

**BEFORE THE  
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION  
UNITED STATES DEPARTMENT OF TRANSPORTATION**

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**COMMENTS OF  
THE OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC**

**IN RESPONSE TO  
NOTICE OF PROPOSED RULEMAKING  
REQUEST FOR COMMENTS**

**[FMCSA Docket No. FMCSA-2005-23315]  
RIN 2126-AA86**

**Requirements for Intermodal Equipment Providers and Motor  
Carriers and Drivers Operating Intermodal Equipment**

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**JAMES JOHNSTON  
President  
Owner-Operator Independent  
Drivers Association, Inc**

**March 21, 2007**

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FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION**

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**I. INTRODUCTION**

**A. Procedural Statement**

These comments are submitted by the Owner-Operator Independent Drivers Association, Inc. (“OOIDA” or “Association”) in response to the Notice of Proposed Rulemaking (“NPRM”) Request for Comments published by the Federal Motor Carrier Safety Administration (“FMCSA” or “Agency”), Docket No. FMCSA- 2005-23315, RIN 2126-AA86 [71 FR 245] (December, 21, 2006) related to proposed regulations for any Intermodal Equipment Provider (“IEP”) and motor carriers and drivers operating intermodal equipment in interstate commerce.

**B. The Interest of the Owner-Operator Independent Drivers Association, Inc**

The Owner Operator Independent Drivers Association, Inc is a not-for-profit corporation incorporated in 1973 under the laws of the State of Missouri, with its principal place of business in Grain Valley, Missouri. The more than 150,000 members of OOIDA are small business men and women located in all 50 states and Canada who collectively own and operate more than 240,000 individual heavy-duty trucks and small truck fleets. Many of OOIDA’s members are small business motor carriers with authority to operate in interstate commerce. The address of the Association is:

Owner-Operator Independent Drivers Association, Inc.  
P.O. Box 1000  
1 NW OOIDA Drive  
Grain Valley, Missouri 64029  
[www.ooida.com](http://www.ooida.com)

OOIDA is the international trade association representing the interest of independent owner-operators and professional drivers on all issues that affect small-business truckers.

The Association actively promotes the views of small business truckers and professional drivers through its interaction with state and federal government agencies, legislatures, the courts, other trade associations, and private business to advocate an equitable and safe environment for commercial drivers. OOIDA is active in all aspects of highway safety and transportation policy, and represents the position of small business truckers on numerous committees and in various forums on the local, state, national, and international levels. The interchange and operation of intermodal equipment affects a significant number of small business truckers and professional drivers including members of OOIDA.

## **II. SUMMARY**

This rulemaking is mandated by section 4118 of the Safe, Accountable, Flexible, Efficient Transportation Act: A Legacy for Users (“SAFETEA-LU”). The intent of the proposed rule would ensure that intermodal equipment used to transport intermodal containers is safe and systematically maintained. The proposed regulations would for the first time make intermodal equipment providers (“IEPs”) subject to the Federal Motor Carrier Safety Regulations.

OOIDA appreciates that FMCSA is proposing to place responsibility for maintenance of intermodal equipment where it belongs, with IEPs that tender such equipment to motor carriers. However, the Association has concerns with the

enforceability of the term “timely manner” in reference to when an IEP must make repairs to, or replace intermodal equipment found to be defective during a driver’s pre-trip inspection.

OOIDA also has concerns that the Agency stops short of assigning responsibility for damage, defects or deficiencies that are beyond the ability of the driver to find during a normal pre-trip inspection.

### **III. COMMENTS OF THE ASSOCIATION**

#### **A. Ineffectiveness of Proposal to Ensure IEPs Will Properly Maintain Intermodal Equipment and Prevent IEPs From Coercing Drivers Into Accepting Equipment With Damage, Defects or Deficiencies**

Admirably, the Agency expresses the desire to help drivers reduce their waiting time for repair or replacement when tendered defective or deficient intermodal equipment by an IEP. To accomplish this goal FMCSA proposes § 390.40(h), which states in part, “The repairs or replacement must be made in a timely manner after being notified by a driver of such damage, defects, or deficiencies.” The Agency is obviously concerned that if a driver is forced to wait for an extended period of time before repairs are made or equipment replaced, that wait could serve as a disincentive for drivers to accurately complete deficiency reports and instead depart without having corrections made. Requiring IEPs to repair or replace defective intermodal equipment in a “timely manner” would theoretically encourage drivers to report defects and seek remedy without fear of significant loss of time and revenue. However, absent stringent oversight of IEP practices the objective of the entire proposal becomes meaningless.

Any IEP that desires to persist in the practice of transferring maintenance responsibilities to motor carriers and drivers can and will do so by continuing to ignore

its own maintenance responsibilities and discreetly coerce drivers into accepting damaged, defective or deficient equipment. The quantity of intermodal equipment tendered by IEPs in various stages of disrepair is staggering. Routinely, drivers reporting deficient equipment to an IEP are made to wait, uncompensated, for absurdly long periods of time for repairs to be made at IEP facilities. To avoid long delays it is common for drivers to carry tools and certain replacement parts, such as lights, and make minor repairs themselves. When drivers are tendered equipment requiring replacement or more extensive repairs they must make a choice – wait, or bow to economic and customer or motor carrier scheduling pressures by taking their chances moving defective equipment over the highways.

As the Agency notes, drivers that primarily haul intermodal loads are generally paid based upon the number of trips they make. IEPs know that any significant interruption in a driver's ability to earn a living is a potent weapon to cunningly coerce drivers into behavior counter to the FMCSA's stated purpose for this rulemaking. As proposed the rule would effectively allow the status quo to continue simply because it gives the IEP plausible deniability of their responsibilities based almost solely upon whether a driver completes an accurate inspection report. A driver fearing lost economic opportunity and/or under pressure to make scheduled deliveries is an easy target for IEPs to manipulate.

Trucking has a long and troubled history of drivers being economically coerced into taking unsafe and counter-productive actions. For decades drivers have been coerced not only by IEPs, but by shippers and receivers as well. In the past many drivers were threatened with physical violence. Today, insidious economic coercion is exercised

to a great extent, such as when drivers are left to sit at loading and unloading facilities for hours until they acquiesce to unreasonable or illegal demands.

A precise analogy to this proposal is when Congress passed 49 U.S.C. 14103 in 1980 mandating that shippers and receivers bear the cost of assisted loading and unloading, and prohibiting them from coercing drivers into paying for loading and unloading. Enforcement of that law is the responsibility of FMCSA. To date, OOIDA is unaware of a single prosecution for violations of this so-called “lumper law.” Drivers have complained bitterly for decades about the continuation of illegal practices outlawed by the 1980 legislation. Complaints filed with FMCSA for violations of 49 U.S.C. 14103 will nearly always, if even answered, result in the complainant being told, “FMCSA does not deal with issues like this, only issues that involve safety.” or “...we must emphasize that these cases are difficult to prove...”

The Agency’s unwillingness to act on legitimate complaints for violations of the lumper law has resulted in economic hardship for drivers and negative consequences to highway safety. Violators of the law have absolutely no fear of being prosecuted and as a result there has been a virtual explosion in the number of shippers and receivers violating the law at the expense of drivers and highway safety. Drivers genuinely believe the Agency has turned its back on them when offending parties are not held accountable under the law.

Reporting violations under this proposal would be covered under § 390.42(d). OOIDA is concerned that the level or number of complaints required to trigger an investigation of IEP violations is not defined. The very nature of coercion can be subtle in application, but dramatic in achieving its goal. Many IEPs are already adept at making

drivers “toe the line” by affecting their meager income through significant uncompensated detention time. Inaction or indifference on the part of the Agency in handling driver complaints will allow IEPs to win the game of coercion and incite drivers to once again feel abandoned by the Agency.

Certain States have attempted to solve the very issue that is the subject of this proposal. In conversations with OOIDA members that both primarily and occasionally operate intermodal equipment it becomes apparent that these State laws have been woefully ineffective. The Association has received complaints that IEPs in these States continue to ignore their maintenance responsibilities and persist in delaying drivers that have been tendered equipment in need of repair or replacement. Any law or regulation that goes un-enforced is useless. Unless the Agency takes driver and motor carrier complaints seriously, and acts aggressively to substantiate and correct IEP maintenance negligence and coercive practices the rule fails miserably.

**B. Responsibility Associated With Hidden Intermodal Equipment Defects**

In the preamble under “Relationship Among Intermodal Parties and Allocation of Liability” the Agency states it should not attempt to allocate liability between parties tendering and using intermodal equipment, and references the Uniform Intermodal Interchange and Facilities Access Agreement. This deference to the one-sided interchange agreement widely used by IEPs undermines the requirement for IEPs to systematically maintain their equipment. While FMCSA may not have direct authority over States related to penalty assessments or to which party tickets should be issued, the Agency’s silence on the issue of responsibility for hidden defects will certainly result in the driver being issued a ticket for these violations in almost every instance. Assigning

responsibility to IEPs for violations a driver could not have discovered in a normal pre-trip inspection would be a powerful inducement for IEPs to comply with the proposed regulation. It is utterly indefensible that a driver having complied with the regulations is still allowed to be the party ticketed, fined and possibly placed out-of-service by roadside law enforcement for defects or deficiencies that are clearly the responsibility of the IEP.

#### **IV. CONCLUSION**

OOIDA urges FMCSA to take seriously, and aggressively act upon driver and motor carrier complaints of poor maintenance practices, long wait times for equipment repairs or replacement, and coercion on the part of IEPs. This is the only way to ensure that IEPs are held accountable for their maintenance responsibilities. Furthermore, IEPs must be held financially responsible for fines associated with equipment defects and deficiencies not readily apparent in the mandated driver pre-trip inspection. Unless these issues are resolved, a final rule as proposed will not achieve that which Congress intended and the Agency desires, "...to ensure that intermodal equipment used to transport intermodal containers is safe and systematically maintained."

Respectfully submitted,



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Drivers Association, Inc.

March 21, 2007