THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

NITL WASHINGTON REPORT: ISSUES, NEWS AND VIEWS

JULY 2016

OCEAN TRANSPORTATION

Issue: Containership Industry Consolidation

June Status: Significant Developments. CMA-CGM has nearly completed its acquisition of Singapore-based (and government-owned) NOL/APL. The conjecture about Hapag-Lloyd acquiring United Arab Shipping Company (UASC) ended with an announcement of a takeover deal. All eyes remain on the troubled South Korean carriers Hyundai and Hanjin, and the potential for even more consolidation. Together with the two new global alliances announced in early May (and another massive alliance announced in April), nearly every major containership operator will be aligned in new, dominant partnering structures in early 2017. Our concern is focused on the near term consequences (if any) for competition in this industry.

Summary: The global containership market has a glut of capacity. Too many large ships are chasing too little cargo. Freight rates are at record low levels-- "great" for the shipper, but only in the short run. Prolonged massive losses for carriers threaten the long term survivability of some and are generating pressure to consolidate via mergers, acquisitions and the 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: The stepped-up pace of mergers will be of interest to the Department of Justice Antitrust Division, and the League provided informal views to the Department this month. 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: Unfair Demurrage and Detention Fees

June Status: Unchanged

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 participation. Please contact League Executive Director Jennifer Hedrick for more information.

Issue: Verified Gross Mass of Export Containers (VGM)

June Status: The outlook is decidedly better. Flexibility, practicality, and pragmatism have replaced the hysteria of recent months, and an uneventful implementation of the new requirement took place on July 1st here in the U.S. The Coast Guard had previously announced that weights from marine terminal scales would be deemed "equivalent" to the two weight methods specified by the IMO rule; and the Ocean Carrier Equipment Management Association (OCEMA) announced its support of that option. (OCEMA also previously advised that shippers will not be held liable for accurate container tare weights.) In addition, the IMO has advised member governments to take a "soft enforcement" posture for several months. Major U.S. ports and terminals announced that they will facilitate container weighing and data transfer. No significant "meltdowns" in foreign ports have been reported, and U.S. importers remain cautiously optimistic that global implementation of the VGM regime will come on stream in an orderly fashion.

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 earlier "guidance" from the Coast Guard was unhelpful. Importers remain concerned about the ability of their foreign sources to comply. 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 monitoring implementation of the rule in overseas export markets.

RAILROAD TRANSPORTATION

Issue: STB Rulemakings on Arbitration and Agency-Initiated Investigations

June Status: The League filed comments on the STB arbitration rulemaking on June 15th. And, on July 15th filed comments on agency-initiated investigations.

Summary: Both rulemakings are a direct result of the reauthorization act, and as such follow the guidelines provided by Congress. The League commented favorably on a previous Board rulemaking to encourage greater use of arbitration in disputes. The new proposed rule coming out of this proceeding follows the explicit guidance given by Congress. Importantly it opens the door to take rate disputes to arbitration for the first time and provides for a $25 million cap on awards to shippers. However, the rail carrier must first be shown to have market dominance which remains a complex and costly proceeding at the Board.

Issue: Competitive Switching Ex Parte 711

June Status: Unchanged**.** Disappointingly, and contrary to trade media reports of STB Chairman Dan Elliott's promise of an announced decision in June, no decision was announced this month. (Also see the

"News and Views" item below.) The STB announced that their goal now is to issue a ruling by the end of July.

Summary: This is the League's most visible initiative in the rail transportation arena, but five years have passed without the STB taking meaningful action on the League's petition for rulemaking. Chairman Elliott told the League that the Board will announce a decision in June and repeated that statement in several public appearances. However, at month's end no announcement from the Board signaled there is not yet an agreed majority opinion.

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

Issue: Rulemaking on Performance Metrics

June Status: The League submitted comprehensive comments in May on the modified proposed rule underscoring the importance of freight rail performance data to shippers. A decision on a final rule is likely in the near term, but no timetable has been established.

Summary: On April 29 the Board published a Supplementary Notice of Proposed Rule Making (SNPRM) 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 Notice of Proposed Rule Making. 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

June Status: Comments on the proposed rule are due to the STB on July 26th.

Summary: In a decision announced March 23, the Board took a first step by identifying five commodities for further consideration of exemption revocation.

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 in 2011.

Next Steps: The League will submit comments on the STB proposal urging the agency to move forward in its new examination of exempt categories of rail freight.

MAY NEWS AND VIEWS:

Competitive Switching (EP 711)

An opinion article in the *Wall Street Journal* in mid-June by Ed Hamberger, President of the Association of American Railroads (AAR) was critical of the League's efforts to bring competition to freight rail markets. Without directly citing our petition to the STB, Hamberger erroneously said shippers are trying to force "railroads to open up their tracks and facilities to other railroad competitors". The League provided a response to the Wall Street Journal but it was not published. The *Journal of Commerce* published a League defense of head-to-head rail competition on June 30.

HIGHWAY TRANSPORTATION

Issue: Hours of Service and Restart

June Status: Cloudy at best. 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 a 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, and floor action any time soon is not likely. This provision appears to be in jeopardy, but final results will not be known for sometime

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 consecutive 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: The League will continue to maintain its 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

June Status: With the comment period now closed all parties will be waiting for the agency's decision. The League did not submit comments.

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 claims its proposed rule 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.

Next Steps: Industry observers remain 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.

An Update on Other Issues of Note

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 DOT Inspector General's office is beginning an audit on the impact of loading and unloading delays to assess available data and provide information on measuring the potential effects of such delays.