

96 MAY 16 A7:29

QA

20022

May 7, 1997

LEGS./REGS. DIV.

Department of Transportation
Federal Highway Administration
Docket Clerk, Room 4232
Office of the Chief Counsel
400 7th Street, S.W.
Washington, DC 20590

RE: FHWA Docket No. MC-96-6

FHWA-97-2277-25

Gentlemen:

Here is my response to this notice of proposed rulemaking regarding Safety Performance History of New Drivers (61 Fed. Reg., 10548, Thursday, March 14, 1996).

Part 391.15(c), Information on Accident Experience.

Discussion: Obtaining the accident experience of a prospective driver is a necessity as it is one of the best indicators of future performance. However, we believe it is necessary to amend the language to clarify the extent of the information to be furnished.

Recommendation: Part 390.15(c) be amended to read: "(c) Motor carriers shall make available, within 30 days after receiving a request for information about a driver's accident records from a new or prospective employer, only the information pertaining to each accident as prescribed in paragraph (b) (1) of this section.

Part 383.35(f), 391.21(d), and 391.23(d), Driver's Right of Review and Comment.

Discussion: Unrestricted right of review and comment is not acceptable because it would open the door to endless controversy between the prospective driver and the employer. It opens the door to potential litigation against former employers and would require prohibitive expenditures. The process must be simplified to allow compliance with as little as possible controversy.

Recommendation: Amendment of the last sentences of Paragraphs 383.35(f) and 391.21(d) a follows:

"...The employer shall also inform the applicant that upon a written request, he/she will be provided an opportunity to review the comments on information obtained from previous employers as prescribed in 391.23(c) (1)."

DOCKET
PAGE

MC-96-6-23

OF

4

Amend 391.23(d) to state:

"If, requested in writing by the prospective driver, the motor carrier shall afford the driver a reasonable opportunity to review and comment on information obtained during the investigation in accordance with paragraph (c) of this section. The motor carrier shall notify the driver of right at the time he/she submits the application for employment. NOTE: We believe the term "reasonable opportunity" should be defined as "that period of time which coincides with the maximum period within which the required investigation must commence, plus the maximum time a response must be made by the previous employer". A 60-day period is also consistent with time prescribed in 382.411 for the driver to request the result of a pre-employment controlled substance test.

Part 391.21(c)(1)(ii), Hours of Service Violations

Discussion: We, as well as many motor carriers, oppose this requirement because these violations can occur under a variety of circumstances, from simple mathematics, the decision of an individual law enforcement officer that the driver's logs were not up to date, the driver's efforts to meet a schedule, etc. While the necessity to comply with the hours of service regulations is important, the responsibility for insuring compliance belongs to the respective motor carrier's management. I do not believe this requirement would serve any useful purpose in the hiring process.

Recommendation: Delete Part 391.21(c)(1)(ii) in it's entirety.

Part 382.413(a)(1) and 391.23(e) to require that the written authorization of the driver shall authorize the release of all safety-related information specified in 391.23(c).

Discussion: As currently proposed, authorization by a driver applicant to release information to a prospective employer is limited to regulations governing alcohol abuse and use of controlled substance. Thus, a previous employer providing other information mandated in the NPRM could be vulnerable to a lawsuit if a former driver's application is rejected on the basis of the release of information beyond that "authorized" by the applicant under the proposal.

Recommendation: Add the following as subparagraph (a)(1)(iii) to 382.413: "(iii) All other safety-related information prescribed in 391.23(c)."

Amend 391.23(e) to read: "(e) The information required under paragraph (c) of this section must be obtained pursuant to the driver's written authorization.

DOCKET MC-96-6-23
PAGE 2 **OF** 4

Issue: FHWA should limit the scope of the inquiries mandated in Part 382.413(a) to a more reasonable level by eliminating the need for employers to conduct costly and burdensome investigations and make inquiries beyond the scope of motor carrier operations.

Discussion: Limit the scope of inquiries mandated in subparagraphs (a) (i) and (ii) to those instances of "known" to the previous employer. We are concerned that we could be held in violation of the regulations if we fail to transmit information on an incident which was not in our records nor were we aware of such incident. We believe that FHWA may have intended that previous employers provide only information of which we have knowledge. It is imperative that this limitation be clearly expressed in the final rule.

Recommendation: I recommend that the language of Part 382.413(a) (i) and (a) (ii), respectfully, be amended to read as follows:

- " (i) Known violations of the prohibitions..."
- (ii) Known failure to undertake or complete..."

Additional Issue: The proposed requirements to check for violations of alcohol and drug regulations of other DOT agencies is unreasonable.

Discussion: This extensive level of checking is not mandated by the Act. FHWA must bear in mind that motor carrier managers, particularly in small companies which constitute the majority of the industry, typically perform many separate functions as terminal managers, dispatchers, safety directors, maintenance managers, sales persons, etc. These people all have a difficult time coping with the regulations that apply directly to our respective operations.

To expect us who specialize in particular phases of motor carriers operations, to also know which categories of employees are subject to alcohol and drug testing requirements of another mode of transportation creates an unwarranted burden. I suggest you review FHWA studies which have consistently shown a low level of drug/alcohol use within the motor carrier industry. And, ask yourselves, do those results require the unwarranted measures being proposed??

For the motor carrier industry, the requirements are straightforward applying only to persons required to possess a Commercial Driver's License (CDL). In other modes, the situation is more complex. We don't want to be responsible for other modes' issues. Heaven knows that we as an industry bear more than our share of crosses in dealing with the vast variety of complex regulations already on the books.

DOCKET MC-96-6-23
PAGE 3 OF 4

Federal Highway Administration
RE: Docket No. MC-96-6
Page 4

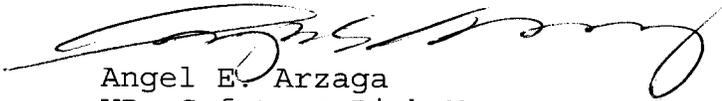
Another Issue: The "Daisy-chain" requirement of Part 382.413(a)(2) for passing on information from one previous employer to another employer.

Discussion: I am frankly quite surprised the FHWA would expect us to pass on a driver's information obtained from a previous employer to another employer. The likelihood of errors of omission and commission increase proportionately. The proposed requirement for one previous employer to pass along all of the information it has received from other previous employers creates just such an opportunity for error, for inadvertent and unavoidable technical violations, and more opportunities for disaffected applicants to take legal action against one or more previous employers. No employer should be required to provide information on situations other than those which occur during the driver's period of service with that carrier.

Suggestions: Delete Part 382.413(a)(2) in it's entirely.

Let me state that I applaud FHWA's efforts in continuing to address issues which are important to our industry. You are on the right track working to establish regulations which will further enhance motor carrier's safety programs. I appreciated the opportunity to respond and if you have any questions and/or comments, contact me at (405) 945-2016.

Sincerely,



Angel E. Arzaga
VP, Safety & Risk Management

AEA/mm/FHWA5796

DOCKET MC-96-6-23
PAGE 4 OF 4