senator LAUSCHE. Yes, the answer, I agree with that. All right, is there anything further?

Mr. TUCKER. No, sir. We would be glad to supply any further information the committee may desire, Mr. Chairman, at any time on this bill.

Thank you.

Senator LAUSCHE. All right, thanks very much, Mr. Tucker.

Mr. Schwartz, chairman of the executive traffic committee. Mr. Schwartz, you may proceed.

STATEMENT OF RALPH SCHWARTZ, CHAIRMAN, EXECUTIVE TRAFFIC COMMITTEE, AMERICAN FEED MANUFACTURERS ASSOCIATION

Mr. SCHWARTZ. Mr. Chairman, I am representing the American Feed Manufacturers Association in one statement, and the other statement is presented on behalf of the Trunk Line Grain and Grain Products Council. Now for simplicity, I will insert the one that is for the Trunk Line Grain and Grain Products Council, which is pretty much the same as the one for the American Feed Manufacturers. So I will only cover the first one, if that is all right.

Senator LAUSCHE. The statement of the Trunk Line Grain and Grain Products Traffic Council will be fully printed in the record.

Mr. SCHWARTZ. Right. Thank you.

(The statement follows:)

STATEMENT BY RALPH SCHWARTZ, TRAFFIC MANAGER, THE BEACON MILLING CO., INC., CAYUGA, N.Y., FOR THE TRUNK LINE GRAIN AND GRAIN PRODUCTS TRAFFIC COUNCIL

The Trunk Line Grain and Grain Products Traffic Council is a voluntary organization of traffic men representing twenty-four grain, feed and flour milling concerns located throughout Trunk Line Territory who ship and receive by railroad in volume.

I am appearing for The Trunk Line Grain and Grain Products Traffic Council (hereafter referred to as Trunk Line Council) in support of S. 858. We believe many claims are not settled because the legal cost would be greater than the

amount of the claim. This bill would put the claimant in a position to file suit for just claims and receive just settlement.

There seems to be a position taken by the roailroads that they are not liable for full shortage of lading developed in rail shipments of grain, grain products, feed and feed ingredients. The Trunk Line Council feels many of these shortages are due to the lack of adequate equipment for the movement of these products and the railroads are liable for this type of shortage.

To substantiate this we refer to a study made by Farmers Cooperative Service, U.S. Department of Agriculture Marketing Research Report No. 766 dated August 1966. In this study a total of 13,611 individual rail shipments were studied and 60 percent of these cars were short at destination. These shipments originated in six states and terminated in twenty five states.fl There were 50 different combinations of origins and destinations. This report showed much higher losses for shipments moved over 1,000 miles than those under 1,000 miles.

Shippers complained that most of the grain shortages at destinations were due to defective cars furnished by the carrier. Inspection by the researchers of 700 cars furnished showed only 15 percent were sound and free from loss associated defects, approximately 50 percent of the inspected cars had defects in more than one component part of the car floor, sidewalls, ends and roof.

Based on this survey, I am sure that a great portion of these shortages on grain and grain products are due to the rail equipment used for the transportation of these products.

We would therefore, urge for adoption and passage of this Bill S. 858.

Senator LAUSCHE. Now if you will proceed to discuss the views of the American Feed Manufacturers Association.

Mr. SCHWARTZ. My name is Ralph W. Schwartz. I am traffic manager of the Beacon Milling Co., Inc., and also I am chairman of the Executive Traffic Committee of the American Feed Manufacturers Association; and I have with me here representing the association Mr. Oakley M. Ray, vice president of this association.

The American Feed Manufacturers Association is the national association of the feed manufacturing industry. Members of the association produce more than 70 percent of the feed which is sold by primary feed manufacturers.

We would like to urge the passage of S. 858.

Our basic problem is the frequent physical losses which occur during the rail shipment of feed ingredients which we purchase. These losses often cause us to pay for a larger quantity of ingredients than is actually received. In the majority of cases the amount of the shortage is not sufficient to justify the costs which would be incurred if litigation against the railroad is required to obtain a just settlement of the claim. The railroads, of course, understand this, and we frequently find ourselves at their mercy as they make decisions as to whether or not to honor claims. The passage of S. 858 would encourage the railroads to honor the claims of feed manufacturers when the evidence indicates that the railroad is at fault.

The basic problem appears to be the dilapidated condition of many of the freight cars which are used to transport feed ingredients. This is a problem which confronts every feed manufacturer who uses rail transportation for the delivery of ingredients.

A recent research study by the U.S. Department of Agriculture indicates the extent of the problem. The results were published in August 1966, in USDA Marketing Research Report No. 766.

USDA researchers carefully checked the physical condition of 700 boxcars which were furnished by the railroads for the transportation of grain. The inspection was made on a four-part basis which considered the car from the standpoint of its four component parts affecting loss in transportation—that was floors, ends, sidewalls, and roof.

Eighty-five percent of the 700 cars inspected were found to be defective. The most common defects were holes, cracks, or both. Obviously, these are vitally important in the transportation of feed ingredients in bulk. The table below summarizes the result of the inspection of the 700 cars as published in USDA Marketing Research Report No. 766.

Senator LAUSCHE. That tabulation will be printed in the record, and unless you want to highlight it——

Mr. SCHWARTZ. Well, the only thing I would mention, Mr. Chairman, is just to point out that the location of the defects in these 700 inspected rail cars and in their character, out of the 700—34 were on account of floor and 45 percent on account of the end and 76 sidewall and 11 percent roof. That would be the only thing.

(The tabulation follows:)

LOCATION OF DEFECTS IN 700 INSPECTED RAIL CARS, AND EXTENT AND CHARACTER OF DEFECTS

Location of defect	Percentage of cars with defects	Character of defect	Percentage of defects of this character
Floor	34	Holes	36
		Cracks	54
		Weak or rotted	10
End	45	Holes, cracks	33
		Part missing	30
		Battered	15
		Loose liner	5
		No liner or improvised liner	17
Sidewall	76	Bad or missing doorposts	41
		Missing boards	13
		Holes, cracks	21
		Broken boards	25
Roof	11	Cracks, holes, bad seams	56
		Loose liner	25
		Part of liner missing	19

With this quality of equipment it is not surprising that more than 60 percent of the 13,611 cars of grain studied in the USDA project had losses during shipment. The average loss (for the cars which had losses) was 923 pounds per car between origin and destination. Cars tended to have larger losses as the distance shipped increased. Shipments that moved over 1,000 miles averaged much higher losses than those under 1,000 miles.

Until proper equipment is made available by the carriers for the shipment of feed ingredients, feed manufacturers are likely to continue to be faced with the problem of losses which are caused by the defective equipment now in use. We believe that the passage of S. 858 would serve to encourage the railroads to provide improved equipment which would prevent losses, and would also encourage them to give fair and prompt consideration to a just settlement of the losses caused by defective cars.

That concludes my statement, Mr. Chairman.

The reason we bring this out at this time is that we believe that a lot of these claims, as pointed out by this report, are caused because of defective equipment that is furnished. And this survey also shows that these cars were inspected and many times the shipper orders maybe 12 cars or three cars, whatever it may be, and the railroad puts in a car that is in his estimation, upon examining the car, defective and is not suitable for grain loading. So he repairs it on his own the best he can and ships the car. This means many times one of the prime refusals for claims is because the grain door is pulled away from the doorpost.

Now this grain door is a paper grain door with steel bandings probably 8–10 inches apart, and the door runs approximately 6 feet high, and these grain doors are—the only way they are secured is by nailing them to the doorpost of the car. And after many nailings over a period of years the floor posts, as brought out in this survey, become rotten and deteriorated to the point that they just won't hold the grain door solid, and for this reason in many of my claims personally they have been returned to me and said that they are not liable because the grain door was leaking; and in my personal experience and my own judgment of this, this is a defective car and the railroad should be liable for this type of a claim.

Senator LAUSCHE. All right, Senator Pearson.

Senator PEARSON. Well, I think you are absolutely right. As a member of a subcommittee of this committee on boxcar shortages, I think it was the year before last I held hearings in three midwestern cities. The problem is not so much shortage in number of boxcars, but the cars we have are in miserable condition. I recall a number of shippers who testified that they just went in and did extensive repair work on the boxcars at their own expense, just to get a car suitable to haul grain to market. This is part of the problem, and I do recall a lot of people that substantiated what you say here this morning.

Mr. SCHWARTZ. I would like to, if I may, Mr. Chairman—yesterday at the hearing I believe it was brought out, the question of freight charges, whether freight charges were based on the origin or destination weights.

Senator PEARSON. I asked that question.

Mr. SCHWARTZ. And I believe the answer was given that they were based on destination weights, if I am correct.

Senator LAUSCHE. That is correct.

Mr. SCHWARTZ. Now in my personal experience for my company I would say that, without having the figures right before me, at least 80 percent of all the ingredients that we purchase and receive in boxcars the freight charges are based on the origin weight and not on the destination weight.

Now this means that when the shipper loads this car, whatever it may be, feed or feed ingredients—and we use a number of different ingredients of the manufactured feed—they are of what they consider as official weights, and this is by a board of trade, and it comes down to the receiver, whom we are representing, of this commodity. Now this commodity may develop a $900 shortage. We as receivers are standing the brunt of this. We have no recourse back to the shipper under our present agreements. We have no recourse back to the shipper, and there is no recourse—of course, the railroad says they are not liable. So this is many millions of dollars that are stood by the receiver of these goods, entirely by him.

Senator LAUSCHE. All right, thanks very much, Mr. Schwartz.

Mr. Liljenquist, president and general manager, Western States Meat Packers Association.

Mr. Liljenquist.

STATEMENT OF L. BLAINE LILJENQUIST, PRESIDENT AND GENERAL MANAGER, WESTERN STATES MEAT PACKERS ASSOCIATION

Mr. LILJENQUIST. Mr. Chairman, I would like to just file my short statement and make a couple of comments, if I may.

Senator LAUSCHE. The full statement will be printed into the record.

(Statement of Mr. Liljenquist follows:)

Mr. Chairman and Members of the Subcommittee:

My name is L. Blaine Liljenquist. I have served as President and General Manager of the Western States Meat Packers Association since 1961 and as a member of the Association staff since 1946. There are 648 member firms in our Association, located primarily in the Rocky Mountain and Pacific Coast States, Texas, Alaska and Hawaii.

We appreciate this opportunity to express our views on the proposal contained in S. 858 to provide recovery of a reasonable attorney's fee in case of successful maintenance of an action for damages sustained in the transportation of property.

We believe that enactment of S. 858 would be of great benefit to members of the livestock and meat industry. Most of the damages incurred in the movement of meat and meat products in interstate commerce appear to be small dollar amounts. For instance, one steer would cost approximately $260 before being dressed out. After slaughtering and processing, the animal is worth approximately $270. Multiply these values by as few as 5 head lost per week and it becomes apparent that these small damages can mean a substantial dollar loss to independent packers and processors.

To recover these losses through normal channels of litigation would entail an almost prohibitive cost. The monetary loss of the animal's potential and actual value, coupled with attorney fees makes it economically inadvisable to pursue recovery of small claims.

WSMPA believes that enactment of S. 858 would have numerous indirect benefits—not only to our members, but to the consuming public. If the transportation companies are made aware that we will contest damages, it follows that the carriers will endeavor to provide more efficient handling of meat and meat products, and livestock. Instead of the one or two trains, composed of 100 to 200 cars, moving each day (often using less than standard equipment), perhaps more trains with fewer cars would be utilized. Modernization of methods by carriers will result in better service not only to the industry, with less loss and therefore fewer claims, but also insure an adequate and constant supply of good, undamaged, quality products to our customers. This in the long run benefits the consumer.

The meat industry is in a dramatic cost-price squeeze today. Meat consumption per capita continues to rise, yet labor demands upon our highly regulated industry place a tremendous strain on our profits.

Under our free enterprise system, a bill such as S. 858 would enable the independent or small businessman to have equal access to law without undue burden or discrimination because of size. Large transportation companies invariably maintain adequate "in-house" legal staff. The smaller packing or processing firm must rely on outside legal counsel. In lengthy cases, this could impose a tremendous financial drain on his resources should he wish to try to recover damages to property. Were the transportation companies to understand, however, that smaller claims would be contested, perhaps they would be more inclined toward an equitable settlement rather than ignoring justified claims.

Western States Meat Packers Association supports S. 858.

Gentlemen, thank you for your attention.

Mr. LILJENQUIST. We think in the meat industry where we have many claims with the carriers that if they understand that these small claims will be contested it will be an incentive to the carriers to be more efficient in their operations and to provide better service to the public so that their claims will be reduced.

Now with perishable meat and perishable livestock, you see, we have

a lot of claims of these railroads, and they don't pay a lot of these claims, or if they do make a payment they cut them way down.

So we think, first of all, this legislation would be a good incentive for more efficient railroad and other transportation services carrying these products. Then secondly——

Senator PEARSON. Let me interrupt you. How do you have a loss on meat products? Livestock doesn't drift out the grain door, I know.

Mr. LILJENQUIST. Very often it takes a lot longer to carry livestock by rail than the schedule would call for. There are delays, and then also from neglect there are various bruises and death losses; and on the transportation of meat very often the mechanical refrigeration will go bad or the icing will be insufficient. And we do carry a lot of meat and oftentimes long distances by rail and also by other means of transportation.

Then secondly, if the transportation companies were to understand that the smaller claims would be contested we think that they would be more inclined to make equitable settlements rather than ignoring justified claims.

And then finally, I think that this provision to provide for the payment of attorney fees would not be unreasonable from the railroad's point of view, because a shipper who has suffered damages would not enter a suit unless he felt assured that his claim was right and justified and would be awarded by the court because he would recognize that if his claim was not good and was not justified that he, himself, would not only fail to be paid on his claim, but he would have to pay, himself, the cost of the attorney fees. So he is still not going to take advantage of the railroads and he will not file a claim unless he feels that he has an excellent chance of obtaining recovery.

Senator LAUSCHE. Senator Pearson.

Senator PEARSON. No.

Senator LAUSCHE. I have no questions, Mr. Liljenquist. Thanks very much for your help.

Mr. LILJENQUIST. Thank you.

Senator LAUSCHE. Mr. D. W. Ward, manager, Philadelphia Terminals Marketing Association.

You may proceed.

STATEMENT OF D. W. WARD, MANAGER, PHILADELPHIA TERMINALS MARKETING ASSOCIATION

Mr. WARD. Mr. Chairman, Mr. J. S. Burak is also appearing here with me because our testimony or comments are more or less related.

My appearance in support of S. 858 is at the request of some 25 carlot receivers of fresh fruits and vegetables in Philadelphia whose tonnage is in excess of 7,500 carloads annually, and all of whom support this proposed legislation.

My reason for this support is based on the belief that this bill, if enacted, will in some degree cause carriers to assume a more responsible attitude toward the transportation of this perishable traffic. As it now stands, these eastern carriers often decline payment on legitimate losses caused by their negligence with the knowledge that the claimants cannot afford to sue for the recovery of losses on amounts

often equal to or less than the cost of such action. The receivers of fresh fruits and vegetables——

Senator PEARSON. You said eastern carriers. Are they more arbitrary than other carriers, or is it just your experience?

Mr. WARD. Well, they are more arbitrary in that it was eastern lines which in 1964 went off the so-called guarantee schedule which the western lines continue to recognize, and service has a relation to guarantee.

Senator PEARSON. Now where are you reading?

Mr. WARD. I am reading from a prepared statement, but I have filed my statement with the committee.

Senator PEARSON. All right.

Mr. WARD. Receivers of fresh fruits and vegetables must have dependable, on-time delivery by the carriers in order to successfully conduct their business.

The price of these commodities is governed by two principal factors, namely, supply and demand and quality and condition. Delays such as we have encountered during the past 3 years have often disturbed the balance of supply and demand as well as affected the condition of the commodity on arrival.

Senator PEARSON. Why do you have delays?

Mr. WARD. On account of delay in transit.

Senator PEARSON. Why? Shortage of equipment?

Mr. WARD. No, there is no such thing as shortage. I think it has been based purely on——

Senator PEARSON. Inefficiency?

Mr. WARD. A desire on the part of eastern railroads to operate at their convenience, or as they call it, on a reasonable dispatch schedule rather than on the schedules which had been in effect for the past 30 or 40 years prior to June 1964. They said it was an economic factor with them.

As pointed out in my statement, prior to June 1964, we enjoyed reasonable on-time delivery simply because eastern carriers then guaranteed their scheduled arrival time. Since June 1964, the date that eastern lines announced the intent to deliver only with reasonable dispatch, their service has left much to be desired.

In addition to this, their interpretation of reasonable dispatch has encompassed many causes for delay that heretofore were recognized as negligence on their part.

Our principal carrier, the Pensylvania Railroad Co., cannot deny the fact that its service has deteriorated to a large degree.

In the Verified Statement No. 11 by Stuart T. Saunders, the chairman of the board, before the ICC, Ex Parte No. 256, Increased Freight Rates, 1967, the affiant on page 9 states:

> . . . At the present time, the Pennsylvania, for example, is combining from 25 to 40 road trains a day, varying with the day of the week. As a result, the trains must carry additional blocks of traffic, entailing extra work en route, and frequently causing the trains to arrive late at final destination.
>
> The lack of adequate revenue also requires a reduction in local freight operations. In the last six months the Pennsylvania has reduced local service on over 25 assigned local freight trains.
>
> In yard operations, the PRR has had to reduce the number of classification crews as well as industry switching crews. It has also had to combine transfer runs, which often causes cars to miss their scheduled connections with other railroads.

We have presented evidence in our statement to show that this curtailed service has damaged the shipper and receiver of fresh fruits and vegetables.

While we may sympathize with the carrier's financial position, if such exists, we cannot agree that this justifies irresponsible service and the declination of recognized liability to the extent of injuring their patrons.

As previously stated, we support and respectfully urge Commission approval of S. 858, not as a cure-all for the eastern carriers' present inadequate service, but as a means whereby claimants with valid claims, no matter how small, will be in a financial position to seek redress through the courts. This we believe will be a step forward in our effort to secure a clear interpretation as to what constitutes reasonable dispatch.

Senator LAUSCHE. Senator Pearson.

Senator PEARSON. I don't have any questions. What is your position again, sir?

Mr. WARD. I am general manager of the Philadelphia Terminals Marketing Association. That is a local trade organization representing the carlot receivers of fresh fruits and vegetables in Philadelphia.

Senator PEARSON. Can you give me any estimate of the annual loss of the members of this marketing association?

Mr. WARD. My duties are not in the claim field, Senator. That is why we asked for the appearance of Mr. Burak, who is in the traffic work.

Senator PEARSON. Could you give me an estimate of the annual loss of the members of this association?

Mr. BURAK. No; no figures of this type are kept, Senator, but they are very substantial.

Senator PEARSON. I have no further questions.

Senator LAUSCHE. Are you the most informed individual of this association on the subject of claims? You are the expert, is that right?

Mr. BURAK. I have my own traffic bureau, Senator. I represent not only many members of the association, but a lot of handlers, quite a few handlers of fruits, vegetables, and meats, and my principal duty is to process these claims against the carriers. So you might say that I am the expert in that field.

Senator LAUSCHE. What would you say is the money value of the average claim?

Mr. BURAK. About $150.

Senator LAUSCHE. Now this $150 average value claim covers what type of merchandise that you have in mind?

Mr. BURAK. Fruits, vegetables, and meats.

Senator LAUSCHE. And is it your experience that because of the smallness of the claim there is a disposition to reject them arbitrarily, knowing that the filing of a suit will entail attorney's fees and in the end bring nothing to the claimant, or little?

Mr. BURAK. Those claims which are caused by delay are the ones that are being rejected arbitrarily, not the ones for damage. Now any condition loss caused by delay will also be rejected arbitrarily.

Senator LAUSCHE. What is the cause that the railroads give for the delay?

Mr. BURAK. That the car was handled with reasonable dispatch, and according to the railroad interpretation that can mean just anything.

Senator LAUSCHE. That is, the claimant says, "You were dilatory and negligent, causing the delay," the railroad says, "We were not, we did move it with reasonable dispatch"?

Mr. BURAK. That's right. Senator, I have in my own statement a few examples of claims that were turned down, and the claims were disallowed because of so-called reasonable dispatch and yet—well, the statement speaks for itself.

Senator LAUSCHE. Excuse me. I didn't know you had a statement. Go ahead.

Mr. BURAK. Should I read it?

Senator LAUSCHE. You can either read it or summarize it.

STATEMENT OF J. S. BURAK, OWNER, J. S. BURAK TRAFFIC BUREAU

Mr. BURAK. I can state from my own experience that most claims, disallowed by the railroads, are simply placed into "dead file" because the legal costs would exceed the potential recoveries. I am making specific reference to those disallowed claims which, in my opinion, warranted payment, either in full or in part.

As examples, I will submit herewith the pertinent information covering a few claims which have recently been disallowed:

Pennsylvania Railroad Co. claim reference 623–01563: Filed for market decline loss due to delay, totaling $73.50, on carload of celery. Car was shopped on PRR due to a hot journal box. Fifteen hours later the car was shopped again and this time it was necessary to install new wheels. Carrier contends car handled with reasonable dispatch and disallowed claim.

Pennsylvania Railroad Co. claim reference 623–01582: Filed for market decline loss, due to delay, totaling $182.50, on carload of cantaloupes. The locomotive developed motor trouble east of Harrisburg resulting in the missing of the objective market at Philadelphia. Carrier contends car handled with reasonable dispatch and disallowed claim.

Pennsylvania Railroad Co. claim reference 723–00048: Filed for market decline loss, due to delay, totaling $460, on carload of onions. Car was shopped on the PRR April 20, 1966, due to a wheel flange being quite worn and thin. Another pair of wheels were applied and car moved out of shop on April 21, the following day. It requires a considerable length of time before a flange will wear down. This car should not have been spotted for loading yet claim was disallowed on the allegation that car was handled with reasonable dispatch.

Pennsylvania Railroad Co. claim reference 623–01281: Filed for market decline loss, due to delay, totaling $144 on carload of peas. Car was in a train behind a derailment on the main line of the PRR and was rerouted. Carrier acknowledged liability for all cars damaged in the derailment but declined payment of this claim, alleging car was handled with reasonable dispatch, despite the fact that the loss was caused by the same derailment.

Pennsylvania Railroad Co. claim reference 623–01502: Filed for market decline loss, due to delay, totaling $211.50, on carload of lettuce. Total railroad delay was 3 days; 1 day chargeable to the Southern Pacific Co., the other 2 to the PRR. Received offer of one-third loss amounting to $70.50 covering Southern Pacific portion, balance disallowed by PRR.

It is noteworthy that the PRR exceeded their regular 2-day schedule by the 2-day delay, yet contended that this was ordinary progressive delay and disallowed balance of claim alleging car was handled with reasonable dispatch.

Baltimore and Ohio Railroad Co. claim reference 815580–1: Filed for loss due to segregated, damaged, fibreboard cartons of tomatoes totaling $105. The tomatoes were bruised and the carrier acknowledged these packages as bad orders. Carrier held that there was no visible, external damage to the trailer and con-

sequently there was no affirmative evidence to show that damage resulted from any carrier negligence. Claim was disallowed.

There are many more similarly disallowed claims which, from a practical standpoint, do not justify litigation. The attorney's fees will exceed the amounts collectable. The railroads understand this situation and by disallowing such claims they are violating the intent, if not the letter, of section 20–11 of the Interstate Commerce Act. The amendment to the act as proposed by S. 858 will enable all claimants to press for the recovery of meritorious transportation losses, regardless of amount.

I have contacted many firms of the fruit and vegetable and meat industries in the Philadelphia area. Everyone supports S. 858.

At the present time we are in a merger trend involving railroads in all segments of our country. There is no doubt that many mergers will result in a monopoly to a greater or lesser degree. It is therefore of paramount importance that the shipping public is given the greatest possible protection. For this reason and those stated above, I respectfully urge committee approval of S. 858.

Senator, there is a part of my statement that has been mimeographed but was probably omitted. It relates to attorney fees. Could I just touch on that a moment? It is very short.

Senator LAUSCHE. Proceed.

Mr. BURAK. From my own experience, attorney fees on this type of claim will run from $350 to $750, sometimes more, depending on the amount of investigative work that has to be done and the time required in court by the attorneys.

Senator LAUSCHE. What class of cases are you now talking about?

Mr. BURAK. The same type of claim that I just described.

Senator LAUSCHE. But didn't you a moment ago say they averaged $150.

Mr. BURAK. Yes, but the amount of work, the principle involved is the same on a $150 claim as it would be on an $800 or $900 claim. You may have a market decline——

Senator LAUSCHE. Yes, I understand that, but now what is that $750 figure?

Mr. BURAK. It is a range of $350 to $750 representing bills from law firms which we have received in the past for claims presented in court.

Senator LAUSCHE. These are attorney's fees.

Mr. BURAK. Yes.

Senator LAUSCHE. Proceed.

Mr. BURAK. That is all, sir.

Senator LAUSCHE. Will you please clarify my thinking—in your statement you say "Carrier held that there was no visible, external damage to the trailer and consequently there was no affirmative evidence to show that damage resulted from any carrier negligence." It is my understanding of the law that the carrier, while he is not the absolute insurer, in essence he is that, except that he has five defenses that he can interpose to a claim. Now under what category do they defend that they are not liable because they were not negligent?

Mr. BURAK. That there was no visible damage to the outside walls or floor of the trailer. Now considering that these tomatoes——

Senator LAUSCHE. No outside damage—is that a defense?

Mr. BURAK. Senator, other carriers pay those claims. This particular carrier doesn't.

Senator LAUSCHE. Well, here the Interstate Commerce Act proposed carriers liable for the full actual loss, damage, or injury caused by it. The rule codifies the common law rule that the 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 (1) an act of God; (2) the public enemy; (3) the act of the shipper himself; (4) public authority; and (5) or the inherent vice or nature of the goods.

Now in this case that you mentioned, Baltimore & Ohio Railroad Co. claim reference 815580–1, "filed for loss due to segregated, damaged, fibreboard cartons of tomatoes totaling $105. The carrier held that there was no visible, external damage to the trailer and consequently there was no affirmative evidence to show that damage resulted from any carrier negligence." Would you as the complainant have to show that the railroad was negligent in causing the damage?

Mr. BURAK. No, we had a joint report signed with the carrier.

Senator LAUSCHE. Go ahead. Finish.

Mr. BURAK. They issued this joint report acknowledging that a certain number of packages were in bad order and this represents damage for which they will ordinarily accept responsibility. But not in this particular case.

Senator LAUSCHE. All right, that answers it. Thanks very much for your help.

Mr. H. Haskell Lurie, attorney at law, 188 West Randolph St., Chicago, Ill.

Mr. Lurie, you may proceed.

STATEMENT OF H. HASKELL LURIE, ATTORNEY AT LAW

Mr. LURIE. I have taken the liberty to present my form which was in the nature of a brief, and I think I submitted a letter to Mr. Sender in connection with that brief.

Senator LAUSCHE. Your statement will be printed in the record. My suggestion would be that you proceed to discuss the highlights of this bill as you see it with respect to its merits or demerits.

Mr. LURIE. Thank you.

(Prepared statement of Mr. Lurie follows:)

188 WEST RANDOLPH STREET,
CHICAGO 1, ILL.,
July 11, 1967.

Mr. STANTON P. SENDER,
Transportation Counsel, Committee on Commerce,
U.S. Senate, Washington, D.C.

DEAR MR. SENDER: . . . I am an attorney licensed to practice in the State of Illinois and have been associated with the growing, shipping, receiving, and distribution of fruits and vegetables for a long period of time. I am a member of and represent the Potato & Onion Association of Chicago; I am also a member of the United Fresh Fruit & Vegetable Association and the International Apple Association of Washington, D.C. In matters relating to interstate shipments of fruits and vegetables, the following is a partial list of clients whom I represent:

F. E. Baldwin Company, Cooney & Korshak, Inc., David Pepper Company, Bacon Brothers, H. Huizinga & Sons, The Isaacson Company, Lurie Brothers, Capodice Gringer Inc., Albert Barnett Company, Irvin Barnett Company, Dolce Brothers, Gianukos-Mandolini Company and Nathan Krupnick of Chicago, Illinois; S. Albertson Co. Inc. and S. Strock & Company of Boston, Massachusetts; James Burns & Sons, Almond, Wisconsin; Babijuice Corp. of Florida, Orlando, Florida; Ballantine Produce Company and Chris Sorensen Packing Company of Reedley, California; Cargil Produce Company, Ulvalde, Texas; Federal Fruit

Distributors of Sanger, California; Gem Fruit Union, Emmett, Idaho; Hayashida Farms and Schmieding Brothers of Alamosa, Colorado; Ito Packing Company, Bakersfield, California; R. C. Kellett, Inc., Caldwell, Idaho; Sumida Farms, Doug Motz, Mizokami Brothers and Mountain Lion Fruit, Inc., of Blanca, Colorado; Muir-Roberts Company, Salt Lake City, Utah; A. J. Rinella, Albany, New York; Steinberg Company of Pittsburgh, Pennsylvania; Stadelman Fruit Company and Sunny Roza Fruit & Produce of Yakima, Washington.

Respectfully yours,

H. HASKELL LURIE.

MEMORANDUM, BRIEF AND ARGUMENT IN SUPPORT OF SENATE BILL 858 TO AMEND 49 U.S.C. 20(11)

PURPOSE OF THE CARMACK AMENDMENT

The legislative and legal history of the purpose of the Carmack Amendment, which we seek to amend, clearly indicates that Congress intended to create an easier remedy to assist shippers in recovering by litigation their loss for damage to a shipment of goods in interstate commerce. This remedy was in addition to other common law liability. The legislative body involved in the passage of the Amendment concerned itself with the protection of the shipping public against an unequal advantage which could be utilized in favor of the carriers by legalistic obstacles confronting the shippers. This principle has long been recognized by the courts on a federal and state level. Numerous decisions support this argument; suffice it to cite, however, the two leading cases: *Boston and Maine Road* vs. *Hooker*, 233 U.S. 97 (1914) and *Reider* vs. *Thompson*, 339 U.S. 113 (1950).

EFFECT OF CLAIM PRACTICES UPON THE CARMACK AMENDMENT

The property rights of shippers involved in loss and damage are currently handled in two ways:

1. By voluntary negotiations between freight claim personnel of the carriers, and the shippers and receivers of goods. All voluntary settlements are governed by a unilateral code of "Principles and Practices for the Investigation and Disposition of Freight Claims, Effective September 10, 1933 and revised to April 15, 1947." The disposition of voluntary adjustments has been implemented by an inter-carrier review board under the direction of the Association of American Railroads. Voluntary settlements, therefore, are under the control of the "Principles and Practices for the Investigation and Disposition of Freight Claims" as interpreted and determined by the freight claim personnel and the review board of the Association of American Railroads.

2. Failure to resolve their rights on a voluntary basis in conformance with the "Principles and Practices for the Investigation and Disposition of Freight Claims" therefore leaves the only alternative open which is the utilization of legal proceedings either under the common law rights or those afforded by the Carmack Amendment. Since the inception of the rules promulgated under the "Principles and Practices for the Investigation and Disposition of Freight Claims" the fruit and vegetable industry has been the recipient of harsh and obsolete unilateral treatment which has resulted in serious economic loss. The fruit and vegetable industry has been singled out for such enforcement. This problem has plagued the industry for many years. In 1946, John J. Saltonstall stated:

"There are many devices utilized by the railroads to enable them to avoid the full legal consequences of their own negligent handling of fresh fruits and vegetable shipments . . . By using unilateral rules such as Principles and Practices the railroads attempt to exempt themselves from the full measure of their legal liability in deragation of the Cummins Amendment, and, as the text of the amendment further provides, 'any such limitation (upon the liability of the carrier) without respect to the manner or form in which it is sought to be made, is * * * unlawful and void * * *.'"

The claim practices and policies of the carriers have become more negative as the years roll on. The result is that the fruit and vegetable industry is now the exclusive victim of an antiquated, obsolete system of claim policies and practices. The attitude of some of the carriers would dare the shippers to enforce their rights in a court of law. Often the claim policies and practices would close the door for voluntary negotiations on a claim level. Often, also, claimants are compelled to accept voluntary offers much less than their provable loss under a threat of the declination of their claim.

In most cases, the losses suffered by the fruit and vegetable industry range from $50.00 to less than $1,000.00. The cost of presenting a plaintiff's case has become so prohibitive as to result in the abandonment of rights of action in the aggregate of millions of dollars yearly. These losses affect the agricultural community as well as the consuming public. Today, therefore, the small shippers and receivers are without an adequate remedy to enforce their rights provided to them by law against the organized efforts of the carriers in preventing them their "day in court."

I can cite hundreds of instances of the inequities which prevail today concerning this subject. I shall, however, refer to one recent instance which is indicative of the problem. This concerned the case of a Colorado shipper who sustained a loss of approximately $2,800.00. The case was filed in the Circuit Court of Cook County, Illinois. After many preliminary motions, hearings and briefs filed, the cause was dismissed on carrier's motion under the doctrine of forum non conveniens. It was then re-filed in the United States District Court for the Northern District of Illinois. Motions were made there by the defense counsel to transfer the cause to a District in Denver, Colorado. After voluminous briefs and affidavits were filed, the Northern District Court transferred the cause to a District Court in Denver, Colorado. The attorney sought to be retained by the shipper for prosecution of the cause requested a fee of $2,000.00. The shipper, rather than become involved with attorney's fees and costs of transporting witnesses from various parts of the country, which would have been in excess of the amount of the claim, was forced to abandon his right of action.

OTHER FACTORS INVOLVED IN CARRIER NEGATIVE CLAIM PRACTICES AFFECTED BY THE CARMACK AMENDMENT

Growers, shippers and receivers of fruits and vegetables are governed under an Act of Congress (code of federal rules, 7 U.S.C. Section 499, commonly known as the Perishable Agricultural Commodities Act.) The provisions of this Act govern the practices of the fruit and vegetable agricultural community and distribution. Carriers engaged in the transportation of fruits and vegetables are in no wise governed by this legislation. However, the policies of the carriers and the Association of American Railroads in the area of transportation have adversely affected the custom, usage and practices promulgated to regulate the industry. The continuation of these practices would destroy and disturb orderliness, and create chaos within the industry, and lead to destruction of the whole purpose of the Perishable Agricultural Commodities Act and the licensing programs granted to the Secretary of Agriculture under this Act. The inability of the enforcement of the rights of shippers and receivers in seeking redress in the courts for damages due to delay in the singularly small losses, due to excessive costs of litigation, will result in creating a legal atrophy. This will destroy the rights of small businessmen and affect the whole agricultural community and the public at large. These results can be avoided by amending the Carmack Amendment to enable the small and large shippers the right to redress for injury, which the Congress of the United States fully intended to do under the Carmack Amendment.

HISTORICAL BASIS FOR ALLOWANCE OF REASONABLE ATTORNEY'S FEES

One of the ideals of the law is to fully compensate an individual who has been wronged by another, at least as far as can be accomplished with money. But, in most civil cases today, including those cases which involve a shipper who sues an interstate carrier for damage to his goods while in transit, the wronged party does not receive adequate compensation for damages sustained due to the fact that attorney's fees are not included in the judgment. The American system so frustrates the attainment of the goal of full compensation that many shippers do not even resort to the courts as a remedy for their injuries because the costs of the attorney's fees incurred in prosecuting their legal rights make it infeasible to prosecute such claims. As a result, the small businesses and those with small claims are at a disadvantage for it is they who are the least likely to prosecute their claims and receive full compensation for their injuries. It becomes imperative that for the successful attainment of the ideal of full compensation, and for the protection of the small business and shipper facing a larger, well organized, financially capable, adversary, that legislation be passed allowing the recovery of reasonable attorney's fees upon the successful maintenance of an action for damages to goods while in transit.

The allowance of a reasonable attorney's fee upon the successful maintenance of an action is not a new idea, nor would it in any way damage the American system of justice. It seems probable that a plaintiff could recover costs in some forms of damage actions before the reign of Edward I. (4 Holdsworth, History of English Law 537, 3 ed. 1924; 2 Pollack & Maitland, History of English Law 597, 2 ed. 1899). In 1275, the Statute of Gloucester (6 Edw. 1, c. 1.) was passed allowing the recovery of costs by the plaintiff in certain actions. From 1487 to 1705, a series of statutes were passed allowing costs, including attorney's fees, on appeal. See Goodhard, Costs, 38 Yale L.J. 849 (1929).

As a result, long before the American Revolution, the system of allowing costs including attorney's fees upon the successful maintenance of an action, was established and successfully maintained for over seven hundred years in England.

The English system has been regarded by many as being very practical. It is based on a pessimistic assumption that some litigants will resort to all possible technicalities and sharp practices to gain their ends if they are not prevented from doing so. It makes provision so that a defendant who attempts to obstruct justice as long as possible and, after judgment, to appeal to as many courts as are open to him, on the chance that he will wear out the plaintiff, will pay substantially for his efforts. The addition of attorney's fees is another weapon for the plaintiff with a just claim which needs to be presented.

ARGUMENTS FOR ALLOWING THE AMENDMENT

In America, attorney's fees have not been allowed in the absence of statutes, contractual provisions or judicial discretion in certain cases. However, there are many reasons why in matters involving damages to goods being shipped in interstate commerce, reasonable attorney's fees should be allowed.

1. Court congestion is a major problem in America today. A substantial amount of court congestion can be relieved by allowing the plaintiff to recover his reasonable attorney's fees upon successfully maintaining an action because there would necessarily be a greater number of settlements, between plaintiffs with just claims and defendants who have no defense. When faced with the possibility of having to pay plaintiff's attorney's fee, a defendant who knows that he has no defense or a poor defense at most, would be less prone to delaying the litigation by demanding for the production of undisputed evidence, appealing and using dilatory methods throughout the litigation in an attempt to discourage the plaintiff, who more likely than not needs the money very badly and at the same time, cannot afford to undertake a long, protracted litigation. These methods have been used consistently by the interstate carriers with great success in discouraging the prosecution of just claims by the shippers.

At the same time the court congestion problem is being aided by the allowance of reasonable attorney's fees, other benefits will be obtained. As litigation is a costly and wasteful process, the reduction in the amount of litigation will represent a savings to all parties involved. At the same time, the position of the shipper will be enhanced so that a more equitable settlement can be worked out among the shippers, who are now at a disadvantage, and the carriers who now have a tremendous advantage. Also, when the parties do resort to litigation in order to settle their differences, the length of the litigation is likely to be reduced because of a reduction in the amount of dilatory techniques used by the defendants.

2. Merely because a claim is small, this does not mean that the legal problems are small. It is entirely possible for the injured party to pay out at least the amount recovered and more, because of legal fees. A shipper sustaining a fairly substantial amount of damage to his goods being shipped in interstate commerce is often faced with the problem that his attorney's fees may amount to as much as the loss due to the carrier's negligence or at least a substantial amount of it. As such, shippers sustaining minor injuries and small claims are at a disadvantage. This problem has been recognized by many writers on the subject and as Professor Kuenzed stated in his article "The Attorney's Fee: Why Not a Cost of Litigation?" 49 *Iowa L. Rev.* 75 (1963), "To argue that our present system must not be changed is fantastic in light of the complete present disregard for all claims where the damages suffered are in an unsubstantial amount." See also, 38 *U. Colo. L. Rev.* 202, Winter 1966; 15 *U. Cin. L. Rev.* 313 (May, 1941)

3. As was recognized in the Supreme Court Case of *Meeker* v. *Lehigh Valley R.C.*, 236 U.S. 412, 35 S. Ct. 328, 59 L. ed. 644, Ann Cas. 1916B (1915) and the Supreme Court case of *Missouri, Kansas & Texas Railway Co.* v. *Cade*, 233 U.S. 642, 34 S. Ct. 678, 58 L. ed. 1135 (1914), the allowance of reasonable attorney's

fees in actions involving interstate carriers can promote a closer observance by carriers of the duties so imposed; and that there is also a purpose to encourage the payment, without suit, of just demands.

4. It has been stated that attorney's fees should not be granted because they are too remote to be recovered as compensatory damages. *St. Peters Church* v. *Beach*, 26 Conn. 354 (1857). However, in nearly every jurisdiction there are exceptions to the general rule, which allow the recovery of reasonable attorney's fees. There are also many statutes allowing the recovery of reasonable attorney's fees on the federal level, which will be noted later. The question to be considered then, is how can the attorney's fee be considered too remote in some actions while they are not considered too remote in other actions. And, in actuality, attorney's fees are not too remote from the wrongful act because the wrongdoer may forsee that the injured party will resort to the courts for redress if his claim is not paid.

5. As has been mentioned in conjunction with the problem of court congestion, the allowance of reasonable attorney's fees would encourage arbitration, compromise and settlement since persons would be more unwilling to enter court with a doubtful defense.

CONSTITUTIONALITY OF SUCH LEGISLATION

To improve the position of the shipper, there must be legislation directed towards allowing the shipper to recover his reasonable attorney's fees in actions against a carrier for the damage to goods being shipped in interstate commerce. The constitutionality of such legislation would be unquestioned in light of the numerous Supreme Court cases which have upheld statutes allowing the recovery of reasonable attorney's fees in other fields as well.

1. *Arcambel* v. *Wiseman*, 3 Dall 306, 1 L. ed. 613 (1796).
2. *Day* v. *Woodworth*, 13 How 363, 14 L. ed. 181 (1851).
3. *Oelrichs* v. *Spain*, 15 Wall 211, 21 L. ed. 43 (1872).
4. *Stewart* v. *Sonneborn*, 98 U.S. 187, 25 L. ed. 116 (1878).
5. *Atchison, T. & S.F. RR.* v. *Matthews*, 174 U.S. 96 (1899).
6. *Fidelity Mut. Life Ass'n* v. *Mettler*, 185 U.S. 308 (1902).
7. *Life & Cas. Ins. Co.* v. *McCray*, 291 U.S. 566 (1934).

These cases have held such statutes consistent with the due process clause and the equal protection clause of the 14th Amendment of the United States Constitution.

Also, there is an abundance of Federal statutes which allow the recovery of reasonable attorney's fees. Congress has overturned the decisions in the *Philip* v. *Nock*, 17 Wall. 460, 21 L. ed. 679 (1873), and *Teese* v. *Huntingdon*, 23 How. 2, 16 L. ed. 479 (1859), cases by specifically allowing the recovery of attorney's fees in patent cases and Congress has selectively provided a similar remedy in connection with various other statutory causes of action:

1. Clayton Act, 38 Stat. 731, 15 U.S.C. 15;
2. Communications Act of 1934, 48 Stat. 1072, 47 U.S.C. 206
3. Copyright Act, 17 U.S.C. 116, 40;
4. Fair Labor Standards Act, 52 Stat. 1069, 29 U.S.C. 216(b)
5. Packers and Stockyards Act, 42 Stat. 166, 7 U.S.C. 210(f)
6. Perishable Agricultural Commodities Act, 46 Stat. 535, 7 U.S.C. 499g(b)
7. Railway Labor Act, 48 Stat. 1192, 45 U.S.C. 153(p)
8. Securities Act of 1933, 48 Stat. 907, 15 U.S.C. 77 K(e) (1964)
9. Securities Exchange Act of 1934, 48 Stat. 890, 897, 15 U.S.C. 78 i(e), 78r(a)
10. Servicemen's Readjustment Act, 38 U.S.C. 1822(b)
11. Trust Indenture Act, 53 Stat. 1176, 15 U.S.C. 77 www(a)
12. Fed. Rules Civ. Pro. 77(a) and 56 (g)
13. Torts Claims Act, 28 U.S.C. 2678 (1964)

INTERSTATE COMMERCE FIELD

In the area of Interstate Commerce, there is statutory authorization for the recovery of attorney's fees in several sections.

1. 49 U.S.C. 8, 16(2) permits the recovery of reasonable attorney's fees by successful plaintiffs in certain kinds of actions arising under Part I of the Interstate Commerce Act.

2. 49 U.S.C. 908(b) and (e) pertain to recovery of attorney's fees in actions against common carriers by water for overcharges to freight. See *Ingalls v. Maine C. R. Co.*, 51 F. 2d 310 (1931 DC ME).

3. 49 U.S.C. 322(b)(2) pertains to motor carriers.
4. 49 U.S.C. 1017(b)(2) pertains to freight forwarders.

The Interstate Commerce Act also provides for investigation by the Interstate Commerce Commission of complaints that a common carrier has violated 49 U.S.C. 13, 908(c), and if, after a hearing on the matter, the commission finds that any complaining party is entitled to an award of damages for such violation, the commission must make an order directing the carrier to pay the complainant, and if the carrier does not do so, the complainant may bring suit, and if he prevails, he shall be allowed a reasonable attorney's fee, to be taxed and collected as part of the costs of the suit.

By virtue of these provisions, counsel fees have been awarded to shippers in their successful suits against carriers based on reparation orders by the Interstate Commerce Commission for excessive freight rates charged the shippers by the carriers.

1. *Glenn Falls Portland Cement Co.* v. *Delaware & H Co.*, 66 F. 2d 490, cert. den. 290 U.S. 697, 78 L. ed. 599, 54 S. Ct. 132(1933, CA 2, N.Y.)
2. *Danville v Chesapeake & O.R.Co.*, 34 F. Supp. 620 (1940, D.C. Va.)
3. *Missouri P.R. Co. v. C.E. Ferguson Sawmill Co.*, 235 F. 474 (1916, C.A. Ark.)
4. *El Paso & S.W.R.Co. v. Phelps-Dodge Mercantile Co.*, 75 F. 2d 873 (1935, C.A. 9 Ariz.)

And, for discrimination in car distribution.

1. *Pennsylvania R. Co.* v. *Minds*, 250 U.S. 368, 63 L. ed. 1039, 39 S. Ct. 531 (1919).

The attorney's fees to be collected are for services performed at the trial and appellate court level. To be noted here is the fact that many of the statutes cited are fairly recent and not many cases have arisen under them which have contested the provisions for the allowance of attorney's fees. Of those that have, none have mentioned their reasons for allowing the attorney's fees to be granted to the plaintiffs other than the fact that the statute authorized it.

STATE AUTHORITY

State authority on this point is very impressive indeed. State legislation has produced such a multitude of statutes allowing for reasonable attorney's fees that only a representative sampling need be mentioned. Under special statutory provisions in many states, attorney's fees are recoverable as costs in certain actions or proceedings directed against certain classes of persons in actions arising from the failure to perform or the violation of statutory or contractual obligations. Such statutes includes limited classes of suits against railroad companies and carriers. See:

1. *Missouri, K. & T.R. Co.*, v. *Cade*, 233 U.S. 642, 58 L. ed. 1135, 34 S. Ct. 678.
2. *Kansas City S.R. Co.* v. *Anderson*, 233 U.S. 325, 58 L. ed. 983, 34 S. Ct. 599;
3. *Atchison, T. & S.F.R. Co.* v. *Matthews*, 174 U.S. 96, 43 L. ed. 909, 19 S. Ct. 609;
4. *Peoria, D & E.R. Co.*, v. *Duggan*, 109 Ill, 537
5. *Burlington, C.R. & N.r. Co.*, v. *Dey*, 82 Iowa 312, 48 NW 98;
6. *Mills* v. *Lehigh Valley R. Co.*, 238 U.S. 473, 59 L. ed. 1414, 35 S. Ct. 888;
7. *Atlantic Coast Line R. Co.*, v. *Coachman*, 59 Fla. 130, 52 So. 377;
8. *Missouri, K. & T.R. Co.*, v. *Simonson*, 64 Kans. 892, 68 P. 653.

Many of the state statutes allow substantial attorney's fees in actions against railroads generally on account of their damage to property along their lines, or tariff overcharges.

1. Minn. Stat. 219.33 (1945—damage from failure to maintain fences.)
2. Minn. Stat. Ann. 221.251 (1965—tariff overcharges)
3. Tex. Rev. Civ. Stat. art. 2226 (1964)
4. Tex. Rev. Civ. Stat. art. 6393 (1926—freight damaged at depot)

All of this points out the fact that the legislation and case law allowing reasonable attorney's fees in similar instances is not novel. Statutes date back early in American history and the modern trend is definitely in the direction of allowing the recovery of attorney's fees in more and more actions. To be noted here is the fact that the statutes mentioned and the cases referred to usually speak in terms of "reasonable" attorney's fees. As such, the plaintiff still may not be fully compensated, but it is a step in the right direction.

TWO IMPORTANT SUPREME COURT CASES

Some of the case law in the area point out distinct advantages in having statutes authorize the allowance of reasonable attorney's fees when involved with Interstate Commerce. In *Missouri, Kansas & Texas Railway Co.* v. *Cade*, 34 S. Ct. 678, 233 U.S. 642, 58 L. ed. 1135 (1914), the United States Supreme Court upheld the constitutionality of Texas Rev. Civ. Stat. 1911, art. 2178 and 2179 allowing the recovery of attorney's fees by a successful plaintiff. The defendant had contended that the Act was a burden on interstate commerce and contrary to subdivision 3, 8, Art. I, of the Constitution. In upholding the validity of the statute, the court stated that the purpose was merely to require defendants to reimburse plaintiffs for part of their expenses not otherwise recoverable and that the statute imposed only compensatory damages upon a defendant who, in the judgment of the legislature unreasonably delayed and resisted payment of a just demand. The court went on to state that, the fact that the statute was partially designed as an incentive to prompt settlement of small but well founded claims, which are more oppressive where the amount involved is small, did not militate against its validity. The court also noted that the outlay of the attorney's fee was a necessary consequence of the litigation, and since it must fall upon one party or another, it is reasonable to impose it upon the party whose refusal to pay a just demand renders the litigation necessary. And finally, the court recognized the fact that statutes as the one in question could have the effect of promoting a closer observance by the carriers of the duties so imposed.

Another major Supreme Court case upholding such statutes is *Meeker* v. *Leigh Valley R. Co.*, 236 U.S. 412, 35 S. Ct. 328, 59 L. ed. 644, Ann Cas. 1916B 691 (1915) wherein the court was concerned with 49 U.S.C. 16. A complaint was brought before the proper commission. An award was granted to the plaintiff but the defendant refused to pay, so the plaintiff exercised his legal rights and brought an action in the Federal court to recover the damages alleged to have been sustained by the shipper and awarded by the Interstate Commerce Commission because of the carrier's overcharges and unjust discrimination. The district court awarded to the plaintiff who successfully maintained the action, attorney's fees. Upon appeal, the defendant contended that the provision authorizing an allowance for services in the action was invalid as being purely arbitrary and as imposing a penalty merely for failing to pay a debt. The Supreme Court held that the evident purpose was to charge the carrier with the costs and expenses entailed by a failure to pay without suit—if the claimant finally prevails—and to that end to tax as part of the costs in the suit wherein the recovery is had, a reasonable fee for the services of the claimants attorney in institution and prosecuting the suit. The court went on to state that the defendant's contention was without merit and that the provision was leveled against common carriers engaged in interstate commerce, a quasi-public business, and was confined to cases wherein a recovery was had for damages resulting from the carrier's violation of some duty imposed in the public interest by the act to regulate commerce. The court held that the validity of the statute was not even doubtful but was certain and that the reasons behind such statutes were proper.

State courts have also upheld similar legislation:

1. *Vogel* v. *Pekoc*, 157 Ill. 339.
2. *Burlington & C. Ry. Co.* v. *Dey*, 82 Iowa 312.
3. *Cameron* v. *Chicago & C. Ry. Co.*, 63 Minn. 384.
4. *Wortman* v. *Kleinschmidt*, 12 Mont. 316.

Numerous other decisions can also be cited.

Once more, all of these decisions and statutes point out the fact that the allowance of reasonable attorney's fees is not a new and unworkable idea, but that it has operated successfully for many years. The reasons behind such statutes and the proposed amendment here are meritorious and have been deemed so by the United States Supreme Court which has often upheld such statutes. Allowing the recovery of reasonable attorney's fees in closely related actions under the Interstate Commerce Act and not allowing the recovery of reasonable attorney's fees under 49 U.S.C. 20 (11) seems infeasible in light of the need for such legislation in order to allow shippers whose goods have been damaged while in interstate commerce to be fully compensated for their losses.

CONCLUSION

The proper prosecution and the defense of the fruit and vegetable cases under the Carmack Amendment often require the use of as many as fifteen witnesses scattered from shipping points to destination. The time required for the hearing of a trial is from two to five days. The expense involved, exclusive of attorney's fees, to transport witnesses and take depositions, is often prohibitive. These factors have created an inequality between the shipper's ability to prosecute and the carrier's ability to defend. While other areas of federal regulation and procedure to alleviate this imbalance should be investigated, it would appear at this time that the relief sought by S. 858 would be a step in the right direction.

Respectfully submitted,

H. HASKELL LURIE,
Attorney at Law.

APPENDIX

Texas Rev. Civ. Stat. art. 2226:

"Any person having a valid claim against a person, or corporation for personal services rendered, labor done, material furnished overcharges on freight or express, lost or damaged freight or express . . . may present the same to such person or corporation or to any duly authorized agent thereof; and if, at the expiration of 30 days thereafter, the claim has not been paid or satisfied, and he should finally obtain judgment for any amount thereof as presented for payment to such person or corporation, he may also recover, in addition to his claim and costs, a reasonable amount as attorney's fees, if represented by an attorney."

APPENDIX II

SMITH HURD ILLINOIS ANNOTATED STATUTES

Chapter 114, Section 117

Claim, How collected, Attorney's fee, Provisions cumulative

"Any person, having a valid bona fide claim against any common carrier by railroad doing business in this State for loss, damage or delay of grain transported by such carrier in intra state or interstate commerce, may present the same to such common carrier or to any duly authorized agent thereof as provided by State or Federal law, rule or regulation and if, at the expiration of ninety days after the presentation of such claim, the same has not been paid or satisfied, such claimant may institute suit thereon, and if such claimant establish by the decision of the court or jury that the amount for which suit has been brought is justly due and owing to such claimant, and that such claim was presented as hereinbefore provided at least ninety days before suit was brought for a sum or sums not exceeding the amount so found due and owing, then it shall be the duty of the court before whom the case has been tried to allow the plaintiff, when the foregoing facts appear, a reasonable attorney's fee in addition to the amount found due and owing on such claim, such fee not to exceed ten per cent of the amount so established, provided that no such fee shall be less than ten dollars. Provided, however, that nothing in this Act shall be construed to appeal (repeal) or in any manner affect any provisions of law now in force giving a remedy to those having claims of the character mentioned in this Act, but the provisions of this Act shall be considered as cumulative of all other remedies. 1919, June 28, Laws 1919, p. 715, Section 1."

Mr. LURIE. I am an attorney licensed to practice in the State of Illinois and have been associated with the growing, shipping, receiving, and distribution of fruits and vegetables for a long period of time. I am a member of and represent the Potato & Onion Association of Chicago. I am also a member of the United Fresh Fruit & Vegetable Association, the International Apple Association. And in matters relating to the interstate shipment of fruits and vegetables I have enumerated a number of people for whom I have participated in legal action. These gentlemen and these firms you will note are representative of people throughout the United States.

Now in connection with my statement I want to take the opportunity to preface my written remarks to the Senator and Mr. Sender, and I

would like to preface my written statements which I have submitted by stating that there is more romance to this subject than just a mundane discussion of attorney's fees.

The real issue here, Senator, is not whether this legislation will provide a means for encouraging litigation or assisting the economic status of the legal profession. What really is important, Senator, is whether this legislation will have a salutary effect and have an impact upon the carriers' obligation to the agricultural community and to the trade, and most important of all, to the housewives and the tables of this great country of ours.

It so happens that I represent the fruit and vegetable people and I have always had a feeling that fruit and vegetables are a very important part of the habits and the eating experiences and the health of this Nation, and what concerns me primarily is the effect of this legislation in creating a kind of atmosphere that will best serve the best interests of the public.

The problem of loss and damage due to delay or improper handing or faulty equipment or a combination, if such factors do exist, should not merely be a legal concept. It goes far beyond that. I submit that those of us aware of the problem in and out of the legal profession have a duty to zealously guard against the encroachment of any rights which affect the public interest. Nor can we in the legal profession encourage nor allow these legal rights to go by the way of default, and I contend, Senator, that this is exactly what is happening today.

These rights that affect not only the shipping public, not only the people who are involved in raising the commodity and distributing the commodity, but it involves the very basis of distribution and it involves the quality and the nature of these particular products that we hope to present to the public and to the retail institutions and to the eating institutions in the United States in the best form available.

Now it is with that in mind I will now refer to my statement.

Now the purpose of the Carmack amendment is very clear. The legislative and the legal history of the purpose of the Carmack amendment which we seek to amend clearly indicates, Senator, that this act was promulgated for the primary purpose of offering relief to the shipping public. At that particular time when the amendment was originally discussed in its first form there was a need to protect the shipping public. There was a need to give the shipping public a right to be able to remedy their grievances. And it was this act that came about that gave us the opportunity for the first time to find an easy way, a better way, a more practical way of seeking out a defendant railroad rather than to search for them all over the United States and for them to employ legalistic obstacles so that these rights could not be protected.

Senator LAUSCHE. Will you for the purpose of the record identify the Carmack amendment.

Mr. LURIE. The Carmack amendment is section 49 U.S.C. 20, subparagraph 11.

Senator LAUSCHE. What is its purpose?

Mr. LURIE. The legislative purpose, and the reading of the cases, *Boston and Maine* and the *Hooker* case and the *Reider* case, and the reading of the legislative discussions that engendered the creation of the Carmack amendment—the purpose of it was specifically talked

about on the basis of offering the shipping public a means by which they could protect their legal rights.

Senator LAUSCHE. And what did the Carmack provide?

Mr. LURIE. The Carmack provided that the initial carrier or the delivering carrier would become liable for all of the acts of all of the carriers involved in the transportation of that commodity, and provided further that they shall have their full and actual loss for any damages which they sustain by the activities of one or two or three of the carriers that were involved.

Now the effect of the shippers involved in loss and damage are concurrently handled in two ways; and I think, Senator, it is interesting to note the procedure in handling fruit and vegetable cases. First, we have a method by voluntary negotiations, and this is on page 2 of my brief—by voluntary negotiations between freight claim personnel of the carriers, and the shippers and receivers of goods. All voluntary settlements are governed by—I call it a unilateral code of "principles and practices for the investigation and disposition of freight claims." The disposition of voluntary adjustments has been implemented by an intercarrier review board under the direction of the Association of American Railroads. This particular review board has its home in the city of Chicago.

All voluntary and all nonvoluntary settlements of claims are then handled in two ways: First, by the particular road involved who, by making representations or settlements, are able to then determine the rights of all of the other carriers by this particular type of negotiation. From there, Senator, this matter goes to a review board under the direction of the American Association of Railroads, who again review the particular aspects of this claim.

Now it is important for us to know that the principle and practices for the investigation and disposition of freight claims is the code or is the procedure or is a limitation upon the ability of the freight claim adjusters for the particular railroads to then make determinations. No settlement voluntarily can be made outside of this code.

It is therefore apparent that the reason lawsuits are filed today primarily is because they do not come within the confines of this unilateral agreement or the personnel problem that is involved in negotiations between the carriers and the representatives of the shipper.

Now when then the claims are not paid under a voluntary system provided for by the principle and practice the claimant has no opportunity, no other means, no other method than to employ counsel and to present his claim. Now this may be a $100 claim, it may be a $200 claim, it may be $3,000 claim. There is no limitation on the amount.

Now referring again, so that I do not fail to make my points, failure to resolve their rights on a voluntary basis in conformance with the principle therefore leaves the only alternative open which is the utilization of legal concepts.

Now I want to point out—and I am not going to take the time to read, because it is in the record—this problem is not new. This problem has plagued the industry for many years, and especially the fruit and vegetable industry.

And I call the Senator's attention to page 3, in which I make reference to a statement that John J. Saltonstall, a Boston attorney, made in 1946 in addressing the International Apple Association on problems inherent to the claim practices of some of the carriers.

Now I do not want to take the time at this point to point out specific—there are five or six or seven specific instances why these claims must go to suit. For example, these specific instances that are referred to are limitations upon the right of a claimant. They say that he cannot do this, he cannot do this. For example, a very important problem that we have——

Senator LAUSCHE. What page are you reading from?

Mr. LURIE. Well, I am not reading. I am reading from a note that I have that refers to Mr. Saltonstall's statement. I can put this in the record, if your Honor please.

Reading from Mr. Saltonstall's statement, "One requirement is"—and he is referring to the P and P, the principle and practice—"is that claims may not be settled by any railroad at a higher figure than that indicated by a report of an authorized carrier inspection bureau."

"In other words," continues Mr. Saltonstall, "if an inspector on the staff of the carrier inspection bureau who, after all, is no more than an employee of the railroads—if that inspection says that the amount of deterioration is only $300 worth, then $300 is the top figure that the carrier may settle for, even though the report of the independent inspection agency employed by the receiver may show that there is deterioration amounting to $600. P and P imposes a restriction upon his ability to go beyond that particular figure."

In computing value of destination shipment in larger than retail quantities carlot prices will be recognized and no retail values will be employed. This is another limitation. Supposing it is a chainstore. I mean this is a limitation that restricts the fullest use of the law of damages.

Now I am not in a position to say at this time that one's proof of damages is sufficient to warrant a judgment, but what I am saying is it is a limitation upon the use of the legal methods by which there is presentation of evidence tending toward the proof of damages. There are limitations.

Another limitation, referring again to Mr. Saltonstall's statement, "when the transportation record develops negligent delay by the carriers and delay also on the part of the shipper or upon owner, claim for proven damages shall be adjusted in amount not in excess of carrier's proportion ascertained by using material delays of both carriers and shippers or owners as factors."

Now what they mean to imply there is that if the carriers are guilty of delay due to some cause chargeable in law, that this delay has to be apportioned between the shipper and the carrier. So that if a car is held at one point or another in their cars with their service, with all of the factors involved in using the maximum type of protection in order to carry this car, they will say that in order to settle this claim we have to apportion the loss between the two.

Now I am not going to argue the justice of this right at this point. I am merely arguing the fact that these are conditions and limitations which cause claimants to proceed in a court of law in order to determine their rights under their bill of lading contract.

Senator LAUSCHE. What does the carrier say in justification of the adoption of the limitation that there shall be apportionment? What reason does he give? Does he claim that there shouldn't be apportionment?

Mr. LURIE. No, I would say this—may I respond to your question in this way: They feel that if it is a question of delay, that the delay factors ought to be divided, if there is a loss due to it that it ought to be divided between the carrier and the shipper.

Now these factors that we are talking about are condition factors. We know this—we know that in carrying fruits and vegetables, as distinguished from other objects, that their shelf life—we know that these are live objects. We know that they have a certain amount of time to live, and we know that every time delay factors are involved we reduce their period of palatability, their appearance. So these are some of the factors that are involved in this.

If I may continue, but more important than this——

Senator LAUSCHE. No, my question is what reason do they assign for the adoption of the rule that there shall be apportionment?

Mr. LURIE. This adoption of the rule, if I understand the historical basis of all of these rules, was to prevent receivers and shippers or persons involved in claims from making claims that would not be based upon fact. I think the promulgation of these claims—I am sure were intended at one time for the purpose of protecting the carrier against the shipper, and this is one method of doing that.

Senator LAUSCHE. Well, do you claim that the principle which they adopt and which you have just been discussing is wrong, unjust to the shipper?

Mr. LURIE. It is in certain cases. It cannot be in all cases, but it is in certain cases.

For example, let me go a little further. For example, if there is a car delayed 2 days or 1 day, causing a condition factor, and the car comes in in badly damaged condition and must be handled on a salvage basis by a reputable merchandising house or by a chainstore, and because of the salvage condition of that car they cannot sell it as quickly as they can, I would say any charge upon them that the claimant ought to pay for the amount of time that it took to sell a salvaged car of merchandise would be definitely unfair.

Senator LAUSCHE. Proceed.

Mr. LURIE. Now in most cases the losses suffered by the fruit and vegetable industry range from $50 to less than $1,000. Now let me say this. I think the most of my cases that I have handled range between the area of $250 and have gone as high as $4,000. Those have been some of the cases we have handled.

Now I think it is well to point out, Senator, that in delay cases, as distinguished from condition cases, or a combination of delay and condition—in delay cases per se the amounts would be relatively small. The amounts would be from $150 to $200; and I have currently in my office today about 22 cases on reasonable dispatch that involves delays that run from $200 to $300. I have currently in my office about 30 more files which I am very reluctant in filing because of the amount of work that will be entailed in handling these reasonable dispatch cases. I am fully aware of that.

Now on condition cases the amounts are generally larger.

Now I would like to cite—I have had considerable experience and I would like to cite one case——

Senator LAUSCHE. I don't want to hurry you, but you can either read your paper or use your notes.

Mr. LURIE. All right.

I can cite hundreds of instances of the inequities which prevail today concerning this subject. I shall, however, refer to one recent instance which is indicative of the problem. This concerned the case of a Colorado shipper who sustained a loss of approximately $2,800. The case was filed in the circuit court of Cook County, Ill. After many preliminary motions, hearings and briefs filed, the case was dismissed on carrier's motion under the doctrine of forum non conveniens. It was then refiled in the U.S. District Court for the Northern District of Illinois. Motions were made there by the defense counsel to transfer the case to a district in Denver, Colo., After voluminous briefs and affidavits were filed, the northern district court transferred the case to a district court in Denver, Colo. The attorney sought to be retained by the shipper for prosecution of the case requested a fee of $2,000. The shipper, rather than become involved with attorney's fees and costs of transporting witnesses from various parts of the country, which would have been in excess of the amount of the claim, was forced to abandon his right of action.

Now I think, your Honor, that I would like to make this one statement. I have handled these cases, and I think this is a good time to advise you——

Senator LAUSCHE. Did you handle this case that was initiated in Chicago?

Mr. LURIE. Yes, I handled the initial portion of this case which was finally abandoned because of the fact that the counsel in Colorado wanted a fee of $2,000. And I might say that he warrants a fee of $2,000. These cases are complicated cases of issue of fact and of law. These cases require witnesses from shipping point and require witnesses from destination point. I have in the circuit court in my district been faced with 15 witnesses that my adversary persented to me.

These cases employ plant pathologists. These cases employ experts in tariff regulation. These cases take from 2 to 5 days to try, and I think that the man in Colorado was justified in requiring a fee of $2,000 if he were to do the kind of job that I think ought to be done in every one of these lawsuits.

Now I am going to refer to page 6 of my brief, talk about historical basis for allowance of reasonable attorney's fees.

One of the ideals of the law is to fully compensate an individual who has been wronged by another, at least as far as can be accomplished with money. But, in most civil cases today, including those cases which involve a shipper who sues an interstate carrier for damage to his goods while in transit, the wronged party does not receive adequate compensation for damages sustained due to the fact that attorney's fees are not included in the judgment.

The American system so frustrates the attainment of the goal of full compensation that many shippers do not even resort to the courts as a remedy for their injuries because the costs of the attorney's fees incurred in prosecuting their legal rights make it infeasible to prosecute such claims. As a result, the small businesses and those with small claims are at a disadvantage for it is they who are the least likely to prosecute their claims and receive full compensation for their injuries. It becomes imperative that for the successful attainment of the ideal of full compensation, and for the protection of the small business and shipper facing a larger, well organized, financially capable, ad-

versary, that legislation be passed allowing the recovery of reasonable attorney's fees upon the successful maintenance of an action for damages to goods while in transit.

Now page 8 of my brief merely talks about the English history involved in allowing attorney's fees, and this method in England has proved very successful. I will dispense with the reasons given on pages 8 and 9.

Now arguments for allowing the amendment—and I will refer to my first paragraph.

Court congestion is a major problem in America today. A substantial amount of court congestion can be relieved by allowing the plaintiff to recover his reasonable attorney's fees upon successfully maintaining an action——

Senator LAUSCHE. Mr. Lurie, at that point, the congestion of business in the courts can be relieved by allowing attorney's fees to whom, only to the plaintiff in the event he recovers, or also the defendant if he succeeds in disproving the claim of the plaintiff?

Mr. LURIE. I have an opinion, Senator, on that, and confining it to the problem that we have at hand I would say that a reciprocal attorney's fee amendment would destroy the very purpose of the Carmack amendment and would do nothing. I would call this a standoff. If we have a concept here that would allow reciprocal attorney's fees we would be disturbing the very purpose of the Carmack amendment. Not only would we be disturbing the Carmack amendment, but we would be perhaps creating the same kind of a monster as we had before. What good is it arming both sides with the same ammunition, and in view of the fact, Senator, that both sides are not exactly in the same position. One is the railroad, the economic giant, the other is still the small businessman. I can conjecture that the carriers could create a large cost in a particular case by introducing many witnesses. I can picture a plaintiff coming into a court and perhaps losing a case and perhaps finding that he has to pay $1,000 in costs because he was encouraged——

Senator LAUSCHE. In your statement you say "one of the ideals of the law is to fully compensate an individual who has been wronged by another, at least as far as can be accomplished with money. But, in most civil cases today, including those cases which involve a shipper who sues an interstate carrier for damage to his goods while in transit, the wronged party does not receive adequate compensation for damages sustained due to the fact that attorney's fees are not included in the judgment."

That principle is sound, but why do you forget an innocent defendant who has been required to hire attorneys to answer a baseless suit filed by a plaintiff?

Mr. LURIE. Well, in relation to these particular claims the carrier still has one or two doors before it goes to a lawsuit, and they will still have the opportunity to determine how defenseless they are——

Senator LAUSCHE. If your principle is just and sound, that there must be a different rule of law applicable to economic giants than is applicable to a small businessman, then I can go along with you. But if you are wrong in that principle that you have got to have two yardsticks of judgment, one for the strong and one for the poor, then I can't.

Mr. LURIE. I would agree with you, Senator.

Senator LAUSCHE. All right, proceed.

Mr. LURIE. At the same time the court congestion problem is being aided by the allowance of reasonable attorney's fees—and when I say the allowance of attorney's fees will aid the court congestion problem, that is only because it makes it possible for voluntary discussions and voluntary settlements. It is in that context that we discuss the question of aiding the court.

Senator LAUSCHE. All right, let's stop at this point. At the same time, the court congestion problem is being aided by the allowance of reasonable attorney's fees to the plaintiff. Now why wouldn't congestion in the court's business also be aided by allowing attorney's fees to the defendant in the event the defendant succeeds?

Mr. LURIE. I would agree with the premise.

Senator LAUSCHE. Well, now we again come back, I suppose, to the industrial giant on the one hand and the impotent individual on the other hand.

Mr. LURIE. What really concerns me, Senator, is if we are going to be talking about legislation or considering legislation I am concerned with this legislation having a purpose, and if the purpose of this legislation is to avoid litigation, if the purpose of attorney's fees will avoid litigation then I think we have accomplished something.

Senator LAUSCHE. But it should be accomplished through the imposition of the same burden on each of the litigants in order to encourage both to settle and to discourage them from going into court.

Mr. LURIE. I will agree with you on that, Senator.

At the same time the court congestion problem is being aided by the allowance of reasonable attorney's fees, other benefits will be obtained. As litigation is a costly and wasteful process, the reduction in the amount of litigation will represent a savings to all parties involved. At the same time, the position of the shipper will be enhanced so that a more equitable settlement can be worked out among the shippers, who are now at a disadvantage, and the carriers who now have a tremendous advantage. Also, when the parties do resort to litigation in order to settle their differences, the length of the litigation is likely to be reduced because of a reduction in the amount of dilatory techniques used by the defendants.

I discuss some of the legal aspects and the present trend which I contend exists today. It says that this problem of allowing attorney's fees has been recognized by many writers on the subject, and as Professor Kuenzed stated in his article "The Attorney's Fee: Why Not a Cost of Litigation?," citing the Iowa Law Review, and Mr. Kuenzed said—

> To argue that our present system must not be changed is fantastic in light of the complete present disregard for all claims where the damages suffered are in an unsubstantial amount.

And I think it is very important for us to consider that the problems that are engendered by this problem that we are discussing——

Senator LAUSCHE. Who is Professor Kuenzed?

Mr. LURIE. He is a professor of law.

Senator LAUSCHE. In Colorado?

Mr. LURIE. That's right.

Senator LAUSCHE. University of Colorado?

Mr. LURIE. I understand he is a professor at Iowa. This is 49 Iowa Law Review, page 75, 1963.

Senator LAUSCHE. Did you read his paper or are these concentrated extractions?

Mr. LURIE. These are concentrated extractions that were prepared by the gentlemen in my office.

Senator LAUSCHE. Do you know what he feels about the mutuality—you don't know?

Mr. LURIE. I do not know.

Now, talking about the constitutionality of such legislation—and I don't think I ought to take the Senator's time to discuss that——

Senator LAUSCHE. I don't think there is any question about the constitutionality, right?

Mr. LURIE. But I do want to refer, if the Senator please, to the page which discusses the various congressional acts in which attorney's fees have been allowed, and I won't take the Senator's time to discuss that.

Senator LAUSCHE. Were you present this morning when I questioned Mr. Tucker about the instances in the Interstate Commerce Act which allow attorney's fees?

Mr. LURIE. Yes; I was.

Senator LAUSCHE. And that is what you have covered by this——

Mr. LURIE. This is what I cover.

Senator LAUSCHE. All right.

Mr. LURIE. Now I might say this, Senator. There have been several instances here that are reciprocal. Most are not. But there are several instances where they talk about the prevailing party. And it is noteworthy that in the instances where they talk about reciprocal climates in that area it applies to the Security Exchange Act—for example, it really applies in areas where businessmen are involved, where large, substantial amounts could conceivably be considered, stock transactions of that nature. But I have a statement in which I have outlined here which ones are not reciprocal. If the Senator wishes me to point them out I can. But this covers as many as I could find. It starts with the Clayton Act.

Senator LAUSCHE. Oh, I see. You identify different acts in which attorney's fees were allowed.

Mr. LURIE. Yes.

Senator LAUSCHE. Thanks very much for providing that material.

Mr. LURIE. Now my statement deals with additional material covering attorney's fees, some of which are reciprocal and some of which are not.

Now I note that 49 U.S.C. 908 pertaining to recovery of attorney's fees in actions against common carriers by water for overcharges to freight are not reciprocal.

Now I talk about State authority. There is a long line of State authority in which reasonable attorney's fees have been allowed.

Senator LAUSCHE. Without disrespect to the State statutes allowing attorney's fees, I notice that you say under special statutory provisions in many States, attorney's fees are recoverable as costs in certain actions or proceedings directed against certain classes of persons in actions arising from the failure to perform or the violation of statutory or contractual obligations. Is it fair to say that the general rule is that attorney's fees are not allowable, but that in certain classes of

cases under certain circumstances the legislatures of some States have made attorney's fees allowable?

Mr. LURIE. That is a correct statement.

To continue, I am referring to those specific types of statutes that the Senator made reference to. In Minnesota we have a 1965 act which specifically covers the area that we are talking about. It talks about loss and damage in motor carriers, and it is noteworthy that this is not a reciprocal provision.

The Texas statute, which is a 1964 statute, which also talks about loss and damage of freight—that is protecting the shipping public—is not reciprocal.

These two statutes are specifically involved in the area which we are talking about.

In addition, we have an act in the State of Illinois which I have appended to my brief which has been on the books since 1909 which specifically covers the area, except that it is under the Grain Act, and it has provided a percentage of attorney's fees in cases involving damage to grain. We have no other provision other than that. This also, Senator, is not reciprocal.

Continuing, I discuss some of the legal arguments. The court, discussing the *Missouri* v. *Texas* case, stated—

> The court went on to state that, the fact that the statute was partially designed as an incentive to prompt settlement of small but well founded claims, which are more oppressive where the amount involved is small, did not militate against its validity. The court also noted that the outlay of the attorney's fee was a necessary consequence of the litigation, and since it must fall upon one party or another, it is reasonable to impose it upon the party whose refusal to pay a just demand renders the litigation necessary. And finally, the court recognized the fact that statutes as the one in question could have the effect of promoting a closer observance by the carriers of the duties so imposed.

And I might say that is a very important part of our argument, that what we seek here is not attorney's fees, what we seek here is some method of imposing a responsibility on the carriers. The fear is that if we have an atrophy of legal rights because of cost, the fear is that it could get worse, the fear is that it would create perhaps an indifference on the part of the carrier in carrying out their obligation. It is the law that guarantees us the right to be able to remind the carrier that it has violated a contractual obligation that has been imposed upon them.

Now in closing I want to say this, and I think this is extremely important. There is a relationship between the industry, the Department of Agriculture, and the problem that we have at hand. All of the people that are engaged in the perishable agricultural commodities business are governed by and licensed by the Secretary of Agriculture. We have a code of ethics that is promulgated by the Secretary. We behave within that code. The interrelationship between the various shippers and the receivers are zealously guarded by the U.S. Department of Agriculture. A violation or a reparation order against any one of the licensed persons would deprive them by an act by the Secretary of their opportunity to do business.

This act—and it is included in my brief—this act has defined certain practices that we are engaged in. It defines days of shipment. If I want to buy a car of cherries tomorrow for $5 I can get on the phone or I can send a wire or I can get on a communication system of one sort or another and I advise the shipper I want a car as of today or as of

tomorrow at a specific price, and he is bound to carry out that order. We follow it up perhaps with a memorandum of agreement.

Now I say this because the action of the carriers on the question of reasonable dispatch has caused our industry to become chaotic, has disturbed a practice that we have had for 75 years, has disoriented any kind of agreement that we might have with our constant customers throughout the Nation, has disturbed orderly marketing, has created losses. The effect of this has worked upon the purses and upon the tables of the United States.

There is more to this problem, I repeat again, than reasonable attorney's fees. I don't think that the question of reasonable attorney's fees is the complete answer.

Senator LAUSCHE. Well, you covered that twice, Mr. Lurie. In the beginning you said this is more than cold dollars being paid to attorneys, it is romance in which the consumer, the housewife, and the general welfare of the people is involved. So that need not be repeated.

Mr. LURIE. I have no more to say, and I thank you for the privilege of coming before you.

Senator LAUSCHE. And I am grateful to you for your presentation. You obviously have given the subject great thought. Thanks very much.

Mr. Charles A. Webb of the National Association of Motor Bus Owners.

We will hear the testimony of Mr. Webb, and then I will put the matter over until some future date to be announced later.

Mr. Webb, you may proceed.

STATEMENT OF CHARLES A. WEBB, NATIONAL ASSOCIATION OF MOTOR BUS OWNERS

Mr. WEBB. Mr. Chairman and members of the subcommittee, my name is Charles A. Webb. I am president of the National Association of Motor Bus Owners, often referred to as NAMBO.

NAMBO is the national trade association for the intercity motorbus industry. Its members include Greyhound Lines, companies affiliated with the National Trailways Bus System, and numerous carriers not affiliated with either system. Collectively, these carriers provide three-fourths of the intercity motorbus transportation in the United States. In addition to passengers and their baggage, they transport a substantial volume of package express.

S. 858 would provide for allowance of a reasonable attorney's fee to claimants who prevail in actions brought under section 20(11) of the act for recovery of loss or damage to property. Section 219 of the act makes the provisions of section 20(11) applicable to motor carriers.

In commenting favorably on the bill, the Assistant Comptroller General of the United States concluded in his letter of February 24, 1967, to the committee:

> Such allowance is in harmony with the other provisions of the Act and with court decisions permitting recovery of an attorney's fee in other kinds of actions.

We do not agree with that conclusion. In our opinion, allowance of attorney's fees in loss and damage actions would not be even remotely comparable to present provisions of the Interstate Commerce Act.

There are five classes of actions in which the act provides for the

allowance of attorney's fees. The common characteristic of all the statutory provisions is that the carrier reasonably could be expected to avoid all liability in the situations leading to judgment and the award of attorney's fees.

Sections 8 and 308(b) of the act provide for an allowance of attorney's fees in actions which result from violations of express requirements or prohibitions in the act. It is obviously not difficult for a carrier to avoid all liability by complying with specific statutory or regulatory commands.

Section 15(9) of the act provides that a carrier adversely affected by another carriers' disregard of shippers' routing instructions shall be allowed a reasonable attorney's fee as part of the judgment. Carriers may avoid all liability simply by complying with the routing instructions of shippers.

Sections 16(2) and 308(e) of the act provide that carriers which refuse to comply with Commission orders for the payment of damages shall be liable for the reasonable attorney's fee of a plaintiff who prevails in an action to enforce the Commission's order. All liability in these situations may be avoided simply by complying with the terms of Commission orders awarding damages.

Sections 222(b)(2) and 417(b)(2), which were enacted by Public Law 89–170, provide that reasonable attorney's fees may be awarded to the prevailing party in actions by one carrier against another to enjoin unlawful operations. Liability may readily be avoided by not engaging in authorized operations or by not seeking to restrain lawful operations.

I think another common characteristic of these provisions is that the allowance for attorney's fee is a sanction or a penalty against violations of the act which are both clearcut and avoidable.

Section 20(12) of the act provides that a carrier which unsuccessfully defends a loss and damage claim for which another carrier is ultimately responsible shall be reimbursed by the latter for the expenses incurred by the former in defending the action. Neither carrier is responsible for paying the plaintiff's attorney fee. See *Strickland Transportation Co.* v. *Harwood Trucking, Inc.*, 348 S.W. 2d 581 (Mo. App. 1961). Also, carriers may avoid liability for the attorney's fees of connecting carriers not responsible for the loss or damage simply by defending the suits brought against their connections.

The proposed amendment to section 20(11) cannot be in harmony with other attorney's fees provisions of the act, as contended by the Assistant Comptroller General, unless carriers reasonably may be expected to avoid liability for loss and damage claims. The fallacy of the premise requires no elaborate demonstration. For example, Greyhound alone transports about 27 million pieces of checked baggage and more than 25 million express shipments each year. Although its record of loss and damage prevention is good—less than one claim for every 1,000 shipments—the company paid 32,318 claims in 1966 for loss or damage to baggage and express. Inevitably, some shipments will be lost or damaged.

It is impossible to estimate with any degree of precision the economic impact of the proposed legislation on the bus industry. Shippers and passengers would know (1) that they could sue without cost; (2) that the carrier is liable for some payment; and (3) that in order to defend

the suit, the carrier would be required to pay a fee to its own attorney and a fee to the plaintiff's attorney. A legal fee of $50 in each instance would probably be the minimum.

But I might add that if the average fee ranges up to $350 mentioned by Mr. Burak, the bus industry will be paying far more in attorney's fees than it is paying today to settle loss and damage claims.

In 1966 Greyhound paid $875,456 for loss or damage to interstate and intrastate shipments of package express and $346,414 on all baggage claims. The corresponding figures for Continental Trailways carriers for the 12-month period ended May 30, 1967, exclusive of intrastate claims, were $162,745 paid for claims on package express and $141,513 paid for claims on baggage. Section 20(11) of the act applies only to interstate transportation, but if it were amended to provide an allowance for attorney's fees, a number of States would no doubt amend their laws to maintain uniformity in baggage and package express liability.

If section 20(11) were amended as proposed, the loss and damage expense of bus carriers would be substantially increased. Payments representing actual loss or damage to baggage and express would be about what they are today. The additional expense would be represented by attorney's fees of carriers, passengers, and shippers and by the payment of claims believed to be excessive but made to avoid litigation.

In this connection, it is important to recognize, Mr. Chairman, that the vast majority of claims which are filed with the bus carrier on whose line the loss or damage occurred are valid and are paid. Differences of opinion may exist as to the amount of loss or damage but the fact of liability is seldom contested. Since the plaintiff is bound to prevail in almost every case, his attorney will be entitled to a fee even though the amount of the judgment is no greater than what the carrier had previously offered to pay. And, in most instances, the plaintiff's attorney's fee will equal or exceed the amount in dispute.

In these hearings reference has been made to the provision of Public Law 89–170 which provides that the party which prevails in those actions may in the discretion of the court recover reasonable attorney's fees. I would like to suggest, Mr. Chairman, that reciprocity with respect to attorney's fees for loss and damage claims could not be achieved by any similar provision because by the very nature of these cases the plaintiff is bound to recover something since the carrier in most cases does admit liability, the difference being how much.

Baggage is transported under the tariff provisions which limit the carrier's liability for loss or damage to $50 or up to $250 upon the payment of 25 cents for each $50 of declared value in excess of $50. Most passengers fail to declare value in excess of $50.

In 1966, Greyhound paid 12,281 baggage claims with the average payment per claim being $28.21. For Continental Trailways carriers for the 12 months ended May 30, 1967, the corresponding figures, excluding intrastate shipments, were 3,175 and $33.90. The claims experience of other bus carriers is not essentially different. Of course, when a piece of baggage is lost and the carrier's maximum liability is $50, there is seldom any question concerning the amount of liability. The lower average amount paid per claim includes a very large num-

ber of very small claims arising from scratching or other minor damage to suitcases.

Under the terms of released rate orders approved by the Interstate Commerce Commission, express rates are based upon property declared not to exceed $50 in value for any shipment of 100 pounds or less, or not exceeding 50 cents per pound for shipments weighing in excess of 100 pounds. With some exceptions, shipments declared to exceed $200 in value are not accepted. In 1966, Greyhound paid 20,037 claims for loss or damage to package express with the average payment per claim being $43.69. For Continental Trailways carriers for the 12 months ended May 30, 1967, the corresponding figures, excluding intrastate shipments, were 5,399 and $30.14.

The practical effect of S. 858 on the average claim for loss and damage would be to add to the carrier's admitted liability of approximately $30 an additional liability of $20 to $100, or more, the exact amount of added liability being determined by its maximum liability under baggage and express tariff provision, and, of course, by the attorney's fee. No matter how inflated the claim, it would be cheaper for the carrier to pay it than to pay a $30 judgment plus a fee of $50 or more to its own attorney and $50 or more to the claimant's attorney.

In other words, S. 858 would add to section 20(11) a heads-I-win-tails-you-lose proviso. Superficially, this might appear to be a boon to the legal profession. However, the bar has not requested any such form of legal aid and there are sound reasons why it should not. To provide for the allowance of attorney's fees in a multitude of small claims cases, many thousands, and in which the plaintiff is almost certain to recover something, is an open invitation to champerty.

Today bus carriers have a strong incentive to be reasonable in settling small claims. They do not seek to discontinue or to curtail passenger service but to increase it. The desire for continued patronage is incompatible with a niggardly claims policy.

The bus industry is keenly aware of its obligations to passengers and shippers. If there were widespread complaints about the handling of claims involving baggage and express, that fact would be known by Members of Congress, the Interstate Commerce Commission, and NAMBO. And finally, if widespread complaints should arise, the Commission is empowered to take appropriate action.

For example, widespread dissatisfaction existed several years ago in regard to the manner in which movers of household goods were handling claims for loss and damage. In Ex Parte No. MC–19, *Practices of Motor Common Carriers of Household Goods*, 95 M.C.C. 138, 96 M.C.C. 196, 102 M.C.C. 267, the Commission found that 24 percent of the shipments of household goods studied produced loss and damage claims; that with respect to some 200,000 loss and damage claims filed, receipt of the claim was not acknowledged in 40,000 instances; and that in 11,275 instances no offer of settlement or disallowance of the claim was made within 120 days. If the bus industry should become similarly derelict in the handling of loss and damage claims, the Commission can impose the same rules and regulations on the bus industry as it imposed on movers of household goods. It is significant that the Commission did not seek to cure the household goods problem by recommending legislation similar to that proposed in S. 858.

Senator LAUSCHE. What is that regulation?

Mr. WEBB. The regulations which were applied to household goods carriers, Mr. Chairman, provide that in effect the carrier shall maintain a register of loss and damage claims open to the inspection of the Commission and its agents. It further provides, I believe, that all claims must be acknowledged within 30 days, and that within 120 days the carrier must either offer to settle the claim or to disallow it. That was in general the regulation prescribed by the Commission in that case.

Senator LAUSCHE. What was the purpose of the adoption of the regulation in the form that it was adopted?

Mr. WEBB. The purpose was to minimize the complaints which the Commission felt justified with respect to shipments of household goods.

Senator LAUSCHE. All right, proceed.

Mr. WEBB. When Senator Magnuson introduced S. 858, he explained that eastern rail carriers no longer considered themselves liable for losses in market value of fresh fruits and vegetables due to their failure to meet published freight schedules, 113 Cong. Rec. S. 1544 (daily ed., Feb. 6, 1967). This particular controversy involves the question of whether the rail carriers involved are or should be liable, whereas the typical loss and damage claim against carriers involved, not the fact of liability, but the amount of loss or damage.

If the problem to which Senator Magnuson referred requires legislative correction, section 20(11) can be amended without affecting the vast majority of loss and damage claims against rail carriers and without affecting in any way those involving motor carriers. Accordingly, we urge that S. 858 not be approved or in the alternative, that the bill be confined to the particular loss and damage claim problems which require a legislative solution.

Senator LAUSCHE. Mr. Webb, you take the position that the statement made by the Assistant Comptroller General of the United States in his letter of February 24, 1967, to this committee is not supported by the laws which are now in existence providing for the granting of attorney's fees under certain extraordinary circumstances?

Mr. WEBB. That is correct.

Senator LAUSCHE. The Comptroller General's statement in support of this bill, "Such allowance is in harmony with the other provisions of the act and with court decisions permitting recovery of an attorney's fee in other kinds of actions." Will you point out why this statement is not in accord with the general law and in accord with the general instances in which attorney's fees have in the past been allowed by Congress in the Interstate Commerce Act?

Mr. WEBB. The Congress has concluded as a matter of policy in certain unusual types of cases that there should be added as a sanction or in the nature of a penalty an allowance of attorney's fees to prevent or to curtail serious misfeasance where the liability could have been avoided. Thus the Congress provided if a carrier violates an express provision or requirement of the Interstate Commerce Act or if the carrier disregards shipper's routing instructions or fails to respond to an award of reparations by the Commission or engages in unauthorized operations or falsely accuses another carrier of engaging in unauthorized operations, in those circumstances the Congress concluded that if an injured party is required to go to court to get redress and

if he prevails in court then he should be awarded an attorney's fee, and we certainly have no quarrel with those provisions.

Senator LAUSCHE. In these instances which you have cited I understand you to say that the carrier could avoid the responsibility that falls upon him merely by doing what the law required him to do or by not doing that which it prohibited him from doing.

Mr. WEBB. That is correct. It is not difficult in these situations for the carrier to avoid liability.

Senator LAUSCHE. Now have you studied this subject enough to know why basically in the common law attorney's fees were not allowable?

Mr. WEBB. No; I made no investigation——

Senator LAUSCHE. You used the word "champerty" in your paper.

Mr. WEBB. Yes, that is true, and it was used advisedly because, in our opinion, if this bill should be approved the Congress is going to be creating hundreds of thousands of potential court cases in which—in practically every one—the plaintiff is bound to prevail, and so in every one of which the plaintiff's attorney is going to recover a minimum reasonable attorney's fee.

Senator LAUSCHE. Your position is that in most claims brought against the carriers, which under the general law, while not insurers, are practically insurers——

Mr. WEBB. Yes.

Senator LAUSCHE (continuing). Each damage, that in every action the liability is practically fixed?

Mr. WEBB. That is true, and in practical——

Senator LAUSCHE. All right, stop at this point. The issue, however, between the carrier and the shipper may only be damages.

Mr. WEBB. How much.

Senator LAUSCHE. Yes. And with that status prevailing the result is a judgment for the plaintiff carrying with it the burden of paying the attorney's fees if this bill is adopted.

Mr. WEBB. Yes, the plaintiff is almost certain to recover some judgment.

Senator LAUSCHE. Well, I taught the subject of equity, and equity was supposed to be based upon a departure from the harsh and severe rules, technical rules of law, and in it there was a principle that obligations must always be mutual, equity cannot impose an obligation on one party of a litigation without imposing a similar responsibility upon the other. That is mutuality of obligation must be enforced.

Now why can't we impose a mutuality of obligation here in paying the attorney's fees of the successful litigant?

Mr. WEBB. Because, Mr. Chairman, the claimant is bound to prevail in practically every case.

Senator LAUSCHE. Well, now let's assume that you have a case in which he claims a $300 damage. The railroad says it is $150, and it feels obligated to stand by its offer, and he goes to court and he recovers only $150. Under the present bill he would be entitled to full attorney's fees although the ultimate result of the action proved that the railroad was right, or the carrier was right, and the shipper was wrong.

Mr. WEBB. That is my understanding.

Senator LAUSCHE. Well, couldn't there be drawn language where the attorney's fees would only become allowable when it is shown

that there is a certain disparity between the amount he claimed and the amount that was eventually awarded by the court?

You need not answer that now, but you can think about it, and I will welcome further opinion from you.

Mr. WEBB. Thank you, Mr. Chairman.

Senator LAUSCHE. Is there anything further you desire to say?

Mr. WEBB. No, that is all. I appreciate the opportunity to present our views.

(The information requested by Senator Lausche and answer furnished by Mr. Webb follow:)

NATIONAL ASSOCIATION OF MOTOR BUS OWNERS,
Washington, D.C., September 20, 1967.

Hon. FRANK LAUSCHE,
Surface Transportation Subcommittee, of the Senate Commerce Committee, U.S. Senate, Washingon, D.C.

DEAR MR. CHAIRMAN: At the conclusion of my testimony on S. 858, you asked if I would give some thought as to the manner in which the bill might be amended to insure equity as between claimants and carriers with respect to any allowance for attorney's fees which might be authorized in cases arising under Section 20(11) of the Interstate Commerce Act.

In responding to your invitation to comment on this matter, I should make two points clear. First, I am confident that members of the National Association of Motor Bus Owners would prefer that Section 20(11) not be amended because they do not consider an allowance for attorney's fees in loss and damage actions to be comparable to such allowances under other provisions of the Interstate Commerce Act or under other Federal or State legislation. Also, in suggesting language of amendment which would make the bill unobjectionable to the bus industry, I do not suggest that such language would eliminate the concern expressed in testimony on S. 858 on behalf of the railroad and trucking industries.

Mutuality of risk for payment of attorney's fees in loss and damage actions arising under Section 20(11) cannot be achieved simply by authorizing an allowance "if the plaintiff shall finally prevail." That is because the vast majority of claims for loss or damage to baggage or package express are valid and are paid. Differences of opinion may exist as to the amount of loss or damage but the plaintiff would be bound to "prevail" in virtually every case.

In my opinion, legislation which simultaneously encouraged carriers to offer prompt and reasonable settlements and discouraged the prosecution of spurious or exaggerated claims would contain the following essential features:

(1) Language similar to that contained in the amendment to S. 858 proposed by Chairman Tucker of the Interstate Commerce Commission;

(2) That allowance of an attorney's fee be discretionary with the court, rather than mandatory;

(3) That the plaintiff be allowed an attorney's fee only if the judgment obtained is substantially greater than the amount offered by the carrier;

(4) That the defendant be allowed an attorney's fee only if the defendant prevails or the judgment obtained by the plaintiff does not exceed the amount offered in settlement of the claim; and

(5) That, in any event, the allowance of a plaintiff's attorney's fee shall not exceed the amount of the judgment.

Attached hereto is a suggested revision of S. 858 which incorporates the five provisions described above. I hope that this letter and the attachment may be helpful to your Subcommitee in its deliberations.

Sincerely yours,

CHARLES A. WEBB,
President.

A BILL To amend the Interstate Commerce Act, with respect to recovery of a reasonable attorney's fee in case of successful maintenance or defense of an action for recovery of damages sustained in transportation of property

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That paragraph 11 of section 20 of the Interstate Commerce Act (49 U.S.C., sec. 20, par. 11) is amended by inserting at the end of the fifth proviso and immediately before the sixth proviso the following: "*And provided further,* That the court, in its discretion, may allow a reasonable

attorney's fee to the plaintiff or the defendant in any action, to be taxed and collected as part of the suit, but (a) no such fees shall be allowed to the plaintiff except upon a showing that the plaintiff has filed a claim with the carrier or carriers against whom the action has been brought, and that such claim has not been paid within 90 days after receipt of the claim by the carrier or its agent; (b) no such fees shall be allowed to the plaintiff unless the judgment rendered in his favor is substantially greater than the amount offered in settlement by the carrier prior to institution of the suit; (c) no such fees shall be allowed to the defendant unless judgment is rendered in its favor or is less in amount than the amount offered by it in settlement of the claim prior to institution of the suit; and (d) no such fees shall be allowed to the plaintiff which exceed the amount of the judgment obtained.

Senator LAUSCHE. All right, now we will recess at this time until a future date that will be announced by me. It will be in the not too distant future.

Is this inconveniencing any of the witnesses unduly that were scheduled to testify this morning? Both Mr. Breithaupt and Mr. Beardsley are from Washington, aren't they?

Mr. BREITHAUPT. Yes.

Senator LAUSCHE. Will this be inconviencing to you in putting it over to a future date?

Mr. BREITHAUPT. No, Mr. Chairman. I had hoped to be accompanied by an additional witness from the city of New York, but in these circumstances it would be better to put him over, too, so that he may appear with me.

Senator LAUSCHE. Yes, that is correct.

All right. You will be notified when the hearings will be continued.

We stand adjourned.

(Whereupon, at 11:20 a.m., the hearing was adjourned, to reconvene at the call of the Chairman.)

RECOVERY OF REASONABLE ATTORNEY'S FEES

FRIDAY, AUGUST 25, 1967

U.S. SENATE,
COMMITTEE ON COMMERCE,
SUBCOMMITTEE ON SURFACE TRANSPORTATION,
Washington, D.C.

The subcommittee met, pursuant to call, at 10:07 a.m., in room 1318, New Senate Office Building, the Honorable Frank J. Lausche presiding.

Senator LAUSCHE. We now go to the hearing on S. 858, recovery of reasonable attorney's fees by plaintiffs who institute legal action and are successful.

Mr. Peter Beardsley, general counsel, American Trucking Associations.

STATEMENT OF PETER T. BEARDSLEY, GENERAL COUNSEL, AMERICAN TRUCKING ASSOCIATIONS, INC.

Mr. BEARDSLEY. Mr. Chairman, Senator Pearson, my name is Peter T. Beardsley, and I am general counsel of American Trucking Associations, Inc., 1616 P Street NW., Washington, D.C. 20036.

You are probably familiar with our organization, but just for the record let me say that ATA is the national trade association of the motor carrier industry. It represents all types of motor carriers, and has affiliated associations in every State and the District of Columbia.

S. 858 would amend section 20(11) of the Interstate Commerce Act to provide that where action is brought to recover for loss or damage to property thereunder, a successful plaintiff would be allowed, in addition, a "reasonable attorney's fee."

The reasoning behind the introduction of S. 858 was set forth in a statement by Senator Magnuson, its sponsor, at the time he introduced the bill (113 Cong. Rec. S1544 et seq., daily ed. Feb. 6, 1967). Senator Magnuson's remarks dealt solely with the failure of the railroads to maintain firm delivery schedules on fruits and vegetables from the West to Chicago and eastern consumer markets.

Among other things, he stated:

> The purpose of the bill which I am today introducing is to provide a financial responsibility or burden for failure of a railroad to maintain its schedules. A shipper or receiver sustaining damage because of a railroad's failure to carry out a scheduled delivery could recover a reasonable attorney's fee in court.
>
> Shippers of perishable fruit and vegetables desire a reliable schedule for orderly marketing rather than lawsuits to collect damages because of intransit damage or delay. Apparently, certain eastern railroads are more interested in forestalling damage claims than in maintaining or improving their present schedules for fruit and vegetable transportation. I am advised that eastern lines to date have remained adamant in their position that they will not guar-

antee schedules and that they will not pay delay claims unless neglience is proven by the carrier or receiver.

As we understand the matter, the railroads formerly used to guarantee certain delivery times, and if those schedules were not met, damage claims were paid.

The remarks of an official of the Northwest Horticultural Council, printed in the Congressional Record following those of Senator Magnuson, include the statement that for many years—

> American railroads paid claims for delay in shipment of perishables on the basis of a "guaranteed schedule." * * * To attract business, or to meet competition, railroads voluntarily assumed a liability greater than that imposed upon them by the common law or the contractual clauses of the bill of lading.

Some eastern railroads are said to be no longer willing to guarantee scheduled delivery—and pay damage claims for failure to meet the schedule.

Because of this, it is proposed that the Interstate Commerce Act be amended to allow shippers who are successful in maintaining an action against railroads for damage caused by late delivery to recover, in addition, a "reasonable attorney's fee."

We find ourselves in a somewhat peculiar position. This is not, in any real sense, our battle, and we would very much like to stay out of it. Unfortunately, however, the bill as drafted would embrace regulated motor common carriers as well as railroads.

The movement of fruits and vegetables by truck is largely handled by carriers operating under the provisions of section 203(b)(6) of the Interstate Commerce Act, which exempts vehicles hauling those commodities from economic regulation by the Interstate Commerce Commission. This means that the hauling of fruits and vegetables by truck is largely unaffected by the provisions of section 20(11) of the Act, which S. 858 proposes to amend.

And, in any event, the complaints which are said to justify the amendment are directed against railroads, not motor carriers.

While the legislation is said to be needed as redress for failure of railroads to maintain scheduled deliveries of shipments of fresh fruits and vegetables, the amendment proposed to section 20(11) would provide that an attorney's fee be awarded to any person who successfully maintains an action for loss or damage against any railroad or motor common carrier, regardless of the basis of the cause of action. Thus, an extremely broad cure is proposed for a relatively limited malady.

As noted, the bill would require the payment by motor carriers—as well as railroads—of attorney's fee to plaintiffs who are successful in maintaining loss and damage suits against such carriers, regardless of the basis for the action. This would be added to the damage claim awarded by the judge or jury, as the case might be.

As the members of the subcommittee know, the provisions of section 20(11) of part I of the Interstate Commerce Act (which the bill would amend), and which would otherwise not apply to motor carriers, are incorporated into the provisions of part II of the act by virtue of section 219 thereof.

Thus, though no one accuses the regulated motor carriers of the same default which is attributed to the railroads, the bill, if enacted, would penalize them to the same extent as the railroads. This is not the logical or equitable way to solve the problem.

We do not mean to suggest that the railroads should be burdened with attorney's fees, as proposed by S. 858. But we will leave their defense to them. What we do say is that neither the sponsor of the bill—nor the shipping interests on whose behalf it appears to have been introduced—claim that it is needed to alleviate any problem caused by motor carriers. This being so, we strongly suggest that regulated motor carriers should not be required, arbitrarily, to shoulder the considerable burden which S. 858 would impose upon them.

The law already provides that common carriers, rail or motor, shall be liable "for any loss, damage, or injury" which they cause to property shipped in interstate commerce. This can, of course, include damage caused by delay.

By the same token, the law, as it is administered by the Interstate Commerce Commission, requires that carriers may not pay damage claims, whether arising from delay or otherwise, without a thorough investigation to ascertain whether the loss or damage involved was, in fact, caused by the carrier.

A carrier which paid damage claims lodged with it almost as a matter of course would, no doubt, have a satisfied shipper clientele. But, in addition to paying out a very substantial portion of its revenues in claims, it would very likely find itself charged with violating the law for its failure to use due care in conducting its investigation with respect to such claims.

S. 858, if enacted, would place motor carriers on the horns of a dilemma. If they did not pay claims which they felt had not been justified, they would incur the risk of not only paying damages, but of having such damages increased by a "reasonable attorney's fee."

Since the bill does not in any way relate the size of the fee to the amount of damage involved, there would, no doubt, be many cases in which a "reasonable attorney's fee," depending on the difficulty of proving the case, could well be more than, or even several times as much as, the damage involved.

For example, it would not be at all unlikely that a case might result in an award of only $50 damages, but a $250 attorney's fee. This would considerably increase litigation, in that claimants for relatively small amounts would often be able to find attorneys willing to take their cases on a contingent fee basis. Thus, claimants with poor cases would often have nothing to lose by instituting actions at law.

In short, the proposed amendment would lead to harassment of motor carriers by shippers, in an effort to collect damages for unfounded claims. This in turn would probably result in instances of legal blackmail in which motor carriers, particularly the smaller ones, would pay claims they felt were unjustified rather than run the risk of paying an attorney's fee equal to, or greater than, the damage claimed.

In this connection I would like to point out that as of 1965, the latest year for which such statistics are available, there were 11,700 for-hire motor carriers regulated by the Interstate Commerce Commission whose gross annual revenues were under $200,000.

I repeat that there has been no justification for saddling the regulated motor carriers with the burden which S. 858 would impose.

In the absence of a special statute so providing, it is elementary in American jurisprudence that counsel fees are not recoverable by a

successful litigant. The time, effort and money expended are simply the consequences of defending or maintaining every suit (*Luckett* v. *Cohen*, 169 F. Supp. 808, 809, S.D. N.Y. (1956)).

As noted, no reason whatever has been offered to justify the addition of an attorney's fee to any recovery for loss or damage to property moved in interstate commerce by motor common carriers. This being so, if motor carriers are to be required to pay such fees to shippers who succeed in loss or damage litigation against them, equity requires that claimants who put motor carriers to the expense of defending unjustified claims should be required to pay the carriers an attorney's fee. Justice demands fair treatment for both parties to the contract of carriage.

If I may summarize, Senator Magnuson made it clear, in introducing S. 858, that his purpose was to "provide a financial responsibility or burden *for failure of a railroad to maintain its schedules*." [Our emphasis.]

Assuming this is a desirable aim, no reason has been suggested as to why motor carriers should shoulder the same burden.

We therefore request that if S. 858 is favorably reported by the subcommittee, that it be amended to reflect its sponsor's aim. This could be done by amending section 219 of the act to provide that attorney's fees not be added to damages awarded thereunder.

But if it should be decided that regulated motor carriers are to be required, arbitrarily, to pay attorney's fees to those who successfully maintain actions against them for loss or damage to property, then those who subject them to the expense of defending unjustified claims should be required to pay such carriers a "reasonable attorney's fee."

Thank you, Mr. Chairman, and Senator Pearson.

Senator LAUSCHE. From an academic standpoint, I pose to you the situation that we adopt a general law covering all litigation, allowing the judge or the jury to fix reasonable attorneys' fees for the successful litigant, whether he be the plaintiff or the defendant. What would be the probable result of the adoption of such a law?

Mr. BEARDSLEY. Well, of course, I don't pose as any expert in this area, Senator Lausche, but it seems to me that, with all your new law school graduates coming into the business every year, the opportunity to receive an attorney's fee for any successful litigation in any type of claim or action in the courts would tend to increase I think the litigation tremendously. That is my feeling.

Senator LAUSCHE. That is the exact answer. And that is why the general rule from time immemorial has been that attorneys' fees shall not be allowed except in certain extraordinary situations where malice is involved and where other moral impropriety is a part of what was done.

Now, then, I am not expressing an opinion upon what should finally be done with this bill, but the objective of those who wrote the common law was to dissuade litigation, and they adopted the law of—what is it? Champerty and maintenance?

Mr. BEARDSLEY. I think that is the term, Senator.

Senator LAUSCHE. Well, in approaching the disposition of this bill, that factor has to be given consideration. For if you give attorneys' fees to the plaintiff in this type of action, there will soon come a proposal to provide for attorneys' fees in personal injury cases, and so on ad infinitum.

Senator PEARSON. I have no questions. Thank you, Mr. Beardsley.
Senator LAUSCHE. The next witness is Mr. Harry Breithaupt.

STATEMENT OF HARRY BREITHAUPT, JR., GENERAL ATTORNEY, ASSOCIATION OF AMERICAN RAILROADS

Mr. BREITHAUPT. Good morning, Mr. Chairman and Senator Pearson. For the record, my name is Harry J. Breithaupt, Jr., and I am general attorney of the Association of American Railroads, with headquarters at Washington, D.C.

The Association of American Railroads is a voluntary, nonprofit organization.Its membership comprises railroads that operate 96 percent of the total mileage of all railroads in the United States and have annual revenues approximating 96 percent of the total annual revenues of the railroads.

My appearance here today is by authority of the association's board of directors and is for the purpose of expressing the views of the association and its members on S. 858.

The Association of American Railroads, speaking for its member railroads, opposes S. 858. Let me explain why. It is inevitable that I replow some of the ground covered at the earlier phase of this hearing, especially on jurisdical points, but it is my hope that in doing so I shall be able to help the subcommittee put the matter in proper perspective. To that end, I want, with your indulgence, to recite a little bit of hornbook law.

In our system of jurisprudence, it is the general rule as the chairman has just recognized, that plaintiffs—even when they are successful in litigation and thus prevail over defendants—are not entitled to recover their attorneys' fees either as part of the costs or as an element of damages. There are exceptions, as the chairman has also recognized. The reference work "American Jurisprudence" puts it this way:

> The right to recover attorneys' fees from one's opponent in litigation as a part of the costs thereof does not exist at common law. Such an item of expense is not allowable in the absence of a statute or rule of court or in the absence of some agreement expressly authorizing the taxing of attorneys' fees in addition to the ordinary statutory costs. This rule is not changed by the fact that fraudulent or malicious acts are disclosed, although in certain circumstances fraud or malice may furnish a basis for the recovery of the expenses of litigation, including counsel fees, as an element of damages. (20 Am. Jur. 2d Costs § 72)

Senator LAUSCHE. Just stop there. I am glad that last sentence is in there, because I thought that my recollection was wrong. There are jurisdictions, and I think it is rather generally so, where when malice or fraud are involved they allow punitive damages which may include attorneys' fees. Is that right?

Mr. BREITHAUPT. Your recollection is entirely correct, Mr. Chairman. And if the balance of what I have quoted from "American Jurisprudence" and "Corpus Juris Secundum" may be incorporated as a part of the record, I will spare the subcommittee its recitation.

Senator LAUSCHE. It will be so done.

(The citations referred to follow:)

> As a general rule, and in the absence of any contractual or statutory liability therefor, attorneys' fees and expenses of litigation incurred by the plaintiff or which the plaintiff is obligated to pay, in the litigation of his claim against

the defendant, are not recoverable as an item of damages, either in a contract or a tort action. (22 Am. Jur. 2d Damages § 165)

* * * * * * *

There is a difference of opinion upon the question whether counsel fees and other expenses of litigation may be included in estimating the damages in cases where exemplary or punitive damages may be given. According to the rule in a number of jurisdictions, in tort actions founded upon a wrong which involves elements of fraud, malice, or wantonness such as authorize an award of punitive or exemplary damages, the plaintiff's probable counsel fees and expenses of litigation may be taken into consideration in assessing the damages. * * * In some jurisdictions an allowance of counsel fees and other expenses of litigation beyond taxable costs as an element of damages is not permissible even in cases where exemplary damages are proper. (Id., § 167)

In "Corpus Juris Secundum," it is summarized thus—

. . . as a general rule, in the absence of statutory or contractual authorization, there can be no recovery as damages of the costs and expenses of litigation, or expenditures for counsel fees, regardless of whether the successful litigant is plaintiff or defendant, even though the necessity of engaging in the litigation was caused by the wrongful act of the opposing party. Such expenses or expenditures are not recoverable as general or special damages, either in the action in which they were incurred or in a subsequent action between the parties.

In cases of civil injury or breach of contract, in which there is no fraud, willful negligence, or malice, the courts have considered that an award of the costs in the action is sufficient to cover the expenses of litigation and make no allowance for time, indirect loss, and annoyance. Accordingly, litigation expenses and attorney fees are not ordinarily recoverable as damages either in tort actions or in actions for breach of contract, and they have been held to be precluded as damages in actions for accounting, actions to recover real or personal property, actions for conversion, mandamus or injunction proceedings, and in other actions or proceedings.

There are, however, various exceptions to, or modifications of, the general rule, and under some circumstances where the wrong is of such character that the proper protection of his rights requires plaintiff to employ counsel to gain redress, it has been held that plaintiff may recover reasonable counsel fees as an element of damage. (25 C.J.S. Damages § 50)

Mr. BREITHAUPT. Not only fraud and malice have constituted exceptions, Mr. Chairman, but, to refresh your recollection, also wanton negligence or willful negligence have sometimes been considered grounds for an exception to the general rule.

It is perfectly clear as a matter——

Senator LAUSCHE. May I interpose that wanton or willful negligence borders pretty well on moral turpitude and malice, so it falls under that general principle.

Mr. BREITHAUPT. That is correct.

Senator LAUSCHE. Proceed.

Mr. BREITHAUPT. It is perfectly obvious, Mr. Chairman——

Senator PEARSON. May I interrupt you? I would suggest that maybe there is another exception, and counsel will either agree or make the distinction. I think there are some cases where the litigants find themselves in a position of absolute impossibility to maintain an action without some sort of an attorney's fee, and I am thinking of domestic cases. In those situations you have yet another dimension or another factor involved.

Mr. BREITHAUPT. I think that is entirely true.

Senator PEARSON. Pardon me. I am not suggesting that that relates here. But I am a lawyer, and I just could not resist gettting into the act here a little bit.

Mr. BREITHAUPT. Your recollection is also correct and is also borne out by a portion of the recitation which I have just received permission to omit reading.

It is perfectly obvious I think that claims for freight loss and damage are not within any of the exceptions to the general rule; else the proponents of S. 858 would not be urging the Congress, through its enactment, to create a special statutory exception to the general rule.

I have wanted to make clear to the subcommittee that what is sought here would be an exception to the general rule. S. 858 would provide for the recovery of attorneys' fees in a class of cases—a type of case, if you please—where it is not generally thought appropriate to apply such a rule.

We do not believe that it would be appropriate or the exercise of sound legislative judgment for the Congress to create a special exception to the general rule in the case of litigation involving controversies between shippers and carriers as to the carriers' liability for freight loss or damage.

The scales are already heavily weighted in favor of claimants who go to court in suits brought against carriers on claims of this kind. I doubt that any useful purpose would be served by attempting to review here the law of freight loss and damage claims. Lengthy books have been published on the subject. (A good one is Miller, "Law of Freight Loss and Damage Claims" (Sigmond's ed. 1967.)

It would not be a true statement to say, even speaking generally, that carriers are absolute insurers of the property they transport or that they are unconditional guarantors of certain standards of service; but the legal pinciples that are applicable do impose very substantial obligations upon them. No doubt it should be so. It has been so since the early days of the Common Law.

But my statement as to the scales being already weighted in favor of shippers and against the carriers is not occasioned by the nature of the basic and underlying legal principles of carrier duty, and carrier liability for breach of that duty, alone.

I have more particular reference to such matters as the burden of proof in cases involving freight loss and damage. It is a comparatively simple and easy matter for a claimant to establish a prima facie case against the carrier, and then the burden of proof (often a very difficult one) comes to the carrier to exonerate itself.

I am not an expert in this branch of law and hence am qualified to speak only in generalities, but let me illustrate my point with a case in point.

Just 3 years ago, the Supreme Court was called upon to resolve a controversy involving damage to a carload of melons. (*Missouri Pacific Railroad Co.* v. *Elmore & Stahl*, 377 U.S. 134 (1964).) The fruit shipper had sued the railroad in a Texas court. The jury found that the melons were in good condition at the time they were turned over to the railroad at a city in Texas, but that they arrived in damaged condition (spoiled, decayed) at their destination in Chicago. The jury also affirmatively found (and this emphasizes) that the railroad defendant and its connecting carriers had performed all required transportation services without negligence. This the carrier proved.

The State court concluded, in view of the jury's findings, that although a common carrier is not responsible for spoilage or decay which

is shown to be due entirely to the inherent nature of the goods, the railroad defendant had not established that the damage was caused *solely* by natural deterioration.

The Supreme Court of the United States granted certiorari, and in its opinion said that section 20(11) of the Interstate Commerce Act, making common carriers liable for the full actual loss, damage, or injury caused by them clear.

> . . . codifies the common-law rule that 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." (*Missouri Pacific Railroad Co.* v. *Elmore & Stahl*, 377 U.S. 134, 138 (1964).)

So far: merely codification of the common-law rule, the Court said. It went on to hold, however, that—

> . . . 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. [Emphasis supplied.] (*Missouri Pacific Railroad Co.* v. *Elmore & Stahl*, 377 U.S. 134, 138 (1964).)

The inherent nature of melons being what it is, one would suppose that once the carrier proved affirmatively—to the satisfaction of the jury—that it and its connecting carriers had performed all required transportation services, and had performed them without negligence, it would be absolved of responsibility for the spoilage and decay—but no the burden of proof is quickly and decisively shifted to the carrier in "delay" cases, too. Carriers are required to transport property with reasonable dispatch, which is said to mean "without unreasonable delay." Fair enough. But what constitutes "reasonable dispatch" or "unreasonable delay"? That is a question of fact, and the parties of course are not always able to agree. Reasonable men may well differ. If they do, a lawsuit may ensue. In that event—and I quote from a recognized reference work on this subject—

> The claimant has the burden of proving that the carrier failed to deliver the goods within a reasonable time. Claimant must establish that a longer time was consumed than should have been necessary to complete the transportation. A prima facie case of negligent delay is established when evidence of unusual delay is adduced and the burden is then on the carrier to show an excuse for the delay which cannot be attributed to its own negligence or that of its employes. (*Miller, Law of Freight Loss and Damage Claims* (Sigmond's ed. 1967), p. 191.)

Perhaps this is not unreasonable either. It does seem unreasonable, however, to propose that attorneys' fees be awarded the claimant just because he manages to prevail over the defendant in a lawsuit involving a dispute of this kind.

The proponents of this legislation appear basically to want *guaranteed schedules* so that a carrier's failure to deliver goods by 10 o'clock Sunday night, let us say, will in and of itself be such unreasonable delay as to lay the foundation for damages. Disappointed because of their failure to persuade certain rail carriers to provide such guaranteed schedules, the proponents of S. 858 now seek to punish the carriers.

Listen to these remarks attributed to Mr. Ernest Falk, secretary-manager of the Northwest Horticultural Council, Yakima, Wash., on the occasion of an annual convention of the United Fresh Fruit and Vegetable Association in Washington, D.C., on January 31, 1967. They were inserted in the Congressional Record of February 6, 1967 (at page S1545, 1546), by Senator Magnuson—

> If the Eastern carriers are responsible for the current situation, Western shippers should recognize that the legal expense imposed upon Western carriers by bringing suit at the point of origin will have little, if any, pressure or effect upon the Eastern carriers. They should seriously consider suing the Eastern lines at point of origin if jurisdiction can be obtained or, at some place where the carriers do not have staff counsel. When the carriers recognize that their unfair and unlawful policy will cost them money, or business, they may decide to honor their legal obligations.

While Mr. Falk (as quoted) then went on to say that he, for one, does "not suggest that we should go back to the guaranteed schedule days," he did express the deepest sort of dissatisfaction with the policy of certain of the railroads as to the nature of the showing shippers must (in the absence of guaranteed schedules) make before claims based upon allegations of delayed delivery will be paid; and he, Mr. Falk, suggested that "pressure" might be brought to bear upon those carriers by suing them "at some place where the carriers do not have staff counsel."

The obvious implication, of course, is that the offending railroads will be subjected to greatly increased costs if they must defend suits at locations where they do not maintain staff legal representation. The recovery of any damages to which the shippers may be entitled becomes, in this view of the matter, almost a secondary consideration. If damages are recovered, however, the proponents of this bill want to superimpose upon those damages allowances to the claimants for their attorneys' fees.

Mr. Chairman, I was speaking, earlier, about the substantial advantages shippers already have over carriers in the prosecution of freight loss and damage claims—advantages they enjoy without the one-sided benefit that would also be theirs if this bill should become law. The problems thereby created for the railroads vary from circumstance to circumstance, from claim to claim. The bases for assertion of loss and damage claims are numerous; one is tempted to say that they are without number.

I would guess that in the case of perishables the predominant claims are for market value decline (based upon delay) and for spoilage (based upon faulty handling or delay), not necessarily in that order.

In the case of grain shipments there is a different set of problems. They revolve, in large part, around allegations of loss in transit. They involve weighing, and weights, at origin and destination.

I have asked Mr. L. F. Battaglia, director of freight claims for the New York Central system, to explain those problems to the subcommittee; and he will do so, as well as elaborate upon the matter of claims growing out of the shipment of perishables, at the conclusion of my statement (if that course is acceptable to the subcommittee).

Before I leave the matter of advantages (if I may so label them) that claimants already have when it comes to obtaining redress for freight loss or damage, there is another very important feature of carrier liability which I must mention. It is this: Under the Interstate

Commerce Act, not only is the initial (or origin) carrier liable for any loss, damage or injury to property it may have caused; the delivering carrier is similarly liable; and, furthermore, both the initial and the delivering carrier are made liable for loss, damage or injury caused by any carrier "over whose line or lines such property may pass." (Sec. 20(11).)

Thus, one claiming freight loss or damage may make demand upon, and proceed against, either the initial carrier or the delivering carrier; and both are liable not only for loss, damage or injury occurring while the shipment is in its own possession but even that occurring when it is in the possession of a connecting line (or any of several connecting lines).

Of course, the initial or delivering carrier making payment of a claim is "entitled to recover from the * * * railroad * * * on whose line the loss, damage, or injury shall have been sustained, the amount of such loss, damage, or injury as it may be required to pay." (Section 20(12) of the Interstate Commerce Act.)

Surely it is obvious, however, that a railroad presented with a claim for freight loss or damage that occurred while the shipment was on another railroad's line, or that is attributable to another railroad's handling or mishandling of the shipment, must be reasonably prudent—even cautious—in any settlement it makes if it hopes to be made whole again by that other railroad. The right over (as the courts call it) is limited to such amount as the settling carrier is "required to pay."

As a practical matter, this particular problem today presents no great difficulty. This is because the railroads (through the Freight Claim Division of our association) have agreed to, and follow, a comprehensive set of rules for apportioning claim liability as among themselves. There is provision for arbitration to settle disputes arising between railroads under these rules.

Regardless of this, it seems to me that it would be doubly unfair to impose a penalty for the failure of carriers to make payment of doubtful claims that are founded on the alleged misdeeds of other carriers to whom the paying carriers must look for reimbursement.

I used the word "penalty." The penalty contemplated by S. 858 would be assessment of the claimant's attorney's fee against the defending carrier whenever the claimant's lawsuit on the doubtful claim succeeded. It is no answer to say that under section 20(12) of the Interstate Commerce Act the attorneys' fees so assessed would—on a balancing of the books—ultimately be paid by the carrier responsible for the damage suffered by the shipper. It is still a penalty for not voluntarily making payment of a doubtful claim.

Now, despite all of the considerations I have mentioned (and some additional ones that Mr. Battaglia will tell about), I recognize that the shippers—or at least some of the shippers—feel that it is they and not the carriers who are put upon in the matter of freight loss and damage claims. That is natural, I suppose. But entirely apart from the equities involved, let me tell you of some of the results we foresee if S. 858 should become law.

We feel that enactment of this bill could not help but encourage and multiply the litigation of claims. In the first place, it would be certain to discourage and retard the voluntary settlement of freight

loss and damage cases at the claims stage. There would be strong incentive for a claimant to reject an offer of negotiated compromise settlement and instead (using the vernacular) "go for broke." His incentive? It would be the knowledge that, if he did prevail in court, he would not only be recompensed for whatever damages he might be found to have suffered but would also be allowed an attorney's fee.

Claimants would thus be tempted, in many instances, to forego voluntary settlement procedures and resort, rather, to the courts. The claimant would run the risk of obtaining through litigation less than he might obtain in voluntary settlement, or even obtaining nothing at all it is true; but the risk, in a very real sense, would be less than it is now, for if he did prevail he would also recover an attorney's fee.

Furthermore, enactment of this bill would quite likely encourage litigation by spawning "claims sharks"—collection agencies, so to speak—who would find it profitable to solicit and accumulate large numbers of claims—largely, perhaps, of dubious merit—on which suit could be brought in the expectation that a certain proportion would be decided against the carriers and that those so decided would carry with them allowances for attorneys' fees.

For these and similar reasons, the litigation of these claims would cetrainly grow by leaps and bounds if this bill were to be enacted. The added litigation would almost certainly involve, to a substantial extent, doubtful claims—claims of dubious merit.

If that is so, Mr. Chairman, you may well ask, how will the carriers be substantially hurt? How will this bill unfairly harm them, since it provides for the recovery of attorneys' fees only in cases where "the plaintiff shall finally prevail"—only in cases, then, where the claim has been found to be meritorious?

The answer is found, of course, in the expense that would be incurred in defending against the floodtide of litigation this bill would unleash.

I should like to point out here that the proponents of S. 858 (and only some of them at that), in colloquy with the subcommittee, have only with great reluctance given halfhearted acquiescence to the chairman's tentative suggestion that carriers successfully defending suits for freight loss and damage be permitted to recover their attorneys' fees from the unsuccessful claimants.

Even if the bill were to be amended so as to provide for the recovery of attorneys' fees by successful defendants as well as by successful plaintiffs, however, there would still be rank inequity directed against the carriers.

Assume, if you will, a situation in which a railroad is willing to pay $1,000 in settlement of a claim but the claimant demands $1,500 and, not getting it, goes into court. If he were to get a judgment in any amount, even much less than the $1,000 offered him, he would be the prevailing party and would (under the bill) be allowed an attorney's fee.

There are literally, quite literally, millions of these freight loss and damage claims each year—in the case of the railroads alone. In 1966, the railroads that report to our Freight Claim Division received 2,740,511 such claims. That figure was not out of line with previous years.

I have listed the figures for the last 10 years as reported to the AAR Freight Claim Division:

1957	3,312,057	1962	2,764,759
1958	3,051,187	1963	2,760,632
1959	3,025,908	1964	2,811,205
1960	2,872,860	1965	2,769,157
1961	2,842,197	1966	2,740,511

Senator LAUSCHE. Will you stop there a minute? Consider the situation where there is an argument about what the settlement ought to be between the shipper and the carrier. The carrier, as you illustrate, offers $1,000. The plaintiff refuses to accept it. He files a lawsuit and obtains only $500, which is $500 less than he was offered. He is the victorious litigant on the books of the court, but from the economics of the thing he is the loser.

Mr. BREITHAUPT. In retrospect, yes, sir.

Senator LAUSCHE. Yes. That is, in retrospect, the carrier by the finding of the court was proved to be in better judgment in relation to the actual facts than the shipper.

Now, then, the paradox is that, while in fact the carrier was in the right as proved by the judgment, by the law the carrier, though he were in the right, is required to pay the attorneys' fees to the shipper.

Mr. BREITHAUPT. You have put your finger right on it, Mr. Chairman.

Senator LAUSCHE. Now, how could we remedy that situation if a bill is adopted by including in the bill language that would prevent the happening of such situation? You need not answer at this time.

Mr. BREITHAUPT. It is hardly my place here today to speak of overloaded court dockets and the delay and congestion of cases in the courts; but I ask you to reflect for just a moment on the potential, in that regard, of these figures I have just given you.

While on the subject of figures, there is another matter that I would like to get into proper perspective. The proponents of this bill have, I fear, left the impression that the small shipper (or at least the shipper with the small claim) is especially disadvantaged by the railroads' settlement practices and procedures.

Senator LAUSCHE. May I say to you that that argument is to me a very serious one. The argument that there has been adopted an inflexible, artificial program that, "We will only pay 75 percent"—or 50 percent, whatever it may be—"at the most," and that there is no departure from that program, to me is a serious factor in considering this bill.

So you may proceed now. I want to hear what you have to say on it.

Mr. BREITHAUPT. In the calendar year 1966, for which I have obtained the figures, 2,550,846 freight loss and damage claims were paid by the railroads reporting to our Freight Claim Division. The total amount paid out in these settlements was $167,131,514. Thus, the average claim settlement, last year, was only $65 or $66. Those are small claims.

As you know, the Congress has in certain particular instances seen fit to provide what this bill would provide. The Congress, in a limited number of particular situations, has enacted statutes permitting successful plaintiffs to recover allowances for attorneys' fees. In preparing for this hearing I have undertaken to acquaint myself with those situations and to discover, if I could, the reasons for enactment of such statutes. I wanted to know just what the precedents are. I wanted to

see if there is a pattern. I think I can fairly say that there is a discernible pattern, and that the reasons for the pattern are clear and understandable.

This is the point that the chairman raised at the earlier session of this subcommittee.

I cannot be sure, and therefore am careful not to assert, that I have run to ground each of the instances in which the Congress has directed losing defendants to pay attorneys' fees to plaintiffs who prevail. On the basis of what I have found, however, I am convinced that the Congress would be plowing new ground—creating a unique and unwise exception to the general rule—if it wrote the provisions of S. 858 into statutory law.

Proponents of the bill have cited what they say they consider to be "precedents" for what they seek. Let us first consider those.

One such "precedent" they have cited is section 8 of the Interstate Commerce Act, in which it is provided that if a railroad violates any provision of that Act applicable to it, it is liable to the persons injured thereby for the full amount of damages sustained in consequence of such violation "together with a reasonable counsel or attorney's fee in every case of recovery, which attorney's fees shall be taxed and collected as part of the costs in the case."

This provision is one of a number that the Congress has enacted to help ensure compliance with its regulatory statutes. It is, for example, virtually identical with a provision of the Communications Act of 1934 to the effect that a communications common carrier violating any provision of that Act is liable to the persons injured thereby for damages "together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case."

The philosophy of these two statutes, and others that are similar, is that the public interest is served by encouraging private suits to enforce compliance with the Federal regulatory scheme. In other words, it is the purpose of the Congress to encourage enforcement of the statute on the initiative of, and at the instance of, private parties.

As Judge Wyzanski (after alluding to a number of Federal statutes, all of which will be mentioned subsequently in this statement) put it in *Hutchinson* v. *William C. Barry*, 50 Fed. Supp. 292, 298 (1943)—

> The rationale in all the federal statutes is the same. The argument runs as follows. The government has set up a regulatory system for the benefit of persons in the plaintiff's class. To make the regulation effective private suits as well as public prosecutions are permitted. Suits by plaintiffs, if well founded, are in the public interest. Therefore, the cost of prosecuting successful suits should be borne not by those who were victims but by those who have violated the regulations and caused the damage . . .

This happened to be a suit under the Fair Labor Standards Act, which makes an employer who violates certain provisions of that Act (concerning the payment of minimum wages and overtime compensation) liable to affected employees in the amount of their unpaid minimum wages, or their unpaid overtime compensation, or both, and which provides further that in an action to recover such liability the court "shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

Similar provisions for the recovery of attorneys' fees in suits for damages based upon breaches of Federal statutory law are to be found in connection with violations of the Merchant Marine Act of 1936, the Securities Act of 1933, the Securities Act of 1934, the Servicemen's Readjustment Act, the Trust Indenture Act of 1939, and a section of the United States Code (15 U.S.C. 72) making unlawful the importation or sale of imported articles at less than market value or wholesale price.

Another example is to be found, of course, in the case of suits brought under the antitrust laws by persons who are injured in their business or property by reason of anything forbidden in the antitrust laws. In antitrust suits the successful plaintiff "shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

In some of the statutes I have just cited, I should point out, the allowance of attorneys' fees runs only to successful plaintiffs. In others, attorneys' fees may be awarded either to the prevailing plaintiffs or to prevailing defendants.

So far as I have been able to ascertain, however, whenever a Federal statute provides for the allowance of an attorney's fee to either plaintiff or defendant—whichever prevails—it is couched in permissive or discretionary, rather than mandatory, terms.

To illustrate, under the Securities Act of 1934 a court may (but is not required to) assess reasonable costs, including reasonable attorneys' fees, against either party litigant in a suit dealing with manipulation of security prices or with "misleading statements."

Senator Lausche, in each of the examples I have given so far, the situation has been one in which the Congress has established standards of conduct or behavior that it believes to be in the public interest and then, as a matter of public policy, has fould it expedient to provide private persons injured by deviations from the prescribed standards of conduct and behavior with an additional incentive for bringing suits to redress the statutory wrongs committed.

The assessment of attorneys' fees as part of the costs of litigation recoverable by successful plaintiffs is, of course, an incentive for instituting litigation. It makes litigation more attractive—or, at least, less unattractive—to prospective plaintiffs.

It may, indeed, be likened somewhat to statutory provision for treble damages under the antitrust laws and to the exemplary and punitive damages that are sometimes assessed in other kinds of lawsuits.

A recent (1963) volume of the Lawyers' Edition, second series, U.S. Supreme Court Reports, contains an annotation on "prevailing party's right to recover counsel fees in Federal courts" (8 L. ed. 2d 894). The authors of this annotation—and I shall refer again to it in a moment—make the statement that statutes of the type I have mentioned "suggest that in the classes of litigation to which they apply Congress seeks to encourage the bringing of suits or to discourage defenses against such actions." This expresses, in a nutshell, the point I have been laboring at some length to make.

The claims being discussed in this hearing are not of such a character that the Congress should seek to encourage the bringing of suits on them. Such suits are not in the same category as suits for damages

suffered by one who is harmed by reason of a carrier's failure to abide by the regulatory statute.

Claims for freight loss or damage are not matters of public policy concern. Claims seeking redress for damage suffered because of breaches of regulatory statutes are matters of public policy concern.

A freight loss and damage claim involves merely a breach of the transportation contract between shipper and carrier. Violations of the regulatory statutes, on the other hand, go beyond matters of private right and private duty; they partake of public policy and of the national interest.

The proponents of this bill have also called attention to the provisions of section 15(9) of the Interstate Commerce Act. It is there provided that—

> Whenever property is diverted or delivered by one carrier to another carrier contrary to routing instructions in the bill of lading, . . . such carriers shall, in a suit or action in any court of competent jurisdiction, be jointly and severally liable to the carrier thus deprived of its right to participate in the haul of the property, for the total amount of the rate or charge it would have received had it participated in the haul of the property . . . [and] in any judgment which may be rendered the plaintiff shall be allowed to recover against the defendant a reasonable attorney's fee to be taxed in the case.

Here again, obviously, the right of a successful plaintiff to recover an attorney's fee from a losing defendant is predicated upon that defendant's violation of an express regulatory command—to wit, to follow the instructions as to routing. There is no such predicate in the case of freight loss and damage.

If claims for freight loss and damage did represent violations of the regulatory statute and thus were the kind of claims heretofore recognized by the Congress as being of a nature that should, as a matter of public policy, be pursued through private litigation as a means of enforcing the regulatory scheme, the proponents of S. 858 would not be here today seeking its enactment. They would already—as they are not—be entitled to recover allowances for attorneys' fees under the general provisions of the existing statute I have cited—section 8 of the Interstate Commerce Act.

What I am trying to say is that the Congress has already enacted "public policy" legislation allowing attorneys' fees in suits successfully brought for damages suffered in consequence of carriers' violations of the Interstate Commerce Act, thus promoting the enforcement of that Act, and the suits that are the subject of consideration here today are not included. Nor should they be. They are not of the "public policy" category.

The proponents of this bill also cite provisions found in section 16 of the Interstate Commerce Act under which the Interstate Commerce Commission is, in certain circumstances involving violation of the Act—such, for example, as the charging of excessive freight rates or discrimination in car distribution—directed to ascertain the amount of damages due to a complainant because of a carrier's violation of the Act and make an order directing the carrier to pay that sum to the complainant; and providing further that if the carrier does not comply, the complainant may bring suit and "if the plaintiff shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit."

This statute is also typical of a number of others. If the Secretary of Agriculture, acting under the Packers and Stockyards Act, makes an order for the payment of money, and the defendant does not comply, suit may be brought and "if the petitioner finally prevails, he shall be allowed a reasonable attorney's fee."

There is an identical provision of law in the case of suits brought against commission merchants, dealers or brokers for nonpayment of reparation awards made against them by the Secretary of Agriculture under the Perishable Agricultural Commodities Act.

Similarly, if a carrier does not comply with an order of the National Railroad Adjustment Board, the petitioner may file a petition in Federal court and "if the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee."

The distinguishing characteristic of all of these statutes is that, in each case, there has been an administrative determination or adjudication on the merits, and an order to pay a sum certain or otherwise comply, before the litigation stage is reached. A governmental agency (whether it be the ICC, or the NRAB, or the Secretary of Agriculture) has already heard the parties and rendered a decision. There is always the possibility that a different result may obtain on judicial review but the defendant has "had his day in court," so to speak (although at the commission, or board, or departmental level), and there is at the very least a *prima facie* liability or obligation on his part.

Not so in the case of freight loss and damage claims. The two situations are not analogous.

Then, passing reference has been made during these hearings to section 222(b)(2) of the Interstate Commerce Act, enacted just 2 years ago. (Section 4 of Public Law 89-170, approved Sept. 6, 1965.) Under that section—

> If any person operates in clear and patent violation of any provisions of . . . (certain sections of the Act), any person injured thereby may apply to the district court of the United States for any district where such person so violating operates, for the enforcement of such section. . . . The court shall have jurisdiction to enforce obedience thereto by a writ of injunction or by other process, mandatory or otherwise, restraining such person, his or its officers, agents, employees, and representatives from further violation of such section . . . and enjoining upon it or them obedience thereto. . . . The party who or which prevails in any such action may, in the discretion of the court, recover reasonable attorney's fees to be fixed by the court . . .

Here again the provision for award of an attorney's fee to a prevailing plaintiff has been made in lawsuits based upon breach (in this case "clear and patent violation") of the regulatory statute itself. Public policy calls for the encouragement of private litigation as a means of halting unlawful gray-area transport operations. Suits on claims for freight loss and damage are not in that category.

I intimated, Mr. Chairman, that I would come back to the annotation on "Prevailing party's right to recover counsel fees in federal courts" found at 8 L. ed. 2d 894. Let me now do so.

A major part of that annotation has to do with what is under consideration in this hearing, that is, "Recovery of counsel fees pursuant to statute." I have to assume the annotation, professionally compiled for 1963 publication, is reasonably complete.

I have, in the course of this statement, referred to every single statute on this subject discovered and mentioned by the annotators

(and one or two others besides) except the Federal statute relating to "docket fees" (not germane here), the matter of attorneys' fees in "diversity of jurisdiction cases" (application of State laws), copyright and patent cases (clearly a special area) and Bankruptcy Act matters (also clearly a special case).

One of the witnesses who appeared before the subcommittee on July 18, 1967, in support of S. 858 (Mr. H. Haskell Lurie, Attorney at Law, Chicago, Ill.) submitted for the record a "Memorandum, Brief and Argument" in which he listed (at p. 56) the "Torts Claims Act, 28 U.S.C. 2678 (1964)" as an instance in which "Congress has selectively provided a similar remedy" for the recovery of attorneys' fees. The witness is in error.

The reference is to a provision of the Federal Tort Claims Act, codified at 28 U.S.C. 2678, which (as amended by Public Law 89–506, approved July 18, 1966) provides that—

> No attorney shall charge, demand, receive or collect for services rendered, fees in excess of 25 percentum of any judgment rendered . . . or in excess of 20 per centum of any award, compromise, or settlement made . . .

This is merely a limitation upon what the plaintiff's attorney may charge his client. It does not provide for the recovery of attorneys' fees from the defendant (United States).

Even before its amendment, 28 U.S.C. 2678 included no provision for taxing attorneys' fees against the defendant. It merely fixed maximum percentages that might, in the discretion of the court or agency, be determined and allowed as "reasonable attorney fees . . . *to be paid out of but not in addition to the amount of judgment, award, or settlement recovered*, to the attorneys representing the claimant." (emphasis supplied) Hence the Federal Tort Claims Act is not, nor was it prior to the 1966 amendment, a precedent for S. 858.

On this basis, I submit that there is no real congressional precedent for S. 858. Suits based upon claims for freight loss and damage are not of such a nature as to fall within any of the categories as to which the Congress has on other occasions provided by law for the recovery of attorneys' fees. Nor is there anything so special about either the circumstances of this litigation or the nature of the legal rights and duties involved in this litigation as to warrant special treatment of the plaintiffs in freight loss and damage suits.

One further, and final, point:

The proponents of the bill have made much of a provision contained in section 20(12) of the Interstate Commerce Act, where it is provided that when either the originating carrier or the delivering carrier is required to make payment of a claim for loss or damage to freight—that loss or damage having been sustained on the line of a railroad other than the one paying the claim—it may recover from the railroad on whose line the loss or damage did occur such amount as it shall have so paid together with "the amount of any expense reasonably incurred by it in defending any action at law brought by the owners of such property."

This is a different situation altogether, of course, from that presented in loss and damage claim controversies between shippers and carriers. By no stretch of the imagination does it, when understood, constitute an analogy for what is proposed in this bill.

As I explained earlier, section 20(11) of the Interstate Commerce Act makes it the unusual legal obligation of originating carriers and delivering carriers to pay shippers' claims for freight loss or damage even though such loss or damage was sustained on the line of some other railroad.

It is only fair and simple equity, in these circumstances of vicarious liability, to allow the carrier making payment of the claim to obtain from the other railroad, in whose behalf the claim was defended, reimbursement of the expenses of that defense (including counsel fees). This is not the award of an attorney's fee to the victorious party in an adversary contest between two disputants; it is merely the recoupment of moneys expended in another's behalf and is an essential incident of the proxy liability (if I may call it that) imposed by the statute.

So, Mr. Chairman, for all of the reasons I have given, supplemented by what Mr. Battaglia will say in explanation of some of the railroads' problems with respect to the settlement of claims and some of the railroads' practices and policies in that regard, the association in behalf of its member roads urges that the bill not be favorably reported.

Senator LAUSCHE. Any questions?

Mr. SENDER. Yes.

With regard to statistics on claims—and you have referred to some in your statement on page 12—could you supply for the record the percentage of claims filed with the railroads that are under $300 and whether more claims below $300 are rejected than those above $300, if the statistics are available?

Mr. BREITHAUPT. I understand your request. And with the understanding that if the statistics are available, I would be happy to provide them. I have some doubt that they are available, Mr. Sender.

(The information requested follows:)

ASSOCIATION OF AMERICAN RAILROADS,
Washington, D.C., September 1, 1967.

Hon. FRANK J. LAUSCHE,
Chairman, Surface Transportation Subcommittee, Committee on Commerce, U.S. Senate, Washington, D.C.

DEAR SENATOR LAUSCHE: During the course of my appearance before the Senate Surface Transportation Subcommittee on August 25, 1967, in connection with S. 858 (90th Congress), "to amend the Interstate Commerce Act, with respect to recovery of a reasonable attorney's fee in case of successful maintenance of an action for recovery of damages sustained in transportation of property", I was asked by Mr. Sender . . . could you supply for the record the percentage of claims filed with the railroads that are under $300 and whether more claims below $300 are rejected than those above $300, if the statistics are available?

I replied that ". . . if the statistics are available, I would be happy to provide them. I have some doubt that they are available . . ."

I have now investigated and found that such statistics *are not available*, nor is information from which the statistics might be derived readily available.

The Freight Claim Division of the Association of American Railroads periodically receives (from railroads that are members of the Association) freight loss and damage claim reports, but these reports do not contain information as to dollar value that would permit the compilation of statistics such as those sought by Mr. Sender.

Respectfully yours,

HARRY J. BREITHAUPT, Jr.

Mr. SENDER. At the last hearing on this bill, Mr. Charles E. Blaine testified as to a case in which the Union Pacific Railroad offered to pay

on a claim only the full loss, damage or injury less the estimated amount of the attorney's fees. He later supplied for the record the names of the shippers and the representatives of the Union Pacific Railroad handling this claim.

Would you care to comment on this matter?

Mr. BREITHAUPT. I must say that that is one episode in the hearing that escaped my attention. I am not in a position to comment on it.

Mr. SENDER. You mentioned section 8 in your testimony. If an individual is a passenger on a railroad train and is injured thereby due to a violation of the Safety Appliance Act or the Power Brake Act, could he recover a reasonable attorney's fee if he prevailed?

Mr. BREITHAUPT. I am unable to answer that question, Mr. Sender. I had not thought about it and don't know.

Mr. SENDER. I noticed in your statement you inserted the word "Federal" statutes. Are there not a number of State statutes providing with regard to intrastate claims that the shipper may recover a reasonable attorney's fee if he prevails?

Mr. BREITHAUPT. My research on his subject indicates that there are some. I don't know how many.

Senator LAUSCHE. Thanks very much, Mr. Breithaupt.

Mr. BREITHAUPT. Thank you, Mr. Chairman.

Senator LAUSCHE. The next witness is Mr. Battaglia, director of freight claims of the New York Central Railroad.

Your paper is very brief, so you may read it, Mr. Battaglia.

STATEMENT OF L. F. BATTAGLIA, DIRECTOR OF FREIGHT CLAIMS, NEW YORK CENTRAL RAILROAD CO.

Mr. BATTAGLIA. Thank you, Mr. Chairman.

My name is Leo Battaglia. I am Director of Freight Claims of the New York Central Railroad. I have held that position for the last 2 years, and my responsibilities include the supervision of processing and payment of all claims received by the New York Central System.

Previously, I was assistant general attorney for the railroad in New York, and my main responsibility was legal advice and actual trial of lawsuits arising from the loss and/or damage to freight transported by the railroad.

It is my understanding that Senate bill S. 858 is being considered by the Senate at the request of shippers of fresh fruits and vegetables as well as shippers of grain and bulk grain products. It is the contention of these two groups that this bill is necessary because they allege that the railroads have adopted an arbitrary position in connection with claims for loss or damage on which they have filed claims.

I would like to clarify for this committee the position being taken by the New York Central in connection with claims of this type and explain how the New York Central resolves the problems presented by such claims.

One group—the grain and feed dealers—allege that the carrier is being arbitrary in the manner in which it handles claims for loss of grain and bulk grain mill products. We are dealing here with alleged losses to grain or bulk grain products moving on the railroad. The claimant asserts that because a difference exists in the weights at des-

tination from the weights taken at origin that the carrier must be held responsible for this loss.

The claimant further states that the reason the carrier must be responsible is that he has "official weights" at both origin and destination or at either one of these points. "Official" weights means that weights at origin and/or destination are obtained under the supervision of recognized agencies, such as boards of trade, chambers of commerce and other designated authorities as provided in the governing tariffs.

The American Association of Railroads designates these markets to be class 1 through 5, based on the amount of supervision provided by the governing agency. The vast majority of such markets are designated as class 2. Class 2 provides for only partial supervision in that only a representative number of cars are directly supervised. It has been our experience that, in most of these markets, no more than 5 percent of the rail cars are actually receiving such supervision.

As a result of this token supervision, the weights of all of the cars that they load are deemed "official" weights. It is important to understand how an official weight is obtained, since the preponderance of grain claims involve clear record cars. That means claims of this kind are invariably based on only one fact—a difference between origin and destination weights without any evidence that the grain was lost in transit.

The question remains in this type claim: How dependable, in fact, are these weights?

The answer I think is found in the work being done by the Eastern Weighing and Inspection Bureau during the past 3 years.

They have found, as a result of hundreds of inspections at many elevators, various causes that would explain these shortages other than defective railroad cars. They are defects which would result in the scale stating that a certain weight was loaded into a railcar when, in fact, it was not; or at destination they are defects which result in scales stating that all of the grain was taken out of the railcar and stored in the elevator at destination when, in fact, it was not.

I will cite some of these defects for you:

(1) Worn-out hanger weights or broken hanger castings.
(2) Accumulation of dust on beams and liners.
(3) Scale beam slides and poise were worn, causing inaccurate weights.
(4) Leaking scale garners.
(5) The garner slide not closing properly and allowing grain to leak through.
(6) Track scale decks dirty with an accumulation of grain or other types of debris.
(7) Careless, inaccurate, or fast weighing by the weighmaster.
(8) Prepunching scale tickets, or not punching scale tickets at the time of weighing; or punching one scale ticket although more than one draft is weighed for a particular car.
(9) Scale knives binding or improper clearances of scale rails causing binding.
(10) Scale out of balance and not brought into balance before weighing cars.
(11) Lading remaining in the garner and not weighed.
(12) Tare weighing cars with old grain doors in the car as well as the new grain doors that are to be applied for outbound shipment.
(13) Unauthorized or improperly trained personnel doing the actual weighing and not a qualified weighmaster.
(14) Spills during the actual loading or unloading of cars.
(15) Incomplete unloading including failing to sweep cars and fast unloading over car dumpers.
(16) Leaking load-out spouts, allowing grain to fall to the ground or into pits.

(17) Accumulation of grain and debris in pits and unloading hoppers.
(18) Faulty equipment in elevators including leading crossover legs and other grain handling equipment.
(19) Improper loading and overloading of cars, including not trimming the lading, thereby causing spills or leakes over the grain doors.
(20) Stating that grain remained behind the lining of the rail car when a visual check of that car by the inspector revealed that there was no grain behind the lining.
(21) Improper coopering of cars by elevator personnel in the installation of grain doors and use of caulking paper.

The critical factor about the items I have just listed is that in each of these instances any one or combination of these defects results in the scale stating that a certain weight was put into the railcar when, in fact, that portion of the grain lost because of these defects was never placed inside the car. At destination, although the scale states that the grain weighed was all the grain that was in the car and was taken out of the car, the facts may be the grain was lost coming out of the car or never removed from the car in the first instance.

Therefore, the railroad is presented with a claim that an investigation does not explain. In claims on clear record cards, there is no way of knowing whether the loss occurred from defective equipment or any one of the factors I have listed previously.

In these cases, the railroad has taken the position that it should not pay these claims on the basis that only the carrier could have been responsible. However, I would like to stress that where we have evidence of carrier negligence, claims are paid in full.

As to clear record cars, you must evaluate the experience of hundreds of inspections and surveys and consider the many ways in which grain could have been lost other than as a result of defective railroad equipment. Considering this experience, we have asked the industry to share this responsibility with the railroad, and have offered to compromise this type of claim.

Senator LAUSCHE. Stop at this point, please.

Define what is a "clear record car."

Mr. BATTAGLIA. A "clear record car," Senator, is when you conduct investigation of all the records you have available, the movement, records covering the movement of that car, the inspection records at destination if they are available, and at origin if they are available, and there is no explanation on the basis of those records as to why the weight at destination is less than the weight at origin.

Senator LAUSCHE. Proceed.

Senator PEARSON. If I may interrupt, what other classifications do you have similar to a clear record? Do you have a door leak classification?

Mr. BATTAGLIA. A door leak would be a specific cause, Senator Pearson. And if there was evidence of such a door leak, that claim would be paid in full.

It is not a category as clear record cars are. It would be similar to a train accident where the car is actually derailed and the grain spilled on the ground.

Senator PEARSON. Let me tell you why I stopped you and asked that question.

May I ask you this: Do you have a policy in your department or on your railroad that in different classifications you pay certain percentages of the claims submitted to you?

Mr. BATTAGLIA. It is not quite that way, Senator Pearson. What we are doing——

Senator PEARSON. What I am asking about is the policy of your line.

Mr. BATTAGLIA. Just my line is what I'm speaking about, Senator.

Senator PEARSON. Yes, of course.

Mr. BATTAGLIA. The way we handle this type of claim is we take a look at the studies we have made, apply them to the various markets, and gage what our experience shows us, how these markets perform, how they do the loading, how accurate they are, how they do the unloading.

Based on our experience, we then go to the industry and say, "If you have——

Senator PEARSON. Now we are talking about grain?

Mr. BATTAGLIA. Grain only.

Senator PEARSON. All right.

Mr. BATTAGLIA. We then go to the industry and say, "If you have a class 2 market, we will pay you 50 percent"—on the theory if there is no other explanation for the loss, the loss could have occurred in any of the ways I have mentioned and which our inspections on a recurring basis——

Senator PEARSON. You call that clear record on 50 percent?

Mr. BATTAGLIA. That's right, sir.

Senator PEARSON. All right. Now go ahead. Based on history and your experience from area to area, and so forth, do you have a percentage policy of what amounts you will pay on a claim in a given area?

Mr. BATTAGLIA. We only offer a percentage of a claim, Senator, when there is no explanation as to how that loss occurred.

Senator PEARSON. That is clear record?

Mr. BATTAGLIA. And that is a clear record car.

Senator PEARSON. On everything else you just make a determination on what you think the reason for the loss may have been and then make a judgment from car to car on that basis. Is that right?

Mr. BATTAGLIA. Yes, sir. If there is concrete evidence that it wasn't the carrier's responsibility at all.

Senator PEARSON. Who offers that evidence?

Mr. BATTAGLIA. If, for example, that particular car moved when there happened to be an inspector there and he makes out an inspection report and it is, let's say, signed and agreed to by the shipper, in that case we wouldn't pay a dime on that claim. We would disallow it.

In other cases where there is evidence that the grain was loaded into a car with a gaping hole in the side and the grain was spilled all along the right-of-way, we pay that claim in full.

Senator PEARSON. I want to explore this with you, but I don't want to interrupt you, because I want to give you the opportunity to finish.

Mr. BATTAGLIA. Our analysis of this type claim certainly does not indicate the assumption of an arbitrary position. To continue to pay these claims in full, against this factual background, every time a claim is presented, and to insist upon such payment knowing the facts as I have outlined them, certainly could be characterized as arbitrary.

The second group evincing interest in the passage of this bill claiming arbitrary treatment at the hands of the railroads are shippers of fresh fruits and vegetables, who claim that we arbitrarily disallow

claims on cars that are delayed, even though that delay results in the claimant having to sell his product in a lower market. Again, we have not in the past and we do not intend to arbitrarily disallow this type claim. This is a far more difficult area to determine responsibility. The history of this type of claim would reveal to you that a railroad was receiving and, in the past, paying claims for a decline of market value because of a few minutes' delay.

The individual claim adjuster, in reviewing a claim to determine whether or not a railroad moved with reasonable dispatch, takes into consideration, and the law states that he should take into consideration, many factors before determining the reasonableness of the movement. Those factors are the distance, the character of the weather, the season of the year, the ordinary facilities for transportation, and the volume of traffic. All of these factors would have a bearing on whether a particular delay was unreasonable or not.

This is an area where reasonable men can and do differ. Given the same or similar fact situations, different courts will arrive at different conclusions as to whether or not a railcar moved with reasonable dispatch.

This group alleges that they must have guaranteed schedules. This is not the legal obligation of a carrier. The bill of lading itself provides that:

> no carrier is bound to transport said property by any particular train or vessel or in time for any particular market or otherwise, than by reasonable dispatch.

We do not take the position that we will not assume liability unless the claimant can prove negligence to us. We do analyze the claim as presented to us and make a determination, in each case, as to whether or not the car was unreasonably delayed. We arrive at our conclusions as to the reasonableness or unreasonableness of the delays based on any one or more of the factors which the courts have directed us are proper to consider in resolving this question.

Because we do not agree with the claimant in a particular case that the shipment was unreasonably delayed, it has been alleged that we are arbitrarily denying these claims.

If, for example, there is an 8-hour delay in a car that normally takes 6 days to move from the west coast to the east coast, I would not consider the delay unreasonable. If, on the other hand, to take an extreme example, there was a 5-day delay for the same movement, we would not consider this reasonable and would pay such a claim.

We do not believe that our approach is unreasonable. In those instances where the industry filed claims where there was a few minutes' delay, that was in our opinion unreasonable.

To the extent that justification for the enactment of S. 858 is the allegation that the railroads are arbitrary in disallowing claims, I trust my explanation of the problems in connection with the type claims we are concerned with here sufficiently demonstrates that that is not the case.

Thank you, Senator.

Senator LAUSCHE. Senator Pearson.

Senator PEARSON. These questions are directed to the field of grain, and I don't have any experience in perishable commodities. But I do have a little experience in the field of grain. I am from Kansas.

Mr. BATTAGLIA. I know that, sir.

Senator PEARSON. As a matter of fact, when I first started practicing law, I just went out and hung up my shingle, and I had my first client the way most young lawyers get their first clients. My family gave me some business. They sent a case over. And they happened to be in the grain business and have been in the grain business for 85 years from the Kansas City Board of Trade.

So I sort of cut my teeth on filing claims and talking to adjusters for railroads.

I think the thrust, the motivation behind this legislation is based upon that allegation which you have sought to testify about today.

There is in my State a State grain inspection system, and I think probably we have a pretty high classification in those various classifications 1 to 5 that you enumerate, as to what degree of expertness and preciseness you weigh when you start and when you get to your termination.

But so many of the members of the Board of Trade, from my own experience, are just met so often with this sort of a proposition—and I speak only for the Midwest and a lot of people on the Board of Trade in Kansas City have confirmed this—that they file all these claims. Then you get a stack about this high and then the adjuster comes around. He is a decent and very, very nice guy. They sit down, and he just says, "Well, you have got so many clear records and so many door leaks and so many of this and so many of that kind of claim. We will just give you so much here and so much here and so much percentage for that." And that's it.

And so in many cases I suppose the claims individually, from car to car, are so small or the accumulation of all of them is such an amount that they just take what the railroads offer them.

I have filed two or three cases and settled. I have never gone to trial with one of them.

But your testimony is very helpful, and I certainly receive it with the greatest respect. But, contrary to the point that you developed so ably, it is the people in the Midwest in the grain section that have talked to me continually about this very problem. You recognize it and I recognize it. I think your testimony is very valuable in that respect.

Let me ask you this: What is the condition of your boxcars on the New York Central?

Mr. BATTAGLIA. It is not quite my area of authority, Senator, but we are constantly upgrading our boxcars.

Since you brought up that point, I would like to point out a development that has been occurring——

Senator PEARSON. This is part of the problem.

Mr. BATTAGLIA. Yes, sir.

Senator PEARSON. We don't have enough boxcars, and the ones we have are just in terrible condition.

Mr. BATTAGLIA. We don't have enough boxcars, Senator, that is true. And there are many cases where we do furnish boxcars that perhaps should not have been furnished.

But to show you that the root of this problem doesn't revolve solely upon the condition of the boxcars, take a look at what is happening with these brand new covered hopper cars.

Senator PEARSON. Yes.

Mr. BATTAGLIA. Now, on the Central, we have been spending large sums of money on these hoppers cars and trying very, very hard to supplant the boxcars with this new type of cars.

Even with this brand new type of hopper cars, we began getting claims for losses in weight which even most of the industry admits they shouldn't have filed in the first instance.

I just recently saw an article in Feed Stuffs, one of the national magazines, where one of the grain elevators is going to begin lawsuits against railroads because no railroad will pay a claim on that particular type of car.

And that type of claim I think stresses the fact that there is a difference in origin and destination weights that isn't necessarily, Senator, caused by defective equipment.

And I think that is all our policy is trying to reflect—a more equitable distribution of what the problem is all about economically.

Senator PEARSON. Thank you very much.

Mr. BATTAGLIA. Thank you, Senator.

Senator LAUSCHE. I think this question has already been asked, but will you describe the procedure that is followed in delivering the grain, let's say, to the railroad? Who weighs it? Under what supervision is the weighing done? Will you describe that procedure?

Mr. BATTAGLIA. Yes, Senator. I think I alluded to it in my statement. I tried to point out how the markets comes about and who has responsibility for weighing the grain. The shippers weigh the individual cars——

Senator LAUSCHE. Talk into the microphone, please.

Mr. BATTAGLIA. The shippers weigh the individual cars at origin. They actually weigh the grain as it is being put into the rail car.

The way they weigh the grain is that the weighing takes place at some place in the elevator and that subsequent to the weighing procedure the grain then flows from the elevator into the rail car.

Senator LAUSCHE. Who is present when the weighing is actually done? Is there a representative of the railroad present?

Mr. BATTAGLIA. No, sir; there is not. There would be an almost impossible economic burden for the railroad to have an inspector on the weighing of every railroad car, particularly around harvest time.

Senator LAUSCHE. Well, do you agree upon the identity of the agency or the person who is to submit the certificate of weight?

Mr. BATTAGLIA. We do. You see, Senator, you have to go back a little further to understand how this came about. And this is an excellent question, because this gets into why did the AAR formulate these classes of markets, which I believe is the essence of your question: Does the railroad agree to a Class 1, Class 2, Class 3 market and so-called official weight, that the market has that status?

The railroads originally set these markets up for revenue purposes.

Now, you would ask: If they are good enough for revenue purposes, why aren't they good enough for claim purposes?

Well, when they set these markets up for tariff purposes, the understanding was if you have a shortage in one car and an overage in another car, it would eventually balance itself out. And when you set cars up to impose revenue tariffs, what you are doing is usually weighing a string of cars. And it has been our experience—and various

tests have shown—you will get shortages in some cars and overages in other cars, and it will balance out.

But to take that same type of weight procedure and take that certificate and then apply it for claim purposes, I would like to point out we do not get credit for overages. Therefore, this procedure which we have described is partially defective to the extent that if there are 10 cars an elevator loads today and five of those cars have shortages and five have overages, all the railroad will receive is a claim for the shortages with no credit at all for the overages.

So what they have done is taken a system that was evolved for revenue purposes—and we can live with that—and try now to apply it to a claims situation, which the figures indicate we cannot live with.

Senator LAUSCHE. Now, let's go back to what I am trying to find out. What is the procedure? The grain is in the elevator. From the elevator it is delivered to the car?

Mr. BATTAGLIA. Yes, sir.

Senator LAUSCHE. Mention has been made of boards of trade and other agencies. How do they come into the matter?

Mr. BATTAGLIA. They come into this matter in this way: If it is a class 2 market, the board of trade appoints weighmasters, supervisors, and they will come out to that elevator at any given time and look at a certain number of cars and look for the things that I listed that may be wrong and see to it that they are corrected. Also they will test the scales and see if the scales are within tolerances.

But the point I would like to make in connection with that procedure, Senator, is that they look at a very small number of cars. They don't look at every one of the hundreds of thousands of cars that are moving.

Senator LAUSCHE. Now, then, you have this weighmaster at the elevator. He makes the weighing and certifies what his evidence shows. Is that correct?

Mr. BATTAGLIA. Yes, sir.

Senator LAUSCHE. Then you again weigh it at the point of delivery?

Mr. BATTAGLIA. Yes, sir.

Senator LAUSCHE. And is practically the same procedure followed there?

Mr. BATTAGLIA. Yes.

Senator LAUSCHE. You rely upon the agencies that are in the receiving operation and in the loading operation in ascertaining the weights?

Mr. BATTAGLIA. That is not quite true, Senator.

Senator LAUSCHE. I don't think it is true because sometimes you don't rely on it.

Mr. BATTAGLIA. Most times we don't. Most times we are accepting the shipper's and the receiver's weights.

Senator LAUSCHE. Now, then——

Senator PEARSON. Would the Senator yield? This is all on a card on the side of the boxcar, is it not?

Mr. BATTAGLIA. I don't follow that question, Senator Pearson.

Senator PEARSON. Isn't there a card or a cardboard type form which is attached to the side of the boxcar?

Mr. BATTAGLIA. Filling out the information as to the weights?

Senator PEARSON. Yes.

Mr. BATTAGLIA. I believe there is, Senator.

Senator LAUSCHE. How do you ascertain when you have carried more than the loading certificate shows? That is, when you unload——

Mr. BATTAGLIA. Yes, sir.

Senator LAUSCHE. It shows more?

Mr. BATTAGLIA. Yes, sir.

Senator LAUSCHE. How often does that happen?

Mr. BATTAGLIA. With quite a degree of frequency. Of course, I don't have those statistics in connection with claims, because, as I said, there is no claim presented and no credit given to the carrier. But we have made individual checks. And just recently in connection with this harvest season we took photographs of various cars at origin, at various points along the way at which these cars were stopped, and at various destinations, polaroid color photographs, to try and see if the grain was leaking out of the railcar.

I believe, we had 40 or 50, Senator. Of those, about 10 came in with overages, about 25 came in with shortages, and the pictures didn't indicate any leaking of the cars en route.

Senator LAUSCHE. That is all, I think. Do you have something, Mr. Sender?

Mr. SENDER. How long has the claim policy that you have described with respect to clear-record cars on grain been in effect on the New York Central?

Mr. BATTAGLIA. Since April of last year.

Mr. SENDER. What was the reason for this change in policy in April of last year?

Mr. BATTAGLIA. I personally reviewed this policy when I took over this position about 2 years ago, and I found this area wanting, and some other areas as well, speaking now only about the New York Central.

Mr. SENDER. What was the prior policy?

Mr. BATTAGLIA. They used to pay such claims.

Mr. SENDER. I have no further questions.

Senator LAUSCHE. Thank you.

Now, then, are there any other witnesses to be called? Anything further?

There will be inserted in the record at this point a statement from Senator Warren G. Magnuson with two memorandums from the Legislative Reference Service.

(The information follows:)

STATEMENT OF SENATOR WARREN G. MAGNUSON IN SUPPORT OF S. 858

Mr. Chairman. On February 6, 1967, I introduced S. 858, to provide for the recovery of a reasonable attorney's fee in the case of successful maintenance of an action to recover damages sustained in the transportation of property.

The purpose of this bill is to help the small shipper, and indeed any shipper with a small claim, to realize justice when justice is due.

A shipper seeking to collect a small damage claim from a large transportation company whether he be a householder moving treasured personal possessions, or a producer marketing a car of grain or perishables can be precluded from recovering his just claim because of the high cost of legal fees and court charges.

As Mr. William H. Tucker, Chairman of the Interstate Commerce Commission, pointed out at the July 18, 1967 hearing, the Commission has no power

to settle loss and damage claims between shippers and carriers; thus, in the absence of a voluntary settlement, a shipper's only recourse is a civil action in either a state or federal court. Chairman Tucker noted that in this circumstance, a shipper having a contested claim is faced with a dilemma, particularly on smaller claims. If he sues on his claim, his recovery in many cases may be less than his attorney's fees. If he chooses not to sue, he may be faced with writing off the uncollected portion of his claim.

A recent action taken by eastern railroads affords an additional ground for passage of this measure. On April 30, 1964, various eastern railroads served notice that effective June 1, 1964 they would no longer "guarantee delivery of perishable freight at destinations to meet previously agreed cutoff times for the various markets located on our system."

Subsequent to this 1964 notice, I am advised that service on the lines of eastern railroads deteriorated in the movement of perishable foods. Shippers of perishable fruits and vegetables need reliable schedules for orderly marketing.

I am further advised that since this 1964 notice, the eastern railroads have automatically declined to pay delay claims unless negligence is proven.

The decision of the eastern railroads to remove guaranteed schedules and to decline delay claims falls hardest upon the shippers of western perishables.

There are many federal and state statutes providing for the recovery of a reasonable attorney's fees. In 1948, this Committee amended section 20(12) which covers transportation damage recovery suits between railroads to add the words: "and the amount of any expense reasonably incurred by it in defending any action at law brought by the owners of such property."

At my request, the Legislative Reference Service of the Library of Congress compiled a list of United States and State statutes providing for attorney's fees. The Library of Congress' list of such statutes contains four and a half pages of Federal statutes, and fifteen pages of State statutes. I was advised that "since there are literally scores upon scores of State statutes allowing attorney's fees," only State laws involving property damaged in transportation, and all anti-trust and monopoly situations were included.

In view of the question raised at the earlier hearing as to whether a bill such as S. 858 should provide for attorney's fees to both plaintiffs and defendants, at my request the Library of Congress supplied a breakdown of the federal and state statutes in which fees (1) are allowable to either party in the discretion of the court; (2) are allowable to the prevailing party; (3) or are allowable to the prevailing or successful plaintiff. The Library of Congress memorandum concludes: "As the enclosed list indicates, it is fairly rare for attorney's fees to be awarded to either party in the discretion of the court, or to the prevailing party, especially in State law. *The unmistakable pattern that emerges from examination of the law, Federal and State, is to award attorney's fees to the plaintiff, and then only if he prevails in his suit.*"

I ask to have inserted in the record at the conclusion of my testimony the two memorandums and list of statutes from the Library of Congress.

I support S. 858, and hope the Subcommittee will take early and favorable action.

THE LIBRARY OF CONGRESS,
LEGISLATIVE REFERENCE SERVICE.
Washington, D.C., June 13, 1967.

To: Hon. WARREN MAGNUSON.
From: American Law Division.
Subject: U.S. and State Statutes Providing for Attorney's Fees.

This will refer to your request of May 31, 1967 in which you ask us to compile a list of United States and State statutes which provide for attorney's fees which, apparently, would be similar to a cited Illinois statute allowing attorney's fees in actions for damages against a railroad for loss of grain, and similar also to those cited Federal laws in Title 49 of the Code which also pertain to actions for damages to property injured in interstate transportation.

Therefore, since there are literally scores upon scores of State statutes allowing attorney's fees, our list of State laws is limited to those actions involving property damaged in transportation, and all anti-trust and monopoly situations. However, the list of Federal laws is complete. The two lists are attached hereto.

HUGH C. KEENAN,
Legislative Attorney.

FEDERAL STATUTES PROVIDING FOR ATTORNEY'S FEES

1. 15 U.S.C. 15: Reasonable attorney's fees allowed in suits by persons injured by antitrust violations.

2. 15 U.S.C. 77www: Court may allow reasonable attorney's fees in suits for damages for misleading statements under the Trust Indenture Act; allowable to either side in discretion of court.

3. 15 U.S.C. 77k: Civil liabilities under Securities Act of 1933; civil liabilities on account of false registration statement: reasonable attorney's fees allowable by court (also for any other suit under this Act); allowable to either party in discretion of court.

4. 15 U.S.C 78i: Securities Exchange Act of 1934: any person injured by manipulation of security prices, forbidden by this Act, may sue the offending party for damages and recover reasonable attorney's fees; attorney's fees allowable to either party in discretion of court.

5. 15 U.S.C. 77ooo: Trust Indenture Act; an indenture, to be qualified under this Act, may contain provisions to the effect that all parties thereto agree that the court may assess reasonable attorney's fees in any suit on the indenture against any party litigant in the interests of justice.

6. 15 U.S.C. 72: Prevention of unfair methods of competition: importation or sale of articles at less than market value or wholesale price—any person injured by a violation of this provision may sue the offending party and recover reasonable attorney's fees in addition to damages.

7. 7 U.S.C. 499g(b): Suits by injured parties to enforce reparation orders of Secretary of Agriculture stemming out of prohibited practices of unfair conduct in dealing with perishable agriculture commodities: reasonable attorney's fees shall be allowed to prevailing petitioner.

8. 7 U.S.C. 210: Suits to enforce order of Secretary of Agriculture to redress unfair practices by stockyards: aggrieved party shall be allowed reasonable attorney's fees by court to be taxed as costs of the suit, if he prevails.

9. 17 U.S.C. 1: In suits against a manufacturer by a copyright holder for royalties due, the court may award a reasonable counsel fee to successful plaintiff.

17 U.S.C. 116: In all actions, suits, or proceedings under Title 17 (Copyrights), the court may award to *the prevailing party* a reasonable attorney's fee as part of the costs.

10. 18 U.S.C. 3006A: Adequate representation for indigent defendants in Federal criminal cases: provision is made for appointment and payment of counsel.

11. 18 U.S.C. 3495: Fees are allowed to foreign counsel in consular proceedings to authenticate foreign documents.

12. 22 U.S.C. 277d–21: The United States Commissioner (International Boundary and Water Commissioner), in rendering an award in favor of any claimant under the procedure for settlement of the Chamizal boundary question, may allow reasonable attorney's fees as part of the award.

13. 22 U.S.C. 1623: The Foreign Claims Settlement Commission may allow just and reasonable attorney's fees in connection with any claim it decides, up to 10% of the total award.

14. 25 U.S.C. 1031: Attorney's fees are allowed out of funds appropriated to pay claims of the Shawnee Tribe against the United States.

15. 28 U.S.C. 2678: The court may allow reasonable attorney fees to successful plaintiff in the following specified cases:

a. Tort claims against the United States (28 U.S.C. 1346(b)).

b. Administrative adjustment of such claims by a head of a Federal Agency.

c. Compromise of such claims by the Attorney General with court approval.

16. 31 U.S.C. 243: Limits attorney's fees to 10% of the amount paid by the government for settlement of claims of military and civilian personnel for damages to or loss of personal property incident to service.

17. 35 U.S.C. 285: Patent infringement actions: reasonable attorney fees may in exceptional cases be awarded by the court to *prevailing party.*

18. 42 U.S.C. 406(b)(1): Permits courts to award reasonable attorney's fees in suits for benefits due a claimant under the Social Security program; fee awards go only to successful plaintiff.

19. 49 U.S.C. 8: Suits against common carriers by persons injured by their violations of Interstate Commerce Act; reasonable attorney's or counsel's fees allowable by court to successful plaintiff, apparently.

20. 49 U.S.C. 16(2): In suits to enforce an order of the Interstate Commerce Commission against a common carrier by person for whose benefit order was made, attorney's fees shall be allowed to the plaintiff if he prevails, to be taxed as costs.

21. 49 U.S.C. 322(b)(2): Actions for damages by persons aggrieved by motor carrier's violations of Interstate Commerce Act—the *prevailing party* may get reasonable attorney's fees in discretion of court.

22. 49 U.S.C. 908(b)(c): Actions for damages by persons aggrieved by water carrier's violations of Interstate Commerce Act—reasonable attorney's fees allowable in every case of recovery, to be set by the court.

23. 49 U.S.C. 1017(b)(2): Actions for damages by persons aggrieved by a freight forwarder's violations of Interstate Commerce Act—*prevailing party* may be allowed reasonable attorney's fees by court.

24. 49 U.S.C. 20(12): A common carrier, railroad, or transportation company issuing a bill of lading is entitled to recover damages against another common carrier, etc. on whose line any damage to receipted property occurs, and is entitled to "amount of any expense reasonably incurred by it in defending any action" brought by the owners of such property.

25. 49 U.S.C. 15(9): Where a carrier diverts property contrary to instructions in bill of lading, the carrier is liable in damages to the carrier thus deprived of its right to participate in the haul of the property, and the plaintiff shall be allowed reasonable attorney's fees. Allowance of fee left to discretion of court.

26. 50 App. U.S.C. 20: Alien Property Law—attorney's fees may be allowed for claims under this law apparently only to prevailing party.

27. 50 App. U.S.C. 1985: American-Japanese Evacuation Claims—the Attorney General in rendering an award in favor of any claimant, may as a part of the award allow reasonable attorney's fees; not to exceed 10% of amount allowed.

STATE STATUTES PROVIDING FOR ATTORNEY'S FEES

Alabama—Code 7:291(1): Successful plaintiff in detinue action may get a reasonable attorney's fee.

Arizona—Revised Statutes 40:688: Any person injured by breach of a motor carrier transportation agent's bond may sue thereon in name of State for damages, which shall include the attorney's fee which the court allows.

California—West's Annotated Codes, Business and Professions Code, 16750: Civil action; venue; damages, attorney fees; costs.

(a) Any person who is injured in his business or property by reason of anything forbidden or declared unlawful by this chapter, may sue therefor in any court having jurisdiction in the county where the defendant resides or is found, or any agent resides or is found, or where service may be obtained, without respect to the amount in controversy, and to recover three times the damages sustained by him, and shall be awarded a reasonable attorney's fee together with the costs of suit.

The amendments to this section adopted at the 1959 Regular Session of the Legislature do not apply to any action commenced prior to September 18, 1959.

(b) The State and any of its political subdivisions and public agencies shall be deemed a person within the meaning of this section.

(c) The Attorney General may bring an action on behalf of the State or of any of its political subdivisions or public agencies to recover the damages provided for by this section, or by any comparable provision of Federal law, provided that the Attorney General shall notify in writing any political subdivision or public agency of his intention to bring any such action on its behalf, and at any time within 30 days thereafter, such political subdivision or public agency may, by formal resolution of its governing body or as otherwise specifically provided by applicable law, withdraw the authority of the Attorney General to bring the intended action.

Florida—Statutes Annotated: 350.33: Any person from whom any moneys shall have been exacted by any such company or common carrier in excess of the amounts properly chargeable under the provisions of this chapter, and any person who shall have suffered any pecuniary injury by the violation of any such company or common carrier of any provisions of this chapter, shall have the right, by written demand, to require the commissioners to enforce recovery of his damages, or may upon failure of the commissioners to institute suit therefor within ninety days after such written demand, institute suit in his own name against any such company or common carrier in any court of competent jurisdiction in the county in which the cause of action arose, or in any county in the

State through or in which such company or common carrier runs or does business; and any such person upon establishing his right of recovery, shall be entitled to recover the total amount of such overcharge or other pecuniary injury, with interest thereon, together with such additional amount as the jury may find necessary to reasonably compensate him for all expense, including the value of his own time and services, and all reasonable cost and attorney's fees incurred in the recovery of such damages, and such right of action shall exist in the legal representatives or assignee of any such person.

350.56. Long and short haul; special cases; reduction and increase of rate in competition with water route; application to change rate; penalty; liability of carrier, proviso—

No railroad company engaged in the business of common carrier of freight in the state, shall charge or receive any greater compensation in the aggregate for the transportation of freight of any nature for a shorter than for a longer distance over the same line or route in the same direction, the shorter, being included within the longer distance, or charge any greater compensation as a through rate than aggregate of the intermediate rates, subject to the provisions of this section; but this shall not be construed as authorizing any common carrier, within the terms of this section, to charge or receive as great compensation for a shorter as for a longer distance; provided, however, that upon application to the railroad and public utilities commissioners such common carrier may in special cases, after investigation, be authorized by the railroad and public utilities commissioners to charge less for a longer than for shorter distances, for the transportation of freight, and the railroad and public utilities commissioners may, from time to time, prescribe the extent to which such designated common carrier may be relieved from the operation of this section. Whenever a carrier by railroad shall, in competition with a water route, reduce the rate on the carriage of any species of freight to or from competitive points, it shall not be permitted to increase such rates unless, after hearing by the railroad and public utilities commissioners, it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition. No rates or charges shall be required to be changed by reason of the provisions of this section in any case where application shall have been filed before the railroad and public utilities commissioners in accordance with the provisions of this section until a determination of such application by the railroad and public utilities commissioners.

If any railroad company shall violate any of the provisions of this section, or any rule, order or regulation prescribed by the railroad and public utilities commissioners under the authority of this section, such company or common carrier shall thereby incur a penalty for each offense of not more than five hundred dollars, to be fixed, imposed and collected by the railroad and public utilities commissioners in the manner provided in § 350.28. In case any common carrier subject to the provisions of this section shall do, cause to be done, or permit to be done, any act, matter or thing in this section prohibited or declared to be unlawful, or shall omit to do any act or thing in this section required to be done, such common carrier shall be liable to the person injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this section, and shall thereby incur a penalty of one hundred dollars for each such offense, recoverable by the injured party, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery. This attorney's fee shall be taxed and collected as part of the costs in the case. This section shall not apply to commerce among the several states.

351.17. Suits of persons injured for damages by railroad's failure to maintain crossing lines (351.14) and to receive cars from connecting lines (351.16), reasonable attorney's fees allowable.

353.01, .02, .03. Claims for freight lost or damaged by common carrier; payment within sixty days.

(353.01). All common carriers operating within this state when any person, his agent or attorney, files with, or presents to them, or any station agent of said common carrier, or where there is no station agent, upon any other agent of such common carrier, his claim for any freight, baggage or express lost or damage by said common carrier, or for any overcharge made by such common carrier on any freight, baggage or express, or for any reciprocal demurrage, shall pay the said claim within sixty days from its filing with, or presentation to, said common carrier or any station agent, or other agent of such common carrier.

(353.02) Carrier not paying claim liable for amount and fifty per cent per annum, etc.

Should any common carrier fail to comply with the provisions of § 353.01, then the said common carrier making such failure shall be liable to the claimant for the amount of his claim and fifty per cent per annum interest on the principal sum of said claim from the date of the filing of the same with, or presentation of the same to, the common carrier, or any station agent or other agent of such common carrier, and when the said claimant shall bring suit and recover judgment for his claim against said common carrier, he shall be allowed the said fifty per cent per annum, in addition to the principal sum of said claim, and the same shall be allowed in the verdict giving him judgment; provided however, that the claimant shall not recover and have judgment for the said fifty per cent per annum, nor attorney's fees, as provided for in § 353.03, unless he recovers judgment for a sum which fixes the principal sum of said claim at an amount greater than the amount which said common carrier had offered and tendered to the claimant in settlement of his claim before the expiration of said sixty days in which the said common carrier is required to pay such claim under the provisions of § 353.01.

(353.03). Attorney's fee: Any common carrier who fails to comply with the provisions of § 353.01, shall, in the event that the claimant shall prevail in an action to recover on his claim, be liable for a reasonable attorney's fee, and the court shall allow the claimant such reasonable attorney's fee, which shall be fixed by the court, not to exceed fifteen dollars if the amount received does not exceed one hundred dollars, and not to exceed fifteen per cent on any amount recovered greater than the sum of one hundred dollars.

353.32. Action against riverboats for damages for failure to deliver freight in dry places; plaintiff may get reasonable attorney's fee.

363.05. Telegraph companies liable for damages for failure to deliver messages promptly and for refusing messages for transmission (363.02, .04); plaintiff may also get 10% of amount recovered as attorney's fees.

Illinois—Smith-Hurd Annotated Statutes—Ch. 114, sec. 117: Action for damages against railroad for loss of grain; prevailing plaintiff must get a reasonable attorney's fee, up to 10% of damages.

Ch. 5, sec. 150. Actions by persons injured against commission merchants, dealers or brokers dealing in perishable agricultural commodities for damages for violation of prohibited commercial practices; reasonable attorney's fees included in judgment, to prevailing plaintiff.

Ch. 38, sec. 60–7. Any person injured in business or property by a violation of Illinois Antitrust Act may sue for an injunction or for damages; reasonable attorney's fees in both cases to prevailing plaintiff.

Ch. 1218, sec. 313. Authorizes injunction by a person likely to be damaged by a deceptive trade practice of another and attorney's fees may be assessed against a defendant only if he has willfully engaged in such practice.

Indiana—Burns Statutes—23: 122: Private actions for damages by persons injured in business or property by violations of antitrust law; reasonable attorney's fee included apparently only if plaintiff is successful.

55: 1406. Prevailing plaintiff allowed reasonable attorney's fee in suits against common carriers for damage to transported property.

55: 713. Actions against railroads for damages caused by prohibiting acts (reciprocal demurrage as to coal cars, discrimination in car service); prevailing plaintiff is allowed reasonable attorney's fee.

55: 719. Refusal to furnish freight rates by railroad—persons injured may sue for damages and get reasonable attorney's fees, apparently only a successful plaintiff gets fees.

Iowa—Code—479.17: Actions against carriers for damages due to prohibited acts; reasonable attorney's fee included in costs, apparently only to successful plaintiff.

553.20. Action for damages for antitrust violation; reasonable attorney's fee as costs allowable to prevailing plaintiff.

Kansas—Statutes Annotated—50–137: Action for damages against grain dealers for injury caused by unlawful pooling; reasonable attorney's fee as costs to successful.

66–176. Action for damages against public utility or common carrier by person injured by illegal acts; reasonable attorney's fee (also on appeal), to successful plaintiffs only.

65–741. Injunction and damages by person injured by violation of Free Flow Milk Law; reasonable attorney's fee to prevailing plaintiff.

50–505. Damages and injunction by person injured by unfair dairy trade practices; reasonable attorney's fee to prevailing party.

50–108. Antitrust violations; damages and attorney's fee recoverable by person injured, apparently if successful.

50–135. Same as 50–108.

66–305. Railroads, liable for damages to property injured; attorney's fee allowable to prevailing plaintiff.

66–233. Railroads, liable for damage caused by fire; plaintiff gets attorney's fee.

66–203. Railroads, liable for failure to furnish freight cars to plaintiff; attorney's fee, to prevailing plaintiff.

66–259. Railroads, liable for failure to give bill of lading to plaintiff; attorney's fee apparently to prevailing plaintiff only.

66–165. Railroads, liable to repay to shipper any excess charges; plaintiff gets attorney's fee apparently only if he prevails.

Louisiana—Revised Statutes—45:1198: Person injured by a common carrier's refusal to comply with an order of Public Service Commission may sue carrier; if successful, he gets attorney's fees as costs.

Minnesota—Statutes Annotated—32A.09: Person injured by unfair dairy trade practices may sue for damages and get attorney's fees, apparently only if he prevails.

221.251. Suits against motor carriers for overcharges; prevailing plaintiff gets attorney's fees.

221.271. Person injured by motor carrier's violation of law may sue for damages and, if successful, gets attorney's fees.

325.82. Unfair price discrimination in petroleum products—purchaser may sue for repayment of contract price where contract is illegal and collect attorney's fees apparently only if successful.

Nebraska—Revised Statutes—59–202: Grain dealers liable to parties injured by unlawful combinations; prevailing plaintiff gets attorney's fees.

59–402. Same, as to lumber and coal dealers, as 59–202.

28–1113. Pooling combinations, grain and stock dealers, liable to persons injured by such combinations in damages, to include attorney's fees for prevailing plaintiff.

74–715. Actions against common carriers for damages to property shipped; attorney's fees allowed to plaintiff (also for appeals).

74–564. Liability of common carriers for failure to transport livestock; successful plaintiff gets attorney's fees.

54–503. Demurrage for stockyard's delay in unloading of livestock; liable to shipper, who gets attorney's fees if he sues and prevails.

59–821. Violations of antitrust laws; person injured may sue for damages, including attorney's fees apparently allowable only to successful plaintiff.

74–711. Refusal of common carrier of livestock to carry attendant for stock; liability to shipper for damages sustained; to include attorney's fees apparently only to prevailing plaintiff.

North Dakota—Century Code—49–14–07: Action against railroads for damages due to delays, refusal to transport, failure to supply cars; attorney's fees shall be allowed but no apparent requirement that plaintiff be successful to get them; however only plaintiff gets fees.

Oklahoma—Statutes Annotated—79–25: Restraint of trade combinations, party injured thereby may sue for damages, including attorney's fees apparently only if successful.

79–36. Same as 79–25; suits for damages by purchaser of goods from violator of trade restraint laws, to include attorney's fees apparently only if successful.

79–86. Same as 79–25; "weaker competitor" injured by violation of this law may sue for damages, including attorney's fees apparently only if plaintiff prevails.

66–91. Party injured by railroad's violation of laws for operation of railroads (e.g. furnishing cars, receiving freight, charges for warehouse) may sue for damages, penalties, forfeitures, demurrage or storage charges; prevailing plaintiff gets attorney's fees.

2–419.5. Dairy products and dealers, unfair practices; party injured may sue for injunctions or damages and, if successful, get attorney's fees.

Oregon—Revised Statutes—646.545: Producer's cooperative bargaining associations; producer injured by unfair trade practice may sue for damages and if successful, may get attorney's fees.

625.330. Advertising and trade practices by bakeries; person injured by violations of law may sue for injunction or damages and, if successful, may get attorney's fees.

621.730. Producer or seller of milk may sue for damages any milk dealer, handler, licensee, or purchaser of milk who takes retaliatory steps; if successful, he gets attorney's fees.

583.126. Milk handlers' unfair practices; injured producers may sue for damages and recover attorney's fees if successful.

646.140. Price discrimination in commerce and food commerce; injured person may sue for injunction or damages and, if successful, get attorney's fees.

757.335. Public utilities; person injured by utilities' violation of regulatory law may sue for treble damages, to include attorney's fees if he prevails.

760.020. Treble damages recoverable from railroads for injuries due to illegal conduct; plaintiff gets attorney's fees apparently only if successful.

760.540. Award of damages by Public Utility Commissioner to person paying unreasonable rates to a common carrier, railroad or transportation company; upon failure to pay award, party injured may sue to enforce it and if successful, gets attorney's fees.

Pennsylvania—Purdon's Statutes Annotated—66–1153: Refunds of express rates by public service companies ordered by Public Utility Commission may be sued only by persons for whose benefit order was made and may get attorney's fees, if he prevails.

Rhode Island—General Laws—39–6–14: Suits against railroads for overcharges, injury to merchandise, damage caused by undue delay, or for personal injury; attorney's fees allowed to plaintiff, if he wins more than amount tendered by railroad (if less, then railroad gets attorney's fees).

South Dakota—Code—52:1112: Railroads liable for demurrage to persons injured (failure to supply cars, delays in shipping and delivering, loading and unloading, bills of lading); plaintiff gets attorney's fees, apparently only if successful.

37 Supp. 1913. Unlawful trust or monopoly; person injured may sue for damages to include attorney's fees, if he prevails.

52–0251. Claims against common carrier for loss or injury to property, or overcharge for freight or express; includes attorney's fees, but not if plaintiff wins less than amount tendered by carrier in settlement.

52–0214. Common carriers liable in damages to persons injured by illegal acts, to include attorney's fees, if plaintiff prevails.

22.1515.—Petroleum products, non-compliance with law: retail dealer may recover purchase price from wholesale dealer and get attorney's fee of $25, if he prevails.

Texas—Vernon's Civil Statutes—Art. 6393: Railroads liable to shippers for damage to goods at improperly maintained freight depots; includes attorney's fees, if plaintiff prevails.

Art. 6062. Public utility (oil and gas) unlawfully discriminating against anyone is liable to them for prescribed penalty, including attorney's fees, apparently only for a successful plaintiff.

Virginia—Code—59–26: Person injured in business or property by violation of antitrust law may sue therefor for damages and get attorney's fees, if he prevails.

Wisconsin—Statutes Annotated—133.02: Action to enjoin antitrust violation by private party; may get attorney's fees, apparently only if successful.

HUGH C. KEENAN,
Legislative Attorney.

THE LIBRARY OF CONGRESS,
LEGISLATIVE REFERENCE SERVICE,
Washington, D.C., August 23, 1967.

To: Senate Commerce Committee; Attention: WARREN G. MAGNUSON.
From: American Law Division.
Subject: U.S. and State Statutes Providing for Attorney's Fees.

This will refer to your request of August 14, 1967, referring to our compilation of United States and State statutes providing for attorney's fees in actions involving property damaged in transportation, and in all anti-trust and monopoly situations. It is now asked which State and Federal laws providing for attorney's fees in such cases grant them to plaintiffs only, to the prevailing party, or to a party in the discretion of the court. It is also asked whether there appears to be a pattern in the statutes involving the award of attorney's fees in these types of cases.

We enclose herewith a breakdown of these statutes as to those fees (I) allowable to either party in the discretion of the court, (II) allowable to the prevailing party, and (III) allowable to the prevailing or successful plaintiff, as the most feasible method of sorting out these various laws. We have cited the laws only, for reference to our detailed list of June 13, 1967, and have omitted a description of them. Category III contains the great majority of these laws, since it is the usual practice of statutes to award attorney fees to a plaintiff where he prevails. Generally the law will make it clear, explicitly or by logical implication, that only a successful plaintiff is to receive attorney's fees. Indeed, in only one case was there any real doubt that a plaintiff must prevail to get the fees: North Dakota, Century Code, 49–14–07, mentioned on the list.

As the enclosed list indicates, it is fairly rare for attorney's fees to be awarded to either party in the discretion of the court, or to the prevailing party, especially in State law. The unmistakable pattern that emerges from examination of the law, Federal and State, is to award attorney's fees to the plaintiff, and then only if he prevails in his suit.

For your further information, we have again gone through the laws on the June 13 list and marked it up to emphasize the party to whom the award of fees goes. However, it sometimes cannot be gathered from a statute whether or not the plaintiff must actually prevail in his suit to get the fees. A copy of this list is also enclosed.

HUGH C. KEENAN,
Legislative Attorney.

THE LIBRARY OF CONGRESS,
LEGISLATIVE REFERENCE SERVICE,
Washington, D.C., August 23, 1967.

AWARD OF ATTORNEY'S FEES IN FEDERAL AND STATE STATUTES [1]

I. Allowable to either party in the discretion of the court:
(1) Federal statutes:
15 U.S.C. 77www.
15 U.S.C. 77k.
15 U.S.C. 78i.
15 U.S.C. ooo.
(2) State statutes: None found.

II. Allowable to the prevailing party:
(1) Federal statutes:
17 U.S.C. 116.
22 U.S.C. 277d–21.
35 U.S.C. 285.
49 U.S.C. 322(b)(2).
49 U.S.C. 1017(b)(2).
(2) State statutes: Kansas, Statutes Annotated, 50–505.

III. Allowable to prevailing or successful plaintiff: This is the great bulk of applicable laws, both Federal and State, and under this category should go all of the rest of the laws cited in the previously prepared list. In many cases, the law is clear that attorney's fees should go only to a successful plaintiff; however, it frequently appears that it is the logical intent of the law that this should be the case, though not exactly stated.

HUGH C. KEENAN,
Legislative Attorney,
American Law Division.

Senator LAUSCHE. The committee has received various statements and letters which will be included in the record at the close of the hearing. The record will be kept open for a period of 10 days. The meeting will stand adjourned.

(Whereupon, at 11:35 a.m., the subcommittee adjourned, subject to the call of the chairman.)

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[1] See list of June 13, 1967 on U.S. and State Statutes Providing for Attorney's Fees, p. 109.

(The following letters and telegrams were subsequently received for inclusion in the record:)

STATEMENT ON BEHALF OF THE NEW YORK BRANCH, UNITED FRESH FRUIT & VEGETABLE ASSOCIATION, IN SUPPORT OF S. 858, BY SIDNEY GLATZER, CHAIRMAN OF THE TRANSPORTATION COMMITTEE

The New York Branch of the United Fresh Fruit & Vegetable Association represents the bulk of the merchants who make up the fresh fruit and vegetable industry in the New York Metropolitan Area. New York is the largest market in the United States of perishable produce and in the year 1966, according to information furnished by the United States Department of Agriculture, 82,770 cars of fresh fruit and vegetables were shipped by rail to New York. Rail shipments of perishable produce to New York are, for the most part, "long-haul", originating in the West and Southwest. The approximate value of the perishable products shipped in the year 1966 was $267,369,710.00. The average cost of freight for long-haul shipments of fresh fruit and vegetables is approximately $1,000.00 per car, which sum normally represents approximately one-third of the total value of the car. Where, therefore, two-thirds of the value of a car reflects the cost and risk to the owner of the goods of growing, packing, loading and unloading, and marketing, and one-third of the value reflects merely the cost of transportation, it can be readily seen that transportation policy on the part of carriers has a direct and compelling impact on the perishable industry and, in turn, upon the consuming public.

The fresh fruit and vegetable industry has a vital and crucial stake in the conduct and performance of carriers in the interstate shipment of fresh fruit and vegetables. Improper handling can cause substantial physical damage to perishable products, and delayed transportation will disrupt orderly marketing of the produce which is essential to the life and health of the industry. The only means of self-help available to shippers and receivers of perishable produce to affect the manner in which transportation services are furnished and to cause proper care of its products on the part of the carriers is to establish liability against the carrier for damages sustained as the result of an inadequate performance or other breach of the contract of carriage. If this weapon is ineffective, or so costly as to make its use uneconomic, the welfare and very existence of this industry is jeopardized.

Interstate shipments of perishable produce, as well as all other products, are carried by several independent but connecting carriers. The events of transportation and the circumstances under which a product may be injured or delayed are solely within the knowledge of the carriers transporting the same. Congress has traditionally been concerned with the adverse affects to the economy and otherwise of arbitrary carrier conduct. This concern, for example, was reflected in the Carmack and other amendments to the Interstate Commerce Act (49 U.S.C., § 20(11)). Congress recognized that a shipper or receiver would not be in a position to establish which of several carriers in an interstate shipment was directly responsible for damage or delay, and consequently provided in the aforesaid amendments that suit may be instituted against either the initial or delivering carrier and that such carrier would be responsible for any damages sustained which were caused by any carrier in the line-haul transportation. The legislation now proposed is in the same tradition and is urgently needed to make effective the Congressional philosophy reflected in earlier amendments to the Act.

There is a direct relationship between the costs of litigation and the ability of those adversely affected by arbitrary action on the part of carriers to secure relief. Some carriers, taking advantage of such costs, have refused to effect settlement of legitimate claims, presumably on the theory that the cost of litigation will so inhibit the consignors or consignees that they will not resort to litigation. An example of such arbitrary action is the position of eastern carriers in their handling of delay claims. The law requires that merchandise be transported with reasonable dispatch. For over twenty-five years all carriers accepted their operating schedules as the standard of appropriate performance and paid lawful delay claims if transportation exceeded that schedule. This is still the policy of most carriers, but eastern carriers, anticipating and following widespread mergers, and the elimination thereby of competition among them, have deemed it expedient to reverse this position. In many instances there have been refusals even to investigate the causes for the delay, and on many occasions, no matter the extent of the delay, the eastern carriers have refused to accept responsibility unless the receiver, with no knowledge of the events of transporta-

tion, could demonstrate to them that the delay was negligently caused. This adamant and harmful position apparently is premised on the expectation that the members of the fresh fruit and vegetable industry cannot afford to litigate the claims involved. This premise is well taken.

The investigations of the New York Branch of the United Fresh Fruit & Vegetable Association, and my personal experience as Traffic Manager, for over twenty years, of Yeckes-Eichenbaum, Inc., one of the larger members of the perishable industry, reveal that the average claim, particularly in respect to delay, involves a relatively small amount of money, generally a few hundred dollars. In order to litigate such claim we have found that on an average attorneys require two to four days of pretrial preparation and two to three days of actual trial. The merchant and his key executives and employees are likewise required to expend a similar amount of time. Attorneys' fees, no matter how moderate, for preparing and trying a case, which will involve between four and seven days of his time, must, of necessity, in the over-whelming majority of instances, be greater than the actual amount involved in the claim. Attorneys representing the carriers have specialized knowledge and experience in this field and the carriers normally have a marked advantage over the average merchant in litigating these claims for this reason unless the merchant is in a position to retain competent counsel of equal experience. Consequently, the cost of litigation as reflected in attorneys' fees are a tremendous handicap and hindrance to the effective prosecution of valid and legitimate claims for damages. Economically it is not feasible to prosecute these claims and this, in turn, explains the arbitrary attitude of some carriers in processing claims, and this situation is ultimately reflected in deteriorating service. Transportation being such a vital and significant element in the welfare of the fresh fruit and vegetable industry, a continuation of this trend could result in the progressive deterioration of the industry.

Although the Bill now before Congress providing for attorney's fees in the event a claimant is successful in establishing his right to relief will not solve all the problems which arise from arbitrary carrier action or from inadequate transportation performance, and other remedial legislation may be necessary, it cannot help but be beneficial in encouraging the Claim Departments of the carriers to properly investigate and adjust legitimate and valid claims, and thereby reduce the necessity for litigation with its accompanying hardship and economic loss. The Bill will not only inhibit arbitrary action, but it will tend to insure the equal and uniform treatment of shippers and receivers in various parts of the country. The New York Branch of the United Fresh Fruit & Vegetable Association wholeheartedly supports and endorses S. 858.

STATEMENT OF EDWIN E. MARSH, EXECUTIVE SECRETARY, NATIONAL WOOL GROWERS ASSOCIATION, SALT LAKE CITY, UTAH

Mr. Chairman and Members of the Subcommittee, this statement is presented on behalf of the National Wool Growers Association which has its principal membership in a 22-state area where 86 per cent of the nation's sheep, lambs and wool are produced. The Association was organized 102 years ago and is recognized as the spokesman for the sheep producers of the United States.

We strongly favor S. 858.

While paragraph (11) of section 20 of the Interstate Commerce Act provides that the liability of any common carrier, railroad, or transportation company shall be the full actual loss, damage to property or injury to the property caused by the common carrier, there is no stated provision in this section to the effect that a plaintiff who prevails in a suit is entitled to recover a reasonable attorneys' fee. The National Wool Growers Association and other organizations have tried for many years to have this injustice corrected.

While sections 8 and 16 of the Act do provide for payment of a reasonable attorneys' fee as part of the costs of a suit, these provisions invlove some violation of the Act. Loss, damage or injury to property in transportation is not traceable to the violation of any provisions of the Act. Therefore, while there is precedent in the Act for payment of reasonable attorney fees, the fact that three is no definite language in this regard in paragraph (11) of section 20 has given the carriers an "out" in refusing to pay attorney fees where the plaintiff prevails in a loss, damage or injury suit.

It seems obvious that the carriers would like paragraph (11) of section 20 to remain in its present silent form as far as payment of attorney fees is

concerned. They probably want it to remain silent because it will be a means of discouraging shippers from instituting suits against the railroads. In small claims running up to $500 the railroads are well aware of the fact that under present law, where the shipper has to pay the attorneys' fee, he cannot afford to bring the suit on the basis of the return involved. Also when a shipper does not sue, the railroads frequently offer to settle for 50 per cent of the damages. In some instances the railroads have offered to pay 75 per cent of the damages if they feel they face the threat of a suit.

As a result of this situation which we have been trying for years to correct, shippers are being deprived of substantial sums of money to which they are entitled.

We therefore respectfully and strongly urge favorable action on S. 858.

STATEMENT OF ERNEST FALK, NORTHWEST HORTICULTURAL COUNCIL

I am the Manager of the Northwest Horticultural Council, a trade association, with offices at 1002 Larson Building, Yakima, Washington 98901.

The Council is composed of the following organizations of fruit growers and shippers in Washington and Oregon:

Hood River Traffic Association.
Medford Pear Shippers Association.
Wenatchee Valley Traffic Association.
Yakima Valley Growers-Shippers Association.
Washington State Apple Commission.
Winter Pear Industry.

The first four Associations above-listed are composed of growers, packers and shippers of deciduous fruits in their respective areas. The Council represents the growers of practically 100 percent of all apples and in excess of 90 percent of all other deciduous fruits grown commercially in the two states, totaling approximately 9,000 growers. Thousands of employees are engaged in orchard work, harvesting, and preparing the fruit for shipment.

Deciduous fruits grown, packed and shipped in this area include apples, pears, cherries, plums, peaches and apricots. Apples and pears are by far our principal commodities.

We support S. 858. The underlying reasons are well set forth in the statement Senator Magnuson made (Congressional Record, February 6, 1967—S 1544–1546), when he introduced the bill. Senator Magnuson included in the Record remarks that I made at the annual convention of United Fresh Fruit & Vegetable Association entitled "Guaranteed Schedules, Claims, and Reasonable Dispatch" (Congressional Record S 1545–6). Rather than encumber the record in this proceeding by duplicating the material Senator Magnuson included in the Congressional Record, I will merely state that in my opinion the statement by Senator Magnuson is sound and that the Northwest Horticultural Council believes that S. 858 should be enacted into law. To supplement my earlier statement, I want to refer briefly to a few very recent experiences.

In the mail this morning I received a copy of a letter from Perham Fruit Corporation of Yakima addressed jointly to the Presidents of the Union Pacific Railroad, Atchison, Topeka & Santa Fe, Pennsylvania Railroad and Toledo, Peoria & Western. The shipper gave the case history of two cars of cherries shipped to Baltimore, Mayland and routed UP–AT&SF–TP&W–PENN. Car PFE 301225 was shipped on June 25 to Baltimore to arrive early July 2, with 1 day leeway, for sale on July 3, prior to the 4th of July holiday. The car was received by the AT&SF at Kansas City in "bad order condition". It was available for sale in Baltimore on July 7—the 12th morning on a schedule that calls for delivery 7th morning.

Car PFE 8769 was shipped from Grandview, Washington on June 28 by the same routing. Apparently the car was lost without a waybill for 3 or 4 days. It was not available for sale in Baltimore until July 10—the 12th morning after the car was shipped. The regular schedule for this service is 7th morning. Some cars make East Coast terminals on the 6th morning.

On July 3, 1967 Mr. Freshwater, President of Perham Fruit Corporation, called me with respect to a number of cars of cherries which they had shipped to Eastern markets. Cars shipped on June 26, June 28 and June 29 to New York City were all available for sale on the Market on July 5. This makes the transit time respectively 9th morning, 7th morning and 6th morning. These are mentioned only because they are very recent examples showing the deterioration in service and the failure of the carriers to maintain a reliable schedule on which shippers can depend and rely.

Shippers endeavor to space their shipments to provide a steady flow of supplies and to avoid a glut on the auction market on any particular day. When there is a surplus of cars on the market, prices are very substantially lower than when the cars arrive in a regular sequence. I have had many reports from shippers that the service offered by the railroads has continued to deteriorate and currently is the poorest it has been for more than 20 years. Waybills are lost, diversions are ignored and cars are permitted to sit on track; car after car, after car arrives off schedule.

Mr. Stuart T. Saunders, Chairman of the Board of Directors of the Pennsylvania Railroad Company, in verified statement No. 11 before the Interstate Commerce Commission in Ex Parte 256, acknowledged that the Pennsylvania Railroad has been combining road trains, frequently causing the trains to arrive late at final destination and also has reduced the number of classification crews and industry switching crews and has combined transfer runs which often causes cars to miss their scheduled connections.

There is no excuse for poorer and slower services in 1967 than was provided prior to 1964 including during World War II years or the 30's. I am convinced, and many shippers are also convinced, that the withdrawal in 1964 of the Eastern carriers from their established claims policy is largely responsible for the poorer service. Eastern carriers consistenly refuse to pay claims for delay, asserting that cars which were delayed as much as 4 or 5 days "were delivered with reasonable dispatch". The railroads appears to be making no great effort to get the cars through on time apparently because they feel there is no financial penalty when they fail to do so. In most instances the Eastern carriers refuse to settle claims for delay or will make only a nominal settlement. Frequently shippers will accept much less than they are legally entitled to because the expense of litigation is disproportionate to the amount involved. Shippers can not afford to prosecute many valid claims due to the attorney's fees and other nonrecoverable costs that are involved.

To effectuate the policy of the Carmack Amendment to permit the shipper-receiver to recover the full damages sustained by the carrier's failure to fulfill its obligation to transport the car with reasonable dispatch, plaintiffs should be permitted to recover reasonable attorney's fees in cases in which they are successful. If S. 898 is enacted I believe the carriers will adopt a fairer and more reasonable claims policy and, more importantly, the carriers will again make a reasonable effort to deliver our perishables with reasonable dispatch and according to schedule. We urge that S. 858 be favorably reported and enacted into law at the earliest possible date. Enactment of S. 858 should spur the carriers, particularly the Eastern roads, to live up to their obligations and to resume their earlier policy of making a sincere effort to have shipments of fruits and vegetables available at market on the due date, based upon the carrier's schedule.

STATEMENT OF NATIONAL COUNCIL OF FARMER COOPERATIVES

The National Council of Farmer Cooperatives supports enactment of S. 858, the bill which would amend Section 20, paragraph (11) of the Interstate Commerce Act, 49 U.S.C. 20(11) to provide for recovery of a reasonable attorney's fee in case of successful maintenance of an action for recovery of damages sustained in the transportation of property.

The National Council is a nationwide organization of farmers' cooperative business associations engaged in the marketing of agricultural commodities or purchasing of farm production supplies or both and of State Cooperative Councils composed of such associations. Farmer cooperatives and their farmer-members are large shippers of agricultural commodities, and thus, would be affected by the outcome of this proposed legislation. The latest statistics indicate that 40 percent of the grain and 21 percent of the feed in this country are either marketed or purchased through cooperatives.

The Board of Directors of the Council acting in response to requests for affirmative relief by regional members adopted, on June 15, 1967, the following policy position:

> Recent developments in the movement of commodities by rail have made the problem of collection of claims based on damages caused by delay, loss or damage in transit acute.
>
> Therefore, the Council will support legislation to amend the Interstate Commerce Act in order to provide recovery by successful claimants of a

reasonable attorney's fee incident to litigation to enforce the carriers' obligation for damages for delay, loss and/or damage in transit.

S. 858 is appropriate legislation to accomplish the results sought by our policy and fair legislation which would enable the shipper to achieve justice in damage actions where justice is due.

Two major policy actions with respect to claims by railroad carriers in recent years have caused widespread and growing dissatisfaction of shippers of agricultural commodities with the carriers. First, the railroads have changed their policy with respect to the collection of damages occasioned by delays in transit of perishable commodities and, second, the railroads have changed their policy with respect to collection of damages as a result of the loss of bulk grain or grain products in transit.

Through 1961 railroads paid claims for delay in shipment of fresh fruits and vegetables on the basis of "guaranteed schedule" even though the standard bill of lading provides that "No carrier is bound to transport said property . . . in time for any particular market or otherwise than with reasonable dispatch". The crisis in the collection of damages caused by delay in transit was made acute when on April 30, 1964, Eastern Railroads served notice that effective June 1, 1964 they "will not guarantee delivery of perishable freight at destinations to meet previously agreed cutoff times for the various markets located on our system". Senator Warren G. Magnuson said of this notice when he introduced S. 858, "That means that they [the railroads] have sought to avoid the financial responsibility or burden for the failure of a railroad to maintain the schedules it gives to the fruit shipper."*

The other action which has aggravated the relationship between shippers of agricultural commodities and the railroads was adoption of a new policy regarding payment of loss-in-transit claims on bulk grain and grain products applicable to all claims filed or received after April 1, 1966. With reference to "clear record" cars (no evidence of leakage) the new policy is:

(1) Official weight at both origin and destination, maximum settlement 50 percent of claimed loss—formerly settled at 100 percent.

(2) One official weight and one unofficial weight, maximum settlement 25 percent—formerly settled on the basis of 50 to 100 percent depending on reliability of the unofficial weight.

It is clear that a large part of this loss is occasioned by the deplorable condition of the cars being furnished by the carriers to shippers. In many instances grain is trapped behind defective linings (and hence regarded as contaminated) and in other situations the fault is that of leaking car doors. The policy on car doors is now to allow 50 percent of the loss. These claims were previously settled at 10 percent, except where it was determined that the shipper was negligent in installation of the car door.

At least two other sections of the Interstate Commerce Act, Sections 8 and 16(2), 49 U.S.C. 8, 16(2), now permit recovery of a reasonable attorney's fee by successful plaintiffs in certain actions under Part I of the Act and are regarded by the National Council as precedent for the proposed amendment to Section 20, paragraph (11). In fact, Senator Magnuson said in introducing S. 858, "In favorably commenting on an identical bill on August 18, 1966, S. 3741 of the 89th Congress, the Assistant Controller General of the United States noted:

" 'Such allowance also is in harmony with other provisions of the Act permitting recovery of attorney's fees in other kinds of action.' "*

Section 8 of the Act permits the recovery of a reasonable attorney's fee in a successful action against a carrier for violations of the Interstate Commerce Act. Under Section 16(2) of the Act, if a carrier does not comply with an order for the payment of money within the time limit in the order, suit may be brought in the District Court of the United States. If a plaintiff prevails finally in such action he is allowed a reasonable attorney's fee as part of the cost of the suit.

The National Council is convinced that this legislation would be a first step towards reasonable claim policies by the railroads. Certainly, failure by carriers, to respond to S. 858, if enacted, would encourage rightful claimants to litigate, but it is the carriers who would control this matter. They, in fact, now are solely responsible for the shippers' plight which has necessitated their move for enactment of this legislation.

Likewise, the National Council considered the advisability of supporting legislation which provides recovery by the successful *party* in such an action and rejected this concept since it is the carrier's obligation to pay claims based on

*113 Cong. Rec. S1545 (daily ed. February 6, 1967).

damages caused by delay, loss or damage in transit. Under the law, common carriers are liable virtually as insurers of goods and they should meet their liability without further detriment to the shippers of agricultural commodities.

It has been argued that the carrier and the shipper should arrive at court on an equal footing and that this means each should be entitled to recover a reasonable attorney's fee if successful. The fallacy of this approach is that common carriers are a regulated and hence, quasi-public industry, charged with a higher duty than the public in the matter of damages. The real issue is not one of a different standard between litigants in the same or comparable position, but that of the correct standard in the matter of litigation between a public or quasi-public regulated industry (common carriers) and individual members of the public (shippers). On this basis it is clear to us that the shipper should have his right to a reasonable attorney's fee if he is successful in court because that success alone is cogent proof that the carrier has not fulfilled the obligation imposed by statute to pay such claim.

For these reasons, the Council respectfully recommends your approval of S. 858.

STATEMENT BY JOHN A. KILLICK, EXECUTIVE SECRETARY, THE NATIONAL INDEPENDENT MEAT PACKERS ASSOCIATION, WASHINGTON, D.C.

Mr. Chairman and Members of the Committee, my name is John A. Killick. I am Executive Secretary of the National Independent Meat Packers Association, the offices of which are located at 1820 Massachusetts Avenue, N.W., Washington, D.C. I should like to thank the Subcommittee for giving me this opportunity to express the support of our Association for S. 858, a bill to amend Section 20(11) of the Interstate Commerce Act.

The membership of our Association is comprised of several hundred meat packing plants located throughout the United States, which are engaged in virtually every aspect of meat packing industry operations. The word "independent" in the name of our Association in general means (although there are some exceptions) that our members operate a single plant serving a community or region, in contrast to meat packers whose products have national or near national distribution. Essentially, our members are important factors in the economic and civic life of their local communities, with very little "absentee" ownership or management represented amongst them. The vast majority of our members would be considered small businesses, operating in an industry that traditionally has been one of low profits and fierce competition.

In the last decade or so, the slaughtering and processing plants, once familiar sights in our large urban areas, have moved to country points closer to the source of livestock production. With this geographical upheaval came the need for fast, prompt and reliable service in transporting our meat and meat products into the cities for ultimate consumer distribution. As a perishable commodity, meat requires all the care and speed in transit that the term "perishable" connotes. Under optimum refrigeration conditions, mechanically refrigerated trucks can deliver at least twenty tons of dressed meat on racks, or on rails, in perfect condition from slaughterhouses in the Mid-west to large markets as distant as New York, or Los Angeles, in less than three days. Meat shipped from Sioux City on Friday may be marketed on Monday in San Francisco in just the ordinary course of business.

However, when the ordinary course of business is disrupted by factors beyond the control of the meat packer, but which factors can be directly attributed to the carrier of his product then we believe a claim for compensation should be honored.

Many of our members presently are engaged in the pursuant of claims, both large and small, filed against carriers in an effort to recover losses sustained due to damage, shortage, condition and delay. For example, one Georgia packer has filed a claim in the amount of $419.37 with a motor carrier involving a case wherein delivery was refused by the consignee because the meat products had partially thawed. The delivery by the carrier had been made in the middle of the night at a time when the consignee was not open for business. The driver thereupon contacted a waitress at a nearby restaurant owned by the consignee, but which had no operational integration with the establishment for which the shipment was destined, obtained the signature of the waitress for receipt of the meat products, and then unloaded the products in front of the appointed establishment with no protection either from the weather or from pilferage by passersby.

These processed meat products deteriorated from exposure to inadequate temperature protection, were refused by the consignee, and the claim made by the shipper was twice denied by the carrier. This meat packer has debated the

advisability of litigation and has about concluded that possible legal costs could not be justified by the size of the $419.37 claim.

Another member reports that a carload of meat shipped by rail from St. Joseph, Missouri last January 12 was scheduled for arrival in Baltimore on Sunday, January 15, for unloading Monday, January 16. The carload of meat did arrive on Sunday and was put on the ground early Monday morning. However, when the receiving Baltimore packer ordered it to be picked up for delivery, the carload of meat was missing in the Baltimore trainyards. According to this member, the railroad "found that it had in error shipped it back West and located it in Cumberland, Maryland. It was then turned around and arrived in Baltimore the next morning, Tuesday, January 17."

This Baltimore packer had to pay costs for doubled-up unloading overtime plus special truck deliveries to satisfy customers when initial meat orders were not filled. The railroad, however, dismissed the entire matter by informing the claimant that "frankly, our rates and tariffs are not set up to provide for claims involving overtime on your part."

It is because of cases such as this that we believe action by the Congress is necessary to eliminate the inequity that exists between the shipper and the carrier in the settlement of claims. The passage of S. 858 would give the shipper the needed impetus to litigate fully a claim when the shipper knows he is in the right. In addition, the carrier would be more likely to treat such claims with a more understanding and open frame of mind. Under the present situation, he need give only lip service to the shipper before denying a claim that he realizes is not of sufficient amount to warrant the legal expenses that would be incurred by the shipper. If the carriers were required to pay the legal fees involved in a successful claim by the shipper, we believe the economic incentive would be provided to honor legitimate claims. Also, it would have a collateral effect in being a continuing reminder to the carrier that shipping delays, damage to and shortage of shipped product, play havoc with orderly marketing, and that their services should be the subject of unbroken vigilance. A close watch on the quality of service provided could only result in better service, and thus reduce the number of claims.

We see in S. 858 a constructive approach to the solution of problems faced by meat packers in deciding whether the costs of litigation will exceed the amounts collectible.

We see in S. 858 a stimulus that could encourage the carriers to meet important schedules that would greatly lessen the need of our customers to look to a competing meat packer to fill an order that was delayed for reasons not of our making.

We see in S. 858 a persuasive argument that could be used effectively in obtaining prompt action from a carrier in honoring the claims of meat packers when the facts indicate that the carrier is at fault.

We wholeheartedly concur in the statement made by the distinguished sponsor of the bill, Senator Magnuson, when he introduced the bill on the floor of the Senate last February 6, that S. 858 would make it easier for the small shipper "to realize justice when justice is due".

It is this justice we ask for in supporting S. 858 and urging its speedy consideration and passage.

STATEMENT OF WM. M. MADDOX, CHAIRMAN, COMMITTEE ON PRACTICE BEFORE REGULATORY BODIES, SOUTHERN TRAFFIC LEAGUE

My name is Wm. M. Maddox. This statement is on behalf of the Southern Traffic League. I am chairman of its Committee on Practice Before Regulatory Bodies. I also engage in the practice of law in Washington with offices at 600 Coal Building, Washington, D.C. 20036.

SOUTHERN TRAFFIC LEAGUE

The Southern Traffic League is a voluntary association of shippers, receivers, boards of trade, chambers of commerce and other entities concerned with rates, traffic and transportation generally. The members of the Southern Traffic League are located in the southeastern part of the United States and are concerns varying from small to large which use all modes of transportation—rail, motor, water and air. The membership of the League is restricted to shippers and receivers and does not include carriers by any mode.

THE PROPOSED ADDITION TO THE INTERSTATE COMMERCE ACT

S. 858 provides for the allowances by the court of a reasonable attorney's fee, to be taxed and collected as part of the suit, in actions against carriers for the loss, damage or injury of property being transported by a carrier subject to the provisions of the Interstate Commerce Act. The members of the Southern Traffic League have considered the proposed addition to the present act and strongly urge the enactment of S. 858. It is the considered opinion of members of the League that such legislation is needed and desirable. Its enactment will tend to place the shippers and carriers on a more equal basis in litigation involving claims by shippers for the loss, damage or injury of property handled by the carriers.

As a practical matter, when loss, damage or injury occurs, shippers file claims with the carriers for reimbursement for such injury. Generally the amounts of such individual claims are relatively small. When the carriers decline to settle such claims, or offer settlements which are substantially less than the damage actually sustained, the shipper or receiver, as the case may be, must either forego the claim, accept the proffered inequitable settlement, or else resort to the courts to obtain justice. The Commission has held it has no jurisdiction over claims for loss or damage to shipments via interstate commerce. *S. Landow & Co., Inc.* v. *Boston & M.R.*, 208 ICC 669.

The damages resulting from the loss, damage or injury to property vary in amounts depending upon the value of the shipment and extent of damage, injury or loss. Many shipments are of modest value and oftentimes sustain some damage or injury, but not complete loss. The shippers and receivers are faced with a hard economic fact of life, particularly when the money amount of the damage is not substantial and the carrier declines to settle the claim on an equitable basis. The shippers' only recourse is to engage counsel and bring action in a court of proper jurisdiction.

While attorney fees are not expensive relative to the time and skill required, they are oftentimes equivalent to a substantial portion of the damage incurred, and in many instances would exceed small claims. Thus, even when a most just claim is declined by a carrier and court action must be brought to recover the damages sustained, the attorney's fee alone will exceed the amount of the recovery. Under these circumstances, shippers have no alternative but to abandon their just claims.

S. 858 would provide for the allowance of a reasonable attorney fee when a shipper or receiver is successful in prosecuting a claim for loss, damage or injury before the courts. The enactment of this legislation will probably result in the carriers tending to make more fair and equitable settlements of claims for loss, damage or injury to property incurred in the course of transportation. This is so because the carriers will recognize that the failure to settle a just claim will not only probably result in court action, the result of which will be entering of a judgment against the carrier for the actual damage to the property for which it is responsible, but also a reasonable attorney's fee. Of course, no attorney fee would be assessed when a frivolous claim is unsuccessfully prosecuted.

The courts, generally comprised of previously practicing attorneys, are fully aware of the value of an attorney's services in handling a given case and can be trusted to provide for reasonable attorney fees commensurate with the services performed. In effect, legislation providing for the allowance of such reasonable attorneys' fees is an equitable approach to allowing a shipper or receiver to be properly compensated for loss, damage or injury to their property sustained during the course of transportation. On the basis of the existing law, when a shipper is required to resort to the courts to obtain justice, at best only partial justice is received in that the damages recovered are always reduced by the amount of the legal fees required to be expended to obtain a just award of damages.

The enactment of S. 858 will tend to reduce the temptation on the part of the carriers to fail to settle claims on an equitable basis. It is doubtful that the courts would allow any substantial attorney fee where the final judgment obtained was substantially the same amount offered by a carrier in settlement. Thus, this legislation would also result in the shippers accepting equitable settlements when proffered by the carriers and thus would not encourage litigation.

The Southern Traffic League earnestly supports the enactment of S. 858 and urges that this Committee report it favorably.

UNITED FRESH FRUIT & VEGETABLE ASSOCIATION,
Washington, D.C., August 25, 1967.

Hon. FRANK J. LAUSCHE,
Chairman, Subcommittee on Surface Transportation, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: I am enclosing a copy of a supplemental statement in further support of S. 858 and shall appreciate its being placed in the record following my original testimony on July 17, 1967. In this statement, I have attempted to answer questions posed by you at the hearing on July 17 concerning the granting of attorneys' fees to the carriers in the event they were successful in a court action involving loss of property.

I hope that the additional information contained in this statement will answer those questions raised by you at the hearing and that you will give favorable consideration to this bill in its present form.

Sincerely yours,

DURWARD SEALS, *Traffic Manager.*

SUPPLEMENTAL STATEMENT OF DURWARD SEALS, TRAFFIC MANAGER, UNITED FRESH FRUIT & VEGETABLE ASSOCIATION, WASHINGTON, D.C.

Mr. Chairman and Members of the Subcommittee, this statement is supplemental to my statement of July 17, 1967 and my testimony in support of S. 858. The Chairman inquired as to whether I believed that the granting of attorneys' fees should be on a reciprocal basis so that if carriers were successful they would also be granted attorneys' fees. I should like to address myself in this supplemental statement further to that question.

Since my appearance before the Subcommittee, I have discussed this matter with many segments of this association and of this industry, as well as with other shipping groups. While we strongly support S. 858 in its present form, we would be opposed to granting attorneys' fees to railroads. We feel that such a change would be out of harmony with the broad remedial purposes of the Carmack Act and its amendments (49 U.S.C. 20(11)), would overlook the carrier abuses which gave rise to the introduction by Senator Magnuson of S. 858 in its present form, and might compound the shippers' difficulties by placing in the hands of some carriers a weapon which they do not require and which they might use for oppressive purposes.

We have no objection to the proposal put forward by the Honorable William H. Tucker, Chairman of the Interstate Commerce Commission and would support the proviso set forth on page "4" of his statement, to-wit:

"And provided further that no such fees shall be taxable except upon a showing that the plaintiff has filed a claim with the carrier or carriers against whom the action has been brought and, that such claim has not been paid by the carrier within 90 days of the receipt of the claim by such carrier or carriers."

We believe that this is in harmony with the draft of S. 858 as submitted by Senator Magnuson, and would further the remedial purposes of the proposed legislation.

Among the reasons why no reciprocal fees are required by the railroads are:

1. As has been amply demonstrated by the statements and testimony in support of the legislation, fees to the shipper are required to remedy carrier abuses and arbitrary carrier conduct which have visited hardship upon members of the shipping public throughout the country.

2. No reciprocal abuses have been shown by shippers nor has it been shown that the carriers are in need of some additional reciprocal protection. Section 20(11) would appear specifically to mandate the payment by the carrier of the shipper's full loss. It provides that the carrier "shall be liable . . . for any loss, damage or injury caused by it . . . and no contract, receipt, rule, regulation, or limitation of any character whatsoever shall exempt such common carrier, railroad, or transportation company from the liability imposed; . . ." It provides specifically for liability "for the *full*, actual loss, damage or injury". However if the carrier refuses to recognize this liability and arbitrarily refuses to make payment or to deal justly with the claim, at present the statutes impose no sanction. Where, on the other hand, the shipper seeks to collect an unjust claim, the carrier is adequately protected by the sanctions of the Elkins Act (49 U.S.C., ss. 41), which makes unlawful unjust claims. Further, as Chairman Tucker of the I.C.C. has pointed out, where the carrier, arbitrarily or otherwise, defends against a claim and loses the lawsuit (under ss. 20(12)) it can recover against the other participating carrier in the line haul not only their proportion of the

recovery by the plaintiff, but also the legal fees and the expenses of defending.

3. In claims litigation the parties do not stand on an equal footing:

a. The carrier is in possession of the records of transportation and is, or should be, aware of its own conduct which gives rise to the claim. The shipper, on the other hand, is not, and in the normal case cannot be, aware of these facts.

b. The carrier is normally defended by counsel who are usually members of its own legal staff and who are expert in transportation matters. Its employee witnesses normally travel by railroad pass and are usually available at the carrier's pleasure. Shippers, on the other hand, must rely on independent attorneys who are not payroll employees. Witnesses must be sought from distant points from consignees or other persons having a more or less tenuous association with the transaction. These witnesses, if brought to the trial, do not travel by railroad pass and are not as readily available to the plaintiff.

c. To prevail in litigation the plaintiff must affirmatively establish his cause of action by a preponderance of the evidence. However, he may lose for many reasons, even though he has a just claim. The death or unavailability of a material witness, the absence of an essential document or failure to prove an essential fact, a mistake in his remedy, a suit in the wrong forum, and many other factors may result in the non-success of the plaintiff.

d. The carrier need do nothing until the plaintiff has affirmatively met his burden of proof in the case. It can then, as it often does, make a settlement "on the courthouse steps". The shipper, having gone to the expense of preparing has no alternative but to then accept a payment which is non-compensatory and does not, in any event, compensate him for the loss of time of himself, his witnesses, and the other expenses incurred. S. 858, as proposed, would not, in any event, compensate a shipper for the expense of preparing for trial, the loss of time of key employees, and other similar costs. It is only designed to deal with one aspect of that litigation, i.e., a reasonable attorney's fee, and that only if the plaintiff wins.

4. The Carmack Act, the Hepburn Amendment, and the various amendments to ss.20(11) are remedial legislation intended to aid the shipping public and to help redress the economic and legal disadvantage of the public in dealing with the railroads. This Congressional policy has tended to aid shippers by making it desirable for railroads to dispose of claims in their claim departments. The need for the admendment sought now (S. 858) arises from the arbitrary action by the carriers. It is succinctly set forth in Senator Magnuson's statement in introducing the Bill (see page "3" of my statement to the Subcommittee on July 17, 1967). Since the necessity for this legislation arises from the conduct of the carriers, it does not seem appropriate that in dealing with the problem created by them that Congress should grant to them reciprocal rights of fees. As Senator Magnuson said, "By establishing meaningful financial responsibility for delay, carriers' performance will improve, which in turn could lessen the amount of such claims". The granting of legal fees to a carrier who succeeded in defeating a claimant in court would, on the other hand, be a retrogressive step and could, in some instances, be an oppressive weapon in the hands of the party to the litigation with the greatest economic power.

The present plight of shippers, as can be seen from the testimony and the statements before this Committee, arises from the action by the Eastern railroads alone, who have departed from well-established practice throughout the railroad industry for over thirty years and which operated with reasonable fairness. It is significant that this step by the railroads closely followed their agreements to merge. Thus as these mergers succeed, shippers will be faced with a lessening of competition between these railroads and a greater concentration of railroad economic power.

We respectfully urge that no need for a reciprocal right of attorneys' fees by railroads has been shown and that such an extension is undesirable.

We wish to thank the Committee for the opportunity of presenting these additional views.

CHAS. E. BLAINE & SON,
Phoenix, Ariz., July 21, 1967.

Re A–16—S. 858, amend Section 20(11) of the I.C.C. Act—Attorney's Fee.

Hon. FRANK J. LAUSCHE,
Chairman, Subcommittee on Surface Transportation,
Senate Office Building, Washington, D.C.

DEAR SENATOR: On the 17th instant when I was presenting my testimony in the above entitled subject, as shown on pages 7 and 8 of my prepared statement when I stated:

"In some instances where claimants have refused to accept less than the amount of the full actual loss, damage, or injury, and signified their intention to bring suit * * * the carriers have informed claimants that the latter would have to pay their attorneys' fees, and the carriers have offered to and did pay on such claims the amount of the full loss, damage, or injury, *less the estimated amount of the attorneys' fees.*"

I was asked to state the location of such transaction. I replied that it was on the Union Pacific west of Cheyenne, Wyoming, I did not recall the name of the claimant but stated that I would furnish it upon my return to our office. That is the purpose of this letter.

Our file shows that two claims were filed which were considered by the Union Pacific on one record. Said claims were filed by Martin Wilson and his son, Algot F. Wilson, Granger, Wyoming. The claim of the former was for $870.00 and that of his son for $135.55, making total of $1,005.00. The former was covered by Union Pacific Claim 46–M–3680 and the latter, 46–M–3681. In January, 1947, these claims were originally filed with Homer N. Johnson, Claim Agent, Union Pacific Railroad, 1416 Dodge Street, Omaha, Nebraska.

However, our file shows that five representatives of the Union Pacific handled these claims with Mr. Martin Wilson. They were Melvin E. Hurd, Claim Agent, Union Pacific, Pocatello, Idaho, George W. Peterson, D.C.A., Union Pacific, 1416 Dodge Street, Omaha, James F. Cox, G.C.A., Union Pacific, Omaha, M. E. Goodnow, D.C.A., Union Pacific, 10 Main Street, Salt Lake City, Utah, and John R. Mulick, A.G.C.A., Union Pacific, 1416 Dodge Street, Omaha, Nebraska.

These claims were referred to us through the efforts of Mr. Russel Thorp, Secretary-Treasurer, Chief Inspector, Wyoming Stock Growers Association, 1816 Carey Avenue, Cheyenne, Wyoming. Thereafter we had voluminous correspondence with claimants and the various representatives of the Union Pacific. Mr. Goodnow in report made at Kemmerer, Wyoming, in October 1947, stated in part:

"Drove to Moxa and found both Algot and Martin Wilson at home. Martin Wilson done all the talking and said there was nothing he could do about it now as turned it over to Mr. Blaine, Traffic Manager, for livestock association in Phoenix. Asked him if Blaine was an attorney and if he had a contract with him. Told him he and I could agree on some figure and voucher could be sent through Blaine so he would get his fee but he would not listen to any proposition of that kind."

Thereafter the matter was settled by payment of $800.00, which we asked be mailed direct to Mr. Martin Wilson. Said amount of $205.00 less than the aggregate of the original claims.

Incidentally, our fee was but $25.00. Mr. Wilson on May 17, 1948, mailed us his check and thanked us for our service which, he stated, was conducted in a most prompt manner.

Yours very truly,

CHAS. E. BLAINE.

J. S. BURAK TRAFFIC BUREAU,
Philadelphia, Pa., August 1, 1967.

Hon. Senator FRANK J. LAUSCHE,
Chairman, Surface Transportation Committee, Senate Committee on Commerce, Senate Office Building, Washington, D.C.

DEAR SENATOR LAUSCHE AND MEMBERS OF THE SUBCOMMITTE: Before submitting this supplemental statement in support of S. 858, I would like to thank you for having given me the opportunity to testify on July 18.

During the hearings you made reference to the concept of Mutuality as it may apply in the law. To equate the carrier and claimant, then invoke this concept by providing for reciprocal attorney's fees, would, in my opinion, be absolutely wrong. The moment a claim is disallowed, our respective positions are no longer equal. Only the carriers are in a position to know what happened to the vehicle in transit. The Supreme Court of the United States, No. 292—October Term, 1963 in Missouri Pacific Railroad Co. vs. Elmore and Stahl, recognizes this fact.

On claims involving delay most carriers will withhold information concerning the specific causes. Instead we are given a standard excuse that the shipment was handled with reasonable dispatch. The following is an abstract of the court decision defining reasonable dispatch:

"In the case of N. Y. P. & N. R. R. Co. v. Peninsula Produce Exchange of Maryland, 240 U.S., 34, the United States Supreme Court recognized loss of market-

ability due to failure to carry with reasonable dispatch as an element of damage and that there can be no better standard for determining what constitutes reasonable dispatch than comparison of the ordinary time taken with that actually taken, in the absence of evidence tending to explain and excuse the delay so shown to have occurred."

Only the excepted causes as contained in Section 1–B of the Bill of the Lading will excuse the carrier of responsibility for delay. It follows that upwards of ninety percent of all disallowed delay claims are not handled with reasonable dispatch. Moreover, the only way we can obtain the actual causes of delay is to start suit and force the carriers to make the disclosures in court.

Many claims are processed through my office. Prior to the abandoment of the guaranteed schedules by the Eastern Carriers on June 1, 1964, the number of disallowed delay claims placed into litigation did not average more than two a year.

There have been some unfounded statements that passage of S. 858 in its original form will lead to many unwarranted suits. These are definitely incorrect. To the average claimant, suits are a nuisance. They involve time and expense spent in preparation; cost of witnesses; time spent in court; also, your own attorney's fee, should you lose.

The carriers can eliminate most of the causes for litigation by improving their operations and handling the traffic on schedule. Suits are not filed because of honest differences of opinion but, rather, arbitrary policies spawned by the carriers. Some hold that they act in concert. From my point of view, they simply play "follow the leader" within certain prescribed territories. They should not be rewarded for avoiding liability in contravention of Section 20–11 of the Interstate Commerce Act.

Reasonable attorney's fees should be allowed only to the plaintiff. This would provide a mutual condition—this would be the equalizer as intended in S. 858.

Senator Magnuson's statement relating to S. 858, as published in the Federal Register, February 6, 1967, makes it quite apparent that the prime reason for sponsorship was to alleviate certain injustices perpetrated by the carriers upon the shipping public. Reciprocal fees would permit the injustices to continue, serve to intimidate potential litigants and, in general, render the bill ineffective.

On behalf of my constituents and myself, I respectfully urge approval of S. 858 in its original form.

Yours respectfully,

J. S. BURAK.

CHICAGO, ILL., *July 21, 1967.*

Hon. Senator FRANK J. LAUSCHE,
Chairman, Surface Transportation Subcommittee,
Committee on Commerce, Washington, D.C.

DEAR SENATOR LAUSCHE AND MEMBERS OF THE SUBCOMMITTEE: In addition to my written and oral statements presented to you and your Committee anent S. 858, I take the privilege of addressing you again in response to your queries concerning the advisability of the Bill being treated on a "reciprocal" basis. I would be opposed to this Bill imposing "reasonable attorney's fees" against the plaintiff for the following reasons:

1. An examination of the Federal statutory provisions dealing with the subject of "reasonable attorney's fees" discloses (a) most do not include reciprocal features; (b) those which do employ "reciprocal" provisions indicate an equitable degree of mutuality of the litigants. This feature is absent in the situations now being considered by your Committee.

2. None of the Federal provisions involving reciprocal features deal with quasi public defendants. It would appear from the decisions of the courts, and especially the Meeker v. Lehigh Valley Railroad case referred to in my brief, that quasi public business such as carriers should bear a higher degree of exposure than ordinary litigants involved in adversary proceedings. In my judgment, to treat public and quasi public corporate interests in the same fashion as members of the public at large, would be inequitable. I believe this principle is well supported by law.

3. The equities would favor a non-reciprocal approach. The carriers have a distinct advantage in seeking redress for operational revenue before the Interstate Commerce Commission, whereas the shipping public is not afforded the same right of redress, nor do they have a right under any other agency, except that provided by the court system for loss and damages involved in transit.

It is to be noted that recent statutory laws of the states, which have provided for relief in the specific cases against the carriers for loss and damage, are not

reciprocal, and have recognized the disparity of mutuality that exists between the parties.

These imbalances create an inequity which can only be resolved by approving the bill in its present form.

Respectfully yours,

H. HASKELL LURIE.

WESTERN GROWERS ASSOCIATION,
Los Angeles, Calif., June 29, 1967.

Re S. 858.

Senator FRANK LAUSCHE,
Chairman, Subcommittee on Surface Transportation, Senate Office Building, Washington, D.C.

DEAR SENATOR LAUSCHE: Western Growers Association is comprised of the growers and shippers of vegetables and melons in California and Arizona, who produce over 40% of the U.S. total of these crops, and ship over 300,000 carlot equivalents of these commodities, in fresh form, annually. Their production represents in excess of $.5 billion to the nation's economy each year.

S. 858, introduced by Senator Warren G. Magnuson, which proposes to amend the Interstate Commerce Act to provide for the recovery of reasonable attorney's fees in the case of a successful maintenance of action for recovery of damages sustained in the transportation of property is before your Committee for consideration. Our people are strongly in favor of this legislation.

On June 1, 1964, the Eastern railroads arbitrarily discontinued the practice of delivering fresh fruits and vegetables on a regularly scheduled basis. Scheduled times of arrival in the terminal markets have been a vital and integral part of the marketing of California and Arizona perishable crops during the past fifty years.

The rail carriers advised all shippers of fresh vegetables, melons and fruits that effective June 1, 1964 they would no longer handle perishable traffic under the published schedules and cut-off (delivery) times then in effect. The carriers announced that after that date they would handle shipments of perishables only under the "reasonable dispatch" terms of the bill of lading. The discontinuance of this long-established service caused confusion in orderly marketing procedures and resulted in losses to Western vegetable and melon farmers.

The loss of "guaranteed" schedules, coupled with the attitude of the rail carriers in rejecting market decline claims due to carrier delays, works an extreme hardship on the farmer, as well as shipper or receiver involved—especially when their only resort is legal action and more often than not the legal fees will exceed the face value of the claim.

The marketing position of the Western vegetable and melon industry is not such that it can stand additional road blocks in its efforts not only to maintain but to regain a fair share of the consumer's food dollar. Production gains have surpassed merchandising progress so that today the fruit and vegetable industry's percentage of retail food sales is about 8%, due to lossses to the processed and convenience foods.

Gratifyingly, however, recent trends indicate that the fresh industry is regaining some of its lost markets. However, in order to continue progress towards recapturing the lost portion of the consumer's dollar, it is essential that produce be transported to the marketplace as fast as possible in keeping with the economics involved, as price is always important. The fresh fruit and vegetable industry has little to offer other than freshness, and this means flavor, appearance and taste. Moreover, increased shelf-life is all important to the retailer and definitely to the housewife, if she is to be retained as a steady buyer.

A committee of vegetable and melon growers and shippers joined with other segments of the produce industry from various parts of the nation in meetings with the executives of the Eastern rail carriers on May 19, 1964, September 17, 1964 and September 29, 1966. At each of these meetings the representatives of the fruit and vegetable industry appealed for restoration of the "guaranteed" schedules, which had been furnished by the carriers for nearly five decades and/or establish an assured "arrival time" which is conducive with the type of service they could now perform. The stress was placed at each session on the adverse effect which had developed in the orderly marketing of these perishable foods, including the fluctuations in prices and returns to farmers occasioned by irregular arrival of shipments in the marketplace, quality detrioration due to delays, etc. Additionally, efforts since 1964 to obtain carriers' definition of "reasonable dispatch" for the guidance of our industry, have proved fruitless.

Notwithstanding railroad claims of faster schedules because of better equipment, actually no real progress is evident in the providing of a dependable service for the orderly marketing of our perishable food commodities—in fact, the service has become more erratic.

The vegetable and melon industry is dependent upon the whims of Mother Nature, and balancing supply and demand is a precarious occupation at best so that anything other than a dependable transportation schedule can only result in market gluts or famines and eventual decline in consumption. Those at the American table don't eat twice as much tomorrow when they can't get the product today.

The Attorney's Fee Bill, S. 858, will restore some of the orderly marketing by making it economically practical for a small grower to sue for rejected claims where carrier negligence is evident. Suits are not generally filed at the present time, unless there is sufficient claim money involved to pay for the attorney's fees on each case. Many claims are now entertained and/or disposed of solely at the discretion of the carrier. The small grower often accepts a minor settlement and refrains from seeking recourse in the courts because it is not worthwhile due to the moderate amount involved or his hesitancy to assume the legal fees entailed.

In other words, growers, especially the small farmer, cannot combat the legal divisions nor match the funds of the giant rail carriers and, therefore, is the only one that now sustains financial loss from deterioration and/or delays in the marketing of his production caused by the shortcomings of rail carrier service.

Our people urgently appeal for your favorable consideration of S. 858.

Yours very truly,

FRANK W. CASTIGLIONE,
Executive Vice President.

WESTERN GROWERS ASSOCIATION,
Los Angeles, Calif., August 25, 1967.

Senator FRANK LAUSCHE,
Chairman, Subcommittee on Surface Transportation,
Senate Office Building, Washington, D.C.

DEAR SENATOR LAUSCHE: May we supplement our presentation of June 29, 1967, relating to S. 858, with the enclosed self-explanatory telegraphic appeal to The Honorable William H. Tucker, Chairman, Interstate Commerce Commission.

S. 858 may not fully solve the problems of erratic, undependable transportation service being experienced by shippers of perishable foods; however, in the opinion of our people, it would serve to make the rail carriers somewhat more conscious of their responsibilities for the public welfare.

We hope it is not asking too much to request that this be made a part of the record.

Yours very truly,

FRANK W. CASTIGLIONE,
Executive Vice President.

[Telegram]

LOS ANGELES, CALIF., *August 24, 1967.*

WILLIAM H. TUCKER,
Chairman, Interstate Commerce Commission, Washington, D.C.:

The rail carriers continue to be weighed in the balance and found wanting. Vegetable and melon growers of California and Arizona, who produce over 40 percent of the U.S. total and ship in excess of 300,000 carlot equivalents of these foods to the Nation's markets appealed, by our August 10 telegram, to the Commission for urgent assistance in alleviating the severe inadequacy of suitable refrigerator cars to move the perishable vegetable and melon crops to the national markets.

Additionally, it is the consensus of western farmers that there appears to be almost a complete breakdown on the part of rail carriers in transporting their perishable products to the marketplace. Transportation failures by rail carriers have caused the essential orderly marketing of such foods to be distorted. It is almost unbelievable to learn that car after car of western perishables arrive in terminal markets 2, 3, and as many as 5 days late. The condition of these foods for the consumer is commensurate with the type of service rendered by the rail carriers.

Growers and shippers strongly feel that the railroads, especially carriers serving official territory, are taking advantage of nonguaranteed schedules, rendering undependable, perfunctory service and almost brutally handling these highly

perishable commodities. Moreover, many cars are reaching markets low on ice, many are being shipped en route for repairs and, as several farmers have reported, believe it or not, some cars are lost in transit.

In summary, our food producers feel that the railroads are failing in their franchise as a public utility and their inept performance in taking care of commerce of perishables is adversely affecting public welfare.

May we again appeal to the Commission that its Bureau of Service or other division instigate and make a thorough, complete investigation on its own with the objective, if it is consistent for the Commission to do so, of requring rail carriers to reestablish service which will be dependable and provide orderly marketing of perishable foods. Our people feel public transportation facilities must be required to correlate with producers in supplying consumers with foods of the best quality possible.

WESTERN GROWERS ASSOCIATION.
FRANK W. CASTIGLIONE,
Executive Vice President.

NATIONAL GRANGE,
Washington, D.C., July 3, 1967.

Senator WARREN G. MAGNUSON,
Chairman, Senate Commerce Committee,
Washington, D.C.

DEAR MR. CHAIRMAN: We wish to direct your attention to S. 858 introduced by you on February 6, 1967, which we whole-heartedly support.

No doubt this legislation, which has long been delayed, has the unanimous support of shippers throughout the country. It is distinctly to their advantage to have this legislation become effective.

Those of us that have had extensive and practical shipping experience over the years can quickly appraise the justification for the need of such legislation which we hope will be enacted without delay.

This writer, as undoubtedly has been the case of many representatives of both small and large shippers, has on occasion advised their principals not to litigate when common carriers refused to pay legitimate claims. It was recognized, in many such instances, even should shippers obtain a favorable court verdict, that following payments of court costs and attorney fees they would inherit a net loss through such activities.

We are indeed pleased that the inequitable situation, to which the above refers, has had the attention of your Committee. Please accept our unrestricted support of this legislation.

Yours very truly,

CHAS. B. BOWLING,
Transportation Consultant.

M. & C. PRODUCE CO., INC.,
Philadelphia, Pa., June 22, 1967.

Senator FRANK J. LAUSCHE,
Chairman, Senate Surface Transportation Subcommittee,
Senate Office Building, Washington, D.C.

DEAR SENATOR LAUSCHE: It will be appreciated if you will place this letter in the record of hearing involving Senate Bill #858—Attorney's Fees as this company has been experiencing difficulty in collecting loss and damage claims lodged with Eastern Railroads.

We are in favor of passage of this bill which we believe will be a deterrent in Eastern Railroad's policy of disallowing claims and at the same time avoid assuming attorney's fees.

Your kind attention will be appreciated.

Very truly yours,

S. M. PERO,
Traffic Manager.

BUD ANTLE, INC.,
Salinas, Calif., June 26, 1967.

Senator FRANK J. LAUSCHE,
Chairman, Senate Subcommittee on Surface Transportation, U.S. Senate,
Washington, D.C.

DEAR SENATOR LAUSCHE: I desire to submit this statement with the request that it be made a part of the record with regard to S. 858: Attorney's Fee Bill to amend Section 20(11) of the Interstate Commerce Act.

Eastern rail carriers, notably the New York Central and the Pennsylvania railroads, have taken a hard nosed position with regard toward paying loss of market claims due to delay or negligence involved following diversions of cars and failure to make proper delivery and placement of cars at terminal market areas. It is also above carriers contention that, because a shipper elects to utilize piggyback service under Plan 2, a one day longer perishable schedule is to be allowed insofar as payment of market decline claims are concerned. No valid reason has, to my knowledge, ever been given. Carriers merely take this arbitrary stand and position and it is time that they should be made to account for these additional delays which cause disorderly marketing, shorten shelf life of perishable products and, in general, create chaos to our industry.

Since July 1, 1964, the eastern carriers have refused to pay most claims filed for loss of market due to delay claiming "reasonable dispatch". Incidentally, this terminology is also rather vague and I sincerely doubt whether or not this can properly be defined in a concrete fashion to satisfy a given situation at a given time.

If a carrier seriously delays a shipment wherein a loss can be proven by any receiver due to market decline or other conditions arising causing such loss, then carriers should voluntarily reimburse shippers or receivers. It is readily apparent that in order to recover these losses, law suits must filed which result in additional attorney's fees and court costs as well as valuable time on the part of both plaintiffs and defendents. We, ourselves, have been forced to file suit in an effort to collect valid loss claims.

To show the extremes with which carriers have gone in an effort to avoid payment of claims, we had a situation where two cars of lettuce were shipped on a single day to one consignee located in Philadelphia, Pennsylvania. Both cars were routed the same and both experienced a three day delay missing a Friday market date due versus a Monday market first business day available.

I was flabbergasted when cars came up for claim conference and the claim adjustor showed me correspondence wherein the eastern carrier admitted negligence on one car and a claim was paid. The second car carrier claimed "reasonable dispatch" and, therefore, disallowed claim. This was indeed ludicrous and resulted in additional correspondence and delay in receiving settlement, which is still forthcoming.

The length of time which many shippers and receivers are forced to await payment of claims by rail carriers is indeed lengthy and costly. Measures should be created and action taken wherein all claims filed by an injured party should be settled within a period of nine months from filing date.

I am enclosing segments of a general guide which claim adjustors and investigators use in determining and establishing carrier liability. Some of the reasons attributed to delay are listed on page 15. Carriers, however, are refusing to make voluntary payment of claims even though delay or negligence can be attributed to these reasons. Legal action invariably follows.

Should you require any further information or testimony, I shall gladly volunteer same.

Sincerely,

ALFRED J. NAVAROLI,
Vice President, Traffic.

[Enclosure]

ASSOCIATION OF AMERICAN RAILROADS, OPERATIONS AND MAINTENANCE DEPARTMENT, FREIGHT CLAIM DIVISION

NEGLIGENCE

It is particularly important that the investigator gain a full understanding of the meaning of negligence and its application to transportation. The dictionary defines "negligence" as carelessness—a simple definition.

In law, negligence is defined as "failure to do or forbear that which a reasonably prudent person would have done under the circumstances, or failure to exercise the care that the circumstances justly demand, whereby some other person suffers injury." As can be seen, the shipper and the consignee may also be guilty of negligence.

A good thing to remember is that the carrier must show that it did not fail in its duty. Although the claimant must show by proper evidence that he was injured by the carrier, the carrier must also show that it was not at fault; otherwise it must make good the loss—the burden of proof, as to freedom from negligence, is always on the carrier.

As related to claims, there is an actual or a presumed failure of the carrier to perform its legal duty. A distinction must be made here, however, because a carrier may fail in its performance and still not cause a loss to the owner of the shipment. For example, a car may be delayed by one carrier and miss a market which could not have been made in any event because of failure of shipper to divert the car in time to make first available train of another carrier; or a car may be delayed with no loss suffered because the sale of the load equalled or exceeded the reasonable market value on the date due.

In any event, negligence must result in loss or injury. Where there is no loss nor injury there is no liability.

The carrier cannot rely upon the owner's carelessness or negligence as an excuse for failure to use reasonable diligence to safeguard the owner's interest. The investigator will find examples in the undertaking to carry freight that was knowingly in frail condition, etc., and that might have been safely handled but was not.

However, the contributions of the shipper and consignee can properly be taken into account. The respective responsibilities become a question of fact to be uncovered by investigation.

The carrier can still be liable although not negligent. This calls attention to operating failures which, though not representing negligence, *may hold carrier for not exercising proper care as an insurer under common law.*

The investigator will encounter examples thereof when station or yard forces undertake to do something which is not contemplated in the contract of carriage and thus create a situation which imposes liability.

The investigator will also meet this situation in the handling of salvage or refused cars and in the diversion of cars, and cars which could have made a certain train but did not. There are other examples not necessary to relate here.

A carrier is required to transport any shipment only with reasonable dispatch. For convenience in the investigation and interline distribution of claims for delay to live and perishable freight, the schedules established, and on record with the transportation department of each railroad, are considered the measure of reasonable dispatch. Under the law, however, the measure of reasonable dispatch is a question of fact to be established in each instance by the evidence. Generally, delay can be measured by comparing the time required to transport the shipment in question, with the time normally required to transport comparable shipments between the same points via the same route. Carriers are not permitted to make special contracts to give special service beyond the requirements of the bill of lading contract to deliver with reasonable dispatch. Accordingly, claims for delay are subject to proof of loss, and are not payable as punitive damage for breach of contract.

Some of the major causes for delay to live or perishable freight which carriers generally concede as negligence are:

1. Delay because of transportation difficulties such as meet orders, slow orders, bad order cars in train, traffic congestion, signal failure, etc.
2. Delay because of mechanical trouble such as hot boxes, safety appliances, etc.
3. Billing, dispatching and diversion errors.
4. *Delay in notification or in placing available for delivery.*

Some of the major causes for delay, for which carrier liability may be denied, are:

1. Acts or omissions of the owner such as delay in loading beyond the usual hour, delay in accepting delivery or placing diversion order, specifying a route other than an established route, or requiring protective service not contemplated in the through schedule.
2. Acts of God, such as unprecedented upheavals of nature.
3. The authority of law such as attachments, quarantine, etc.
4. Riots and strikes.

For so-called dead freight, there is more latitude in determining what represents reasonable dispatch and, generally, claims are not sustained except in aggravated cases, such as seasonable merchandise going astray and not being located until too late for the use or sale for which it was intended.

will study the laws relating to transportation in order to gain a better understanding of the rights of both parties to a contract of carriage and to enable him to know what facts are essential for him to develop in order to close an issue—which is never closed until both parties are satisfied.

The freight hauler for hire from early camel caravan days, has been held to account for his negligence. There gradually developed over the centuries, by the courts, certain legal practices for settling differences between citizens that became known as the "common law," which have come down to us through England, with roots reaching back to Norman, Saxon and Roman times, and which are still effective except where superseded by state, provincial and national statutory law.

Court decisions and legislative enactments usually reflect popular opinion. In the "Harriman Case", the U.S. Supreme Court upheld the contract valuation of a stated amount per head on live stock. It was followed by the passage by Congress on March 4, 1915, of the Cummins Amendment to the Interstate Commerce Act, which compelled the railroads to pay the full actual loss, damage, or injury to the property covered by the bill of lading contract, except in instances where rates depending upon a certain declared value are legally authorized.

After that there followed the "McCaull-Dinsmore Case" (235 U.S. 92), decided by the U.S. Supreme Court May 17, 1920, which held that claimant was entitled to have the destination value of his goods that were lost, notwithstanding a provision of the bill of lading that liability would be computed on basis of value at place and time of shipment.

The next was the "Crail Case" (281 U.S. 57), decided February 24, 1930, in which the U.S. Supreme Court held that the full actual loss suffered by the plaintiff for 5,500 pounds of coal lost from a carload shipment was the wholesale market price of coal at destination, which included a profit over mine cost plus freight.

The Court also indicated that had the consignee been out of coal and had it been necessary for him to purchase coal to fill his customer's orders, the carrier would have been liable for what he had to pay for the coal purchased to fill such orders. As will be seen, these cases followed the "Cummins Amendment."

It is seldom that so-called "punitive" claims are filed or pursued by shippers, who are generally content to be reimbursed for their out-of-pocket loss, but it is well for the investigator to bear in mind that claims are not always filed for the maximum amount which could be legally recovered.

HARDEN FARMS OF CALIFORNIA,
Salinas, Calif., June 29, 1967.

HON. FRANK J. LAUSCHE,
Chairman, Surface Transportation Subcommittee,
Senate Office Building, Washington, D.C.

DEAR SENATOR LAUSCHE: For reasons I shall endeavor to outline below, we are strongly in favor of passage of this legislation.

First let me say I have been closely associated with the railroad industry all my adult life. I was employed in the Freight Claim and Traffic Departments of two large Western Railroads for twenty-three years, and for the past thirty-one years have been with this Company and its predecessors.

During my railroad employment, I traveled through-out the United States and Canada adjusting freight claims on perishable commodities. Occasionally I would find myself in the embarrassing position of being convinced a claim should be paid, but obliged to disallow it because of some arbitrary rule of the Freight Claim Division of the Association of American Railroads, or the refusal of the railroad, mishandling the shipment, to admit of liability.

During my present employment, I have had full supervision of all matters relating to traffic and transportation, including the settlement of freight claims. While we consider ourselves very friendly to the railroads, it has been necessary for us to file suits on various shipments, because the railroads would not assume their proper responsibility.

Only one of these was brought to trial. The highlights were as follows:

> Claim for loss on carload of lettuce, harvested, cooled and loaded in customary manner and shipped under standard refrigeration with 3% salt. "Investigation verifies no carrier delay. * * * icing report shows * * * bunkers reiced at all regular icing stations. * * * Inspection * * * shows * * * soft rot averaging 17% * * *. * * * Offer settlement * * broken packages * * * $49.90, being obliged to disallow the balance of the claim."
>
> Suit filed. Judgment after trial by court: "It is hereby ordered, adjudged

and Decreed that on the complaint, Judgment be granted in favor of the Plaintiff * * * in the amount of $1,199.61, damages plus cost of suit * * *

The trial lasted three days and while we recovered the full amount of our loss, based on invoice value plus court costs, we lost the amount of the attorneys fees.

After the Judgment in this case, two additional pending suits were settled out of court as follows:

Amount of loss Claimed $919.00: " * * * have no alternative than to confirm offer of $250.00, balance of claim is disallowed. * * * the amount of $250.00 offered in full settlement is indeed liberal * * *." Suit Filed. Settled without trial for $400.00.

Amount of loss Claimed $819.00: "This will confirm the disallowance of the claim for reasons explained in conference. Considering * * * carriers clear record of handling * * * the slight delay in rejoicing had very little effect * * *, but to take care of any question, am offering $100.00 in full settlement. * * * am agreeable to close out the item for $178.75. This offer amply takes care of all carrier liability and I cannot justify a greater voluntary payment." Still Filed. Settled without trial for $450.00.

These compromises were accepted only because we felt the net to us would be greater than we would receive, after paying attorneys fees for trials.

Many small claims are not placed in suit, simply because the attorney's fees would be greater than a full recovery in court. I have two such claims before me.

(1) Carload of mixed vegetables shipped to Washington, D.C. August 18, 1964, due for market August 25, available August 27. Claim filed for loss $49.84. Railroad investigation developed; car delayed one day west of Chicago and one day east of Chicago. Western lines acknowledged their responsibility, while the Eastern line admitted it delayed the car, but said it was handled with reasonable dispatch. Claim settled for fifty percent, the Western lines proportion.

(2) Carload of mixed vegetables shipped to Washington, D.C. July 28, 1964, due for market August 4, available August 5. Claim filed for loss $90.00. Railroad investigation developed, car delayed east of Chicago, but Eastern line says it was handled with reasonable dispatch. Claim disallowed. Had the car been delayed west of Chicago the claim would have been paid in full.

The amounts involved do not justify court action because of the cost of attorney fees. Many growers are unjustly suffering such losses simply because of the economic imbalance.

Another situation which frequently exists is carriers refusal to pay when owner of the goods the amount of his full actual loss. This develops when the destination market quotations indicate a lower value than the invoice price. The practice of the railroads is to pay only whichever is the lower.

I am now in the process of preparing this case for suit: Sale was negotiated with the buyer for a carload of asparagus at the going F.O.B. price, resulting in an invoice value of $8,250.00. It arrived at Boston in a badly decayed condition, resulting in its being salvaged on the best possible basis. The carriers acknowledge their negligent handling, but take the position that based on destination market quotations, its value was only $5,936.89. It was salvaged for $3,436.89. They have offered to pay the difference of $2,500.00.

Had the shipment arrived in good condition, the buyer would have been obliged to pay the full amount of the invoice under the Provisions of the Perishable Agricultural Commodities Act, regardless of the destination market quotations.

Our full actual loss is the difference between the amount of the invoice and the amount of the salvage received, or $4,813.11, which is $2,313.11 more than the offer of settlement. Had the market at destination been higher than the invoice, plus freight, they would properly have ignored it and payed only the invoice value, as we would be made whole for our actual loss.

The law seems quite clear as reported in Volume 10 of Corpu Juris, Page 399, and Volume 9, American Juris Prudence Sec. 783. We have little doubt we will collect the full amount of our loss in this case, as the carriers had notice of our sales contract.

Of course we will lose the cost of the attorney's fee.

In most cases of this kind, we have accepted the lower destination value, again because the difference was not great enough to justify attorney's fees.

I also handle traffic matters for a grower-shipper of Rio Grande City, Texas. Listed below are examples of the results obtained by instituting suits on claims covering shipment of Honeydew Melon from Texas, during one season. These

claims were filed with the carriers, but because satisfactory settlements could not be made, they were placed in suit. All were settled out of court. Compromises were accepted, because we felt any additional amounts recovered in court would be offset by the cost of additional fees to the attorneys.

Amount of loss claimed	Offered before suit	Settlement out of court
1,476.50	8.50	600.00
848.63	5.62	229.00
1,060.14	4.86	268.50
418.68	6.32	146.50
701.70	118.80	414.67
1,542.40	10.85	645.00
971.45	15.30	229.35
1,166.13	3.12	602.00
1,167.59	(1)	264.00
845.42	(1)	300.00
932.84	6.91	400.00
1,624.52	20.36	690.50
2,126.00	(1)	1,217.00

[1] Disallowed.

Aside from the relief to growers and shippers which this legislation should provide, there might well be some side effects of even greater value. We would be happy if the carriers always handled our shipments without negligence, thereby eliminating the necessity of filing claims. Orderly marketing is a prime requisite in our industry. Carriers failure to maintain schedules, upsets the entire process.

If a train with fifteen cars of lettuce is scheduled to arrive in Philadelphia for Friday's Market, but fails to arrive, those fifteen carloads are added to the twenty cars scheduled to arrive on Monday. The result is a demoralized Market, not only on Monday, but probably for the entire week. Mrs. Consumer just doesn't buy two heads of lettuce Monday because she couldn't buy one Friday or Saturday. Claims may or may not be paid on the fifteen cars which missed Friday's Market, but there is no basis for filing claims on the twenty cars arriving Monday or those arriving later in the week, all or most of which would normally sell at depressed prices because of carriers failure to maintain scheduled delivery of the cars due Friday.

We feel the passage of this legislation will result in greater effort on the part of the carriers to handle our shipments more efficiently.

The economics of the situation are very simple. For example: if a grower-shipper of approximately 2500 carlot equivalents of vegetables each year can net $10 a car, he has had a fair year; $20 a car, a good year; $100 a car, next to impossible.

From this, it is apparent that if he pays attorneys fees of $100 on ten cars or $1000, he has lost a fair return on one hundred cars. This would put the small—one hundred car or less—grower or shipper out of business.

Again, I urge passage of this legislation, and ask that this statement be made a part of the record at the Hearing.

Thanking you in advance, I am,

Yours very truly,

ROY R. SCOTT,
Vice President.

CAMDEN, N.J., *July 6, 1967.*

HON. FRANK J. LAUSCHE,
Chairman, Surface Transportation Subcommittee,
U.S. Senate,
1327 New Senate Office Building,
Washington, D.C.

DEAR SENATOR LAUSCHE: As Chairman of the Legislative Committee of the Eastern Industrial Traffic League, I want to express the views of our League in support of Senate Bill S. 858. I understand that hearings on this bill are scheduled for July 17 and 18. It will be impossible for any representative from the League to personally present these views, and I would appreciate it if you would have them incorporated in the record.

The Eastern Industrial Traffic League, Inc., is a nonprofit corporation of almost 200 members. These members are responsible transportation executives

representing associations, shippers and receivers of freight, organized for the purpose of securing legislation, rules, regulations, practices, rates, classifications and other related transportation matters helpful to commerce within, to and from the Middle Atlantic and New England states. It exists by authority of the laws of the State of Delaware and maintains offices in Washington, D.C.

With the competition from the various modes of transportation, the railroads have spent a great deal of money advertising dependable, fast freight service. The carriers even go to the point of publishing freight schedules which are available to the public. For your reference I am attaching several pages[1] taken from the June 1967 issue of the Official Guide of the Railways which illustrate how the railroads are attempting to assure their customers that freight trains do run on a schedule.

The Missouri-Kansas-Texas Railroad Co. in their ad has the following statement: "Your products reach market on schedule in any kind of weather." Many of the railroad customers ship commodities which are scheduled for a particular market. If this cargo is late, there is a chance that the customer may suffer a financial loss because his product was not available at the proper time. If the railroads are attempting to convince the public that they maintain freight train schedules and the public can depend upon them, then they should be in a position to reimburse the customer when they do not live up to their advertisements.

The Eastern Industrial Traffic League does not expect automatic reimbursement for financial injury caused by failure of the carrier. However, it does feel that after the facts have been investigated, as prescribed in Paragraph 11, Section 20 of the Interstate Commerce Act, and the carrier is found negligent, the plaintiff should be reimbursed for a reasonable attorney's fee. In order for a claim against the carrier to be processed it is necessary to retain the services of an attorney. This is an added expense which the plaintiff must assume until the carrier is proved guilty. Therefore, this expense should be included in the claim against the carrier. Certainly the plaintiff should not be required to absorb expenses which he incurs when he follows prescribed rules to process a claim brought about by the failure of the carrier to perform the service as advertised. Therefore, it is only right to expect the carrier, when it has been proved that it was negligent, to pay for all reasonable expenses.

For these reasons the Eastern Industrial Traffic League supports S. 858 and requests favorable action by your Committee.

Sincerely,

GEORGE F. MOHR,
Chairman, Legislative Committee.

CORN REFINERS ASSOCIATION, INC.,
Washington, D.C., July 19, 1967.

HON. FRANK LAUSCHE,
Chairman, Subcommittee on Surface Transportation, Senate Commerce Committee, U.S. Senate, Washington, D.C.

DEAR SENATOR LAUSCHE: The Corn Refiners Association, Inc. ("Association") supports S. 858 which would amend Section 20(11) of the Interstate Commerce Act to provide for the recovery of attorney's fees by a successful plaintiff in an action for loss, damage or injury to property transported. The amendment is supported because, as more fully shown hereafter, it would serve the need to encourage prompt payment of just claims without the necessity of lawsuits. It is respectfully requested that our support for the legislation be shown by including this letter in the record of the hearings on S. 858 by the Subcommittee on Surface Transportation.

The Association is the national organization for the corn wet milling industry in the United States. Its members consist of the following:

American Maize-Products Co., 250 Park Avenue, New York, New York 10017; Plant: Roby, Indiana 46370.

Anheuser-Busch, Inc., 721 Pestalozzi Street, St. Louis, Missouri 63118; Plants: St. Louis, Missouri 63118; Lafayette, Indiana 47902.

Clinton Corn Processing Co., Division of Standard Brands, Inc., Clinton, Iowa 52733; Plant: Clinton, Iowa 52733.

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[1] In subcommittee files.

Corn Products Co., 717 Fifth Avenue, New York, New York 10022; Plants: Argo, Illinois 60502; Pekin. Illinois 61554; North Kansas City, Missouri 64116; Corpus Christi, Texas 78408 (grain sorghum processing plant).

Hercules Inc., Cellulose and Protein Products Department, Wilmington, Delaware 19889; Plant: Harbor Beach, Michigan 48441.

The Hubinger Co., Keokuk, Iowa 52632; Plant: Keokuk, Iowa 52632.

The Keever Starch Co., 538 East Town Street, Columbus, Ohio 43215; Plant: Columbus, Ohio 43207.

National Starch and Chemical Corp., 750 Third Avenue, New York, New York 10017; Plant: Indianapolis, Indiana 46206.

Penick & Ford, Ltd., A subsidiary of R. J. Reynolds Tobacco Co., Cedar Rapids, Iowa 52406; Plant: Cedar Rapids, Iowa 52406.

A. E. Staley Manufacturing Co., Decatur, Illinois 62525; Plant: Decatur Illinois 62525.

Union Starch & Refining Co., Inc., Subsidiary of Miles Laboratories, Inc., 235 Washington Street, Columbus, Indiana 47201; Plant: Granite City, Illinois 62040.

These companies transport corn from points of purchase to refining plants and then ship the refined products (starch, syrup, sugar, oil and gluten feed and gluten meal) to market distribution areas. In 1966, the latest date for which industry figures are available, 202, 121, 123 bushels of corn were transported to refining plants. Rail transportation accounted for about 91% of this volume and trucks for the remainder. Over five million tons of refined products were transported to market and the ratio between rail and truck carriage was about the same as for the whole grain. The total cost of inbound and outbound transportation was in excess of $85 million. [1]

Claims arise out of loss or damage of grain as well as refined products, during shipment. Inadequate and defective cars, resulting from disrepair or overloading, lead to these results. The scope of grain losses in transit was revealed by the United States Department of Agriculture in 1966 in its USDA Marketing Research Report 766 titled "Losses in Transporting and Handling Grain by Selected Grain Marketing Cooperatives." The Department's release, dated September 27, 1966, summarized the report in these words:

"Grain leakage during handling and transportation is a serious problem to both shippers and carriers, according to a study made by Farmer Cooperative Service, U.S. Department of Agriculture, of barge and rail shipments of cooperatives.

"However, management decisions, employee efficiency, and maintenance of equipment can be important factors in reducing grain weight losses between point of origin and destination, the study disclosed.

"Of 13,611 rail shipments of grain checked, 8,231 had lost an average of 923 pounds per car between origin and destination. Shipments studied originated at 107 local elevators in 6 States and terminated in 25 States. From 5 to 93 percent of the cars shipped by individual elevators showed weight losses at destination. Losses were higher in shipments moving over 1,000 miles.

"Eighty-five percent of 700 rail cars inspected were found to be defective, with battered or missing doorposts the major problems.

"Weights of 777 barge shipments of grain totaling 31 million bushels were compared at origin and destination. These showed a loss of about one-third of one percent of origin weight. There was no indication of damage from insect infestation or storage fungi."

Since the carrier is in possession of most of the facts relating to loss or damage in transit, it is often difficult for the shipper to prepare its claim or to respond to the carrier's denial of the claim. As a consequence carriers are encouraged to deny claims whether or not there is responsibility and shippers are discouraged from undertaking the expense involved in proving carrier responsibility.

By not allowing recovery of attorney's fees, the present law makes it profitable for carriers to deny claims when they are presented, regardless of the merits, with a view to delaying payment as long as possible and with a view to forcing

[1] Shipments are large and they are transported over long distances in every part of the continental United States. According to 1963 Census figures, 17.0 percent of the classification identified as "corn starch, syrup or oil, corn sugar, and corn by-products (wet process)" are shipped distances of 600 to 799 miles. Next in frequency was 100 to 199 miles, 16.4 percent. Distances in descending order were: 200–299 miles, 12.5 percent; 400–499 miles, 11.3 percent; under 50 miles, 10.9 percent; 500–599 miles, 8.1 percent; and 800–999 miles, 7.6 percent. Considerably smaller percentages were shipped over other distances. These figures, taken from the 1963 Census of Transportation, also revealed that 48 percent of the products from corn were shipped in quantities of 60,000 to 89,999 pounds; 27.1 percent in 30,000 to 59,999 pound quantities; and 23.0 percent in quantities of 90,000 pounds and over.

shippers to weigh the cost of recovery against the size of the judgment which may be expected. The consequent delay in recovery and wasteful expenditure of funds to collect just claims, frequently means a complete defeat of justice for the injured shipper. In many instances it may mean that the injured shipper will not pursue the claim further, after denial by the carrier, in order to avoid the costs of recovery.

Enactment of this bill would eliminate the grave inequities and economic waste inherent in the present system. By offering an incentive to prompt payment of meritorious claims, regardless of amounts involved, it protects the injured shipper from arbitrary denial of monies owed and the costs of unnecessary litigation. It would, further, prompt carriers to improve the handling of property transported and thus reduce their claims liability while curtailing damage to goods contributing to the American economy. Not to be overlooked, in addition, is the cause of justice, which would be served by relieving court calendars congested with claims that would not be presented except for the fact that the carriers benefit by forcing an injured shipper incur the costs and absorb delays of litigation in court.

There is ample precedent for this legislation in the Interstate Commerce Act itself. Section 8 of the Act[2] allows attorney's fees to be "taxed and collected as part of the costs in the case" by a person injured as a result of a carrier's violation of any provision of the Act. This is interpreted to apply only to violations of express requirements or prohibitions of the Act rather than obligations of carriers which are not dependent upon the act (e.g., loss of shipment). *Atlantic Coast Line Railroad Company* v. *Riverside Mills*, 219 U.S. 186 (1911).

Section 16(2) of the Act[3] has a similar provision for plaintiffs required to obtain a court judgment for recovery of a reparation award, stating that:

"If the plaintiff shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit."

The fact that this provision has "a purpose to encourage the payment, without suit, of just demands, does not militate against its validity." *Meeker* v. *Lehigh Valley R. Co.*, 236 U.S. 412 (1915).

S. 858 would close the gap in these provisions which enable a carrier to avoid payment of attorney's fees to injured shippers with just claims for loss or damage to property under Section 20(11) of the Act[4] while requiring such payment for violation of specific provisions of the Act or for refusal to pay reparation awards.

There is no distinction in principle among any of these situations and none should be created by statute. Enforcement of carrier obligations to the shipping public is promoted by imposing liability for attorney's fees incurred by an injured shipper whether the injury is caused by violations of the Act, refusal to pay reparation awards or loss and damage to property. In all these cases the shipper is denied a service which public policy imposes upon any entity holding itself out to the public as a supplier of transportation.

We have reviewed the statement of Chairman Tucker of the Interstate Commerce Commission which supports S. 858 with a proposed amendment requiring a shipper to file its claim with the carrier as a condition precedent to eligibility for recovery of attorney's fees. The Commission's position assures the carrier of an opportunity to make prompt payment of claims. The equity of the Commission's position is manifest and it is endorsed by our Association.

In summary, it is our view that the proposed legislation, with the amendment suggested by Chairman Tucker, would benefit carriers as well as shippers. It is an incentive to improved carrier performance and consequent reduction in claims liability. It eliminates economic waste resulting from needless delays in payment of just claims and costs related to unnecessary litigation. It would, moreover, contribute to relief of court congestion and court delays which frustrate or deny justice.

For these reasons we respectfully urge adoption of a favorable report on S. 858 with the modification offered by the ICC. Enactment of the bill will serve the ends of the National Transportation Policy and improve the administration of justice.

Sincerely yours,

ROBERT C. LIEBENOW, *President.*

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[2] A comparable provision is in Part III of the Act, dealing with water carriers, Section 308(b), 49 U.S.C. § 908(b).

[3] Comparable provision in Part III, Section 308(e), 49 U.S.C. § 908(e).

[4] Section 20(11) of the Act applies to truckers, as well as rail carriers, by reason of Section 219 of the Act, 49 U.S.C. § 319.

NORTHWEST HORTICULTURAL COUNCIL,
Yakima, Wash., August 1, 1967.

The Honorable FRANK J. LAUSCHE,
Chairman, Subcommittee on Surface Transportation,
U.S. Senate, Washington, D.C.

DEAR SENATOR LAUSCHE: Under date of July 10 we submitted a Statement to the Subcommittee on S–858. We are advised that at the hearings the question was raised whether the railroad should be entitled to receive reasonable attorney's fees where it is successful in the litigation. While at first blush there would appear to be merit in the suggestion that the prevailing party should be allowed a reasonable attorney fee, so that the parties are in the same position, we feel that under the circumstances the suggestion should be rejected in the instant case for a number of reasons.

You, of course, are aware that 49 USC Section 8 authorizes allowance of a reasonable attorney's fee to plaintiffs in suits against common carriers; also, 49 USC Section 16 allows reasonable attorney's fees to a plaintiff who prevails in an action where a carrier has not complied with an ICC order. Neither allows a recovery to the defendant.

We believe that it is equitable to allow a reasonable attorney's fee only to a plaintiff in these cases because:

(1) The railroads have knowledge of all the facts whereas the shipper has only limited knowledge, if any, of what happened to the cargo during the course of the shipment. Frequently the shipper has to bring suit in order to ascertain what happened to a shipment, the carrier having declined liability without any explanation of the cause of the damage or delay.

(2) Many attorneys are not experienced in transportation law. In some, if not in many, instances the carrier may prevail because the plaintiff is unable to prove his case even though his cause of action is meritorious. I have seen instances where a shipper lost a case involving delay of a shipment where another shipper who had another car in the same train obtained a recovery because his attorney knew how to obtain the facts and to prove his case.

(3) The railroads have adopted a totally unreasonable position in dealing with claims. Some Eastern carriers have apparently adopted a policy of rejecting claims without giving fair and adequate consideration to them. Occasionally they will reconsider and pay a claim for delay. But, by and large, their policy seems to be one of "claim declined", thus forcing a shipper or a receiver to drop his claim or to bring suit, knowing that in most instances the owner of the cargo can not afford to prosecute a claim because the cost is disproportionate to the amount involved.

We believe that passage of S–858 will have a salutory effect on the railroads and that they may be forced to adopt a reasonable claims policy. Shippers and receivers of cargo will have a better opportunity of recovering "the full actual loss, damage or injury to such property" (40 USC Sec. 20(11)) caused by the common carrier whereas at present they recover only a portion of their loss, damages or injury because the net recovery, after payment of attorney's fees and other non-recoverable costs, is greatly diminished.

The theory of allowing an attorney's fee to a successful plaintiff but not burdening him with a defendant's attorney's fee when unsuccessful is not unusual in American jurisprudence. Successful claimants in Workmans Compensation cases are allowed reasonable attorneys' fees; the Fair Labor Standards Act allows reasonable attorneys' fees where the employer has not complied with the Wage and Hour Act. The responsibility for attorneys' fees is not reciprocal in either of these or other instances.

We urge that the suggestion that the bill be amended to allow a reasonable attorney's fee to the party which prevails not be adopted but that the bill be enacted in the form introduced.

Yours very truly,

ERNEST FALK, *Manager.*

NATIONAL GRAIN TRADE COUNCIL,
Washington, D.C., July 18, 1967.

Re S. 858.

Hon. FRANK J. LAUSCHE,
Subcommittee on Surface Transportation, Senate Committee on Commerce, Old Senate Office Building, Rm. 128, Washington, D.C.

MY DEAR SENATOR: The National Grain Trade Council wishes to advise you that our members favor the enactment of the above-numbered bill "to amend the Interstate Commerce Act, with respect to recovery of a reasonable attorney's fee in case of successful maintenance of an action for recovery of damages sustained in transportation of property."

We request that our views in favor of this proposal be incorporated in the record of hearings of your Subcommittee.

The grain marketing industry has, during the past several years, met with varying degrees of resistance from railroads as members of the industry have attempted to assert what, in their opinion, are valid and justifiable claims for losses to grain during interstate shipment. Railroad resistance to recognize the validity of the claims has come from the adoption, by the railroads, of new and unanticipated claims policies and by failure to acknowledge claims after persons in the industry have documented the validity of the claims which they are asserting.

These claims, varying in size and value, can be proved, but under the present state of the law, only at an expense, sometimes substantial, to grain industry claimants. To minimize this expense, the pending legislation would permit the courts to allow a reasonable attorney's fee to successful claimants, who had been required by the railroads to assert and prove the validity of their claims in court actions.

This, in our judgment, is a sensible result. If enacted, the railroads will be discouraged from resisting more modest claims and may well be encouraged to look with a more objective eye on all claims. Under the proposal, if the court finds against one who is asserting a claim, his expense for legal services remains with him. Only if a court finds that railroads have improperly evaluated claims will the burden of these fees fall to them.

With kindest personal regards, I am,

Sincerely yours,

WILLIAM F. BROOKS.

CHATSWORTH, CALIF., *June 21, 1967.*

Hon. FRANK J. LAUSCHE,
Chairman, Subcommittee on Surface Transportation,
U.S. Senate,
Washington, D.C.

DEAR SENATOR LAUSCHE: As a grower and frequent interstate shipper I am keenly interested in the bill to amend Section 20(11) of the Interstate Commerce Act to provide for recovery of reasonable attorney's fees in case of successful maintenance of an action for damages sustained in the transportation of property.

Following are two valid claims our company has, to date, failed to collect from Southern Pacific Company.

On 3–29–66 we shipped (F.O.B. Saugus, California) 1166 sacks of carrots, weighing 84560# to Campbell Soup Company, Chicago, Illinois, via refrigerated Southern Pacific Car #PFE 300904, with written instructions to set the thermostat at 34° F. According to Campbell Soup Company, the car arrived on 4–8–66, the contents in poor condition. United States Department of Agriculture Condition Inspection Certificate #F–95169 shows the temperature of the carrots was between 46° F. at the top and 40° F. at the bottom of the load, and they were 41% decayed. The entire load was rejected by Campbell Soup Company and disposed of at a loss to us of $1167.52. On 5–2–66 Southern Pacific Company issued us Claimant's Code #90900044. On 6–12–66 we sent a letter of inquiry requesting payment of this claim, to which they responded on 6–15–66 that they were investigating and endeavoring to conclude the claim as promptly as possible. There has been no word during the past year.

Also on 8–10–66 we shipped (F.O.B. Bakersfield, California) 960 sacks onions, weighing 85380# to Campbell Soup Company, Camden, New Jersey, via refrigerated Southern Pacific Company Cars #711584 and 732314. These onions were rejected because of freezing, decay and a heavy infestation of beetles. The load was disposed of at a loss to us of $1095.25. On this shipment we have received no word at all concerning our claim to Southern Pacific Company. Subsequent correspondence is as yet unanswered.

All Records are in my possession and can, of course, be copied. I respectfully request this information be made a part of the record in the forthcoming hearing.

Very truly yours,

ARTHUR ICARDO.

THE LOCAL AND SHORT HAUL CARRIERS NATIONAL CONFERENCE
OF THE AMERICAN TRUCKING ASSOCIATIONS, INC.,
Washington, D.C., August 25, 1967.

Hon. FRANK J. LAUSCHE,
Chairman, Senate Subcommittee on Surface Transportation,
New Senate Office Building,
Washington, D.C.

DEAR SENATOR LAUSCHE: As a result of a phone call to your office, we wish to have this letter included into the record of hearings on S. 858, which calls for an amendment to Section 20(11) of the Interstate Commerce Act to provide that where action is brought to recover for loss or damage to property thereunder, a successful plaintiff would be allowed a "reasonable attorney's fee."

This Conference, an official affiliate of The American Trucking Associations, Inc., represents nationwide the local cartage industry operating as motor carriers of interstate freight within the nation's commercial zones, cities and hamlets. It also represents the short haul motor carrier industry, whose members operate under state public utility commission motor carrier certificates registered with the I.C.C., or under certificates issued directly by the Interstate Commerce Commission in the motor carriage of interstate freight. In the main, the members of this Conference are small, family-owned businesses. Twenty-six per cent of them annually gross less than $250,000 and 59% of them gross annually less than $500,000.

With this information in mind, it is readily apparent that extended litigation over damage claims under any circumstances constitutes a financial hardship upon Conference members. But the provision of this bill to render to successful plaintiffs attorney's fees as well could impose serious additional hardship on our members.

In the case of small carriers, even the threat of expensive litigation would amount to harassment of our membership by shippers. For even if the claim was totally unjustified, our carriers would be faced with the decision to either pay the lower cost of the claim, or run the risk of the expensive and thus oppressive litigation.

Moreover, this legislation could result in the filing of literally thousands of frivolous claims with the I.C.C., because the plaintiffs, not faced with paying attorney fees on small claims, would be encouraged to pursue these claims in extended litigation under contingent fee arrangements.

For these and many apparent other reasons, this Conference also fully ascribes to the points made in the testimony presented by The America Trucking Associations and we strongly oppose inclusion of motor carriers in the provisions of this bill. We understand that the bill is, after all, directed toward solving a problem which has arisen regarding railroad carriage of freight. Therefore, we appeal to the committee to protect our membership from potential harassment or burdensome litigation which apparently is not the intention of those supporting this measure in the first place.

Sincerely,

KENNETH R. KETCHAM,
Executive Director.

[Telegram]

SEATTLE, WASH., *July 25, 1967.*

HON. WARREN G. MAGNUSON,
U.S. Senate,
Washington, D.C.:

S. 858 providing for recovery of reasonable attorney's fees in loss and damage case awards is fair and reasonable. Since WFA is a large shipper and receiver of feed ingredients, its passage would be valuable to our farm members and has our support.

DALE SMITH,
General Manager, Western Farmers Association.

THE SHIPPERS' CONFERENCE OF GREATER NEW YORK, INC.,
New York, N.Y., July 27, 1967.

HON. WARREN G. MAGNUSON,
New Senate Office Building,
Washington, D.C.

DEAR SENATOR MAGNUSON: An ample statement in support of S. 858 has been made by the Honorable William H. Tucker, Chairman of the Interstate Commerce Commission, under date of July 18, 1967. The Shippers' Conference of Greater New York, Inc., consisting of fifty-seven corporate shippers, comes now to add its voice in support of the bill's early passage.

The Conference typically represents the small shipper who can neither afford unreimbursed losses nor the luxury of suing for principle. Some of the shippers represented by this Conference do not provide truckers with enough business to have settlement leverage.

The provision of S. 858 would remove the inequity in the present law, both in fact and in spirit, by stating that if the plaintiff shall prevail in any action for recovery of damages, he shall be allowed a reasonable attorney's fee, in addition to recovery of the value of undelivered or damaged goods.

The proposed legislation applies only to successful actions in court but it will add to carrier incentives to settle valid claims promptly out of court. We also support amending this bill so as to prevent actions at law, prior to 90 days after receipt of the claim by the carrier.

Respectfully submitted.

BARRIE VREELAND,
Secretary-Treasurer.

FORT WORTH GRAIN EXCHANGE,
Fort Worth, Tex., July 25, 1967.

Senator WARREN G. MAGNUSON,
Room 127, Senate Office Building,
Washington, D.C.

DEAR SENATOR MAGNUSON: The members of the Fort Worth Grain Exchange have carefully reviewed the provisions of Senate Bill 858 proposing to:

"Amend the Interstate Commerce Act, with respect to recovery of a reasonable attorney's fee in case of successful maintenance of an action for recovery of damages sustained in transportation of property."

The Interstate Transportation Facilities, for many years, have taken undue advantage of the shippers on small valid claims, simply because they know that the expense in pursuing such matters through legal channels is generally much more expensive than the claim, therefore, such action would be uneconomical and ill-advised.

We sincerely believe that the provisions of S. 858 are long over due and when approved and made part of the Interstate Commerce Act, justice will have been served.

I would appreciate your keeping me advised of any developments on this important subject.

Yours very truly,

C. G. MATHEWS, *Secretary.*

CHICAGO, ILL., *August 30, 1967.*

Re S. 858.

Hon. FRANK J. LAUSCHE,
Chairman, Subcommittee on Surface Transportation, Senate Office Building, Washington, D.C.

DEAR SENATOR LAUSCHE: I have been requested to submit for your consideration copies of correspondence between L. W. Christensen, of Chicago, Illinois, and representatives of the Southern Pacific Railway. This information concerns alleged delay in the shipment of several cars of fruits and vegetables.

You will note, and it is significant, that the carriers admit delay where no provable loss exists and, on the other hand, deny or utilize the defense of "reasonable dispatch" where evidence of a market decline does exist.

I am advised that such instances of arbitrary handling of delay claims are innumerable. My clients inform me that the New York Central and Pennsylvania Railroads are the primary causes of the difficulties in processing claims caused be delay. They advise that full actual loss for damages involved in delay claims require admissions of delay between all of the carriers involved in the transit. Therefore, arbitrary determinations by one carrier in the processing of such claims effects the procedure in inter-carrier negotiations and breaks down the possibility of voluntary adjustments.

We have reason to believe that S. 858 will create an atmosphere conducive to voluntary settlements.

Please consider this statement and the enclosures as part of your record.

Respectfully yours,

H. HASKELL LURIE.

[Enclosures]

SOUTHERN PACIFIC CO.,
San Francisco, Calif., January 19, 1967.

Mr. L. W. CHRISTENSEN,
L. W. Christensen Traffic Agency,
1425 South Racine Avenue,
Chicago, Ill.

DEAR MR. CHRISTENSEN: Please refer to your claim #63-923, filed for S. Albertson Company.

Investigation reveals that car PFE 7961, out of Phoenix, Arizona March 11, 1966, and due at Chicago Tuesday March 15, was placed 7:05 AM that morning. Car was reconsigned to Boston, Massachusetts March 19, where it was due for market Tuesday March 22, with placement being made 12:15 PM that date.

Information furnished indicates car was interchanged by the Pennsylvania Railroad Company to the New Haven Railroad at Greenville 11:35 AM March 21, on schedule, this contemplating arrival at destination 2:00 AM March 22 for market of that date. Car actually arrived 9:15 AM, with placement as indicated above.

We are informed by Mr. J. W. Hall, Freight Claim Agent, New York New Haven and Hartford Railroad Company, under his file #26942-46, of October 17, 1966, that handling was with reasonable dispatch, no liability for delay being admitted.

In the circumstances, believe you will understand that we have no alternative than to disallow that portion of your claim representing decline in market value account delay, and receipt of authority to amend to $26.10 representing shortage only will enable us to arrange for issuance of a voucher.

Yours very truly,

W. B. WILEY.

SOUTHERN PACIFIC CO.,
San Francisco, Calif., May 29, 1967.

Mr. L. W. CHRISTENSEN,
L. W. Christensen Traffic Agency,
1425 South Racine Avenue,
Chicago, Ill.

DEAR MR. CHRISTENSEN: Please refer to your claim No. 63-1026, filed for S. Albertson Company.

Investigation reveals that car PFE 300535, out of Salinas, California, May 26, 1966, was interchanged to the Pennsylvania Railroad at Proviso by 8:00 AM, May 30, 1966. Based upon this, we are informed by the Pennsylvania Railroad

Company that car was scheduled to depart 10:30 PM, May 30 to arrive Greenville 9:00 AM, June 1, with interchange to the New Haven Railroad by 1:25 PM that afternoon. Scheduled interchange contemplated arrival Boston, via the New Haven Railroad, 2:00 AM, June 2, for market placement that morning.

Car was actually interchanged to the New Haven Railroad at Greenville 12:10 PM, June 2 and arrived Boston 7:45 AM, June 3, with placement 9:10 AM that morning, available for market Monday, June 6.

Both the Pennsylvania Railroad and the New Haven Railroad have admitted responsibility for this delay; however, a review of Boston USDA market quotations reveals no decline in market value June 2 versus June 6, 1966. Also, since California Iceberg Lettuce was quoted at mostly $3.00 to $3.25 on the due date, June 2, we compute a potential value of $2,937.50. Due to the considerably higher market prevailing June 3 and June 6, 1966, a total of $3,402.62 was realized from sale of this car; hence, there was no sale loss suffered.

In the circumstances, believe you will understand that we have no alternative than to disallow your claim as filed, offering in settlement $3.62 representing shortage. Receipt of authority to so amend will enable us to arrange for issuance of a voucher.

Yours very truly,

W. B. WILEY.

SOUTHERN PACIFIC CO.,
San Francisco, Calif., August 8, 1967.

Mr. L. W. CHRISTENSEN,
L. W. Christensen Traffic Agency,
1425 South Racine Avenue,
Chicago, Ill.

DEAR MR. CHRISTENSEN: Please refer to your claim number 63–958, filed for S. Albertson Company.

Investigation reveals that car PFE 453036, out of Phoenix, Arizona, April 18, 1966, was due and available at Chicago Friday, April 22, placement being made 5:15 AM that morning. Based upon diversion to final destination, Boston, Massachusetts, April 23, car was due for market of Tuesday, April 26, actual placement being made 3:00 AM April 27. This delay was on the rails of the Pennsylvania Railroad Company, their schedule calling for interchange to the New Haven Railroad at Greenville, N.J. by 1:25 PM April 25, actual interchange being made 5:00 PM April 25. We have letter from Mr. W. D. Hamilton, Manager of Freight Claims, Pennsylvania Railroad Company, under file number 705–11178, indicating that delay was of a non-negligent nature, no liability being admitted.

We have also enclosed, for your convenience, copy of report of mechanical protective service indicating proper temperatures were maintained.

In the circumstances, we can only disallow your claims as filed. If shortage loss was suffered, receipt of substantiating evidence in the form of loading and unloading affidavits, as well as copy of account sales, which will enable us to give that portion of your claim further consideration.

Yours very truly,

W. B. WILEY.

SOUTHERN PACIFIC CO.,
San Francisco, Calif., August 8, 1967.

Mr. L. W. CHRISTENSEN,
L. W. Christensen Traffic Agency,
1425 South Racine Avenue,
Chicago, Ill.

DEAR MR. CHRISTENSEN: Please refer to your claim number 63–1088, filed for S. Albertson Company.

Investigation reveals that car PFE–455221, out of Bakersfield, California July 18, 1966, and diverted to Boston, Massachusetts from Chicago, Illinois 10:15 AM July 24, was due for destination market of Wednesday July 27, 1966. Car actually arrived 2:05 AM and was placed 2.15 AM July 28, available for market of that date. Information furnished us indicates that car was interchanged by the Pennsylvania Railroad to the New Haven Railroad at Greenville, N. J. on schedule 1:25 PM July 26, and would have been due for Boston market of the following morning, had it been properly preclassified for Boston. The New Haven

Railroad informs us that, when received, car was classified for Cedar Hill, not in the Boston block, hence, was not scheduled to arrive Boston until 2:00 AM July 28, for market of that date.

Handling with Mr. W. D. Hamilton, Manager of Freight Claims, the Pennsylvania Railroad Company, reveals that they consider delay to have been of a non-negligent nature, no liability to be admitted for their account. This was furnished under Mr. Hamilton's file number 705–11211.

In the circumstances, believe you will understand that we are left with no alternative than to disallow your claim as filed.

Yours very truly,

W. B. WILEY.

L. W. CHRISTENSEN TRAFFIC AGENCY, INC.,
Chicago, Ill., August 18, 1967.

Mr. W. B. WILEY, GFCA,
Southern Pacific Co.,
65 Market Street,
San Francisco, Calif.
(Attention: Mr. Gordon Ansley).

DEAR MR. ANSLEY: Please see yours dated May 29th offering $3.62 which represents shortage. This car was running for Boston market of June 2nd and not available until 9:10 AM the 3rd for the market of Monday the 6th. The Market on the 6th was higher and you state no proven loss. In this case, both the PRR and the New Haven RR admit of their delay—neither claiming "reasonable dispatch."

We now call attention to your recent declinations covering delays in each case dealing with our 63–923, 63–958 and 63–1088, your aboved code. One the above 3, involving delays with either or both the PRR and the New Haven, you have been informed by these carriers that their delays were of a non-negligent nature—that the cars were handled with "reasonable dispatch".

We respectfully request that on these latter 3 files, that you determine from the PRR and/or the New Haven why they've concluded their delays were non-negligent, particularly where in each case the market did decline—and claimant also requests an explanation as to how the PRR and the New Haven concluded that on 63–1026, the delay was negligent (on a rising market). I note that on at least one of the latter 3 files—63–1088—car was actually misclassified.

Sincerely,

BCC to Murray Albertson: 63–1026 yr 5/3368. 63–923, yr 3–2766. 63–958, yr 4–3132 and 63–1088, yr 7–3753. My letter above to the SP is self explanatory and attached hereto find copies of letters from the SP verifying the facts as outlined above.

BCC Mr. H. Haskell Lurie: Last Tuesday I handed you copy of SP letter of disallowance on our 63–1026, where delays on both PRR & New Haven admitted—on a rising market. Attached hereto find copies of letters of disallowances on the other 3. where the delays were NOT admitted—and in each case, there was a loss on account of the delays. I certainly hope that you do take this up with the proper authorities as further proof of the extent the carriers will go to, in order not to honor legitimate claims.

J. S. BURAK TRAFFIC BUREAU,
Philadelphia, Pa., September 1, 1967.

Hon. Senator FRANK J. LAUSCHE,
Chairman, Surface Transportation Subcommittee, Senate Committee on Commerce, Senate Office Building, Washington, D.C.

DEAR SENATOR LAUSCHE AND MEMBERS OF THE SUBCOMMITTEE: Have been urged by several constituents to inform your committee of the claim practices of the New York Central System. From my own point of view, I believe it is most important that testimony and information is submitted spotlighting some of the practices of this carrier. I am therefore taking the liberty of presenting this second supplemental statement.

NEW YORK CENTRAL SYSTEM REFERENCE 3409–6057–DBG–0400

Claim was filed June 7, 1965 covering condition loss to shipment of Tomatoes from California. The first and only communication received from the carrier was dated July 7, 1967 informing me that their investigation was incomplete. The Honorable William H. Tucker, when testifying July 18, 1967, inferred that a ninety day period was sufficient time for the carriers to investigate and resolve claims. As of this date, 816 days have elapsed and who knows when the item will be concluded.

NEW YORK CENTRAL SYSTEM REFERENCE 4618–6151–3402

Claim was filed April 30, 1965. The first advice received was a letter dated July 7, 1967 summarily disallowing the claim. It involved a trailerload of Tomatoes from California. The shipper inserted the wrong trailer number on the bill of lading then presented the bill to the carrier for execution. All car and trailer numbers are published in a tariff, filed with the Interstate Commerce Commission, called the Official Railway Equipment Register. The carriers and the public are charged with the constructive knowledge of the contents of all tariffs. The agent was duly charged with the responsibility of knowing correct trailer numbers and should not have compounded the shipper's error by signing the bill of lading. Moreover, the carrier had several opportunities to cross check the van number between arrival at the ramp and presentation of the waybills to the train conductor for movement. Such a check was also obligatory and vital for safety reasons.

On the scheduled arrival date at destination, consignee and his teamster inquired about the location of the trailer.

For approximately 3½ days they were consistently informed that the trailer was not available, although the New York Central was given the information relating to the number of the flat car. Finally, the Santa Fe, who originated the shipment, tracked down the correct number. By this time the lading reflected high product temperatures with heavy decay. These were high priced Tomatoes and consequently the loss was quite substantial.

The claim was discussed with Mr. L. F. Battaglia, Director of Freight Claims, after he had presented his own statement before the subcommittee. He promised to review the item and let me know. On July 28 he wrote to me and simply confirmed the original declination.

NEW YORK CENTRAL SYSTEM REFERENCE 3315–6290–CC–710V

Claim was filed December 1, 1966 covering a shipment of Lettuce from Arizona. Car was involved in a wreck on the New York Central and was never forwarded to destination. Such claims are usually handled very promptly by the carriers and have received payment on similar items from one to three weeks. The first communication from the New York Central was dated May 11, 1967. They made an improper offer, which was predicated on the wrong schedule. The next communication was June 20 and this time they offered payment for 880 cartons Lettuce, whereas the shipment contained 980. They also requested an arbitrary discount of 10% of the full destination value. I replied immediately pointing out the 100 carton error and raised objections to the 10% penalty. I did not receive a reply to this letter, and realizing that any communication with Mr. Battaglia would be futile, I sent a personal letter to Mr. A. E Perlman, President, on August 4, requesting his help. Up to this date I have not received a reply or any acknowledgment.

Notwithstanding Mr. Battaglia's testimony on July 17, I must say that for all practical purposes, the New York Central does not pay delay claims. Their policies are arbitrary and quite indifferent to the inconveniences or losses caused by the carrier. As if this wasn't enough, we are forced to contend with these same attitudes on traffic moving via the Indiana Harbor Belt Railroad. It is an important connecting link between the western and eastern carriers, located in the Chicago area. I am informed that the New York Central controls 51% of the common stock and 100% of the claim policy. As mentioned in previous testimony, all the difficulties with the eastern carriers date from the announcement by the New York Central and the Pennsylvania Railroad of their agreement to merge. This should be very significant and emphasizes the importance of approving S. 858 in its original form. It is my honest belief that

conditions will get worse after the merger is consummated. Anyone who thinks otherwise is just not being realistic. All possible safeguards should be enacted into law so that the shipping public may be protected.

Respectfully yours,

J. S. BURAK.

GRAIN & FEED DEALERS NATIONAL ASSOCIATION,
Washington, D.C., September 5, 1967.

Hon. FRANK J. LAUSCHE,
Chairman, Subcommittee on Surface Transportation, Senate Commerce Committee, U.S. Senate, 1324 New Senate Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: The Grain and Feed Dealers National Association followed with great interest the entire hearings on S. 858—to amend Section 20 (11) of the Interstate Commerce Act to provide recovery of a reasonable attorney's fee in the case of successful maintenance of an action for damage sustained in the transportation of property. We would like to comment on several issues raised during the hearings and have this supplemental statement made a part of the record of those hearings.

Award of damages to prevailing party.—This proposal is based on the principle that equal justice and mutuality of equity requires such reciprocity. We cannot subscribe to this theory since we are primarily dealing with small claims filed by small grain operators against huge economic giants where there is no mutuality of economic position as between the small businessman and the railroads.

The provision of a reciprocal award would provide for double compensation to the carrier since we must assume that all rail rates are compensatory and include some of the legal expenses incurred by the carriers in maintenance of their legal staffs as well as the prosecution of all claims that might be comtemplated. We find no mutuality in equity in this situation with respect to the claimant who would recover reasonable attorney's fees under S. 858 if he prevailed but would have to pay double attorney's fees if the carrier prevailed.

Furthermore, we concur in the statement of the distinguished Chairman of the Committee of Commerce, Senator Magnuson, that a provision for reciprocity is contrary to the unmistakable pattern of Federal and State laws with regard to the award of reasonable attorney's fees.

In our opinion, an amendment to S. 858 which would award attorney's fees to the prevailing party would completely frustrate the intent of the legislation and leave the shipper and receiver in the same inequitable position that they are at present; would frustrate the settlement of claims by bargaining and would tend to increase the number of claims which resulted in court actions. In view of the foregoing, we strongly recommend that S. 858 continue to provide for the award of reasonable attorney's fees to the successful plaintiff.

Award to be discretionary in every case.—Our objection to this proposal is based on the points raised in the above issue. In addition, it does not provide the courts, State and Federal, with strong, positive Congressional guidance and the absence of such guidance was the rationale of the decision in Thompson v. H. Rouw Co. Tex Civ. App. (1051), 237 S.W. 2nd 662. which disallowed the recovery of reasonable attorney's fee.

Contrariwise, the courts would exercise discretion in the amount awarded as reasonable attorney's fees and this would overcome the concern exhibited during the hearings in those cases when the amount of the award was less than the amount proffered by the carrier on the claim. This would be a matter for the court to determine after the judgment had been rendered.

Ninety-day waiting period.—The amendment proposed by Chairman Tucker would preclude the award of reasonable attorney's fees unless it were shown that the plaintiff had filed a claim which had not been paid by the carrier within ninety days of receipt by the carrier. We consider this amendment reasonable and interpose no objection to it.

Award of fees for claim of $500 or less.—We oppose an amendment to S. 858 which would limit the award of reasonable attorney's fees to those prevailing plaintiffs who had claims of $500 or less. We fully support enactment of S. 858 which would put the shipper and receiver in an equitable bargaining position with the carriers with respect to the settlement of meritorious claims. There is no monetary limit provided for in other sections of the Interstate Commerce Act and none is justified in Section 20 (11). S. 858 will benefit most the small

shipper and receiver but with a monetary limitation on claims determining whether or not an award is made could hurt the small and large shipper alike as each could lose as much from one car load of grain.

Causes of losses.—In our statement of July 17, 1967, we recognized that some losses of grain occur as a result of faulty practices of the shipper or receiver. We were surprised that one witness listed the faulty practices of loading and unloading as we do not consider this to be germane to the consideration of this legislation. We reiterate that we want meritorious claims settled and other claims denied. It is for the courts to decide the causes of losses and to make a judgment as to the amount of damages, if any. We would hope that your Subcommittee would discard the non-germane statements with regard to causes of losses.

We appreciate the consideration that you gave us at the hearings and for this opportunity to express our further views on this legislation which is so important to our industry.

Sincerely yours,

JOHN H. FRAZIER, Jr.,
Chairman, Transportation Committee.

INTERNATIONAL APPLE ASSOCIATION, INC.,
Washington, D.C., July 28, 1967.

Hon. FRANK J. LAUSCHE,
Chairman, Subcommittee on Surface Transportation,
Washington, D.C.

DEAR SENATOR LAUSCHE: During the hearings on S. 858, it was clearly evident that you were personally, deeply troubled relative to the "equity" of the legislation.

On several occasions you asked witnesses what their position would be if the bill were amended to provide for the respondents to collect reasonable attorney's fees if the plaintiff was unsuccessful.

You did not pose the question to me during my testimony, and *I would like to go on record that the International Apple Association, Inc. would be strongly opposed to any such amendment.* In fact, we would vigorously work to defeat a bill that provided collection of a reasonable attorney's fee by the successful plaintiff *or* respondent.

Our reason is relatively simple. "Reciprocity" could endanger the Produce Industry's status relative to *all* claims by reason of default.

The IAA and the Produce Industry strongly support S. 858 as a means to partially counteract the *Eastern Carriers'* arbitrary and unreasonable *practice* to reject practically all, if not all, delay claims, due to decline in market, on the basis of "reasonable dispatch" and "non-negligence", regardless of the amount of carrier delay involved. Other industries, such as the Grain Industry, support S. 858 because of the Carriers' unreasonable policy concerning other types of loss and damage claims, and with the grain people it primarily involves losses due to cars being delivered with cargo weights below the originally loaded weights.

We would emphasize that nearly all Carriers have maintained a fairly reasonable policy concerning other loss and damage claims (other than delay claims), such as improper handling, spoilage, decay, bruising due to shifting, etc., involving fresh fruits and vegetables. For fresh fruits and vegetables, *delay claims* in 1966 accounted for less than 20% of the claims paid by the Carriers; *other claims* (mostly because of improper handling which damaged the commodity) accounted for over 80%.

On the other hand, S. 858 involves all loss and damage claims. Amendment of the bill to provide the "reciprocal" feature would, in our opinion, give the Carriers a most unreasonable, inequitable and powerful weapon, which could practically nullify all legal and just claims on fresh fruits and vegetables by default.

It is not unreasonable to believe that, if the "reciprocal" feature were incorporated in S. 858, the Carriers would adopt a stiffer arbitrary and unreasonable policy on all claims involving fresh produce (they did it with the grain people). Then the only recourse for our *small businessman* is to take the Carriers—*the Industry Giants*—to court.

Imagine the reaction of the small businessman who has had a $300 improper handling claim rejected by the Carrier. He seeks legal advice. The lawyer should advise him of his possible costs if he loses. On a "reciprocal" basis his costs, if

he loses, could be very substantial—his own attorney's fee, the Carrier's attorney's fee (which in itself could easily be 5 times the amount of the claim), the costs of his witnesses (who may have to be brought long distances), and loss of his own valuable time away from his dynamic business. This, plus the fact he will be facing an opponent with the best legal assistance available and with a "fat purse," can only result in his deciding his first loss is his smallest and let the claim go by default. With "reciprocity" in the bill this situation would be miltiplied by the thousands in our industry.

We contend that, for our industry, S. 858 would restore some degree of "equitability" between the small businessman and the industry giants, the Carriers, especially in view of the Eastern Carriers' arbitrary policy concerning just delay claims.

We further contend that, for our industry, there presently is no mutuality of the litigants. Certainly the Carriers with their highly qualified and well paid legal staff have a far better opportunity to defend themselves than our industry's small businessman has to successfully sue.

Not only do the Carriers have the necessary finances and the best legal staff, but they are, as you indicated, practically the insurers of the cargo during transportation. They are the only ones who know what happened to the cars while en route to destination. In accepting the bill of lading they are participating in a contract. In failing to meet schedules that were valid (and guaranteed) for 30 years, we contend they have not fulfilled that contract and should be required to prove "non-negligence". With their arbitrary policy of automatically rejecting delay claims, regardless of the delay, the Eastern Carriers are saying, "Not our fault. We delivered with 'reasonable dispatch'. Take us to court and prove us wrong." Under the circumstances, how can our small businessman go to court when the legal costs involved usually far exceed the claim, and the Carrier is the only one who really knows what happened en route.

Further, may we suggest that the Carriers' overall costs of litigation are included in the computation of the line-haul rates. *Therefore, the Carrier is being paid by the shipper to defend before the shipment is made.* Can he logically be also provided with the powerful weapon of "reciprocity"?

In closing, we repeat our recommendation to amend the Interstate Commerce Act to require Carriers to file reasonable schedules for perishables with the Commission, and that failure to meet these schedules would be prima facie evidence in collecting damages, unless the Carrier can prove non-negligence, i.e., act of God, act of the public enemy, or act or default of the shipper or owner.

In our opinion, such an amendment is reasonable and just and would certainly have a salutary effect on the present arbitrary policy of the Eastern Carriers concerning legal and just delay claims.

Sincerely,

FRED W. BURROWS,
Executive Vice President.

DEPARTMENT OF AGRICULTURE,
Washington, D.C., October 6, 1967.

HON. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate.

DEAR MR. CHAIRMAN: This has reference to S. 858 introduced in the Senate of the United States by you on February 6, 1967, proposing "To amend the Interstate Commerce Act, with respect to recovery of a reasonable attorney's fee in case of successful maintenance of an action for recovery of damages sustained in transportation of property."

The bill S. 858 would amend paragraph 11 of Section 20 of the Interstate Commerce Act (49 U.S.C., Sec. 20, par. 11) by inserting at the end of the fifth proviso and immediately before the sixth proviso the following: "And provided further, that if the plaintiff shall finally prevail in any action, he shall be allowed a reasonable attorney's fee, to be taxed and collected as part of the suit:".

This legislative approach to alleviation of a troublesome problem has the support of this Department. A brief statement of the nature of the problem is required to explain our reasons for support.

Prior to June 1, 1964, most railroads of the United States, for many decades, published train schedules between many points for the transportation of perishable freight. Based upon these schedules, producers and shippers of perishable agricultural commodities could schedule their shipments for certain terminal

markets so as to have them arrive within a reasonable time to permit the efficient and orderly marketing of their respective commodities.

As of June 1, 1964, the eastern railroads, serving the principal destination markets east of Buffalo, New York, discontinued guaranteeing train schedules which were designed for arrivals in time for certain markets. There had also been in effect an understanding between shippers and carriers of a daily delivery cut-off time at these particular markets. Many railroads now deny liability for loss of market on cars of fresh fruits and vegetables which arrive at the eastern markets later than the anticipated arrival time. In denying liability, the rail carriers rely upon the language in the bill of lading which states, in part:

"No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or *otherwise than with reasonable dispatch.*"

Relying on this provision the railroads can with impunity interpret actual delivery performance on terms most advantageous to the railroad. The results frequently disrupt orderly marketing, which depends upon reasonable assurance of a steady supply of perishable food reaching the market. Predetermined advertising and retail distribution plans are badly upset if commodities are materially delayed in transit, and then arrive in unwanted volume many days after their planned arrival. Frustration and financial loss accompany the chaotic conditions produced by intermittent gluts and shortages.

The industry desires first of all to smooth out its marketing and distribution problems. Direct negotiations with railroads have been successful in bringing about only temporary improvement in delivery performance. Claims to recoup financial losses resulting from delayed deliveries have run into the stonewall defense of delivery with "reasonable dispatch," as interpreted by the railroads. Recovery through court proceedings is sometimes possible, but the cost consumes too large a part of the amount recovered to justify taking relatively small claims to court. Grain and livestock shippers have also complained that they are handicapped in settling claims for full value.

The provision in S. 858 which would allow a successful plaintiff a reasonable attorney's fee would furnish an incentive for railroads to improve service.

The Bureau of the Budget advises that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely yours,

ORVILLE L. FREEMAN,
Secretary.

OFFICE OF THE SECRETARY OF TRANSPORTATION,
Washington, D.C., October 9, 1967.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This letter is in reply to your request for the views of this Department with respect to S. 858, a bill to amend the Interstate Commerce Act, with respect to recovery of a reasonable attorney's fee in case of successful maintenance of an action for recovery of damages sustained in transportation of property.

S. 858 would amend paragraph 11, section 20 of the Interstate Commerce Act, which relates to the liability of any common carrier, railroad, or transportation company to the holder of a bill of lading for loss, damage, or injury to property, by adding an additional *proviso* allowing a reasonable attorney's fee to a successful plaintiff in an action under that paragraph. The attorney's fee would be taxed and collected as part of the suit. The amendment would be applicable to motor carriers and freight forwarders, as well as railroads.

As we understand it, the bill is intended to (1) make it more possible for a shipper having a meritorious small claim for loss or damage to obtain settlement without having to resort to litigation and (2) to impose a financial burden or responsibility on a carrier for failing to maintain its schedules.

While shippers of perishables have stated that the railroads in recent years have taken a more restrictive approach to the settlement of claims for loss and damage, refusing to guarantee schedules and refusing to pay claims except on a showing of negligence, we have no independent data on which to base a conclusion that a serious situation needing correction exists. If this is the situation, in cases

where the amount of the claim is small, this may effectively preclude recovery since the cost of litigation will often exceed the potential recovery. Allowing the shipper to recover his attorney's fees in a successful suit would have the effect of inducing the carriers to settle meritorious claims.

If the Committee is of the opinion that a situation exists with respect to small shippers which is unjust and should be rectified, the Department would have no objection to enactment of S. 858, subject to the amendment described below.

As the bill is now drafted, it contains the potential for abuse since shippers might resort to litigation involving recovery of attorney's fees over claims which could be easily and fairly settled. This danger was alluded to by Chairman Tucker in his testimony before the surface transportation subcommittee on July 18. He recommended amending S. 858 to provide for the recovery of attorney's fees only where the carrier had been first given an opportunity to settle the claim and had not done so within 90 days. The Department believes that the amendment suggested by the Interstate Commerce Commission represents an improvement to the bill since it would guarantee justice to both parties to a claims situation.

We have been advised by the Bureau of the Budget that there would be no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

JOHN L. SWEENEY,
Assistant Secretary for Public Affairs.

STATEMENT OF WILLIAM J. AUGELLO, JR., TRAFFIC COUNSEL FOR SOCIETY OF AMERICAN FLORISTS & ORNAMENTAL HORTICULTURISTS

The Society of American Florists and Ornamental Horticulturists with headquarters at the Sheraton-Park Hotel, Washington, D.C., hereby supports S. 858 to amend the Interstate Commerce Act by permitting the recovery of reasonable attorney's fees in case of successful maintenance of an action for recovery of damages sustained in transportation of property subject to Section 20(11) of said Act.

The Society is a federated national trade association comprised of 182 affiliated associations representing thousands of firms engaged in all segments of the floral industry. The industry's primary movement consists of small shipments of cut flowers, nursery stock, decorative greens, and related commodities. It follows, therefore, that its claims for loss, damage or delay of such shipments are in relatively small amounts.

Since litigation of declined claims in small amounts if not economically feasible, the carriers utilized by the floral industry naturally weigh this factor in determining whether to voluntarily pay claims. As a result, the industry loses thousands of dollars in unrecoverable claims annually.

The proposed legislation will certainly induce carriers to seriously consider the merits of each and every claim irrespective of the amount thereof and the likelihood of a suit being instituted to enforce collection.

Furthermore, the originating or delivering carriers participating in joint movements of floral products are permitted to recover reasonable attorney fees from connecting carriers upon a judgment in favor of a plaintiff pursuant to Section 20(12) of the Interstate Commerce Act. It appears to be reasonable to permit the successful plaintiff to recover reasonable attorney fees under the same circumstances.

The Society has no objection to Commissioner Tucker's suggested amendment to S. 858 requiring the filing of a claim and a waiting period of 90 days before a suit may be instituted against a carrier, thus giving the carrier an opportunity to voluntarily settle the claim without payment of attorney fees. This appears to be consistent with claim practices prevailing throughout the floral industry at present.

Accordingly, the Society of American Florists wholeheartedly supports the passage of S. 858 as introduced, together with the aforementioned amendment.

Respectfully submitted.

NEW YORK, N.Y., October 12, 1967.

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