



# Interstate Truckload Carriers Conference

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May 13, 1996

**VIA HAND DELIVERY**

Docket Clerk  
Room 4232  
Office of Chief Counsel  
Federal Highway Administration  
400 Seventh Street, S.W.  
Washington, DC 20590

FHWA-97-2277-12

**RE: Docket No. MC - 96 - 6  
Safety Performance History  
of New Drivers**

Dear Sir or Madam:

Enclosed for filing are an original and two copies of comments of the Interstate Truckload Carriers Conference in the referenced proceeding.

Kindly date- and time-stamp one of the enclosed copies and return it to our courier for our records.

Very truly yours,

FEDERAL HIGHWAY  
ADMINISTRATION

Before the 96 MAY 13 A 7:32

DEPARTMENT OF TRANSPORTATION  
LEGISLATIVE & REGS. DIV.  
FEDERAL HIGHWAY ADMINISTRATION

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Docket No. MC - 96 - 6  
SAFETY PERFORMANCE HISTORY  
of NEW DRIVERS

Comments of the  
INTERSTATE TRUCKLOAD CARRIERS CONFERENCE

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INTERSTATE TRUCKLOAD CARRIERS CONFERENCE

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Dated: May 13, 1996

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Before the  
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The Interstate Truckload Carriers Conference ("ITCC" or "Conference") submits its following comments in response to the referenced notice of proposed rulemaking issued by the Federal Highway Administration ("FHWA"). In its notice, FHWA proposes to amend the Federal Motor Carrier Safety regulations ("FMCSRs") to conform to directions contained in Section 114 of the Hazardous Materials Transportation Authorization Act of 1994 ("Act"), P.L. 103-311, enacted August 26, 1994.

ITCC supported the incorporation of Section 114 into the Act, and subscribes generally to the freer availability of driver

safety information to ensure commercial vehicle safety on the nation's highways. We are troubled, however, by some of the procedural regulations through which FHWA proposes to implement Congress' mandate.

**I. Identity of Commentor**

The ITCC is the only national trade association representing the irregular-route common and contract truckload segment of the motor carrier industry. The Conference represents more than 900 members, including dry van, refrigerated, flatbed, and dump trailer carriers domiciled in the 48 contiguous states and serving those states, Alaska, Mexican states, and the Canadian provinces. The truckload segment of the motor carrier industry operates more than 200,000 tractors and 400,000 trailers which are operated by more than 220,000 holders of commercial drivers licenses. Conference members have historically been diligent in investigating the history of driver applicants but, as the FHWA recognizes in the preamble to its proposal, the current regulations do not require former employers to respond to a prospective employer's inquiry. For this reason, some former employers either refuse to respond to an employment-related inquiry, or they ignore such a request altogether.

The difficulty in sometimes determining a driver applicant's

safety history is aggravated by the increased driver turnover experienced by the truckload segment of the industry. The turnover problem is so extreme that some of our members, with hundreds of drivers, have an enviable driver turnover ratio even though their driver turnover exceeds 80 percent annually. This places a premium on being able to obtain accurate information from prior employers. The Conference and its members understand and recognize the need to remedy the difficulty experienced by some carriers in their efforts to determine the ability of a driver to safely operate their vehicles on the highways. Congress' initiative in making the duty to investigate a driver's safety history a collective one is to be commended. At the same time, consideration must be given to the administrative burdens placed upon carriers that will be obligated to comply with whatever form is taken by the final rules, and to the carriers' risk of exposure to employment litigation as a result of mistaken, erroneous, or inadvertant disclosures of information contained within driver files. As a result of the passage of the Act, and without the safeguards suggested below, a carrier could be subjected to far more litigation from the references it is required to give for its former drivers than for the references it elects to supply for its office and support staff.

## II. Current Federal Highway Administration Regulations

The current regulatory scheme provides, as pertinent, that

with limited exceptions not relevant here, motor carriers must make several inquiries relative to drivers they employ, including (1) an inquiry into the individual's driving record during the preceding three years, and (2) an investigation into the individual's employment record during the preceding three years. See 49 CFR 391.23(a). Such inquiries must be made within 30 days of the commencement of employment. The extant duty to investigate a driver applicant's driving record and work history is hampered by some prior employers' ignoring a request for driver work history or their reluctance to supply anything more than confirmation that a former employee worked there between specific dates. This reluctance is at least partially grounded upon the general business community's substantiated fear of becoming litigation targets of those individuals for whom reference information was given and who were denied employment by subsequent employers. Such individuals who claim to have been aggrieved by the disclosure of reference information have a variety of legal causes of action available to them.

### III. Statutory Requirements

Section 114 of the Act addresses the difficulty sometimes experienced by carriers when investigating a driver applicant's work history. That section reiterates the extant duty to obtain certain information from former employers for the preceding three years. It also imposes upon former employers a corollary duty to

furnish the requested information within 30 days following receipt of the request; allows drivers a reasonable opportunity to review and comment upon information subject to a request; and specifies the types of information that must be sought and obtained.

The safety information identified by Congress that is required to be requested and supplied includes, for the prior three years, (1) any motor vehicle accidents in which the driver was involved; (2) any failure of the driver to undertake or complete a rehabilitation program after being found to have used, in violation of law or Federal regulation, alcohol or a controlled substance; (3) any use by the driver, in violation of law or Federal regulation, of alcohol or a controlled substance subsequent to completing such a rehabilitation program; and (4) any other matters determined by the Secretary of Transportation to be appropriate and useful for determining the driver's safety performance.

#### IV. Proposed Rulemaking

The Conference initially notes the well-placed intentions that support the proposed rulemaking. Motor carriers are continuously searching for tools they can use to more accurately and objectively evaluate a driver applicant's skills and qualifications before entrusting to that person the

responsibility that inheres in the operation of a commercial motor vehicle.

From the perspective of a hiring carrier, the more that can be learned about a driver-applicant, the more informed will be the hiring decision. While the disclosure of information is a safety function, however, it is also a personnel consideration. From the perspective of the prior employer, the obligation to disclose information must be viewed against the potential litigation risks inherent in supplying reference information at the request of prospective employers. Accordingly, the proposal warrants greater scrutiny and some amendment to give prior employers that provide driver safety histories the same protections they enjoy when providing reference information on non-driver employees.

A. The Categories of Safety Information Have Injudiciously Been Broadened.

The FHWA published its proposed rulemaking and request for public comment at 61 Fed. Reg. 10548 (March 14, 1996). In it, the "other matter" that the Secretary determined to be appropriate and useful for considering a driver applicant's safety performance is hours-of-service violations that resulted in an out-of-service order being issued to the driver during the past three years. In adopting this criterion, the FHWA stated that it ". . . considers a driver's hours of service violations

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to be a major safety indicator", Id. at 10550, on the presumption that " . . . [d]rivers who violate the hours-of-service rules often have insufficient rest to safely operate a CMV. The fatigue and loss of alertness resulting from insufficient rest may place them and other highway users at higher risk." Id. The FHWA's presumption, however, is wholly insupportable, and we are shocked that the agency would conclude that there is a relationship between hours-of-service violations and highway safety when none has been shown to exist. In fact, research studies on this topic that FHWA itself is conducting have not even commenced.

The Interstate Commerce Commission Termination Act of 1995, P.L. 104 - 88, directs the FHWA, not later than March 1, 1996, to issue an advanced notice of proposed rulemaking to address a variety of fatigue-related issues, including continuous sleep requirements, rest and recovery cycles, fitness for duty, and regulatory and enforcement countermeasures for reducing fatigue-related incidents and increasing driver alertness. When introducing the amendment containing this directive to FHWA, Senator Snowe (R - ME) called for action to reduce the number of accidents related to fatigue. She stated that the Office of Motor Carrier Safety has six studies pending on the subject of tired truckers. 141 Cong. Rec. S17600 (daily ed. November 28, 1995). She also noted the National Transportation Safety Board's January, 1995, study on trucker fatigue that called upon FHWA to

complete a rulemaking within two years on issues related to trucker fatigue. Id. The rulemaking has not commenced, and not all studies have been completed. It is premature for FHWA to speculate, then, in the instant proposal, that drivers who violate the hours-of-service regulations have insufficient rest to safely operate a commercial motor vehicle, because there is no basis for such a conclusion. Moreover, it is impermissible to allow this flawed and unfounded presumption to support a nexus between hours of service violations and a driver's highway safety. Hours of service violations that result in an out-of-service order reveal nothing more than violations of applicable regulations, and do not themselves implicate highway safety. Violations of the hours-of-service regulations can occur in several ways including oversight and, as has been alleged in recent FHWA enforcement actions, as a result of direction by carrier management. In the latter example, hours-of-service violations say more about the carrier's safety management program than about a driver's compliance with the regulations. The existence of such inconclusive information in a driver file serves no purpose other than to await discovery in litigation and expose carriers to potential liability in a subsequent negligent hiring, negligent retention, or other tort-based employment claim.

B. A Carrier's Liability For Making Representations Should Be Circumscribed

1. Carriers Should Not Be Guarantors of Information Of Which They Have No Independent Knowledge.

Proposed 49 CFR 391.23 prescribes the minimum safety information that must be obtained from previous employers that employed the applicant to operate a commercial motor vehicle. Apart from the objectionable category of hours-of-service violations, discussed above, the rule proposes to require, without limitation, information on accidents, rehabilitation programs, and alcohol or controlled substance usage. Absent some limitation, the proposal makes a prior employer a guarantor of information that falls within the foregoing categories, even such information the prior employer does not know and that a former employee concealed from it. We suggest eliminating the potential liability arising from an unintended employer affirmation as to the truth and comprehensiveness of the information by adding, to proposed 49 CFR 391.23 (c) (1) (i), (ii), (iii), and (iv), the word "known" after the word "Any". Similarly, we suggest that the word "known" be inserted as the first word in 49 CFR 382.413(a) (1) (i) and (ii).

2. Carriers Should Not Have To Duplicate Required Information.

Proposed 49 CFR 382.413(a) (2), addressing a prospective

employer's obligation to make inquiries relative to alcohol and controlled substance information, proposes to require that prior employers supply alcohol and drug information that they obtained from other previous employers. While we might suggest a better placement of a prior employer's obligation than in a section addressing a prospective employer's duty, the proposal is a convoluted request for information that may reach beyond the three-year lookback period and may be stale and irrelevant to an applicant's current ability to perform the driving job free of influence from alcohol or controlled substances.

This proposal places prior employers in the unnecessary position of having to corroborate information that a prospective employer will receive from other prior employers within the three-year period, and it also creates an opportunity for the occurrence of mistakes, errors, and omissions as information is received from previous employers. Every such error that is even inadvertantly transmitted to a prospective carrier forms the basis for a separate defamation action. A prior employer should be obligated only to supply alcohol and controlled substances information of which it is aware during the period in which it employed the individual. Any qualifying information that a prior employer has itself received from another prior employer will be reported directly to the prospective employer by those others who are prior employers during the three-year lookback period and whom the prospective employer is obligated to contact. Putting

prior employers in the position of having to corroborate - or correct - information imposes upon them undue and burdensome administrative requirements that accomplish no net gain in advancing the goals of the Act.

3. Carriers Should Not Have To Engage In  
Administratively Burdensome Paperwork.

Carriers will willingly comply with requirements designed to advance highway safety, but bristle at the prospect of collecting information for the sake of collection. One such nonsensical proposal can be found at 49 CFR 382.413(b), which obligates prospective employers to make inquiries relative to alcohol and controlled substances information. The section astonishingly proposes that if a driver ceases performing safety-sensitive functions before the expiration of 30 days or before the employer has obtained all the information specified in that section, the employer must nevertheless still make a good faith effort to obtain the information. No explanation is offered for proposing that carriers pursue specified information on drivers even after they quit, and we suspect that is because there can be no good explanation for such a proposal. Much of the turnover experienced by truckload carriers occurs within the first 30 days of employment when some individuals decide that driving a truck simply isn't for them. Having decided to exit the industry, history reveals they are unlikely to attempt a driving job again. To require carriers to expend administrative resources to collect

alcohol and drug information on such former employees is administratively burdensome, however, and this aspect of the proposal should accordingly be eliminated.

FHWA should similarly withdraw its proposal, in 49 CFR 382.413(a), that inquiries be made of the violations of alcohol or controlled substances rules of, or failures to undertake or complete a rehabilitation program prescribed by, other Department of Transportation agencies. Such an extensive level of background investigation is neither required nor contemplated by the Act. Moreover, if any such violations are relevant, they will be revealed as part of a prospective employer's check of former employers for the prior three years.

4. Carriers Should Not Have To Supply Accident Reports.

The Act provides that prospective employers obtain information on any accidents in which the driver was involved in the preceding three years. FHWA proposes, for various reasons stated in the proposal, that only those accidents meeting the accident definition at 49 CFR 390.5 be investigated. The Conference applauds this minor deviation from the Act. It is important to emphasize that FHWA should not consider requiring prior employers to supply accident reports when responding to an inquiry for accidents in which a driver was involved. Such reports are neither uniformly nor completely filled out, and

certain information (i.e., charges against a driver) are subject to change after the report is filed by the law enforcement agency. Moreover, accident reports may be protected documents shielded from disclosure by one or more privileges if they relate to an accident for which there is pending litigation. Requiring their disclosure would nullify the privilege they otherwise enjoy.

While a brief description of an accident may help a prospective employer evaluate whether the driver declined or was charged with responsibility for the accident, neither the Act nor the proposed regulations require that a prior employer's accident register be disclosed to prospective employers. Indeed, the term "accident register" is not defined by the FHWA. The information a prospective employer currently maintains in its accident register, identified at 49 CFR 390.15(b)(1), plus a brief description of the accident, is all a prospective employer should be entitled to receive. While carriers are required, at 49 CFR 390.15(b)(2), to maintain copies of accident reports, whether they elect to surrender copies of such reports to a prospective employer should be left to their discretion.

C. A Carrier's Liability For Making Representations Should Be Protected

1. "Reasonable Opportunity" To Review Should Be Defined.

The Act thoughtfully provides that drivers to whom the requested safety information applies must have a reasonable opportunity to review and comment upon the information. Declining to define the term "reasonable opportunity", FHWA instead proposes to leave this to a carrier's discretion, and suggests that carriers inform driver applicants of this right when an employment application is completed. In implementing the Act, however, the FHWA proposes to allow drivers a reasonable opportunity to review and comment " . . . upon any information obtained during the employment investigation, including the information described . . . [in the Act]" [underscoring supplied]. See 49 CFR 391.23(d). The Conference predicts much needless litigation unless FHWA addresses some fundamental personnel and employment practices that give meaning to the term "reasonable opportunity" and protection to the carrier providing the reasonable opportunity.

A good starting point is to redraft the proposed regulation to allow drivers an opportunity to review and comment upon only that objective, safety-related information required in the Act to be obtained from prior employers, and to correspondingly advise

drivers of this more limited right. Where the right of review is given to subjective comment and observation, the right becomes meaningless, particularly where the subjective comment casts the driver in a poor light, because there will be endless dispute over the truth and accuracy of such comment, and such disputes will inevitably invite litigation from those drivers who object to the characterizations they see. To eliminate the perceived "war of words" such a proposal could engender, and to have the proposal more properly reflect the right to review information the carrier is required to receive, the right to review should be limited to objective, safety-related information required to be obtained.

What constitutes a "reasonable opportunity" should be stated in terms of a finite number of days for the benefit of all who will be affected. A ten-day period following notification to the driver of the disposition of the employment application or receipt of the information is sufficient to discharge the employer's obligation. The proposed regulations provide that the investigation into a driver's employment record must begin within 30 days after employment commences. The Act provides, and the proposed regulations reflect, a 30-day period for a prior employer to comply with the information request. In some cases, a prior employer may not provide the requested information until the 30th day, or 60 days after employment commences. Drivers should thereafter have a ten-day period to review and comment

upon information received by the current (or prospective) employer. If a carrier is awaiting the results of its investigation before hiring the driver, the notification of disposition of the employment application will alert the driver that the review period has begun. Alternatively, drivers who are already driving for the carrier can easily be notified that the review period has begun. Although the proposed regulations do not clearly specify which party is responsible for notifying the driver that the right of review may actually be exercised, the review period will become self-executing with the driver applicant's learning that an employment decision has officially been made.

We also suggest that the FHWA cure the inconsistency between 49 CFR 391.23, which proposes to require that previous employers respond within 30 days to requests for information on, inter alia, failure to undertake or complete a rehabilitation program pursuant to 49 CFR 382.605, and 49 CFR 382.413, which proposes, alternatively, to require that the same information actually be received within 30 days, and to allow drivers to perform safety-sensitive functions after 30 days provided (only) a good-faith effort has been made to obtain the information as soon as possible. Inconsistency should be resolved in favor of language following the Act's requirements.

2. A Carrier's Representations Should, To The  
Extent Possible, Be Accurate.

It is insufficient for FHWA to suggest, as it does at 61 Fed. Reg. 10552, that a motor carrier is not responsible for correcting any information received from a prior employee, and that drivers should contact the prior employer to settle disputes over allegedly incorrect information. If the driver's right to review is to have any beneficial effect, a prospective motor carrier should, even though it is not required to do so, note the existence of a dispute, of which it is aware, relative to information contained in a driver file, or the resolution of the dispute. In this way, the prospective carrier, which will in turn become a prior employer, can transmit to future employers accurate, correct information, instead of preserving incomplete and incorrect information to be passed along to future employers. As in many employment contexts, a terminated employee may have more disagreement with the contents of a driver file than will a driver who voluntarily quits in pursuit of another driving position. Not correcting driver information to reflect known disputes or resolutions thereof will, in the long run, invite litigation by driver applicants that are denied employment by subsequent employers, particularly where the information involved in the driver file is subjective.

3. Carriers Should Be Immunized Against Tort Liability For Releasing Driver Information.

Many employers in the business community generally will confirm to prospective employers only the name, social security number, dates of employment, and job titles and duties of former employees. The reason for deciding against disclosing additional information or volunteering gratuitous information is often to limit exposure to potential tort liability, and the cost of defending against even meritless litigation, should the job applicant be declined employment and claim, in a defamation allegation against the former employer, that the information disclosed was not accurate, cast him in a poor light, and induced a prospective employer to deny him employment. For non-driver employees, motor carriers still have the option of declining to supply substantive information to prospective employers. For driver employees, however, that option evaporates when the rules mandated by the Act take effect.

If a prospective employer denies employment based upon incorrect information that is contained in the driver applicant's file, employment litigation may result. The prior employer should accordingly receive immunity when complying with its statutory obligation to produce requested information, except in instances where the carrier knows or has reason to know the information is incorrect or fabricated and produces it with reckless disregard as to its truth or with the intent of

prejudicing the driver's likelihood of securing future employment.

It is unclear whether FHWA may effectively immunize against the type of tort liability that is needed to fully protect prior employers against potential liability when complying with the requirements of these rules. Certainly FHWA may insert its opinion that the mere compliance with the obligation to disclose information is not intended to serve as the foundation for an action in tort. See, e.g., 49 CFR 1057.12(c)(4) (suggesting an absence of characterization of employment status). We think the more appropriate vehicle to ensure the necessary protection is for FHWA to seek legislation that will accomplish the requisite purpose.

D. The Regulations Should Expressly Apply To Independent Contractors

The current controlled substance and alcohol testing regulations apply broadly to every person operating a commercial motor vehicle in any state, see 49 CFR 382.103(a), and include independent contractors who themselves hold no operating authority but engage in leases with authorized motor carriers. The current regulation addressing employment investigations, however, does not so clearly apply to independent contractors. Although the regulations seem to apply to individuals driving on behalf of motor carriers, 49 CFR 391.1(a), they also specify that

drivers who are motor carriers must comply with the rules for motor carriers and drivers.

So there is no misunderstanding as to the responsibility to produce information with respect to independent contractors, the rules should specify that motor carriers have the duty to inquire, and the corresponding duty to respond, on behalf of employee drivers and leased operators that do not themselves possess operating authority.

**V. Conclusion**

For the foregoing reasons, the ITCC suggests that the FHWA eliminate, as part of the minimum safety information to be sought when investigating a driver's employment record, its proposal to include hours of service violations that resulted in an out-of-service order being issued to a driver during the prior three years. The ITCC also suggests that the FHWA's final rules reflect its other comments outlined hereinabove.

The ITCC believes that the importance of the issues presented by the proposal warrants continuing consideration and discussion. Because of the opportunity for additional enlightenment on these issues at annually-conducted meetings that will be held May 19-21 and June 19-21, the Conference respectfully requests the opportunity to supplement its comments

as appropriate.

Respectfully submitted,

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