

Transportation Safety – March/April 2007 Update
By
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Planned Opening of Border to Mexican Trucks Remains a Hot Safety Topic

FMCSA's plan, announced in February 2007, to open the U.S. border to Mexican trucks operating beyond the commercial zones on a demonstration program basis has, predictably, come under intense fire from safety advocates and labor interests. FMCSA has nonetheless vigorously defended its plan and, on May 1, 2007, published a notice describing its demonstration plan and requesting public comment. *Demonstration Project on NAFTA Trucking Provisions*, 71 Fed. Reg. 23883 (May 1, 2007).

The FMCSA Notice reviews the history of cross-border trucking operations and explains the safety criteria to which Mexican trucks will be subject under the demonstration program. For example, all vehicles used by the Mexican trucking companies allowed to operate in the United States must be manufactured in conformity with NHTSA motor vehicle safety standards and must meet all U.S. emission control requirements. Further, the drivers and vehicles will need to comply with all FMCSA requirements, including hours of service, medical standards and insurance requirements. All vehicles will also be subject to a safety inspection and must display a Commercial Vehicle Safety Alliance decal, valid for three months. Vehicles lacking such a decal will not be allowed to enter the United States.

FMCSA will grant permission to up to 100 Mexican motor carriers, each of which must pass a pre-authorization safety audit conducted by FMCSA personnel. The permission to operate in the U.S. will be limited to the carriage of international cargo and will expire at the end of one year, when the demonstration program will terminate. FMCSA will gather data on the safety record of the Mexican carriers during that one year period and monitor and evaluate the data while the program is in place. FMCSA has also set up an independent panel to review that data.

Further, FMCSA has announced that the Mexican border will simultaneously open to a limited number of U.S. truckers seeking to operate in Mexico. This represents a change from the initial announcement of the demonstration program made by FMCSA in February, at which time it was anticipated that it would be several months after Mexican trucks were allowed in the U.S. before the Mexican border might be opened to U.S. carriers.

It remains to be seen whether FMCSA's latest announcement will mollify its critics. In a lawsuit filed on April 23, 2007 in the U.S. District Court for the Northern District of California, a coalition of groups seeks an injunction against implementation of the FMCSA pilot program. The coalition, composed of Public Citizen, the Sierra Club, the Teamsters, OOIDA and others, argues that FMCSA's program was unlawfully adopted in violation of the Administrative Procedure Act for failure to provide adequate public notice of the program and failure to seek comment on it. Those criticisms,

however, appear to have been answered by FMCSA's May 1 Notice. The same groups simultaneously filed a petition for review of the FMCSA program in the U.S. Court of Appeals for the Ninth Circuit, apparently concerned that one court or the other might find their challenge to have been brought in the wrong court. It is unclear when either court will rule or how the May 1 announcement will impact these legal actions.

At the same time, Congress has acted quickly in an effort to put a halt to the FMCSA program. The emergency Iraq War funding measure, vetoed by President Bush, contained a provision that would have barred FMCSA from implementing its plan for Mexican trucks until Mexico allows U.S. trucks to enter that country on a reciprocal basis, and until FMCSA complies with prior Congressionally-imposed conditions for allowing Mexican trucks to operate in the United States. As of this writing, Congressional Committees are looking at new legislation to stop Mexican trucks from operating beyond commercial zones, but a veto threat looms for any such measure.

Surface Transportation Security Measures Impact Safety Too

As of this writing, the House has passed a surface transportation security bill (H.R. 1401) and the Senate Commerce Committee has reported out such a measure (S. 184). Among other provisions, both bills would require security plans for the transportation of certain highly hazardous materials, provide grants to carriers to enhance security, require expanded background checks for certain individuals involved in the transportation of hazardous materials and require the preparation of threat assessments.

Of special note, the House-passed measure contains a provision that would roll back the preemption of state law, including causes of action based on negligence, in rail safety cases. The measure provides that nothing in the Federal Rail Safety Act (and specifically in Section 20106 of Title 49, which provides for national uniformity of rail safety laws to the extent practicable) would preempt a state cause of action or any damages recoverable in that cause of action, unless compliance with the state law would make compliance with federal requirements impossible. The measure further provides that nothing in Section 20106 confers federal jurisdiction over a question relating to such a cause of action, an apparent attempt to prevent federal courts relying on rail safety laws as a basis for applying the complete preemption doctrine. In addition, the preemption rollback provision states that Section 20106 only preempts "positive laws, regulations and orders" that expressly address rail safety and security and that such preemption may be exercised when DOT or DHS act by "substantially subsuming the same subject matter."

The House measure is an apparent response to decisions, reported on previously in this column, such as *Mehl, et al. v. Canadian Pacific Railway, et al.*, 417 F.Supp.2d 1104 (D.N.D. 2006) in which some courts have held that the FRSA preempts state-based causes of action alleging railroad negligence in connection with claims associated with the sufficiency of track inspection and maintenance. Whether the measure will survive further Congressional action will be closely watched.

Motorcoach Safety Comes Under Scrutiny

Responding to some recent high-profile motorcoach crashes, the Subcommittee on Highways, Transit and Pipelines of the House Committee on Transportation and Infrastructure held a hearing on motorcoach safety on March 20, 2007. The hearing signals a renewed interest in motorcoach safety, even though it remains an extremely safe form of passenger transportation.

FMCSA Administrator Hill testified at the hearing that his agency is expanding the number of compliance reviews being conducted in the motorcoach sector and beginning in FY 2007, states will be required to include bus inspection programs in their Commercial Vehicle Safety Plans in order to receive federal safety funds. The agency is also conducting a Bus Crash Causation Study to be completed this year. New entrant carriers are also subject to safety audits within 9 months of beginning operations. FMCSA has also targeted a special safety compliance program at so-called “curbside operators” in the Northeast states.

The Advocates for Auto and Highway Safety also testified at the hearing, and painted a somewhat different picture. The Advocates was generally critical of federal safety agency oversight of motorcoach safety. NHTSA was criticized for not establishing tougher crashworthiness standards, such as standards that will reduce the number of rollovers and reduce the risk of passenger ejections. FMCSA was criticized more broadly for failing to maintain good data on safety risks and thus failing to identify high risk carriers. According to the Advocates, FMCSA conducts too few compliance reviews, including of Mexican bus operators allowed to operate within commercial zones. States were also criticized for lax motorcoach oversight.

Industry and labor interests also testified at the hearing. No specific legislation was considered and it remains to be seen whether any concrete legislative or regulatory steps will emerge from the hearing.

FRA Adopts Final Emergency Waiver Request Regulations

In August 2006, FRA adopted an interim final rule establishing expedited procedures to allow the agency to rapidly address the need for waiver of its rules in the event of an emergency, such as a major hurricane or a terrorist attack. FRA has now adopted final waiver rules. *See Establishment of Emergency Relief Dockets and Procedures for Handling Petitions for Emergency Waiver of Safety Regulations*, 72 Fed. Reg. 17433 (April 9, 2007). FRA anticipates that the type of relief it might grant in response to emergency waiver requests could include temporary relief from track maintenance and inspection requirements, as well as relief from recordkeeping and certain operational requirements. Its final rules, which are virtually identical to those adopted on an interim basis, set forth a process under which parties may seek emergency waivers of FRA rules, establish a brief public comment period, and specify the process to be used by FRA in acting on requests for relief.

Rail Safety Reauthorization Measure Introduced

On May 2, 2007, House Transportation and Infrastructure Committee Chairman Oberstar introduced the Federal Railroad Safety Improvement Act of 2007. According to the press release issued by the Committee at the time of the measure's introduction, it would do the following:

- strengthen hours-of-service for all signal personnel and train crews;
- require railroads to submit fatigue management plans to the Secretary of Transportation for review and approval;
- provide the Secretary with the regulatory authority to reduce the maximum number of hours an employee can remain or go on duty and increase the minimum number of hours of rest;
- reorganize the FRA as the Federal Railroad Safety Administration and require it to consider the assignment and maintenance of safety as the highest priority;
- create a new position for a Chief Safety Officer and increase the number of Federal safety inspectors to at least 800 by fiscal year 2011;
- require the Secretary to develop a long-term strategy for improving railroad safety by reducing the number of accidents, increasing the effectiveness of enforcement and compliance programs, targeting enforcement at and safety improvements to high-risk grade crossings, and enhancing research that promotes railroad safety;
- require regular reporting of statutory mandates that have not been implemented and open safety recommendations made by the NTSB or the Inspector General regarding railroad safety;
- increase civil and criminal penalties and strengthen transparency in the FRA's enforcement process;
- strengthen whistleblower protections for rail workers and ensure injured workers get prompt medical attention;
- implement positive train control, which has been on the NTSB's Most Wanted Safety Improvements list since its inception in 1990;
- strengthen safety at our nation's grade crossings;
- require railroads to minimize accidents due to track defects and provide funding for track inspection equipment; and
- implement NTSB recommendations from the recent accidents in Graniteville, South Carolina, Macdona, Texas, Home Valley, Washington, and Nodaway, Iowa.

This bill will bear close watching over the next few months as it is certainly possible that Congress will finally enact a reauthorization measure. The hours of service issue is likely to be the focus of much of the coming debate on this measure. FRA does not currently have broad regulatory authority in this area and the railroads have resisted efforts to invest the agency with that authority, reasoning that the rail industry needs to retain flexibility.