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DEPT. OF TRANSPORTATION
Dockets

99 APR 19 PM 5:00

Thomas D. Wilcox, L.L.B.
Charles T. Carroll, Jr., J.D.
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April 19, 1999

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Via Fax (202-493-2084) and messenger

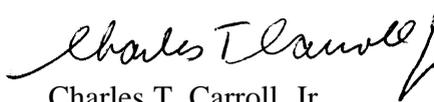
Mr. Kenneth R. Wykle
Administrator, FHWA
Room 4218, HOA1
U.S. Department of Transportation
400 Seventh St., SW
Washington, DC 20590

Re: FHWA Docket No. 98-3656-43

Dear Mr. Wykle:

On April 13th the National Association of Waterfront Employers ("NAWE") requested an extension of time within which to file comments to the above referenced rulemaking. As of noon today, we have not received a response to our request. Enclosed therefore are NAWE's abbreviated comments to the ANPRM, due today. We reserve the right to respond to Petitioners' final comments, data, and evidence, and ask that this letter be made a part of the record.

Sincerely,



Charles T. Carroll, Jr.

DEPT. OF TRANSPORTATION
DOCKETS

99 APR 19 PM 5:00

COMMENTS BEFORE THE
FEDERAL HIGHWAY ADMINISTRATION

on

FHWA INTERMODAL CONTAINER CHASSIS AND TRAILERS RULE

FHWA Docket No. FHWA-98-3656: ANPRM, General Requirements Inspection,
Repair, and Maintenance: Intermodal Container Chassis and Trailers
Federal Register, Vol. **64**, No. **31**, February **17, 1999**

Submitted by

NATIONAL ASSOCIATION OF WATERFRONT EMPLOYERS

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April **19, 1999**



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FHWA INTERMODAL CONTAINER CHASSIS AND TRAILERS RULE

Comments of the National Association of Waterfront Employers

Re: FHWA Docket No. FHWA-98-3656: ANPRM, General Requirements Inspection, Repair, and Maintenance: Intermodal Container Chassis and Trailers: Federal Register, Vol. 64, No. 31, February 17, 1999.

The National Association of Waterfront Employers (NAWE)¹ and its membership endorse the operation of safe intermodal equipment on our highways. Most NAWE members operate intermodal equipment interchanges (“interchanges”) under agreement(s) with one or more maritime carriers on one or more marine terminals, and in this capacity take prudent steps to ensure that only intermodal equipment deemed roadworthy by the drivers employed by motor carriers departs from the terminal interchange. If there is indeed a problem with unsafe intermodal equipment on our highways, as Petitioners indicate, NAWE suggests that a lawful and rational solution can be developed. Unfortunately, Petitioners’ solution is neither.

NAWE offers the following general comments to the Agency’s ANPRM:

The petition’s underlying premise—that “pier operators” and “steam ship lines” are the parties somehow responsible for the fact that drivers *employed by Petitioners* do not have the “ability or opportunity to do a full and adequate inspection” of intermodal equipment prior to departing interchanges—is a self serving half-truth. It becomes truthful only to the extent that motor carriers represented by Petitioners all too often fail to train their drivers and/or require their drivers to take the time to conduct adequate equipment inspections prior to departing from interchanges, despite the legal obligation to do so presently imposed by DOT/FHWA motor carrier safety regulations (FMCSRs).² The plain language of the petition admits as much.

Given the motor carrier industry’s admitted failure to supervise, it should come as no surprise that many drivers do not take advantage of the inspection procedures now in place at

¹ NAWE is a national trade association of private sector marine terminal operators and stevedoring companies whose membership operates marine terminals and equipment interchanges on all four coasts and Puerto Rico. NAWE members thus have a direct interest in the safe operation of the intermodal equipment owned by the maritime industry but used by the motor carrier industry. NAWE, for example, was extensively involved in the discussions leading up to P.L. 102-548, the Intermodal Safe Container Transportation Act of 1992, now codified at 49 U.S.C. § 5901 *et seq.*

² 49 CFR Part 396.

equipment interchanges, and that some drivers, in their haste to depart from the interchange, chose to depart with faulty equipment in violation of the FMCSRs.³

While they are not regulated motor carriers under the various motor carrier statutes, as discussed in detail below, maritime interchange operators have developed a common operating philosophy and near universal procedures governing the interchange of chassis and containers.⁴ Amongst these procedures are strict inspection requirements for inbound inter-modal equipment, and the provision for adequate pre-departure inspection of equipment by outbound drivers. Inbound equipment deemed unsafe for highway use is repaired by the interchange operator prior to its subsequent use. Outbound equipment deemed unsafe is either immediately repaired or returned to the equipment pool for exchange. [See the attached Addendum entitled “A BRIEF **OVERVIEW OF HOW MARITIME EQUIPMENT INTERCHANGES FUNCTION**” for a more detailed explanation of interchange operations.]

Present interchange inspection procedures essentially mirror the FHWA regulatory obligations now placed on motor carriers/drivers to inspect equipment prior to operating it on the highways. They are a private quasi *contractus* substitute for the enforcement of the motor carrier safety statutes and ensuing FHWA regulations. But the system only works if motor carriers and drivers carry out their respective lawful obligation to inspect equipment prior to use, as set forth in the FMCSRs.⁵

Ironically, instead of working with the maritime industry to improve these procedures, petitioners are attempting to impose an entirely irrational set of regulations on the maritime industry. In other words, instead of fixing a problem of their own making, and well within their control, Petitioners have elected to cloak a punitive regulatory scheme over parties with no legal control over drivers employed by petitioners. It appears to NAWA that the motor carrier industry will do anything but take steps to train and supervise its drivers.

Petitioners’ proposed § 396.7(b) and(c) abounds in irrationality. Foremost, in conjunction with proposed § 390.37, it effectively absolves motor carriers of any civil and criminal liability and penalties for the operation of unroadworthy equipment in violation of 49 CFR Subchapter B, unless the “person tendering [intermodal equipment]” provides the “motor carrier with adequate equipment.. .and facilities to make...necessary repairs...prior” to the equipment leaving the

³ NAWA notes that many motor carriers frequently pay their drivers on a per movement basis. It is academic to point out that drivers paid in this fashion seldom devote time to conduct an adequate inspection. Time is money.

⁴ Even without regulation, it is in the maritime industry’s economic self-interest to take highway safety into account when interchanging intermodal equipment. Interchange operators now have every incentive to release only equipment deemed operationally safe onto the highways, given both the industry’s substantial investment in intermodal equipment and the fact that the delivery of containers is usually time sensitive in our “just in time” economy. Substandard or unsafe equipment allowed off the terminal all too often is prone to breakdown or accident, and thus incapable of delivering containers in a timely manner.

⁵ Motor carrier inspection obligations are found at 49 CFR § 396.3; driver obligations are found at 49 CFR § 396.13.

terminal.⁶ Any failure by interchange operators to provide this equipment also relieves motor carriers from the inspection and certification requirements imposed by interchanges. Petitioners fail to explain how granting motor carriers relief from both their DOT/FMCSRs legal obligations and their private *quasi contractus* obligations could possibly result in increased highway safety.

Moreover, the likely results flowing from § 396.7(b) and c) present several glaring non sequiturs that the Agency cannot ignore. First, every maritime interchange presently has an established equipment repair facility [normally on or adjacent to the terminal] operated by qualified mechanics. Any regulatory scheme requiring that interchange operators provide overlapping “equipment, time and facilities” to motor carriers so that employees of the latter can make repairs duplicates the interchange operators’ existing repair services. Such duplication defies logic. If the present system-using qualified mechanics to repair equipment deemed unroadworthy by drivers—cannot provide roadworthy equipment, how is a duplicative repair system-using motor carrier drivers not qualified as mechanics-going to possibly provide roadworthy equipment?⁷

Second, Petitioners have completely failed to explain how drivers allegedly without either the “ability” and/or with so little time to find the “opportunity” to conduct an adequate inspection will, should this proposal be incorporated into a final rule, somehow find the time to “repair [unroadworthy] equipment” before departing from marine terminals.

For these reasons, NAWA submits that any final rule as incongruous and irrational as the proposed §396.7(b) and (c) will be set aside as per se arbitrary and capricious under applicable Administrative Procedure Act review standards. Furthermore, NAWA is amazed at Petitioners’ obvious belief that the FHWA is so gullible that the Agency will, in turn, publish a proposed rule absolving motor carriers of liability, codify their failure to train and supervise their drivers, etc, etc., etc. A thorough investigation by the Agency is bound to conclude that any rule proposed by the Agency based on this petition will actually lead to increased use of unroadworthy intermodal equipment on the highway, rather than the decrease as claimed by Petitioners.

This outcome is so predictable that NAWA suggests that Petitioners’ proposed solution is actually designed to accomplish a hidden purpose—to relieve motor carriers entirely from being

⁶ Proposed § 390.37 effectively shifts the legal responsibility for determining roadability questions from regulated motor carriers and their employees, who presumably receive training in motor carrier safety and are familiar with the statutory safety requirements, to maritime employers who have little familiarity with the motor carrier statutes. In essence under proposed § 390.37 these maritime entities become the legally responsible party for the actions of drivers employed by regulated motor carriers, while absolving the latter of any legal responsibility for the actions and training of their driver/employees. This is absurd.

⁷ A literal reading of the language of the proposed rule would allow motor carriers to assign their own mechanics to the repair facilities. Even putting aside the question of labor union jurisdiction, however, no rational motor carrier would ever consider such a move because no motor carrier would willingly expose itself to the jurisdiction of the Longshore and Harbor Workers’ Compensation Act, 33 U.S.C. § 901 *et seq.* The LHWCA exempts drivers temporarily on a marine terminal, but would not exempt mechanics assigned to the terminal. Therefore NAWA concludes that the proposed rule would, as a matter of fact, make drivers the designated repairmen.

penalized for failing to inspect motor vehicles for roadworthiness subject to their ultimate control, as now required by 49 CFR § 396, and for operating intermodal equipment deemed unroadworthy under the various motor carrier statutes. **49 U.S.C. §§ 31135, 31136, 31502.** Put another way, the petition, offered under the guise of sound public policy by two major stakeholders of the FHWA, is, on its face, little more than a self serving attempt to limit motor carrier legal liability, and to shift that liability to the maritime industry.

At the conclusion of the Agency's hearings and investigation, should the Agency determine that a problem with unroadworthy intermodal equipment does in fact exist, NAWE respectfully requests that the proposed amendments to the FMCSRs be redrafted in a manner that presents a rational solution to the problem.

NAWE suggests, for example, that the FMCSRs can easily be refashioned to make it clear that the party best positioned to correct driver "inability" or lack of "opportunity" to conduct inspections at equipment interchanges is the individual driver's employer, i.e., the regulated motor carriers comprising Petitioners' respective memberships. As noted above, drivers presently have a legal duty to inspect equipment prior to its road use, and a continuing duty to ensure roadworthy equipment. Unquestionably, this obligation is now properly placed on the parties best positioned to inspect, observe, and learn of defects, which violate the FMCSRs.

NAWE suggests that current FMCSRs can be refined even further to underscore this obligation and enhance highway safety. For example current regulations could be amended to specifically require that drivers conduct an inspection prior to departing from equipment interchanges and provide written assurances that the equipment complies with the FMCSRs. Of course, these changes will not alleviate enforcement problems encountered by the motor carrier industry on the highway, but they will determine at which point intermodal equipment becomes unroadworthy. See footnote #10.

Another equally rational regulatory approach would be to require that motor carriers using intermodal equipment on the highways provide their own chassis to haul containers, as is the common practice throughout Europe and Asia, instead of relying on those freely supplied by the maritime industry.

ADDITIONAL COMMENTS CONCERNING THE BURDEN OF PERSUASION AND AGENCY JURISDICTION:

BURDEN OF PERSUASION: This rulemaking is governed by the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.* ("APA"). APA § 7(c), 5 USC § 556(d), places the burden of persuasion, along with the burden of production of evidence, squarely on the party seeking the rule, here the Petitioners. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994). This burden can only be met through the production of a preponderance of credible evidence, normally referred to as the substantial evidence test. *Steadman v. SEC*, 450 U.S. 91 (1981). Any final rule of the Agency must also meet this test, and must not be arbitrary, capricious, or otherwise not in accordance with the various motor carrier safety statutes. 5 U.S.C. §706.

While NAWE acknowledges that this is only an ANPRM, and thus subject to further investigation and fact finding by the Agency, NAWE submits that the petition itself does not even come close to meeting the APA standards or the applicable case law. Petitioners have produced no data to substantiate their allegations. Indeed, NAWE doubts that any useful data can be produced, given the fact that most state law enforcement databases, to NAWE's knowledge, do not even distinguish between defects found on power units and intermodal chassis. Even more troubling, Petitioners have indicated no rational basis justifying the punitive nature of their proposed rule.

JURISDICTION: Despite the assertion to the contrary found in the ANPRM, NAWE questions the FHWA's claim that the Agency has statutory jurisdiction over "pier operators" or "steamship lines." These maritime entities are regulated under the Shipping Act of **1984, 46** U.S.C. App §§ 1701 *et seq.*, and their safety practices fall under the respective jurisdictions of the Occupational Safety and Health Administration and the U.S. Coast Guard.* No amount of toying with the statutory definitions of 'employer' and 'employee' subject to the Agency's jurisdiction under 49 U.S.C. § **31132 (2)** and (3), as the ANPRM does, can convert these maritime entities into motor carriers or maritime employees into drivers/mechanics subject to the motor carrier safety statutes, as suggested by the petition.

NAWE acknowledges, however, that the Agency does have jurisdiction over intermodal equipment *once placed in operation on the highways*. Clearly, the Agency may possess the authority to require intermodal equipment owners to comply with the Agency's annual safety inspection regulations, 49 CFR § 396.17, although the present regulations do not do so. However, maritime equipment owners and interchange operators voluntarily comply with this regulation now, as there is no other efficient way of placing intermodal chassis/containers on the highway, given the facts that very few of the numerous motor carriers which provide transportation services to maritime interchanges own intermodal equipment and that chassis must have had this inspection prior to use.

NAWE suggests that FHWA's statutory jurisdiction is quite limited. Agency jurisdiction does not extend to direct regulation of off highway interchange operations. Mere ownership cannot be read to bring equipment owners and/or interchange operators into the **ambit** of FHWA jurisdiction on the same basis that motor carriers employing drivers who operate commercial motor vehicles on the highways fall under the jurisdiction of the Agency.

NAWE submits that the FHWA is absolutely without lawful authority to regulate maritime equipment interchanges to the extent required by **\$396.7** of the proposed rule. The Agency certainly may not compel these equipment interchanges to turn over their repair facilities to drivers employed by motor carriers in order to gain the benefit of having the motor carrier certify the **safety/roadworthiness** of the equipment before taking it out on the highways.

⁸ OSHA regulations require containers to be inspected for "visual defects in structural members and fittings" each time they are hoisted. 29 CFR § 1918.85(j). Coast Guard regulations require that containers be examined at least once every 30 months. 49 CFR Part 452.

If nothing else, proposed § 396.7 raises the specter of the Fifth Amendment's takings clause. Should the FHWA take regulatory action, re, to compel one private actor [maritime equipment interchange operators] to expend financial resources [providing the motor carrier with "equipment.. .and facilities.. .to make necessary repairs.."] to the extent required by Petitioners' proposed rule, for the benefit of another private actor [motor carriers], in order to satisfy the latter's safety obligations required by statute and Agency regulations, it would clearly trigger takings claims under the Fifth Amendment.

Petitioners' proposed rule would effectively convert private conduct into state/government action, which would, in turn, trigger the protections of the Due Process clause for those employers victimized by the scheme. See *Sullivan v. AMMI*, ___ U.S. ___ (1999)(slip opinion at 10) and related cases.

II. ANSWERS TO THE FHWA'S QUESTIONS: HEARINGS AND INVESTIGATION.

NAWE applauds the Agency for seeking the necessary data and answers to the questions posed in the ANPRM. Unfortunately, NAWA suspects that little more than anecdotal evidence is available by way of answers to the key fact bound questions, particularly questions #1 and #2, but suggest that a thorough investigation into the matter can provide the necessary answers.'

Towards this goal, NAWA suggests that the Agency start by examining a statistically valid sample of highway citations issued for unroadworthy or substandard intermodal equipment, and backtracking each citation to determine 1) the exact nature of the cited safety violation (defective/bald tires, bad breaks, broken light lenses, burned out lamps, etc.); 2) what piece of equipment was cited, i.e., power unit or chassis; 3) the source of the unsafe equipment (i.e., marine terminal or other); 4) the amount of time (and mileage, when determinable) elapsed between the equipment interchange and the violation; and 5) whether or not the driver conducted an initial inspection at the point of interchange and/or attempted to exchange equipment he/she deemed unsafe.

As the Agency's questions suggest, short of obtaining this data there is no way to determine if unroadworthy equipment is, in fact, leaving equipment interchanges.

NAWE offers the following answers to the Agency's remaining questions:

No. 3: As noted by the question, the Uniform Intermodal Interchange and Facilities Access Agreement contains a standard clause disavowing any warranty for the fitness of intermodal equipment. The maritime industry first notes that this uniform agreement was drafted with the

⁹ NAWA submits that an investigation will reveal that most highway safety citations involving unroadworthy intermodal equipment will be issued for bad tires, faulty breaks, or burned out light bulbs and that faulty power units will be cited as frequently as faulty chassis.

NAWE further submits that the vast majority of these citations will be for failures, which occur after inspection/departure from the interchange. Failure is much more likely to occur post inspection/departure during highway operation than during terminal operation. The former involves longer hours and hard driving while the latter involves a relatively brief amount of time and light driving.

input of the motor carrier industry. It is not an adhesion contract. NAWE believes that this clause is fair for several reasons. First, the motor carrier industry, when using intermodal equipment owned by the maritime industry, is the party best situated to judge the roadability of the equipment prior to departure, as per their obligation under the FMCSRs. Second and most importantly, once the equipment departs from the interchange, the motor carrier is in sole and complete control of the equipment and its roadworthiness. It is noteworthy that motor carriers frequently keep equipment beyond its free time and use it for purposes not known to, or approved by, the interchange operator. Warranting equipment under these circumstances would be foolhardy.

If the motor carrier industry desires to have fully warranted equipment, it is free to provide its own chassis.

No. 4: NAWE cannot provide an answer to this question.

No. 5: While not required to do so by FHWA regulations, interchange operators already assume complete responsibility for the mechanical condition of the intermodal equipment prior to its departure. As pointed out in NAWE's general comments, this equipment is owned by the maritime industry and it is in our economic interest to maintain it in roadworthy condition. Once equipment leaves the interchange, however, it is outside of our control. Light bulbs can and do burn out; tires can go bad, etc. Moreover, as noted in the Addendum, a few motor carriers have been known to abuse the equipment by keeping it well past the agreed upon free time.

No. 6: While Petitioners would like to make the tendering party absolutely liable for defects discovered after the intermodal equipment departs the terminal, the only rational approach is, as under current law, to hold the motor carrier industry, and its drivers, responsible for defective equipment placed on the highway. In addition to the interchange procedures noted immediately below, drivers have a legal obligation to inspect prior to using equipment on the highway as well as a continuing obligation to operate only roadworthy equipment. Moreover, all interchanges allow equipment deemed unroadworthy by drivers to be exchanged for equipment in compliance with the FMCSRs. As a legal matter, given the FHWA inspection and training requirements placed on the motor carrier industry, intermodal equipment departing from an interchange should be deemed in compliance with the FMCSRs by operation of law.

NAWE believes that any rule placing absolute liability on the maritime industry will lead to the demise of the present interchange scheme. As a practical matter, and putting aside the all important questions of jurisdiction and due process, subjecting interchange operators (and maritime carriers) to civil and criminal liability under the applicable FMCSRs for equipment failure outside of their control will force the industry to adopt a model, as now done in Europe and much of the rest of the world, which requires shippers to hire only motor carriers who provide their own chassis. No one is foolish enough to knowingly participate in a legal scheme making him vicariously liable for the acts of drivers employed by third parties beyond his control.

No. 7: The maritime industry places no obstacles in the way of providing drivers the opportunity to perform a walk around inspection. This is a complete fabrication by the motor carrier industry. Every marine equipment interchange encourages drivers to inspect the tendered

equipment—most require a formal pre-departure driver inspection and some form of certification in addition to conducting their own inspection with longshore personnel. On the other hand, the motor carrier industry, through its pay practices and constant demand to exit terminals quickly, does little to encourage their drivers to conduct adequate inspections, despite the legal obligation to do so imposed by present FHWA regulations.

As for Petitioners' claim that their drivers do not have the "ability" to conduct such inspections, this claim comes unbelievably close to a general admission that the industry has failed in its lawful obligation to train its drivers. At the very least it demonstrates the motor carrier industry's complete contempt for the Agency's present training requirements. Perhaps it would be more productive of the FHWA if the Agency would conduct a [criminal] probe of what appears to be an organized disregard of FHWA regulations by the motor carrier industry.

No. 8: The maritime industry, as noted in the Addendum, already provides extensive repair facilities at each interchange on all major terminals in ports throughout the U.S. These facilities are manned by trained mechanics who repair inbound equipment found to be in need of repair, and who repair outbound equipment deemed unroadworthy at the pre-departure stage by either drivers or terminal inspectors. Intermodal equipment is stored between use in ways designed to conserve scarce terminal space. Consequently, even though inbound equipment is deemed roadworthy upon arrival or after repair, storage itself may lead to the need for further minor repairs.

Any rule requiring that every piece of intermodal equipment be ready for hook up in FMCSR compliant condition is no more achievable than requiring that every motor carrier supplied powered unit be similarly compliant upon arrival at the terminal interchange gate. As noted in the Addendum, roadworthiness (of the overall power unit/chassis/container unit) frequently can only be determined when the combination is first pieced together at the interchange.

While NAWA recognizes that Petitioners desire perfection, i.e., easy access to the interchange, roadworthy intermodal equipment ready for hook up, and quick departure from the terminal, this ideal is something for the two industries to work out in discussions, and not with the gun of irrational federal regulation placed at our head.

Finally, NAWA notes that the petition, if taken literally, would require that these repair facilities be turned over to the drivers to make repairs. This proposal is absurd, given the questions of legal liability and driver competence. The motor carrier industry is well aware that no interchange operator is going to assume liability for drivers employed by the motor carrier industry. And the thought of drivers not schooled as mechanics making substantive repairs to intermodal equipment is, by itself, truly frightening.

No. 9: Interchange operators or equipment owners, as noted in the Addendum, voluntarily comply with the annual inspection requirements of the FMCSRs. NAWA doubts that many chassis are tendered without proof of valid periodic inspection as required by § 396.17. However, given the tens of thousands of chassis in use and the fact that chassis are frequently outside of the interchange operators control for varying periods, even the most sophisticated computer aided

interchanges may fail to conduct every annual inspection in a timely manner, despite their best efforts to do so. Final pre-departure inspections, as now conducted on maritime interchanges, however, should eliminate this as a problem.

No.10: NAWE has no information on this question.

No. 11: NAWE has no information on this question.

No. 12: NAWE has no information on this question.

No. 13: As discussed in the Addendum, this equipment is inspected each time it is placed in use prior to departing the interchange. Therefore, shortening the time between FHWA-required inspections is unlikely to produce any greater degree of safety than the present system does. NAWE further suggest that this question should only be addressed if and when the Agency determines that unroadworthy intermodal equipment is indeed departing from interchanges despite present inspection procedures.

NAWE believes that even if an FHWA (or a state) inspector were to be stationed at each terminal and required to certify the roadworthiness of equipment prior to departure, it would neither increase the roadworthiness of equipment leaving the interchange nor reduce the number of highway citations for non compliant equipment. Most equipment problems occur post inspection. See footnote #10.

No. **14:** See answer to No. 8.

NAWE believes that further Agency hearings/investigation will provide sufficient answers to the Agency's questions. These answers will belie the Petitioners' premise that maritime equipment interchange operators are the party at fault for the operation of unsafe intermodal equipment on the highways by regulated motor carriers.

This implication is based solely on unfounded assertions put forth by the motor carrier industry, and probably is the result of the fact that large marine terminals interchange thousands of containers/chassis on a daily basis, and frustrating delays due to routine equipment interchange problems do occur. NAWE submits that the only proper solution to these delays is changes to terminal/interchange operations borne out of discussions between interchange operators and the motor carrier industry on a terminal by terminal basis, and not through punitive regulations. See Addendum.

ADDENDUM

BRIEF OVERVIEW OF HOW MARITIME EQUIPMENT INTERCHANGES FUNCTION

I. BACKGROUND: Intermodal equipment interchanges (“interchanges”) operated by the maritime industry are based on a simple operational concept. Maritime carriers, for the most part, own (or lease from a container lessor) both the containers and the specialized chassis upon which they are moved.” In turn these carriers normally make this intermodal equipment available to their customers, known as shippers, as part of the agreed upon freight charge under a bill of lading issued by the maritime carrier.

Each maritime carrier provides for its own interchange system, normally on the terminal where its vessels call. Usually this is done through an agreement with a marine terminal operator (MTO) to operate the interchange, its equipment pool, and a repair station as part of the package of terminal services offered by the terminal operator. In a few cases a carrier may directly operate its own interchange. Often, an MTO may serve many maritime carriers and operate numerous interchanges simultaneously on a terminal.

As the name implies, equipment interchanges operate as a distinct function of the terminal, and utilize recognized procedures for the interchanging of necessary paperwork and intermodal chassis and containers with the motor carrier industry. Many of these procedures are standard throughout the industry while others vary somewhat between interchanges. Commonly, interchanges are now going “paperless” as a result of a coordinated effort between the maritime industry and the motor carrier industry. Frequently this is being done on a port wide basis and involves the direct assistance of the regional port authority.

Interchanges do not hire motor carriers to transport containers. Rather, shippers/ consignees hire motor carriers to pick up or deliver a container. Interchanges supply the chassis upon which to haul the container. Both empty and full containers (import) move outbound from the terminal. Full containers (for export) move inbound to the terminal.

While interchanges do not contract with regulated motor carriers to transport containers, they do require any motor carrier who does business on a marine terminal to enter into a formal agreement, normally a variant of the Uniform Intermodal Interchange and Facilities Agreement (U.I.I.A.). Included amongst the provisions of the U.I.I.A. are boilerplate clauses requiring that the motor carrier carry a specified amount of insurance, hold the owner harmless and indemnify the owner for loss, damage, etc., and denying warranted equipment.

Petitioners’ condemnation of the last such clause is misplaced. Under the same circumstances, there can be little doubt that the motor carrier industry would apply this exact same term to the leasing of their equipment to another party.

¹⁰ In a handful of ports, terminal operators own intermodal chassis.

Either interchange operators (or in a few cases, the equipment owners) inspect each chassis within their fleet annually for compliance with the FMCSRs, as 49 CFR § 396.17 requires.” Even though interchange operators are not subject to the FMCSRs, given the fact that the motor carrier industry receives the free use of this equipment on a short term basis, this is the only practical way that roadworthy equipment can be placed on the highways.

Moreover, as discussed below in detail, chassis are presently inspected by interchange personnel on a near constant basis, depending on frequency of use. As importantly, industry protocols call for allowing roadability inspections by drivers with the statutory obligation, expertise, and training to best perform these inspections.

Equipment inspection requirements in and of themselves produce delay. Unfortunately, even further delay caused by equipment failure at the point of interchange is a routine fact of life. No matter how well interchange operators maintain their equipment pools, a chassis failure is most likely to occur when it is first married up to a power unit. Obviously, this is the point when light bulbs, air brake hoses, etc., are most vulnerable to failure. Either correcting the problem immediately or exchanging the offending chassis for another, as interchanges now require, is the only sure way to place FMCSR compliant equipment on the highway.

The maritime industry is well aware of the motor carrier industry’s complaints concerning excessive delay, and is constantly working to improve terminal interchange procedures. This frequently involves a formal discussions between interchange operators, motor carriers, and the port authority. However, delay is often compounded by a variety of factors beyond the control of an individual interchange/terminal operator, including a terminal’s use, size, and location vis a vis highway/rail access. Unfortunately, terminals are a prisoner of geography, and no amount of discussion with the motor carrier industry will alleviate problems caused by these particular conditions.

CAPITAL INVESTMENT: It must be emphasized that with a handful of exceptions in smaller ports, maritime carriers have made the entire capital investment in this interchange system. These carriers own the containers and the chassis and, without exception, each directly operates (or more commonly contracts with a terminal operator to operate) an intermodal equipment interchange including a container/chassis repair station, on the terminal. This is done to ensure that its equipment is maintained, roadworthy, and available for use, and protect its capitol investment.

Motor carriers, on the other hand, have little financial investment in the intermodal system. They provide only the power unit and their employee driver. Nothing in present FHWA regulations requires otherwise. In fact, present regulations reflect and encourage this split structure.

II. INTERCHANGE OPERATING PROCEDURES:

¹¹ Equipment used solely on the terminal is not subject to the FMCSRs. This equipment includes straddle carriers, yard hustlers, bomb carts, and numerous types of powered industrial trucks. Terminal operators inspect this equipment on a daily basis prior to its use.

A. **OUTBOUND EQUIPMENT:** Ordinarily, when a shipper needs an EMPTY container, the motor carrier presents his credentials/paperwork at the interchange gate and is directed to pick up a pre-inspected combination chassis & empty container at the equipment pool. (On some terminals this may be a two step process: the driver may first have to pick up a chassis and then proceed to another area pick up the particular container designated for the shipper.) Full outbound chassis & containers are handled in the same fashion.

Using various methods developed under circumstances that vary from terminal to terminal, prior to departure of outbound intermodal equipment every interchange operator either conducts an inspection using its own [longshore] workforce or requires drivers to inspect outgoing equipment and certify its roadability. Most interchanges provide for both. At a bare minimum, drivers are always afforded the opportunity to inspect and reject equipment that is deemed unroadworthy and exchange it for roadworthy equipment.

Most interchanges also provide roadability lanes for drivers needing minor repairs on his/her assigned equipment. Here equipment capable of being fixed quickly is repaired. Equipment that cannot be serviced quickly is returned to the equipment pool and exchanged for roadworthy equipment.

NAWE emphasizes that at any point in this process, drivers always have the right to return an offending piece to the pool for exchange.

B. **INBOUND EQUIPMENT:** Once the empty container is “stuffed” by the shipper, the container is then returned by the motor carrier to the marine terminal interchange to be placed on the proper ship for delivery to another port. Upon arrival at the terminal, inbound containers/chassis are inspected for safety hazards by interchange operators using their own workforce. In bound drivers are asked to comment on the condition of the equipment. Equipment found to be substandard is sent to the repair station to be repaired before being returned to the equipment pool for later use.

Please note, it is incumbent upon interchange operators to conduct a thorough inspection of inbound equipment. Carriers normally pay interchange operators only for the repair of equipment deemed unroadworthy at the inbound inspection. Carriers do not pay for the repairs of equipment deemed unroadworthy at the outbound inspection. Rather, interchange operators normally pay for repairs to equipment deemed unroadworthy at an outbound inspection out of their own pocket. Thus the system polices itself by shifting the risk for failure to conduct an adequate inspection of inbound equipment and having it repaired to the party making the inspection, the interchange operator.

III. **BENEFIT TO MOTOR CARRIER INDUSTRY:** In addition to the limited capitol outlay discussed above, the motor carrier industry benefits from the present system in many other ways as well. For example, intermodal equipment is provided to the motor carrier only for a limited and set period of time—normally five days of “free time.” However, despite a nominal charge, some motor carriers find it cost effective to keep equipment beyond the free time and use it for

other purposes. It is cheaper for motor carriers to pay the penalty charge than to rent equipment from other sources. Obviously, when this occurs, marine equipment interchanges lose control over where or how many miles are put on the equipment by the motor carrier.