

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

OWNER-OPERATOR INDEPENDENT)
DRIVERS ASSOCIATION, INC., NELSON)
TODD MYERS, BILL GORDON, JACK)
AUSTIN JR., and AUSTIN)
TRANSPORTATION CO., INC., GEORGE)
M. PANCOAST III, LAWRENCE JOSEPH)
MCMULLEN and ROBERT J. BOSTER, on)
behalf of themselves and all others similarly)
situated,)
)
Plaintiffs,)
)
v.)
)
NORTH AMERICAN VAN LINES, INC.,)
)
Defendant.)

ANSWER AND AFFIRMATIVE
DEFENSES TO PLAINTIFFS'
CLASS ACTION COMPLAINT

CASE No. 7:05CV00162

Defendant North American Van Lines, Inc. ("North American") states as its Answer and Affirmative Defenses to Plaintiffs' Class Action Complaint for Declaratory and Injunctive Relief and Damages and Demand for Jury Trial ("the Complaint"):

1. North American admits that the Complaint is styled as a class action and that the Owner-Operator Independent Drivers Association, Inc., Nelson Todd Myers, Bill Gordon, Jack Austin Jr. and Austin Transportation Co., Inc., George M. Pancoast III, Lawrence Joseph McMullen, and Roderick J. Boster appear in the caption as plaintiffs. North American denies the remaining allegations of Paragraph 1.

2. North American admits that subject matter jurisdiction is conferred on this Court by 28 U.S.C. §§ 1331 and 1337 and that Plaintiffs allege violations of 49 C.F.R. Part 376. North American denies the remaining allegations of Paragraph 2.

3. North American admits that it is authorized to do, and does, business in Virginia and that certain of its independent agents have offices in Virginia. North American further states that it is not challenging venue in this District as improper. North American denies, however, that a substantial part of the events described in the Complaint occurred in the Western District of Virginia or elsewhere in Virginia. Further answering, North American states that for the convenience of the parties and witnesses and in the interest of justice, this action should be transferred to the Northern District of Indiana pursuant to 28 U.S.C. § 1404(a). North American denies the remaining allegations of Paragraph 3.

4. North American is without knowledge or information sufficient to form a belief as to the truth of the allegations of the first three sentences of Paragraph 4 and, therefore, denies them. North American denies that OOIDA is an adequate class representative, that the putative class meets the requirements for class certification under the Federal Rules of Procedure, or that a class should be certified, and denies the remaining allegations of Paragraph 4.

5. North American admits that Nelson Todd Myers has leased motor vehicle equipment, with a driver, to its independent agents, A Moving & Storage, Co., Inc., Houston, Texas (beginning in 1984) Clinton Transfer and Storage, Blacksburg, Virginia (beginning in 1985), and that such equipment and driving services have been used to transport shipments moving under North American's interstate operating authority. North American is without knowledge or information sufficient to form a belief as to the truth of the allegations regarding Myers residency and membership in OOIDA and, therefore, denies them. North American denies the remaining allegations of Paragraph 5.

6. North American admits that Bill Gordon has leased motor vehicle equipment, with a driver, directly to North American (beginning in 1977) and to its independent agent, Clinton Transfer

and Storage, Blacksburg, Virginia (beginning in 1980), and that such equipment and driving services have been used to transport shipments moving under North American's interstate operating authority. North American is without knowledge or information sufficient to form a belief as to the truth of the allegations regarding Gordon's residency or membership in OOIDA and, therefore denies them. North American denies the remaining allegations of Paragraph 6.

7. North American admits that Jack Austin Jr. and Austin Transportation Co., Inc. have leased motor vehicle equipment, with a driver, directly to North American (beginning in 1980) and to its independent agents, Lambert Transfer & Storage, Opelika, Alabama (beginning in 1985), AAdvantage North American, Panama City, Florida (beginning in 1996), and Eckert's Van and Storage, San Marcos, California (beginning in 2001) and that such equipment and driving services have been used to transport shipments moving under North American's interstate operating authority. North American further admits that, to date, it has not been able to locate a written lease reflecting Jack Austin Jr. and Austin Transportation Co., Inc.'s leasing relationship with Eckert's Van and Storage. North American is without knowledge or information sufficient to form a belief as to the truth of the allegations regarding Jack Austin Jr. and Austin Transportation Co.'s residency or membership in OOIDA and, therefore, denies them. North American denies the remaining allegations of Paragraph 7.

8. North American admits that George M. Pancoast III has leased motor vehicle equipment, with a driver, to its independent agents, Advance Transportation Systems, Wilton, Connecticut (beginning in 1983), A Better Way Salka & Sons, Inc., Cromwell, Connecticut (beginning in 1984), Morse Moving Company, Norwalk, Connecticut (beginning in 1987) and Prager Moving and Storage Company, Naperville, Illinois (beginning in 2001) and that such equipment and driving services have been used to transport shipments moving under North American's interstate

operating authority. North American is without knowledge or sufficient information to form a belief as to the truth of the allegations regarding Pancoast's residency or membership in OOIDA and, therefore, denies them.

9. North American admits that Joseph McMullen has leased motor vehicle equipment, with a driver, to its independent agents, Ace Moving & Storage, Gulfport, Mississippi (beginning in 1992), B & J Moving & Storage, Battle Creek, Michigan (beginning in 1998), and Hawkeye Moving and Storage, North Liberty, Iowa (beginning in 1999) and that such equipment and driving services have been used to transport shipments moving under North American's interstate operating authority. North American is without knowledge or sufficient information to form a belief as to the truth of the allegations regarding McMullen's residency or membership in OOIDA and, therefore, denies them. North American denies the remaining allegations of Paragraph 9.

10. North American admits that Roderick J. Boster has leased motor vehicle equipment, with a driver, to its independent agents, Nelson North American, Lake Forest, California (beginning in 1993) and Air Van Moving and Storage, Kirkland, Washington from June 1998 through November 2004 and that such equipment and driving services have been used to transport shipments moving under North American's interstate operating authority. North American is without knowledge or sufficient information to form a belief as to the truth of the allegations regarding Boster's residency or membership in OOIDA and, therefore, denies them. North American denies the remaining allegations of Paragraph 10.

11. North American admits that it is a regulated motor carrier that provides transportation of household goods and other property in interstate commerce pursuant to operating authority from the Federal Motor Carrier Safety Administration. North American admits that it is a Delaware corporation with its headquarters located in Fort Wayne, Indiana, and that it provides

household goods transportation services nationwide both directly and through independent agents located throughout the country, including in this District. North American admits that it is authorized to do business in Illinois and currently has 16 agents located in Illinois. North American admits that it directly and through its agents moves household goods and other freight in equipment leased by North American or its agents from independent owner-operators. North American denies the remaining allegations of Paragraph 11.

12. The allegations of Paragraph 12 are assertions of law to which no answer is required. To the extent that a response is required, North American denies them.

13. The allegations of Paragraph 13 are assertions of law to which no answer is required. To the extent that a response is required, North American denies them.

14. The allegations of Paragraph 14 are assertions of law to which no answer is required. To the extent that a response is required, North American denies them.

15. The allegations of Paragraph 15 are assertions of law to which no answer is required. To the extent that a response is required, North American denies them.

16. The allegations of Paragraph 16 are assertions of law to which no answer is required. To the extent that a response is required, North American denies them.

17. The allegations of Paragraph 17 are assertions of law to which no answer is required. To the extent that a response is required, North American denies them.

18. The allegations of Paragraph 18 are assertions of law to which no answer is required. To the extent that a response is required, North American denies them.

19. North American denies the allegations of Paragraph 19.

CLASS ACTION ALLEGATIONS

20. North American admits that the named Plaintiffs seek to represent a putative class of individuals. North American denies that Plaintiffs, either individually or as members of a putative class, are entitled to the relief sought in the Complaint; denies that the putative class meets the requirements for class certification under the Federal Rules of Procedure; denies that a class should be certified; and denies the remaining allegations of Paragraph 20.

21. North American admits the first sentence of Paragraph 21. North American is without knowledge or sufficient information to form a belief as to the truth of the allegations of the second two sentences of Paragraph 21 and, therefore, denies them. North American denies the remaining allegations contained in Paragraph 21, denies that the putative class meets the requirements for class certification under the Federal Rules of Civil Procedure, denies that a class should be certified, and denies that a class should be certified.

22. North American denies the allegations of Paragraph 22 and further denies that the putative class meets the requirements for class certification under the Federal Rules of Civil Procedure and denies that a class should be certified.

23. North American denies the allegations of Paragraph 23 and further denies that the putative class meets the requirements for class certification under the Federal Rules of Civil Procedure and denies that a class should be certified.

24. North American denies the allegations contained in the first two sentences of Paragraph 24 and further answers that nominal plaintiff Gordon, did not authorize plaintiff's counsel to include him as a plaintiff in this lawsuit. North American is without knowledge or sufficient information to form a belief as to the remaining allegations of Paragraph 24 and, therefore, denies

them. North American denies that the putative class meets the requirements for class certification under the Federal Rules of Civil Procedure and denies that a class should be certified.

25. North American denies the allegations of Paragraph 25.

26. North American denies the allegations of Paragraph 26.

27. North American denies the allegations of Paragraph 27.

COUNT I

28. North American incorporates its responses to Paragraphs 1 through 27 as its response to Paragraph 28.

29. The allegations of Paragraph 29 are assertions of law to which no answer is required. To the extent that responses are required, North American denies the allegations of Paragraph 29. North American, in further answering, states that the applicable standard under the relevant leasing regulations is one of "substantial compliance."

30. North American denies the allegations of Paragraph 30.

31. North American denies the allegations of Paragraph 31.

32. North American denies the allegations of Paragraph 32.

33. North American denies the allegations of Paragraph 33. North American, in further answering, states that to establish liability under 49 U.S.C. §14704(a)(2), Plaintiffs must prove that each suffered detrimental reliance or other form of actual, individualized economic injury and thereby sustained damages as a result an act or omission of North American in violation of the federal leasing regulations. 49 C.F.R. Part 376.

COUNT II

34. North American incorporates by reference its responses to Paragraphs 1 through 27 as its response to Paragraph 34.

35. The allegations of the first sentence of Paragraph 35 are assertions of law to which no answer is required. To the extent a responses is required, North American denies the allegations of the first sentence of Paragraph 35, and denies the remaining allegations of Paragraph 35.

36. North American admits that the amount of compensation paid to an owner-operator to haul an interstate North American shipment will depend on the details of North American's, or the relevant independent North American agent's, leasing arrangement with the owner-operator, and that such arrangements may provide for compensation through a percentage of line-haul, accessorial-service, or other revenue, or through other methods. In all other respects, North American denies the allegations of Paragraph 36.

37. North American admits the second sentence of Paragraph 37. North American admits that the amount of revenue received from a customer for an interstate North American shipment will depend on the terms of the applicable tariff or government tender, or, in the case of contract carriage, the terms of the applicable contract with the customer, which may incorporate or be based on some or all terms of a North American tariff and which may include discounts or other reductions in revenue. North American further admits that these discounts and other reductions may reduce the amount of revenue available for distribution among the hauling agent (if any), the booking agent, the origin agent (if any), the destination agent (if any), North American, and the owner-operator (if the owner-operator's leasing arrangement provides for compensation via a percentage of revenue from the shipment). North American further admits that the amount of compensation paid to an owner-operator to haul an interstate North American shipment will depend on the details of North American's, or the relevant independent North American agent's, leasing arrangement with the owner-operator. In all other respects, North American denies the allegations of Paragraph 37.

38. North American denies the allegations of the opening three lines of Paragraph 38.

(a) North American denies the allegations of Paragraph 38(a).

(b) North American admits that, as an interstate motor carrier, North American directly, or through its independent agents, negotiates the terms of contract-carriage shipments without the participation of owner-operators. North American further admits that to obtain interstate contract-carriage shipments, it often agrees to freight rates for particular customers or shipments that are discounted from the rates that appear in North American's tariffs. It is North American's practice to tell either the hauling agent or the owner-operator the estimated net commissionable line-haul revenue for a shipment (which reflects but does not separately state any discount) at the time of dispatch. In all other respects, North American denies the allegations of Paragraph 38(b).

(c) North American admits that in order to secure a contract-carriage shipment from a customer, a discount from the full-tariff rate may be negotiated with the customer on national-account and other shipments. North American further admits that North American, with respect to some North American shipments on which the customer receives a high discount, North American may increase the percentage of net commissionable line-haul revenue going to the hauling agent or in the case of shipments hauled by owner-operators under lease directly to North American, to the owner-operator. North American further admits that whether the increased revenue is passed through to the owner-operator by the hauling agent (where applicable) depends on the details of the leasing arrangement between the agent and the owner-operator. In all other respects, North American denies the allegations of Paragraph 38(c).

(d) North American admits that pursuant to North American's tariffs customer claims for cargo loss or damage on North American shipments are paid at 60 cents per pound

per article (for military shipments, actual cash value up to a maximum of \$1.25 per pound) unless the customer elects to pay for full value protection. North American admits the second sentence of Paragraph 38(d). North American further admits that the cost of full value protection, if not charged to the customer, is sometimes partially recovered by North American by drawing a percentage of the full-tariff-rate gross revenue, thus reducing the amount of revenue available for distribution among the hauling agent (if any), the booking agent, the origin agent (if any), the destination agent (if any), North American, and the owner-operator (if the owner-operator's leasing arrangement provides for compensation via a percentage of revenue from the shipment). In all other respects, North American denies the allegations of Paragraph 38(d).

(e) North American admits that in order to obtain interstate contract-carriage shipments, North American, directly or through its independent agents, sometimes agrees to waive or reduce certain costs to customers, including overtime labor costs, packing costs, and fuel surcharge payments. North American further admits that, as an interstate motor carrier, North American directly, or through its independent agents, negotiates such waivers or reductions without the participation of owner-operators. In all other respects, North American denies the allegations of Paragraph 38(e).

(f) North American admits the first sentence of Paragraph 38(f). North American further admits that when a shipper chooses the credit-card option, North American covers all or part of the commission or fee it must pay to the credit-card company by drawing a percentage of the revenue received from the customer, thus reducing the amount of revenue available for distribution among the hauling agent (if any), the booking agent, the origin agent (if any), the destination agent (if any), North American, and owner-operator (if the owner-

operator's leasing arrangement provides for compensation via a percentage of revenue from the shipment). In all other respects, North American denies the allegations of Paragraph 38(f).

39. North American denies the allegations of Paragraph 39.

40. North American denies the allegations of Paragraph 40.

COUNT III

41. North American incorporates by reference its responses to Paragraphs 1 through 27 as its response to Paragraph 41.

42. North American admits that commercial motor vehicle fuel purchased at the pump generally has fuel tax included in its price; that when such fuel, purchased in one state, is consumed in a state whose fuel use tax rate is higher than in the state of purchase, the difference must be paid to the second state; that, correspondingly, when such fuel is consumed in a state whose fuel use tax rate is lower, the difference is credited or refunded by the first state. North American further admits that, as a household goods carrier, it is required under state laws and the International Fuel Tax Agreement to file periodic reports with its fuel tax base-state covering all jurisdictions within which North American shipments are transported, and that it files such reports on a fleetwide basis covering all fuel purchases and miles driven under North American operating authority. North American admits that in conjunction with these fuel use tax reports, North American must, through its base-state, make periodic payments of net fuel use taxes owed to, or receive credits or refunds for excess net fuel use taxes from, all such jurisdictions combined. North American further admits that, to assist it in preparing fuel use tax reports, all owner-operators under lease directly to North American are required regularly to report to North American their fuel purchases and miles driven under North American operating authority; and that North American's independent agents are required regularly to report to North American the fuel purchases and miles traveled in connection with miles driven under North

American operating authority. In addition, North American admits that all owner-operators under lease directly to North American are required to make payments to North American if they have underpaid fuel use taxes and receive credits from North American if they have overpaid fuel use taxes. North American further admits that North American's independent agents are required to make payments to North American for underpayment of fuel use taxes, and such agents receive credits for overpayment of fuel taxes, in connection with miles driven under North American operating authority; and that certain, and possibly all, agents charge back net fuel-use-tax-debits, and credit net fuel-use-tax credits, to owner-operators. In all other respects, North American denies the allegations of Paragraph 42.

43. North American admits the second sentence of Paragraph 43. In all respects other than those set forth in the above response to Paragraph 42, North American denies the allegations of Paragraph 43.

44. In all respects other than those set forth in the above response to Paragraph 42, North American denies the allegations of Paragraph 44.

45. In all respects other than those set forth in the above response to Paragraph 42, North American denies the allegations of Paragraph 45.

46. In all respects other than those set forth in the above response to Paragraph 42, North American denies the allegations of Paragraph 46.

47. In all respects other than those set forth in the above response to Paragraph 42, North American denies the allegations of Paragraph 47.

48. The allegations of the first sentence of Paragraph 48 are assertions of law to which no answer is required. To the extent a response is required, North American denies the allegations of the first sentence of Paragraph 48 and denies the remaining allegations of Paragraph 48.

49. The allegations of the first sentence of Paragraph 49 are assertions of law to which no answer is required. To the extent a response is required, North American denies the allegations of the first sentence of Paragraph 49 and denies the remaining allegations of Paragraph 49.

50. The allegations of the first sentence of Paragraph 50 are assertions of law to which no answer is required. To the extent a response is required, North American denies the allegations of the first sentence of Paragraph 50 and denies the remaining allegations of Paragraph 50.

51. The allegations of the first sentence of Paragraph 51 are assertions of law to which no answer is required. To the extent that a response is required, North American denies the allegations of the first sentence of Paragraph 51. North American denies the remaining allegations of Paragraph 51.

52. North American denies the allegations of Paragraph 52.

COUNT IV

53. North American incorporates by reference its responses to Paragraphs 1 through 27 as its response to Paragraph 53.

54. The allegations of Paragraph 54 are assertions of law to which no answer is required. To the extent that a response is required, North American denies the allegations of Paragraph 54.

55. North American admits that it satisfies its obligations under 49 U.S.C. § 13906 and Federal Motor Carrier Safety Administration regulations thereunder to maintain insurance protection for the protection of the public through commercial insurance policies, with a deductible, obtained through Transguard and other insurance carriers. In all other respects, North American denies the allegations of Paragraph 55.

56. North American denies the allegations of Paragraph 56.

57. North American admits that it and its agents make periodic financial contributions to the Bodily Injury and Property Damage program ("BIPD"), which covers, directly and through insurance, the cost of processing and paying a wide range of claims against North American and its agents in connection with North American shipments, as well as certain safety-compliance and other administrative costs. North American further admits that owner-operators' compensation has often been directly or indirectly reduced, by North American or its independent agents, to fund portions of the BIPD contributions. In all other respects, North American denies the allegations of Paragraph 57.

58. The allegations of Paragraph 58 are assertions of law to which no answer is required. To the extent that a response is required, North American denies the allegations of Paragraph 58.

59. North American denies the allegations of Paragraph 59.

COUNT V

60. North American incorporates by reference its responses to Paragraphs 1 through 27 and 53 through 59 as its response to Paragraph 60.

61. North American admits that plaintiffs have selectively quoted portions of 49 C.F.R. § 376.12(h) and deny the remaining allegations of Paragraph 61.

62. The allegations of Paragraph 62 are assertions of law to which no answer is required. To the extent that a response is required, North American denies the allegations of Paragraph 62.

63. North American denies the allegations of Paragraph 63.

64. North American denies the allegations of Paragraph 64.

65. North American denies the allegations of Paragraph 65.

COUNT VI

66. North American incorporates by reference its responses to Paragraphs 1 through 27 and 53 through 65 as its response to Paragraph 66.

67. North American denies the allegations of Paragraph 67.
68. North American denies the allegations of Paragraph 68.
69. North American denies the allegations of Paragraph 69.
70. North American denies the allegations of Paragraph 70.
71. North American denies the allegations of Paragraph 71.
72. North American denies the allegations of Paragraph 72.
73. North American denies the allegations of Paragraph 73.

COUNT VII

74. North American incorporates by reference its responses to Paragraphs 1 through 27 as its response to Paragraph 74.

75. North American admits that Plaintiffs have selectively quoted portions of 49 C.F.R. § 376.12(i) and deny the remaining allegations of Paragraph 75.

76. North American denies the allegations of Paragraph 76.
77. North American denies the allegations of Paragraph 77.
78. North American denies the allegations of Paragraph 78.
79. North American denies the allegations of Paragraph 79.
80. North American denies the allegations of Paragraph 80.

PRAYERS FOR RELIEF

North American denies that Plaintiffs are entitled to any of the relief they request in their Prayers for Relief Paragraphs A through M.

AFFIRMATIVE DEFENSES

Without prejudice to their denials of the allegations in Plaintiffs' Complaint, North American states as its Affirmative Defenses, without waiving the obligation of Plaintiffs to prove each and every element of their claims, and pleading in the alternative, as follows:

FIRST AFFIRMATIVE DEFENSE

Plaintiff Owner-Operator Independent Drivers Association, Inc., lacks standing to bring the damages claims asserted in the Complaint. The remaining named Plaintiffs may not pursue damages claims and/or act in a representative capacity relating to any damages claims to the extent there is no named Plaintiff with standing to raise each particular claim.

SECOND AFFIRMATIVE DEFENSE

In asserting a claim against North American for injunctive relief, Plaintiffs have failed to state a claim upon which relief can be granted under 49 U.S.C. § 14704(a)(1) because they have not first obtained an order of the United States Secretary of Transportation declaring North American in violation of any statute, regulation, or order, and then have not established that North American has not obeyed any such order.

THIRD AFFIRMATIVE DEFENSE

If a private right of action for damages exists, Plaintiffs have failed to state a claim upon which relief can be granted under that statutory provision because they have failed to show that any Plaintiff suffered detrimental reliance or any other form of actual, individualized economic injury and thereby sustained damages as a result of an act or omission of North American in violation of the federal leasing regulations. 49 C.F.R. Part 376.

FOURTH AFFIRMATIVE DEFENSE

Plaintiffs have failed to state a claim upon which relief can be granted to the extent the Complaint seeks any measure of damages other than actual damages sustained by Plaintiffs.

FIFTH AFFIRMATIVE DEFENSE

Plaintiffs have waived any claims, and should be estopped from asserting claims, that they may have against North American to the extent they have continued doing business with North American.

SIXTH AFFIRMATIVE DEFENSE

Plaintiffs' claims for damages are barred, in whole or in part, by Plaintiffs' failure to mitigate such damages.

SEVENTH AFFIRMATIVE DEFENSE

Some or all of Plaintiffs' claims may be barred by the doctrine of laches.

EIGHTH AFFIRMATIVE DEFENSE

Some or all of Plaintiffs' claims may be barred by the doctrine of unclean hands.

NINTH AFFIRMATIVE DEFENSE

Some or all of Plaintiffs' claims may be barred by the doctrine of payment.

TENTH AFFIRMATIVE DEFENSE

Some or all of the Plaintiffs' claims may be reduced by the doctrine of set-off.

ELEVENTH AFFIRMATIVE DEFENSE

Some or all of Plaintiffs' claims are barred by the two-year statute of limitations set forth in 49 U.S.C. § 14705(c).

TWELFTH AFFIRMATIVE DEFENSE

North American will rely on all defenses lawfully available to it at the time of trial and reserves the right to amend this Answer and Affirmative Defenses to include additional defenses after completion of discovery.

JURY DEMAND

North American denies that Plaintiffs have set forth claims sufficient to be submitted to a jury for determination. To the extent that Plaintiffs have set forth claims sufficient to be submitted to a jury for determination, North American demands trial by jury on all issues so triable.

Dated: May 13, 2005

Respectfully submitted,

**SCOPELITIS, GARVIN, LIGHT &
HANSON, P.C.**

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that I electronically filed the foregoing Answer to Plaintiff's Class Action Complaint with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following: John P. Fishwick, Jr., Esquire, Lichtenstein, Fishwick & Johnson, PLC, 101 South Jefferson Street, Roanoke, Virginia 24011, and I hereby certify that I have faxed and mailed by United States Postal Service the document to the following non-CM/ECF participants: Paul D. Cullen, Sr. and Joyce E. Mayers, The Cullen Law Firm, PLLC, 1101 30th Street, N.W., Suite 300, Washington, DC 20007, counsel of record for Plaintiffs, this 13th day of May, 2005.

s/ Lori J. Bentley