AUGUST 23, 2021 VOL 31

TIA ON THE HILL

The Latest News and Updates from TIA's Government Affairs Department

IN THIS ISSUE

TIA Prepares Amicus Brief on AB5

TIA has been closely monitoring Assembly Bill 5 (AB5) out of California and its potential devasting effects on the 3PL and transportation industries, along with the case of California Trucking Association v. Bonta. In May 2021, the Ninth Circuit Court of Appeals reversed a preliminary injunction staying the enforcement of AB5 (Labor Code § 2775). The Court determined that the California Trucking Association (CTA) is unlikely to succeed on the merits of its district court claim that AB5 is pre-empted by the Federal Aviation Administration Authorization Act of 1994 (F4A).

The potential decision will have huge implications and consequences to trucking companies, 3PLs, and brokers that employ independent contractors or agents and 3PLs and brokers that utilize the services of dray carriers and owner-operators.

California legislators enacted AB5 after the California Supreme Court adopted the so-called ABC Test in a 2018 ruling (Dynamex Operations West, Inc. v. Superior Court). The test, which under AB5 affects numerous industries, requires that three criteria be met for a worker to be classified as an independent contractor. The worker must:

Continued...

- (A) Be free from the hiring company's control and direction in performing the work, both in fact and under contract.
- (B) Perform work outside the hiring firm's usual course of business.
- (C) Be customarily engaged in an independent trade, occupation, or business.

After the case was initially brought forward, the U.S. District Court for the Southern District of California issued a preliminary injunction blocking the state from enforcing AB5 against motor carriers operating in the state, holding that the CTA's case was likely to succeed on its claim that the F4A pre-empts the state rule. The Court noted that carriers likely would have to reclassify all independent-contractor drivers as employees for all purposes to comply with the California labor law.

Officials in California and the International Brotherhood of Teamsters appealed the ruling to the Ninth Circuit Court of Appeals, which then reversed the district court's order, ruling that the F4A doesn't pre-empt enforcement of AB5 against motor carriers. The battle is now shifting to the Supreme Court of the United States (SCOTUS), and TIA is in the process of filing an amicus brief with the Court in support of the CTA and the larger freight brokerage industry.

The reality is without a reversal from the Ninth Circuit Court of Appeals or SCOTUS agreeing to hear the case and uphold the F4A, the independent contractor model that many of our members utilize will likely be eliminated in the state of California, with a potential domino effect occurring across the country.

The CTA filed the petition on August 9, 2021, which generally triggers a 30-day window for organizations like TIA to file an amicus brief in support or opposition to the case.

TIA has several options available to support the efforts and advocate appropriately for our member companies and the industry. The TIA Executive Committee is currently vetting these options, and the Association will report back on its decision.

If you or your company would like to lend any financial support to this effort, please get in touch withadvocacy@tianet.org for more information on contributing to TIA’s legal defense efforts.

TIA Looking at Bipartisan Ocean and Shipping Legislation

TIA is frequently engaged with Congressional offices on a wide range of issues that affect transportation and the supply chain. We review all the legislation that is referred to Committees of jurisdiction that affects the 3PL industry, transportation, and our members’ businesses.

A piece of bi-partisan legislation was introduced recently that focuses on evening up the playing field, making the United States more competitive as it relates to ocean and maritime transportation, and giving the Federal Maritime Commission (FMC) the power to make decisions that impact the supply chain and enforce laws for the betterment of the economy. The bill is sponsored by Representatives Garamendi (D-CA) and Johnson (R-SD).

Continued...

Specifically, the legislation would:

- Establish reciprocal trade to promote U.S. exports as part of the Federal Maritime Commission's (FMC) mission.
- Require ocean carriers to adhere to minimum service standards that meet the public interest, reflecting best practices in the global shipping industry.
- Require ocean carriers or marine terminal operators to certify that any late fees —known in maritime vernacular as "detention and demurrage" charges—comply with federal regulations or face penalties.
- Shift burden of proof regarding the reasonableness of "detention or demurrage" charges from the invoiced party to the ocean carrier or marine terminal operator.
- Prohibit ocean carriers from declining opportunities for U.S. exports unreasonably, as determined by the FMC in new required rulemaking.
- Require ocean common carriers to report to the FMC each calendar quarter on total import/export tonnage and twenty-foot equivalent units (loaded/empty) per vessel that makes port in the United States.
- Authorizes the FMC to self-initiate investigations of ocean common carrier's business practices and apply enforcement measures, as appropriate.

TIA continues to be a source of reliable information regarding highway and domestic supply chain issues, but international issues as well. TIA looks to enhance our advocacy efforts to reach a larger segment of the 3PL industry. TIA will work with policymakers that develop public policy relating to the Federal Maritime Commission (FMC), international and cross-border issues.

Potential Margin Tax Bill Being Considered in Congress

Another policy piece that TIA is reviewing has to do with limiting TIA members' tax exposure because of overzealous States seeking to increase revenue through franchise or margin taxes. In recent months we have seen a trend of TIA members receiving tax bills for contracts they completed in States, in which freight was delivered but their business is not domiciled. TIA members are receiving a tax bill for businesses they contracted out in a different state, without physically being there. The only presence they have there is the contracted carrier which has put its wheels between States lines. This is often triggered by the issuance of 1099s to motor carriers, which 3PLs are not required to send out.
TIA is considering supporting what is referred to as BATSA, or Business Activity Tax Simplification Act. This legislation is simple yet powerful in its effect. The bill would limit taxes relating to interstate commerce to the Federal Government, not the state, as per Article 1, Section 8 Clause 3 of the Constitution.

You would need to have a physical presence in a state to be taxed by a state entity. This definition of business activity or business nexus would codify the "Bella Hess" definition for nexus as found once again in Supreme Court decision "Quill v North Dakota." This was overturned by the Wayfair decision in 2018. This is a bi-partisan issue with dozens of supporting organizations. The bill would prohibit business activity taxes (BATs), including additional corporate income taxes, franchise taxes, single business taxes, capital taxes, gross receipt taxes, and business and occupation taxes. Corporations currently pay those taxes to a state only if the State can establish a "nexus" with the firm. There is no current bill for the 117th Congress.

TIA is in the beginning stages of learning about this legislation and fact-finding before we weigh in on this policy. If you have any questions about these issues or would like to weigh in on this as a part of our preliminary effort, please do not hesitate to contact us.