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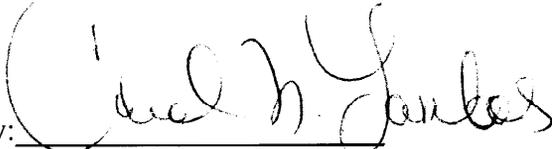
RE: FHWA Docket No. FHWA-98-3656 - 52  
Comments to ANPRM FR/Vol. 64. No. 31, February 17, 1999

Dear Docket Clerk:

We are submitting an original plus one copy of the comments of our clients, the United States Maritime Alliance, Ltd. ("USMX") and the Carriers Container Council, Inc. ("CCC"), in response to the above-referenced ANPRM. As stated in these comments, USMX and CCC are submitting their comments at this time as directed by the Federal Register notice but in doing so expressly reserve their rights to file amendments to these comments. USMX and CCC as opponents of the proposed regulations have not had the opportunity to review the comments and evidence of the proponents of proposed regulations. 5 U.S.C. § 556.

Very truly yours,

LAMBOS & JUNGE

By:   
Carol N. Lambos

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*41620/cnlambos/77000-01-10235*

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**COMMENTS OF**  
**THE UNITED STATES MARITIME ALLIANCE, LTD.**  
**AND**  
**THE CARRIERS CONTAINER COUNCIL, INC.**

**SUBMITTED TO THE**  
**UNITED STATES DEPARTMENT OF TRANSPORTATION**  
**FEDERAL HIGHWAY ADMINISTRATION**

**FHWA DOCKET NO. FHWA-98-3656 - 52**

**IN RESPONSE TO ADVANCED NOTICE OF PROPOSED RULEMAKING**

**DAVID J. TOLAN,**  
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**JAMES A. CAPO,**  
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**Secretary and Regulatory Chairman, USMX**

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**UNITED STATES DEPARTMENT OF TRANSPORTATION  
FEDERAL HIGHWAY ADMINISTRATION**

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General Requirements Inspection, Repair, ) **FHWA Docket No. FHWA-98-3656**  
and Maintenance; Intermodal Container )  
Chassis and Trailers )  
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**COMMENTS OF  
THE UNITED STATES MARITIME ALLIANCE, LTD. AND  
THE CARRIERS CONTAINER COUNCIL, INC.  
IN RESPONSE TO ADVANCED NOTICE OF PROPOSED RULEMAKING**

The United States Maritime Alliance, Ltd. (“USMX”) and the Carriers Container Council, Inc. (“CCC”) by their attorneys, submit these comments’ in response to the Department of Transportation/Federal Highway Administration’s (“DOT/FHWA’s”) advanced notice of proposed rulemaking (“ANPRM”) published in the Federal Register, Vol. 64, No. 31, February 17, 1999.

USMX is an association of ocean carriers, stevedores, terminal operators and port associations responsible for the movement of almost all of the containerized cargo on the Atlantic and Gulf Coasts of the United States. CCC represents twenty-five member companies, all of whom are ocean common carriers with container operations. CCC’s

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USMX and CCC are submitting their comments at this time as directed by the Federal Register notice but in doing so expressly reserve their rights to file amendments to these comments. USMX and CCC as opponents of the proposed regulations have not had the opportunity to review the comments and evidence of the proponents of proposed regulations. 5 U.S.C. § 556.

membership transports more than 80 percent of the containerized cargo that is handled in the ports on the Atlantic and Gulf Coasts of the United States. In addition, CCC members, such as Evergreen America Corp., NYK Line, Mitsui O.S.K. Line, Yang Ming Marine Transport Corp., Zim American Israeli Shipping Co. Inc., Columbus Line USA, P & O Nedlloyd Limited, Sea-Land Service, Inc., and Maersk Line, also have extensive container operations on the West Coast of the United States.

USMX and CCC<sup>2</sup> are commenting: as major stakeholders, on the ANPRM to amend the Federal Motor Carrier Safety Regulations (“FMSCRs”) 49 CFR parts 390 and 396 because these proposed regulations would significantly and negatively impact a vital component of their business--the method and manner of inter-modal equipment interchange. For reasons to be discussed herein, both USMX and CCC urge the DOT/FHWA to refrain from taking any further action on these proposed amendments as they are merely a means to achieve productivity enhancements on the part of the motor carriers under the guise of safety regulations and at the total expense of the maritime industry. The current regulatory requirements are more than adequate to ensure the safety of intermodal equipment at a relatively modest cost to all parties involved. The proposed amendments would upset well-established, clearly understood, and prudent business practices without yielding any safety benefits. In fact, relieving motor carriers of responsibility for the roadworthiness of the intermodal equipment they operate as the proposed amendments mandate, would actually

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<sup>2</sup> Membership lists for USMX and CCC are annexed as **Exhibit “A”**.

The comments made herein represent a compilation of comments from our member ocean carriers, stevedores, marine terminal operators and port associations.

increase the likelihood of unroadworthy inter-modal equipment being operated on public highways to the detriment of public safety.

## **I. THRESHOLD ISSUES**

There are several threshold issues with regard to the proposed amendments to the FMCSRs that demonstrate that further agency action on this issue would be, *inter alia*, unsupported by substantial evidence, in excess of the agency's jurisdiction, and arbitrary and capricious.

### **A. The Petition is Not Supported by Evidence**

As noted in the ANPRM, the Petition alleges that “[t]he motor carrier--or more precisely, the driver--usually does not have the ability or opportunity to do a full inspection of each piece of intermodal equipment to ensure the equipment's roadworthiness or compliance with the FMCSRs when accepting intermodal equipment at a port or railhead.” FR/Vol.64. No. 31/at 7849. This statement has no basis in fact when it comes to marine terminal operations. In fact, there is substantial evidence to the contrary.

#### **1. Relevant Marine Terminal Interchange Procedures**

##### **a. The “EIR” Record Equipment Condition**

While specific procedures may vary in different marine terminals, there are certain procedures that are virtually universal to all terminal operations that help ensure that unroadworthy equipment is not permitted to exit the terminal.<sup>4</sup> Both Inbound and Outbound

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<sup>4</sup>

For a more detailed overview of the maritime inter-modal equipment interchange process, see the addendum to the submission of the National Association of Waterfront Employers (“NAWE”).

equipment interchange is a highly proceduralized act requiring certain formalities that are documented and preserved. Inbound and Outbound procedures vary somewhat but the common thread is that the equipment is inspected and its condition noted when it is returned by the motor carrier and when it is being picked-up by the motor carrier. The Equipment Interchange Receipt (“EIR”)<sup>5</sup> is the document that memorializes Inbound and Outbound interchange. The EIR would record any exceptions to the intermodal equipment noted by the inspector. At the time of this inspection, these exceptions would also be brought to the attention of the driver. The driver may participate in this inspection and note exceptions on the EIR as well or challenge the inspector’s notations. Depending on the marine terminal’s system, the driver may or may not be required to sign an EIR. “Paperless” facilities utilize other methods to record the driver’s receipt of the equipment and exceptions. Damage to equipment noted on an Inbound EIR will be billed to the motor carrier. Conversely, damage noted on an Outbound EIR is not the motor carrier’s responsibility.

**b. The Driver is Given Access to Road Worthy Equipment**

When a motor carrier arrives at a marine terminal to pick-up equipment, he is directed to equipment that has been determined to be safe for highway use. Procedures vary between “grounded” and “container on chassis” facilities. In grounded facilities, the driver connects his power unit or “truck” to a chassis and then proceeds to a container holding area where the container is mounted on the chassis. In a container on chassis facility the containers are

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<sup>5</sup>

An EIR can memorialize approximately 50 different descriptions and damage items.

pre-mounted on the chassis and the driver connects his power unit or “truck” to the assembled container and chassis unit. Terminals usually use a color-coded placard system to differentiate between those chassis in good order and those in need of repair. As a general rule in marine terminals, all intermodal chassis selected for release must have current and valid FHWA inspection stickers. Drivers generally choose their own chassis and may take as much time as they deem necessary in choosing this equipment. If the equipment the driver has chosen is deficient, usually repairs can be promptly made. However, if the repairs would cause significant delays to the driver, substitute equipment can be and is provided. Thus, the first opportunity for the driver to assess and inspect the inter-modal equipment is at the time when the driver chooses the chassis.

**c. The Driver Has Three Opportunities to Inspect the Equipment**

After the complete inter-modal unit has been assembled, the driver proceeds to the interchange inspection. Even if the chassis has a placard indicating that it is in good order, the chassis and container will be inspected at the interchange inspection. This is the driver’s second opportunity to assess and inspect the equipment. Equipment that is deficient will be sent to “roadability lanes” for repair. If quick repairs cannot be made, then alternative equipment will be provided. The driver may at any time during this process reject noncompliant equipment. Roadability lanes provide a third opportunity for drivers to assess and inspect the equipment. Drivers are encouraged to participate in all inspections.

**d. Extensive Marine Terminal Maintenance Facilities**

Marine terminals in fact have extensive maintenance and repair facilities that provide

ample opportunity for a motor carrier to inspect intermodal equipment prior to use on the highways. Concurrent with the opportunity to inspect is the ability to have deficient equipment repaired and the authority to reject defective equipment outright. Whether or not drivers, who are under considerable time restraints and pressure, avail themselves of the opportunity to inspect, repair and/or reject inter-modal equipment is another issue. Significant numbers of marine terminal operators report that motor carrier drivers are often not compliant with their legal obligation to perform equipment assessments and inspections pursuant to 49 CFR § 396.13. Moreover, motor carriers themselves are not zealous in the supervision of these drivers when it comes to performing this statutory obligation.

e. **The Marine Industry is Motivated to Supply Safe Equipment**

The marine industry takes its responsibility for maintaining equipment very seriously for several reasons: 1) to avoid the risk of personal injury to any person; 2) to be able to determine where the equipment was damaged in order to be able to insure that payment for the damage is provided by the responsible party (steamship carrier, stevedore, terminal operator, or trucker); 3) to protect the value of their assets; 4) it is a sound business practice to provide roadworthy equipment to customers; and 5) to protect themselves from potential civil liability that could arise from the operation of defective equipment on public highways. It is a flawed premise that would make ocean carriers and marine terminal operators responsible for the roadworthiness of intermodal equipment being operated by a motor carrier on a public highway because of unsubstantiated allegations that motor carriers are unable to inspect intermodal equipment prior to use. Owners and tenderers of inter-modal

equipment cannot be held responsible for intermodal equipment under the control of the motor carrier because of the motor carrier's failure to adequately train their drivers in equipment inspection procedures and for the failure of the driver to conduct these inspections prior to departing the terminal, despite their legal obligation to do so. 49 CFR §§ 396.3 and 396.13.

**f. Drivers Are Capable Equipment Inspectors**

Drivers should be able to perform these assessments and inspections. CMV drivers are supposed to have a Commercial Driver's Licence ("CDL"), FHWA regulations set out criteria for obtaining a CDL which includes knowledge of the assessment and inspection of inter-modal equipment. 49 CFR §§ 383.23, 383.111, 383.113, Pt. 383 Subpt. G. App. If the driver does not have the technical ability to perform an adequate equipment assessment by virtue of holding a CDL, then it is the duty of the motor carrier to rectify any deficiencies in that driver's training. 49 CFR §§ 396.11 and 396.13.

**g. There is no Basis For This Rule**

The Petitioners' allegation that "[t]he motor carrier--or more precisely, the driver--usually does not have the ability or opportunity to do a full inspection of each piece of intermodal equipment to ensure the equipment's roadworthiness or compliance with the FMCSRs when accepting inter-modal equipment at a port or railhead[,]" has been addressed above. Since the premise for the proposed amendments has been negated, there is no justification for a future rule based on those proposed amendments to the FMCSRs. Consequently, the agency has no basis to act any further on this issue.

**2. Joint Responsibility is Not Warranted**

Since it is well established that motor carriers are indeed afforded several opportunities to inspect the equipment and are encouraged to bring defects to the attention of the terminal operator, then the agency's belief that "it may be prudent to establish joint responsibility between the 'equipment provider' and the motor carrier for the maintenance of these inter-modal container chassis and trailers," has no evidentiary support. Petitioners have also failed to demonstrate that the highway violations that they complain of are in fact attributable to the inter-modal equipment and not the power unit or "truck.". Furthermore, the Petitioners have not substantiated, with empirical data, the existence of any problem. As a result, no change to current regulations with respect to the shifting of responsibility is warranted or justified.

**a. The Present System Works and Would Work Better if the Motor Carriers Were More Diligent in Their Inspection Obligations**

Although an ocean carrier or marine terminal may own the inter-r-nodal equipment, they have no control over that equipment once it leaves the terminal facility pursuant to an interchange agreement. The tenderer cannot control the manner in which the motor carrier operates the intermodal equipment on the road. As such, the Petition should be considered with the knowledge that motor carriers have a substantial economic incentive to get in and out of marine terminals with all haste and to their destination as quickly as possible since delays deter productivity. Marine terminal operators have noted that motor carrier drivers are generally interested in quick turnarounds even if FHWA compliance is compromised. The Petitioners are seeking to guarantee faster turnaround times through federal regulation and are in effect masquerading their business objectives as a safety issue and enlisting the support

of the agency to achieve this goal. The present regulatory system works and would work even better, if the motor carriers took their responsibility for equipment assessment and inspection as seriously as they are required to do. Joint responsibility as anticipated by the agency's statement, is not the answer, since that would only encourage motor carriers to forego any responsibility for ensuring roadworthiness. Under the present scheme, a terminal operator faced with a decision to require equipment repairs or allow unsafe equipment on the road, will generally opt to repair. There is no motivation for a terminal operator to delay a repair. The regulatory scheme that requires a driver to also inspect inter-modal equipment prior to road use provides an additional assurance to the public that the equipment is roadworthy. Proposed regulations that would relieve motor carriers of their responsibility for roadworthiness would strip the public roadways of this additional safety factor. Altering this arrangement will create significant safety concerns.

**B. Jurisdictional Concerns**

**1. Equipment Providers Are Not Employers Under 49 U.S.C. §31132(3)**

The agency alleges that its jurisdiction to regulate in this area is supported by 49 U.S.C. §§ 31132(1), (2), and (3). This allegation is unsupported by law. While intermodal trailers and chassis might meet the definition of a commercial motor vehicle ("CMV") under the statute, ocean carriers, marine terminal operators and stevedores are not "employers" pursuant to § 3 1132(3). In reading the statute as a whole it is apparent that the employee/employer relationship referenced is that of the CMV driver and the motor carrier. The requisite legal formalities appurtenant to the employment relationship do not exist

between the ocean carrier, marine terminal operator or stevedore and the CMV driver or the motor carrier. The mere ownership of intermodal equipment used by a motor carrier on public highways does not create jurisdiction for the DOT/FHWA. Thus, the agency's attempt to create a "joint responsibility" between motor carriers and equipment tenderers for intermodal equipment operated on public highways based on a tenuous interpretation of § 31132(2) and (3) is unsupportable in law and fact.

## **2. The DOT/FHWA Cannot Regulate on a Marine Terminal**

Moreover, the proposed amendment to 49 CFR § 396.7 would require that a marine terminal must provide the motor carrier with "equipment, time, and facilities to make a full inspection and necessary repairs to the trailer, chassis, or container prior to the tendering or interchange of the trailer, chassis, or container." This raises other jurisdictional concerns about whether the DOT/FHWA would be in a position to come onto marine terminals and perform intermodal equipment inspections. While the DOT/FHWA has jurisdiction over inter-modal equipment in operation on public highways and at the motor carrier's facility, marine entities are regulated under the Shipping Act of 1984, 46 U.S.C. App. §§1701 *et seq.*, and the marine terminal as a workplace is under the jurisdiction of the Occupational Safety and Health Administration ("OSHA"). The potential for conflicting agency authority would in effect unduly and unfairly overburden the industry.

## **3. Motor Carrier Employees Working on a Marine Terminal Would Implicate Labor Union Jurisdiction and Create Potential Liability Under the LHWCA**

This proposed regulation implicates maritime labor union jurisdictional issues with regard to repair and maintenance job descriptions since the proposed amendment to 49 CFR

§ 396.7 would require the tenderer of intermodal equipment to provide repair facilities for the motor carrier's use at the marine terminal. Almost every marine terminal on the Atlantic and Gulf coasts of the United States is subject to the provision of the Master Contract which gives all maintenance and repair jurisdiction exclusively to employees who are represented by the International Longshoremen's Association, AFL-CIO and its affiliated local unions. Any regulation which permitted a motor carrier's employees to repair and maintain containers and chassis at the terminal facility would be in direct derogation of the collective bargaining agreement. This could create labor unrest and extensive litigation in grievance, arbitration, National Labor Relations Board, and federal court proceedings.

In addition, any regulatory scheme that would permit a motor carrier to assign mechanics or drivers to a marine terminal to perform repairs to equipment would put these individuals under the purview of the Longshore and Harbor Workers Compensation Act ("LHWCA"), 33 U.S.C. § 901 *et seq.* Accordingly, motor carriers would have a segment of their employee pool that are subject to the federal worker's compensation scheme under the LHWCA, a result which the Petitioners might not have thoroughly considered since it will greatly magnify their worker's compensation exposure.

#### **4. Intermodal Containers are Not Motor Vehicles and Should Not be Included in FMCSRs**

Nothing contained in the definition of either "motor vehicle" or "vehicle" in 49 CFR § 390 Subpart A pertains to containers. A container is a box which constitutes a load, and which is *attached* to a vehicle when being transported down the highway. In that sense, it is no different from any other large load that is transported on a trailer (like a boat or jet

engine). Containers do not have any sort of running gear, such as wheels, tires or brakes, and they have been specifically exempted from federal requirements for lighting and conspicuity devices of highway vehicles. The inclusion of containers in the proposed changes to 49 CFR § 396 is gratuitous. The intention of the regulations is to cover *road vehicles* (like trailers and chassis) and not loads.

Containers are instruments of international cargo movement rather than vehicles. Their safety is covered by the International Convention for Safe Containers (“CSC”), an international treaty to which the U.S. is a signatory. 29 U.S.T. 3707 T.I.A.S. No. 9037, 1064 U.N.T.S. 3, C.T.I.A. Num. 8083.000. The responsibility for enforcing container safety on a regular basis rests with the Secretary of Transportation, 49 U.S.C. §§ 1501- 1507, and the Coast Guard, 49 CFR §§ 450-453. The FHWA has no responsibility for container safety. The U.S. has joined most nations of the world in adopting the CSC as a benchmark for ensuring container safety. In the enabling legislation, the Secretary of Transportation--the office under which both the FHWA and the Coast Guard function--already has assigned the power to enforce container safety to the Coast Guard, thus excluding the FHWA.

The safety of containers is presumed as long as the container bears a CSC approval plate and there is no “significant evidence that the container creates an obvious risk to safety.” 46 U.S.C. § 1504(c). This provision indicates that any risk to safety must be “obvious” and that there must be “significant evidence” of such risk before the container cannot be presumed to be safe. The “obviousness” of risky conditions would make them easy to spot even on cursory inspection.

For the foregoing reasons, the agency would be vulnerable to a successful challenge

to these proposed amendments if promulgated as a final rule based on jurisdictional issues.

**c. The Agency is Acting with a Lack of Substantive Data**

The agency is essentially acting on anecdotal information provided by the Petitioners. Furthermore, the questions in the ANPRM indicate that there is no substantive data to support these proposed amendments. Attempts to quantify when and where defects occur in intermodal equipment, as the agency is seeking to do, are virtually impossible.

In fact, the questions in the ANPRM themselves, even if the data was available, would provide no meaningful evidence that a problem with the intermodal equipment interchange procedures currently in practice presents a safety issue requiring regulatory action. The development of ratios of violations per inspection, or percentage of inspected units being placed out-of-service (“OOS”), does not address, either in absolute or relative terms, the magnitude of inter-modal equipment problems as compared with other highway users. Whether a vehicle has one violation per inspection or more, the conclusion to be drawn is the same: the vehicle inspection and maintenance regime is not adequate. Similarly, the OOS service rate can only be assumed to be statistically significant if the vehicles selected for inspection constitute a true random sample of all such vehicles in operation (whether actually moving on a highway or simply “available” for service). No studies have ever been performed to verify whether this assumption is true. Accordingly, the agency is without substantial evidence that there is even the existence of a problem to address and should refrain from changing the present regulatory scheme.

**D. The Proposed Amendments Lead to Absurd Results**

The alleged purpose of the proposed amendments is to alleviate a “serious safety

problem.” FR/Vol. 64. No. 3 1/ at 7849. Curiously, Petitioners assert that this “serious safety problem” will be addressed by relieving their responsibility for performing statutorily mandated equipment inspections and certifications. 49 CFR § 396.3. This supposition is absurd. The proposed amendments would in effect absolve motor carriers from civil and criminal penalties for operating unroadworthy equipment in violation of the FMSCRs unless the motor carrier is provided equipment and facilities necessary to make repairs. The failure to provide a motor carrier with the equipment and facilities necessary to make repairs would also relieve the motor carrier of their inspection certification requirements. It has been asserted that if you take away the responsibility for inspecting inter-modal equipment from the driver, who has a well-established motivation for exiting the marine terminal as quickly as possible, you completely remove that driver’s incentive to inspect equipment at all. Driver inspections and certifications, although currently mandated, would be unlikely. Instead, under the proposed amendments, the same drivers, who are on tight schedules and not inclined to perform routine assessment and inspections of equipment, will now be performing repairs to unroadworthy equipment. Petitioners are in essence arguing that the public highways will be safer if motor carriers are not required to inspect or certify intermodal equipment but are then required to repair it before leaving the terminal. Any regulations based on this scenario would not withstand a challenge.

## **II       RESPONSES TO QUESTIONS IN THE ANPRM**

1.       What is the out-of-service (OOS) rate for intermodal container chassis or trailers inspected at roadside? If that information is not available, what percentage of the inter-modal equipment transported by individual motor

carriers are placed out of service? What percentage of OOS orders involve intermodal chassis? What percentage involve inter-modal trailers? What percentage of OOS orders are issued within 24 hours after the motor carrier takes possession of the intermodal equipment? Within 48 hours? Within 96 hours? State agencies are encouraged to respond to this question with information from their State inspection databases.

**COMMENT:**

This information is generally not available to an ocean carrier or marine terminal operator.

“Percentage of the inter-modal equipment transported by individual motor carriers . . . placed out of service” cannot be determined. Percentage of units in existence that are placed OOS in a year? This percentage would be a meaningless measure even if possible to obtain.

Only the motor carriers themselves would be able to respond to the number of violations occurring within X hours of taking possession. But to get a percentage, what would be a denominator that is practical to obtain? *There may not be one factually possible!*

2. What is the violation rate (the average number of equipment-related violations of the FMCSRs found per inspection) for intermodal container chassis or trailers inspected at roadside? If that information is not available, what percentage of inspection violations involve inter-modal chassis? What percentage involve intermodal trailers? What percentage of violations are discovered within 24 hours after the motor carrier takes possession of the inter-modal equipment? Within 48 hours? Within 96 hours? State agencies are encouraged to respond to this question with information from their State inspection databases.

**COMMENT:**

This information is generally not available to an ocean carrier or marine terminal operator.

3. Why does the Uniform Intermodal Interchange and Facilities Access Agreement disavow all responsibility for the “fitness” of intermodal equipment?

**COMMENT:**

USMX and CCC are not in a position to comment on a contract freely entered into as a part of an arm's length business transaction. However, it is USMX's and CCC's understanding that under the UIIA an equipment provider has continuing obligations with respect to its equipment but does not warrant its fitness. As we further understand, under the UIIA, the motor carrier is responsible for the cost of damage to the equipment that occurs while the equipment is in the possession of the motor carrier.

4. Generally, national accident databases do not provide enough detail for the FHWA to determine the percentage of commercial motor vehicle accidents that can be attributed, in whole or in part, to mechanical defects or deficiencies. If the FHWA decides to proceed with this rulemaking it would be necessary to estimate the benefits in terms of accidents and injuries prevented and lives saved. Are State officials and motor carriers aware of accidents attributable to mechanical defects or deficiencies on intermodal container chassis or trailers? If yes, what were the specific mechanical defects or deficiencies and how was (were) the cause(s) of the accident(s) determined? Do the States or industry sources have statistically reliable data on accidents of this type, or on defects or deficiencies that could lead to accidents? If so, please provide the information.

**COMMENT:**

This information is generally not available to an ocean carrier or marine terminal operator.

5. If the FHWA were to develop regulations making certain entities who offer intermodal container chassis and trailers for transportation responsible for the mechanical condition of those vehicles, one of the means of enforcement would be through roadside inspections. During a roadside inspection, defects or deficiencies could be identified, but it is uncertain whether inspectors could determine when the defect or deficiency occurred (i.e., before or after the motor carrier took possession of the container chassis or trailer). How could State officials cite the party that tendered the intermodal CMV for defects or deficiencies found at the roadside if there were no proof that the defects or deficiencies were present before the motor carrier took possession of the vehicle?

**COMMENT:**

Intermodal equipment tenderers have complete responsibility for the

maintenance and repair of their equipment. Furthermore, it is a prudent business practice to preserve the working integrity of this equipment. However, once the equipment leaves the terminal, it is no longer under the control of the tenderer but now in the possession and control of the motor carrier.

It would be virtually impossible for State officials to cite the party that tendered the intermodal CMV for defects or deficiencies found at roadside if there were no proof that the defects or deficiencies were present before the motor carrier took possession of the vehicle.

Most deficiencies in intermodal equipment are due to brakes, tires and lights. Where items of negligible cost or those marked with identifiable owner's markings (e.g. brake shoes, tires with owner's brand, etc.) that are worn out could possibly, although not positively, be determined to be due to conditions occurring before an interchange (if the interchange was recent). However, unbranded tires can and are sometimes switched by truckers, making time tracking of wear impossible. It is also not unreasonable to assume that expensive safety-related parts (ABS brake sensors, etc.) could also be replaced improperly by operators. Light failures cannot be identified by time.

There are numerous poor operating practices that can cause almost immediate defects in intermodal equipment tendered in a roadworthy condition. Newly installed brakes can become unroadworthy as a result of improper handling. Often drivers, in an effort to conserve their employer's assets, the power unit's brakes, will often only apply the brakes of chassis for stopping or slowing down, sparing wear on the brakes of the power unit. That motor carrier, pulling its own flat bed or trailer will usually use the brakes of all components in tandem. Furthermore, it is not uncommon to wear out new brakes on a single long steep down grade if the brakes are not operated properly. Tire flat spots are often caused by a driver's sole reliance on the chassis brakes which causes excessive dragging on the tires. A driver's failure to wait for an air up sufficient to release the parking spring brakes or a malfunctioning of the tractor's air compressor can cause dragging on the chassis tires. A driver making tight turns up against a curb can cause cut tires.

6. Should the party that tendered the intermodal CMV be held responsible for all defects or deficiencies irrespective of the length of time the motor carrier has been operating the container chassis or trailer? If not, at what point during the operation of the chassis or trailer should the responsibility for ensuring its safe operation be transferred from the entity offering the vehicle for transportation to the motor carrier?

**COMMENT:**

No, the party that tendered the intermodal CMV cannot be held responsible for all defects or deficiencies irrespective of the length of time the motor carrier has been operating the container chassis or trailer. The responsibility for ensuring safe operation of the chassis or trailer should be transferred at the point of interchange between the mariner terminal operator and the motor carrier. The motor carrier has a legal obligation to inspect the equipment prior to taking the equipment on public roadways and a continuing legal obligation to operate roadworthy equipment. A driver has an opportunity to reject noncompliant or otherwise defective equipment. Most significantly, the tenderer has no control over the equipment once it leaves the terminal.

The goal should be to identify and correct defects at the interchange, not to try to assign liability thereafter in the many ambiguous cases that occur.

7. The petitioners indicated that drivers usually do not have the “ability or opportunity to do a full and adequate inspection of each piece of intermodal equipment to ensure the equipment’s roadworthiness or compliance with the FMCSRs when accepting intermodal equipment at a port or railhead.” What are the obstacles to providing drivers with the opportunity to perform a walk-around inspection of container chassis and trailers? With regard to ability, what types of training would drivers need to perform a walk-around inspection of the container chassis or trailers?

**COMMENT:**

This statement does not accurately depict the mechanics of interchange. There are several opportunities for the motor carrier to inspect the intermodal equipment and reject inter-modal equipment that is not roadworthy or otherwise compliant. Drivers presently have the opportunity to perform a walk-around inspection of container chassis and trailers. There are no obstacles preventing an inspection but it is often the driver that is unwilling to spare the time. It is the experience of marine terminal operators that many drivers do not make any effort to inspect the equipment in the interchange inspection lanes.

Drivers should be trained by their employers in conducting a proper walk-around inspection. Professional operators are required to sit for examinations in qualifying for their mandatory commercial driver’s license (“CDL”). An important component of this examination is a knowledge of equipment assessment and its inspection. Further, it has been estimated that enhanced driver training in assessment and inspection could be accomplished within an

eight-hour program. However, it is not the responsibility of the ocean carrier or marine terminal operator to train the motor carrier drivers in inspecting equipment.

8. If the FHWA issued regulations to make the entities who offer container chassis or trailers responsible for the mechanical condition of the vehicles, these entities would need to provide maintenance facilities and personnel to systematically inspect, repair, and maintain the vehicles. How many inspection, repair, and maintenance facilities and mechanics are currently used by these parties to service container chassis and trailers used in intermodal operations? How many additional facilities and employees would be needed to ensure that every intermodal CMV complied with the FMCSRs before being turned over to a motor carrier? What would be the incremental total and per-vehicle cost to these parties of such a rule? What operational impact would the rule have on intermodal transportation?

**COMMENT:**

This question appears to be addressed to facilities other than marine terminals. Marine terminals already have extensive facilities with trained mechanics to perform necessary maintenance and requested repairs to intermodal equipment. These facilities are charged with the task of repairing inbound equipment found to be defective when returned by the motor carrier as well as outbound equipment deemed unroadworthy by terminal personnel or the motor carrier driver.

If this question is implying that it is possible to promulgate a regulation that would guarantee that all intermodal equipment would be absolutely roadworthy at the moment of pick-up by the motor carrier that is simply not the case. Often otherwise roadworthy equipment becomes noncompliant upon its assembly with the power unit (supplied by the motor carrier). Sometimes the condition of the intermodal equipment can only be determined when combined with the power unit.

As stated in the body of our comments, if marine terminal operators were required to “provide maintenance facilities” for the motor carriers and their personnel to systematically inspect, repair, and maintain the vehicles, this could disrupt the industry as a result of maritime labor union jurisdictional issues. Maintenance and repair jobs are generally union positions and any challenge to this jurisdiction could cause labor unrest, work stoppages or strikes.

9. Currently, Sec. 396.17 requires that all commercial motor vehicles operated

in interstate commerce be inspected at least once every 12 months. Proof of inspection must be carried on the vehicle. If an inter-modal container chassis or trailer or other vehicle being offered for transportation does not have proof of inspection, the carrier should recognize, irrespective of the appearance of the vehicle, that it may not be operated in interstate commerce. How often do equipment providers tender and motor carriers accept container chassis trailers or other vehicles without proof that the periodic inspection was performed?

**COMMENT:**

FHWA annual inspection marks are prominently displayed on intermodal chassis and other CMV's as required by law. Units are not released without evidence of current inspection. If for some reason a chassis has been unavailable for its annual inspection, the absence of inspection marks would be noted during the interchange inspection. Motor carriers should not accept CMV's that do not display valid or timely markings; otherwise, they should arrange for immediate inspection or replacement. It has been reported that drivers have been known to "self sticker" a chassis, to avoid the downtime in getting a chassis properly inspected. Some repair companies stencil inspection dates to prevent this practice.

10. For cases in which vehicles have an inspection decal or other form of documentation indicating that the periodic inspection was performed within 3 months prior to the carrier accepting the container chassis or trailer for transportation, how often are vehicle defects or deficiencies found during roadside inspections?

**COMMENT:**

This information is generally not available to an ocean carrier or marine terminal operator.

11. For cases in which vehicles have an inspection decal or other form of documentation indicating that the periodic inspection was performed between 3 months and 6 months of the carrier accepting the container chassis or trailer for transportation, how often are vehicle defects or deficiencies found during roadside inspections?

**COMMENT:**

This information is generally not available to an ocean carrier or marine terminal operator.

12. For cases in which vehicles have an inspection decal or other form of documentation indicating that the periodic inspection was performed between 6 months and 9 months of the carrier accepting the container chassis or trailer for transportation, how often are vehicle defects or deficiencies found during roadside inspections?

**COMMENT:**

This information is generally not available to an ocean carrier or marine terminal operator.

13. Could the safety objectives of this rulemaking be accomplished by requiring more frequent periodic inspections of container chassis and certain trailers (e.g., every 6 months, or 3 months) with documentation or proof of inspection on the vehicle and an inspection report made available within 48 to 72 hours of a request from a Federal or State official?

**COMMENT:**

Requiring more frequent periodic inspections of container chassis and certain trailers will not likely result in enhanced safety. The FHWA inspection is but one of numerous inspections that a container chassis would be subject to during a normal course of business. It is not unusual for a chassis to be inspected from 10 to 20 times per month during inbound and outbound operations. The risk of more problems being discovered at more frequent intervals is much less at marine terminals for intermodal equipment than for over-the-road equipment, because the former accumulates very little annual mileage. The amount of mileage accruing on intermodal vehicles between intermodal inspections, which are time-based and not mileage based, is much less than that of over-the-road vehicles. Thus, the requirement for more frequent mandatory inspection will not address equipment conditions in the intermodal industry effectively. Moreover, increasing inspections will not prevent citations for defects caused by the improper operation of the equipment.

The most common safety-related defects are brake, tire and lighting failures. All of these are a function of the amount of road mileage of operation. In the intermodal industry, by definition road mileage is minimized: brakes and tires are not worn and lights are not illuminated when the vehicles are carried by non-highway means or when they are stored in terminals and depots. Increasing the frequency of FHWA inspection is unlikely to uncover many additional safety-related defects in the inter-modal industry, when compared against those relating to other highway users.

It is our understanding that the Inter-modal Association of North America is conducting pilot studies relating to this issue. Their data should shed some light on this question.

14. One alternative to the FHWA issuing new regulations is for motor carriers and/or entities offering the container chassis or trailers for transportation to develop maintenance consortiums or make similar arrangements to ensure that routine maintenance is performed and repairs are made in a timely manner. What has the private sector done to resolve the problem of maintenance of intermodal container chassis and trailers?

**COMMENT:**

The membership of both USMX and CCC are concerned with maintenance, repair and safety issues. A significant component of that concern is manifested in the industries commitment to training its employees in proper equipment maintenance and repair functions as well as in proper equipment assessment and inspection functions.

In addition, certain members currently participate in or plan to participate in equipment pools. It has been noted that these equipment pools generally raise the standards on the condition and quality of intermodal equipment. Often these equipment pools have strict limitations on the age and quality of participating equipment.

One steamship line has reported, although several are doing it, that it has set up a national account with a repair vendor to perform any roadside repairs. The motor carriers are given a toll-free telephone number to call if emergency repairs are needed.

We have been informed that the Intermodal Association of North America, is spearheading programs designed to help identify and correct equipment defects in a more timely and effective manner; to establish "Quick Service Lanes" to allow truckers to bypass existing services lanes for quick repairs to brakes, lights and/or tires; and to assess the effectiveness of annual FHWA inspections. There is no reason why the major stakeholders cannot work together to create additional programs to improve intermodal equipment interchange.

### **III CONCLUSION**

In an industry characterized by equipment operators who are not its owners, the party responsible for the defects that occur must continue to be held accountable through a system that is time-tested and effective. The system currently in place has been a matter of contractual agreement over the years. There is no reason for that method to change.

Safety-related defects are generally created as a result of operation and not of ownership. Equipment users, such as motor carriers, believe that such defects happen as a part of use for which the equipment is normally designed. Equipment owners on the other hand, know that such defects are created not while the vehicle is in their possession but rather as it is being used by motor carriers. It is impossible to tell which motor carrier had the greatest opportunity to cause the defect, such as which motor carrier had the most brake applications or put on the most mileage. Because of this paradox, responsibility for rectifying defects has become a matter of contract and not regulation.

However, regulation is necessary to protect the safety of the public, and the operation of all motor vehicles is a primary responsibility of the driver of the vehicle. Blanket or even a partial transfer of liability for the safety of a vehicle from the driver to the owner disturbs that notion and removes much of the incentive for safe vehicle operation from the person most able to prevent collisions and other conditions that threaten public safety. Motor carriers are in the best position to correct the behavior of drivers who fail to inspect or accept equipment known to be deficient. If there are issues that need to be addressed that could improve upon existing intermodal interchange procedures, the agency should permit the stakeholders to resolve these issues on their own and under existing regulations.

Accordingly, the agency should refrain from pursuing any further regulatory activity in response to the Petition.

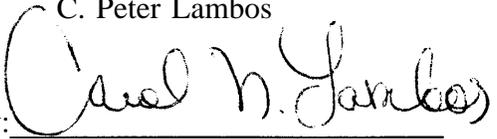
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Respectfully submitted.

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2. Boston Shipping Association, Inc.
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4. Ceres Terminals
5. COSCO North America, Inc.
6. Columbus Line USA, Inc.
7. Cooper/T. Smith Stevedoring
8. Evergreen America Corporation
9. Fairway Terminal Corp.
10. Farrell Lines Incorporated
11. Georgia Stevedore Association
12. Hampton Roads Shipping Association
13. Hanjin Shipping Company, Ltd.
14. Hapag-Lloyd Container Line GMBH
15. International Terminal Operating Co.
16. Jacksonville Maritime Association
17. Maersk Line
18. **Maher** Terminals
19. Mitsui O.S.K. Line
20. Navieras NPR, Inc.
21. New Orleans Marine Contractors
22. New Orleans Steamship Association
23. New York Shipping Association, Inc.
24. **NYK** Line (Nippon Yusen Kaisha)
25. OOCL (USA) Inc.
26. P&O **Nedlloyd** Limited
27. Philadelphia Marine Trade Association
28. Sea-Land Service, Inc.
29. South Carolina Stevedores Association
30. Southeast Florida Port Employers Association
31. Steamship Trade Association of Baltimore
32. Stevedoring Services of America
33. Stevens Shipping and Terminal Co.
34. Universal Maritime Services Corp.
35. West Gulf Maritime Association
36. Zim-American Israeli Shipping Co., Inc.

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12. Mediterranean Shipping Company SA
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