



November 11, 2020

Mr. Shane Kelley, Director
Standards and Rulemaking Division
Pipeline and Hazardous Materials Safety Administration, Attn: PHH-10
U.S. Department of Transportation, East Building
1200 New Jersey Avenue, SE.
Washington, DC 20590-0001

Re: Petition for Rulemaking re Electronic Shipping Papers and Shipper Certifications

Dear Mr. Kelley:

This is a petition for rulemaking submitted by the National Tank Truck Carriers, Inc. (“NTTC”) and the American Trucking Associations, Inc. (“ATA”), two national trade associations with member companies that transport shipments of hazardous materials by tank truck and by package.

NTTC and ATA request, pursuant to 49 CFR § 106.95, that the Pipeline and Hazardous Materials Safety Administration (“PHMSA”) begin a rulemaking to allow offerors and transporters of hazardous materials by motor carrier to use and accept electronic shipping papers and shipper’s certifications on the same basis as offerors and carriers of hazardous materials by rail.

Specifically, NTTC and ATA ask that PHMSA amend 49 CFR § 177.817, 49 CFR §§ 172.201-172.205 and related regulations to the extent that those provisions require the shipping paper to accompany the shipment by being physically present on the vehicle. The petitioners seek new requirements for shipments by motor carrier that are similar or identical to those in 49 CFR § 172.201(a)(5), which specifically authorizes rail carriers to accept shipping paper information from an offeror of hazardous materials either telephonically or electronically (EDI).

Additionally, NTTC and ATA ask that the signature requirements for a shipper’s certification in 49 CFR § 172.204(d)(2) be amended to allow for transmission by telephone or electronically, as is allowed for rail shipments under § 172.204(d)(3).

Petitioners

NTTC's membership is comprised of over 600 companies that specialize in bulk transportation services by cargo tank throughout North America. The tank truck industry

generates roughly 5.1% of all truck freight revenue, but that represents 25.6% of all truck freight in terms of tonnage due to the heavy nature of the liquid bulk products they handle.

ATA's membership is comprised of a united federation of motor carriers, state trucking associations, and national trucking conferences created to promote and protect the interests of the trucking industry. Directly and through its affiliated organizations, ATA represents more than 30,000 motor carriers in the United States encompassing every type and class of motor carrier operation

Background of Industry Action

For many years, shippers and carriers of general freight by commercial motor vehicle have developed a number of protocols for the electronic interchange of shipping documents. Companies routinely use electronic data interchange capabilities to transfer information about the nature and count of products being shipped, the date and time of pickup and delivery, and related commercial and legal language. Many of these commodities are time and/or security sensitive, and EDI technology has facilitated the safe and efficient transport of these products.

Most recently, with the advent of the COVID-19 pandemic, which has resulted in the declaration of a National Emergency¹ by President Trump, companies have redoubled their efforts to develop procedures that avoid human-to-human transmission of the virus. For example, on June 29, 2020, the Consumer Brands Association launched the Contactless Delivery Task Force to bring together manufacturers, supply chain partners and retailers to develop standards for reducing human contact when moving freight from Class 8 vehicles to last-mile drop-offs. *See Transport Topics*, July 13, 2020, at 3. The task force now includes 25 consumer packaged goods companies and retailers.

This task force reportedly will first look at electronic bills of lading, but will consider electronic delivery verification and document digitization more generally as the effort progresses. The *Transport Topics* article describes how electronic document interchange allows companies to build efficient and resilient supply chains by reducing entry error; increasing visibility to over, short or damaged shipments; lowering transportation costs; and improving the environmental footprint of the transportation system.

In addition, the American Trucking Associations has recently asked the Senate Commerce Committee to consider legislation to "amend these federal shipping paper requirements to provide truck drivers hauling hazmat with the option to utilize electronic shipping papers."² While it would be helpful to have Congress pass legislation to mandate that PHMSA adopt such changes, the agency already has the statutory authority to amend its shipping

¹ Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak, March 13, 2020, Presidential Proclamation.

² Testimony of Randy Guillot, Chairman of the American Trucking Associations, before the Committee on Commerce, Science and Transportation, United States Senate, Hearing on the State of Transportation and Critical Infrastructure: Examining the Impact of the COVID-19 Pandemic, June 3, 2020.

paper regulations to allow electronic shipping papers for motor carriers through rulemaking. *See* 49 U.S.C. § 5103(b).

Executive Order on Regulatory Relief

Moreover, on May 19, 2020, President Trump signed an “Executive Order to Provide Regulatory Relief to Support Economic Recovery” as a response to the COVID-19 pandemic. E.O. 13924, 85 Fed. Reg. 31353 (May 22, 2020).

The Order states:

It is the policy of the United States to combat the economic consequences of COVID-19 with the same vigor and resourcefulness with which the fight against COVID-19 itself has been waged. Agencies should address this economic emergency by rescinding, modifying, waiving, or providing exemptions from regulations and other requirements that may inhibit economic recovery, consistent with applicable law and with protection of the public health and safety, with national and homeland security, and with budgetary priorities and operational feasibility. They should also give businesses, especially small businesses, the confidence they need to re-open by providing guidance on what the law requires; by recognizing the efforts of businesses to comply with often-complex regulations in complicated and swiftly changing circumstances; and by committing to fairness in administrative enforcement and adjudication.

Section 4 of the Executive Order states:

The heads of all agencies shall identify regulatory standards that may inhibit economic recovery and shall consider taking appropriate action, consistent with applicable law, including by issuing proposed rules as necessary, to temporarily or permanently rescind, modify, waive, or exempt persons or entities from those requirements, and to consider exercising appropriate temporary enforcement discretion or appropriate temporary extensions of time as provided for in enforceable agreements with respect to those requirements, for the purpose of promoting job creation and economic growth, insofar as doing so is consistent with the law and with the policy considerations identified in section 1 of this order.

The requirement for paper shipping documents to accompany all hazardous materials shipments transported by motor carrier is such a “regulatory standard[] that may inhibit economic recovery.” In this pandemic, physical distancing between shipper, customer and receiver is necessary to prevent spread of the coronavirus. The petitioners assert that a final rule

that provides for the electronic transmission³ of shipping data will “promot[e] job creation and economic growth,” as well as the health and safety of transportation workers by reducing human-to-human contact of shipping documents, without jeopardizing the safety of the transportation operations.

Current Regulatory Scheme

PHMSA currently allows rail carriers to accept shipping paper information either telephonically (*i.e.*, voice communications and facsimiles) or electronically (EDI) from an offeror of hazardous materials. 49 CFR § 172.201(a)(5). The petitioners request that PHMSA extend this option to shipments by highway transport as well.

In addition, NTTC and ATA ask that PHMSA allow motor carriers to receive a shipper’s certification either verbally or with an electronic signature in conformance with the provisions of paragraphs (a)(3)(i), (a)(3)(ii) and (d)(3) of 49 CFR § 172.204. These provisions currently apply only to shipments by rail.

Also, the signature requirements for a shipper’s certification in 49 CFR § 172.204(d)(2) should be expanded to make clear that a signature “[m]ay be legibly signed manually, by typewriter, or by other mechanical means” and may also be “transmitted by telephone or electronically,” as is permitted for shipments by rail. *See* 49 CFR § 172.204(d)(3).

Further, petitioners request that PHMSA amend or withdraw the requirements of 49 CFR § 177.817(e), consistent with the rulemaking contemplated herein. § 177.817(e) provides:

(e) Shipping paper accessibility - accident or inspection. A driver of a motor vehicle containing hazardous material, and each carrier using such a vehicle, shall ensure that the shipping paper required by this section is readily available to, and recognizable by, authorities in the event of accident or inspection. Specifically, the driver and the carrier shall:

(1) Clearly distinguish the shipping paper, if it is carried with other shipping papers or other papers of any kind, by either distinctively tabbing it or by having it appear first; and

(2) Store the shipping paper as follows:

(i) When the driver is at the vehicle's controls, the shipping paper shall be: (A) Within his immediate reach while he is restrained by the lap belt; and (B) either readily visible to a person entering the driver's compartment or in a holder which is mounted to the inside of the door on the driver's side of the vehicle.

³ For example, a driver could have the shipping papers stored in an electronic format on a mobile phone or tablet.

- (ii) When the driver is not at the vehicle's controls, the shipping paper shall be: (A) In a holder which is mounted to the inside of the door on the driver's side of the vehicle; or (B) on the driver's seat in the vehicle.

This subsection requires carriers to have paper copies of all shipping papers (as required in 49 CFR § 172.201) at a readily accessible location in the commercial motor vehicle so that an emergency responder or enforcement official may be able to access the documents in the event of an accident or inspection, respectively. As ATA Chairman Guillot said in his June 3, 2020 Senate testimony, this might be accomplished by allowing remote access to the information, an approach which has been tested and approved for air and rail shipments and would be safer for first responders to an incident.

PHMSA Relief Efforts in Response to COVID-19

In response to the COVID-19 pandemic, PHMSA has attempted to offer some regulatory relief to industry. On April 10, 2020, the agency issued "Notice Highlighting Existing Options Related to Hazardous Materials Shipping Papers and Social Distancing during the COVID-19 Public Health Emergency." This document provided guidance to shippers and carriers on the need to maintain social distancing between parties when exchanging shipping papers.

The document stated:

Under the HMR, no physical contact between parties is required for the purposes of shipping papers. Shippers and carriers may therefore meet all requirements for hazardous materials shipping papers and maintain necessary social distancing. Shipping papers may be exchanged, for example, by physically attaching the document to a clipboard and placing it on a table and stepping away while the paper is signed, or sending the document via email or other means of electronic transmission.

Concerns have specifically been raised about the shipper's certification statement. Section 172.204(d) states that the shipper's certification on a shipping paper: "... [m]ust be legibly signed by a principal, officer, partner, or employee of the shipper or his agent; and ... [m]ay be legibly signed manually, by typewriter; or by other mechanical means." A shipper may ask a person to sign on its behalf, i.e., to enter the shipper's name as the signature for the shipper's certification on the shipping paper. The request may be made verbally or in writing, and may be electronically transmitted (e.g., text message or email).

Using the methods outlined above, PHMSA believes carriers and shippers may satisfy the safety requirements of the HMR while maintaining appropriate social distancing during the COVID-19 public health emergency.

While this information is helpful, it does not address the fundamental issue of requiring a paper copy of a hazmat shipping paper to accompany every shipment of hazardous materials transported by motor carrier.

In Frequently Asked Questions Related to COVID-19, published by PHMSA on its website on May 1, 2020, the agency stated:

Q2. Is a computer-generated signature an acceptable way of complying with the signature certification requirements of the HMR?

A2. Yes. A certification may be accomplished by mechanical means such as a computer-generated electronic signature, in addition to other conventional forms of certification (e.g., signed manually, by typewriter, or by other mechanical means). (See 49 CFR 172.204(d)(2))

Although this answer attempts to offer some regulatory relief, it does not allow transmission of the computer-generated signature by electronic means, as is allowed for rail shipments under § 172.204(d)(3).

Moreover, PHMSA made it clear in the FAQ that electronic shipping papers do not comply with the HMR when hazardous materials are being transported by highway:

Q3. When hazardous materials are being transported by highway, do electronic shipping papers comply with the requirements of the HMR?

A3. No. In accordance with 49 CFR 177.817(e), during highway transportation a shipping paper must be in hard copy form. Furthermore, a driver of a motor vehicle containing hazardous material and each carrier using such a vehicle, shall ensure that the shipping paper is readily available to, and recognizable by, authorities in the event of an accident or investigation. Note: While a physical paper is required to be in the vehicle, the HMR do not prohibit having and transmitting an additional electronic shipping paper throughout the transport chain to support efficiencies and/or social distancing.

Volpe Pilot Project and Report

In fact, the Volpe National Transportation Systems Center has already conducted a pilot project on paperless hazard communications systems.⁴ Section 33005 of the Moving Ahead for Progress in the 21st Century Act (MAP-21) authorized the Secretary of Transportation to conduct pilot projects to evaluate the feasibility and effectiveness of using paperless hazard communications systems. In support of this authority, PHMSA conducted pilot projects in 2015 to test the feasibility and effectiveness of using paperless hazardous materials (e-HM) communication systems (“e-systems”) to communicate hazardous material shipping paper information while the hazardous material is in transport.

⁴ “Paperless Hazard Communications Pilot Program; Moving Ahead for Progress in the 21st Century Act (MAP-21): Congressional Report,” prepared by Volpe for: Pipeline and Hazardous Materials Safety Administration Office of Hazardous Materials Safety, Washington, D.C., January 2016 (“the Volpe Report”).

Volpe received input between 2012 and 2015 from hazardous materials stakeholders, including Federal and State authorities, emergency responders, law enforcement, and shippers and carriers of hazardous materials, with the objective of obtaining feedback on the priorities, gaps, concerns, and operational requirements associated with using e-systems. Volpe executed 21 pilot tests in 2015 with shippers, carriers, law enforcement investigators, and emergency responders in five U.S. regions, including one rural area. According to the Volpe Report, the objective of the tests was to collect data regarding the feasibility, effectiveness, and safety associated with the electronic transfer of hazardous material shipping paper data during inspection and emergency response simulations utilizing pilot test participants' existing equipment and resources.

The conclusions of the Volpe Report support development and implementation of electronic hazard communication systems for transmitting shipping document information. "Based on the findings and information collected under this study, Volpe believes e-systems can be a feasible and effective alternative to hardcopy documentation for communicating HM shipping paper information during the transport of HM. Volpe also believes e-systems can provide an equivalent level of safety and security already provided by hardcopy shipping papers if certain performance standards are met." Volpe Report, at xiii.

Moreover, the Volpe Report recommended that PHMSA conduct the exact type of rulemaking that petitioners request herein. "Volpe recommends considering a rulemaking to modify the [Hazardous Materials Regulations] to permit the use of e-systems for communicating e-HM shipping paper information if a set of minimum performance-based standards are met." *Id.*

The Volpe report set out the following recommended performance criteria to be evaluated and defined during the rulemaking process:

- An identified POC is available for providing the e-HM information 24 hours per day, seven days per week;
- All HM shipping paper information is provided electronically on-demand within a defined time interval after the initial request (Note: DOT-SP 15747 in Appendix H: UPS Special Permit 15747 requires that the e-HM shipping paper information be provided "without delay" to emergency responders and inspectors in a single transmission within five minutes from when the initial request is received by the UPS call center);
- Shippers and carriers develop, document and train (initial and refresher) affected staff on their equipment, procedures, and security protocols associated with providing e-HM communications in HM transportation;
- A performance definition for paperless communication that is flexible; permits the use of different technologies (because of variations in existing systems, across industry, modes, and continually evolving technologies); and provides the e-HM information in an open, easily transferable and readable e-data format (such as, but not limited to, pdf) is developed;
- A standardized defined visual aid (such as a placard) indicating that the HM shipping paper information will be communicated electronically, along with a means to obtain the

e-HM information (such as a POC telephone number or website) is visible on the exterior of the transportation conveyance; and

- In areas with known Internet connectivity issues, transportation conveyance operators must have the means to directly provide the e-HM information to local HM inspectors and emergency responders (e.g., print the HM shipping paper information directly from a device in the transportation conveyance, show the HM shipping paper information on a laptop/tablet screen, etc.), and are provided with a backup procedure for obtaining the HM shipping paper information and providing the HM shipping paper information to local HM inspectors and emergency responders.

Id.

Rural Connectivity Concerns

The Volpe Report identified concerns with Internet connectivity in rural areas where electronic transmission of hazard communication information might not be reliably available in all places at all times. Please understand that petitioners are sensitive to these concerns and do not want to place emergency responders in a dangerous situation due to lack of Internet service. The safety of commercial motor vehicle drivers, law enforcement personnel, first responders and the public are the first priority for any revised regulatory scheme.

But even with these concerns, the Volpe Report noted that “e-systems can provide an equivalent level of safety and security already provided by hardcopy shipping papers if certain performance standards are met.” *Id.* In areas with known Internet connectivity issues, carriers might need to provide alternative or redundant methods of hazard communication (in addition to the vehicle placards) to ensure that first responders have adequate information in an emergency.

Petitioners believe these issues, while realistic and critical, are not insurmountable. This rulemaking should not be deferred until every rural area in every corner of the United States has uninterrupted Internet service 24 hours each day.

Negotiated Rulemaking

Petitioners suggest that this issue might be best addressed through a negotiated rulemaking, with representatives of all interested parties meeting over the course of several weeks or months to discuss how best to construct a regulation that will meet the needs of hazardous materials shippers and carriers without jeopardizing safety. *See* 5 U.S.C. § 561 *et seq.*; 49 C.F.R. § 106.90.⁵

Many stakeholders were consulted in the deliberations leading to the Volpe Report, and NTTC and ATA would welcome their additional input and comments in the context of a

⁵ PHMSA and has used negotiated rulemakings successfully in a number of proceedings. *See, e.g.,* Revisions to Regulations Governing Transportation and Unloading of Liquefied Compressed Cases, Docket HM-225A, 64 Fed. Reg. 16882 (April 7, 1999); Qualification of Pipeline Personnel, 62 Fed. Reg. 7985 (February 21, 1997).

negotiated rulemaking. The findings in the Volpe Report can serve as the basis for further discussions in a structured and facilitated format that may encourage and lead PHMSA to develop a proposed rule.

Conclusion

NTTC and ATA request that PHMSA begin a rulemaking without delay to address the issues of electronic transmission of shipping papers and shipper's certifications while using the recommended performance criteria outlined in the Volpe Report, above. The agency should welcome input from motor carriers, shippers, federal state and local enforcement officials and emergency responders, and other interested parties to develop a regulatory scheme that adopts twenty-first century technology solutions to facilitate commerce, protect the safety and health of transportation workers and first responders, and promote efficient transportation networks. Should you wish to discuss this petition in greater depths, you may contact us by emailing Ryan Streblow, NTTC at rstreblow@trucking.org or by telephone at (703) 838-1960 or Dan Horvath, ATA Vice President of Safety Policy, at dhorvath@trucking.org or (703) 838-8804.

Respectfully submitted,



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