

NITL WASHINGTON REPORT: ISSUES, NEWS AND VIEWS

MAY 2016

OCEAN TRANSPORTATION

Issue: Unfair Demurrage and Detention Fees

Summary: Severe congestion in key U.S. ports and container terminals in 2014 and continuing into 2015 frequently made it impossible for shippers to pick up and/or drop off their containers within allotted free time. As a consequence they (and their dray truckers) were charged demurrage and detention fees, an action the League deems grossly unfair. Together with the National Retail Federation (NRF) we are leading an initiative to petition the Federal Maritime Commission for a new rule or policy statement that would make such penalty payments an "unfair practice" under the Shipping Act. League Counsel Karyn Booth is providing the legal research and writing, and is assisting participants in preparing verified statements for submission to the FMC.

If your company was one of the many hundreds that were invoiced for demurrage and/or detention in 2014-2015 when the delays in picking up or dropping off containers were not the fault of your company, we need your help and participation. We need you to tell your story in a "verified statement" which will be added to other verified statements and a legal brief which we plan to submit to the FMC. Please contact League Executive Director Jennifer Hedrick as soon as possible for more information if your company may be interested in participating.

Issue: Containership Industry Consolidation

May Status: Significant Developments. Two new global alliances were announced in early May. With another massive alliance announced in April, and the existing alliance between Maersk and MSC, nearly every major containership operator will soon be aligned in new partnership structures that will dominate the major ocean trade lanes. Our concern is focused on the near term consequences for competition in this industry.

Summary: The global containership market has a glut of capacity. Shipowners built too many ships with enormous container capacity, and world trade has not sufficiently recovered from the recession. Freight rates are at exceptionally low levels which are "great" for the shipper--in the short run. But prolonged massive losses for carriers threaten the long term survivability of some and are generating pressure to consolidate via mergers, acquisitions and, most recently, the announcement of these three new alliances of major carriers that will begin services early in 2017. The threat is the potential for reduced competition in this global market.

Next Steps: When the new alliances are formally introduced to the FMC, the League will be looked to by many as the key entity to voice shipper concerns and prescribe appropriate analysis and monitoring by the FMC. The FMC has been openly receptive to shipper views, especially the views of the League and its members.

Issue: Verified Gross Mass of Export Containers

May Status: The Ocean Carrier Equipment Management Association (OCEMA) formally reiterated that shippers will not be held liable for accurate container tare weights, and Commerce Committee Chairman John Thune asked FMC staff to brief Committee staff on status/problems/developments at the end of May. Also, the IMO advised member governments to take a "soft enforcement" posture for several months as shippers and carriers adjust to the new requirements.

Summary: In 2014, the International Maritime Organization (IMO) issued an amended regulation to require that all loaded export containers be weighed by one of two methods in order to prepare a "verified gross mass" document to be given to vessel operators in advance of loading. The rule goes into effect on July 1, 2016. Confusing "guidance" from the Coast Guard has been unhelpful; importers are concerned about the ability of their foreign sources to comply; some U.S. exporters have vigorously objected to the new rule. League members have not been vocal on the matter. Via the League's role in the Global Shippers' Forum, a catastrophic rule that permitted only one method (scale weighing) was avoided and an alternative method was permitted. Shipowner interests convinced the IMO this rule was needed; shipper interests suggested the issue was less dire than argued by shipowners. The League is concerned that failures to implement the rule in export markets will disrupt foreign commerce.

MAY NEWS AND VIEWS: League Ocean Transportation Committee Chairman Don Pisano's opinion article was carried online by the *Journal of Commerce*, warning marine terminal operators not to impose additional fees on shippers to finance extended terminal gate hours.

RAILROAD TRANSPORTATION

Issue: STB Rulemakings on Arbitration and Agency-Initiated Investigations

May Status: STB has introduced two new rulemakings.

Summary: Both rulemakings are a direct result of the reauthorization act, and as such follow the guidelines provided by Congress. Both NPRMs must be carefully analyzed; however, the League has previously commented favorably on a Board rule to encourage greater arbitration of disputes; and the League fully supported the legislation that will now allow for agency-initiated investigations.

Next Steps: Analyze both proposed rules, consult with RTC and prepare comments. Comments are due this summer.

Issue: Competitive Switching Ex Parte 711

May Status: Unchanged. Trade media are repeating Chairman Elliott's promise of an announced decision in June.

Summary: This is the League's most visible initiative in the rail transportation arena. A nearly five year delay by the STB in taking meaningful action on the League's petition for rulemaking may be drawing to

a close. STB Chairman Dan Elliott has told the League that the Board will announce a decision in June; he has since repeated that assertion in several public appearances.

Next Steps: The League is awaiting the action of the Board and preparing to respond to various possible outcomes.

Issue: Rulemaking on Performance Metrics

May Status: The League submitted comprehensive comments on the modified proposed rule underscoring the importance of freight rail performance data to shippers.

Summary: On April 29 the Board published a Supplementary NPRM amending its previously published proposed rule on making permanent the Order to the Class I's to provide certain operating and performance metrics. The League provided comments on the original NPRM. The revised version reflects comments obtained from stakeholders in meetings with STB staff, a welcome departure from past practices—and one which came about largely through League efforts. On May 31 the League submitted comments in response to the SNPRM.

Issue: Ex Parte 704—Exemptions

May Status: Unchanged.

Summary: The STB announced a decision in this docket on March 23. The League was a vocal proponent of encouraging the Board to revisit this matter to determine if commodity and service exemptions from regulation were appropriate in light of the many changes in the industry (and relevant law and regulations) that have occurred since the exemptions were decided over 20 years ago. The League also testified at the hearing on this subject. The Board has now taken a first step by identifying five commodities for further consideration of exemption revocation.

Next Steps: The League is reaching out to organizations that represent the five named commodities—and certainly contact any member companies in those industries—to determine whether they wish to pursue revocation or maintain the status quo.

MAY NEWS AND VIEWS:

League Meetings with STB/Implementation of Reauthorization Act

In April the League staff met twice with the STB. The first meeting was with each of the Commissioners where we joined with ACC, TFI and CI in expressing our very strong interest that the reauthorization act be rapidly and vigorously implemented. The second meeting was with staff, to discuss ideas to speed and improve SAC cases. We also introduced an alternative to SAC—the "benchmarking" approach recommended by the TRB last year. These meetings are a clear indication that the STB is moving vigorously to implement the reauthorization act passed in December 2015. Board members are holding face-to-face meetings as now permitted and issuing reports to Congress as mandated.

STB Funding

The League joined with other rail shipper groups to encourage Congress to appropriate additional funds to the STB, and to date the effort has been successful. No final appropriation has been enacted (and recent history suggests that government funding for FY 2017 could likely come in an "omnibus" bill

much later this year.) But both the House and Senate Appropriations committees have agreed on funding of \$37 million, an increase of \$4.625 million over current amounts.

HIGHWAY TRANSPORTATION

Issue: Hours of Service and Restart

May Status: Significant Development. Appropriations committees in both the House and Senate have approved language to maintain the prohibition on imposing the consecutive nighttime rest periods unless and until the DOT study documents safety and health benefits—a win for the trucking industry. But, final action (enactment of the appropriations bill) is a long way off yet.

Summary: The League and over 90 other organizations and companies have joined with the American Trucking Associations to fix a technical drafting error in legislation passed last year with the goal of keeping in place the 34-hour restart provision that was central to the HOS rules since 2004. In 2016, Congress directed FMCSA to conduct a statistically valid study to determine if the two consecutive nighttime rest periods (1:00-5:00 a.m.) in the agency's new HOS rule actually delivered better driver health and safety results. The legislative goal is to prevent a reinstatement of the two nighttime rest periods, a provision which the trucking industry says reduced driver productivity and put more trucks on the road in morning rush hours with no measureable improvement in health or safety. A failure to enact this safety net will likely allow the FMCSA to reinstitute the nighttime rest mandate, putting even more pressures on the overall driver availability problem impacting the trucking industry.

Next Steps: Maintain connection with the ATA and continue to support this legislative fix. The League will continue to monitor developments in House and Senate appropriations committees.

Issue: Safety Fitness Determination NPRM

May Status: Moderate Development. Comment period closed on May 23.

Summary: Shippers, carriers and brokers have loudly complained that FMCSA is not providing clear, unambiguous guidance on which truckers are safe and unsafe. They have been seeking a clear "green light/red light" guide. The FMCSA has now offered a proposed rule which it claims will move fitness determinations in that direction. The proposed new rule would eliminate ratings of "satisfactory/conditional/unsatisfactory" and replace it with a "fit/not fit" safety standard. The NPRM is very complicated; League members have generally been silent to date.

Next Steps: The League's Highway Transportation Committee continues to stay abreast of the issue and monitor developments. Industry observers are perplexed by and highly critical of the agency's issuance of the new proposed rule in advance of a FAST Act (highway bill) mandate to first study and clean up the FMCSA's controversial CSA program—Compliance, Safety, Accountability.

Other Issues of Note

Summary: Three trucking industry matters merit continuing attention by the League and the League's members.

First, the still new Driver Coercion Rule—League members are reminded that personnel in their companies who interact directly with truck drivers should be especially mindful that they may not

pressure or "coerce" a driver to break or even bend safety rules in order to maintain a business relationship, secure future business, etc. Drivers may now take complaints of alleged coercion to the FMCSA for adjudication and possible fines. The rule is as yet untested.

Second, the mandate to install electronic logging devices in all trucks has again been challenged by OOIDA, the powerful lobby group for owner-operators. That group successfully stopped an earlier version of this rule in a court case, and they are trying to repeat that success.

Third, the FAST Act called for a study of the extent to which shippers and receivers cause delays for truck drivers. The study has not been started yet, but merits our continuing attention.