



# Interstate Truckload Carriers Conference

2200 MILL ROAD • ALEXANDRIA, VA 22314 • (703) 838-1950 FAX: (703) 836-6610

ROBERT G. ROTHSTEIN  
General Counsel

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FEDERAL HIGHWAY  
ADMINISTRATION

**VIA HAND DELIVERY**

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

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

FHWA-97-2277-30

Dear Sir or Madam:

Enclosed for filing are an original and two copies of supplementary 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,

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Before the

DEPARTMENT OF TRANSPORTATION  
FEDERAL HIGHWAY ADMINISTRATION

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

*Supplemental Comments of the*  
INTERSTATE TRUCKLOAD CARRIERS CONFERENCE

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INTERSTATE TRUCKLOAD CARRIERS CONFERENCE

Robert G. Rothstein  
General Counsel

Third Floor  
2200 Mill Road  
Alexandria, Virginia 22314

(703) 838 - 1950

Dated: July 12, 1996

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The Interstate Truckload Carriers Conference ("ITCC" or "Conference") filed its comments in this proceeding on May 13, 1996. In those comments, the Conference concluded by stating that "the importance of the issues presented by the proposal warrants continuing consideration and discussion," which in fact was conducted at its annually-convened meetings May 19-21 and June 19-21. The Conference requested the opportunity to supplement its timely-filed comments as appropriate.

An issue of great interest, upon which agreement was achieved among several interests at the foregoing meetings,

involves the matter of driver releases for the information required to be supplied by prior employers to prospective employers. The Conference herewith submits its supplemental comments addressing this issue.

**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. Moreover, as the ITCC observed in its earlier comments, some former employers refuse to respond to, or ignore altogether, a request for driver work history for fear of being sued by an individual on whose behalf reference information was given and who is subsequently denied employment.

**II. A Need Exists For Accurate Driver Information**

The difficulty in determining a driver applicant's safety history is aggravated by the unusual driver turnover experienced by the truckload segment of the industry. The turnover problem is so severe that some of our members are considered to have an enviable turnover ratio even though their driver turnover exceeds 80 percent annually. The need to hire large numbers of drivers places a premium on the ability to secure accurate information from prior employers. The Conference and its members understand and recognize the need to remedy the difficulty experienced by 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 carriers' risk of exposure to employment litigation as a result of mistaken, erroneous, or inadvertent disclosures of information contained within driver files. Many carriers reject more than 80 percent of their driver applicants - some reject more than 90 percent. As an example, J.B. Hunt, one of the largest truckload carriers in the nation, commented in this proceeding that it rejects 88 percent of its driver applicants. As a result of the passage of the Act, and without the safeguard 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.

**III. Carriers Are Entitled To Protection For Information They Are Obligated To Disclose.**

The proposed rules reflect the provisions of Section 114 of the Hazardous Materials Transportation Authorization Act of 1994, P.L. 103-311, enacted August 26, 1994 ("Act"). In pertinent part, that Act (a) requires former motor carrier employers during the prior three years to furnish requested safety information within 30 days of receiving a request (proposed at 49 CFR 391.23(c)(2)), and (b) provides a reasonable opportunity for drivers to review and comment upon the information provided (proposed at 49 CFR 391.23(d)). The safety information required by the Act is additive to a driver applicant's employment record for the prior three years, investigation of which is currently required by 49 CFR 391.23(a)(2). That investigation is to consist of personal interviews, telephone interviews, letters, or any other method of obtaining information, and such information must be reduced to writing and retained in the driver qualification file. Coupled with the carrier obligation to allow driver candidates an opportunity to review the information received, the Act provides fertile ground for a driver who is refused employment to commence litigation against the prior employer on any number of grounds stemming from the allegedly unauthorized disclosure of information, including defamation,

libel, and invasion of privacy.

In addition to objective safety information required by the Act, the written information that is shared with a prospective carrier or is learned during the course of the driver investigation is sure to include subjective comment and observation without regard to its origin, character, or accuracy. During a driver's tenure with a carrier, comments from a variety of sources are placed in the driver file, none of which the driver may know of or have the opportunity to refute. Comments may include but are not limited to, for example, observations that the driver operated the equipment in an unsafe manner; kept a sloppy truck; was rude to customers; padded his or her receipts; abandoned a load; or sold fuel from the truck. All of these comments are subjective, and many can result from an incorrect identification of the driver by, for example, reciting a truck number. In this case, the truck number can be incorrectly recalled, or the numbers transposed, or through a clerical error, a valid comment can incorrectly be placed in another driver's file.

A carrier that receives an employment application from a driver candidate is likely to deny employment after an investigation of that individual reveals any of the foregoing observations reflecting poorly upon a driver's competency, honesty, or attitude. Regardless of the veracity of such

observations, a driver who is refused employment and who exercises the right to review his or her file may be so offended by these comments and may believe they are so inaccurate as to bring an employment-based lawsuit against the carrier that provided the employment information, contending that release of the information was unauthorized, that the prospective carrier acted upon false, erroneous, mistaken, or incomplete information, and that he or she was adversely affected as a result. Because the substance of such allegations are factually-based, such an action will likely survive a motion to dismiss, forcing a carrier involved to expend substantial time and administrative resources defending itself.

The FHWA's treatment of a driver's right to review and comment on information wholly ignores the possibility of litigation. The proposal states, at 61 Fed. Reg. 10552 (March 14, 1996) that ". . . the motor carrier is not responsible for correcting any information obtained. The driver should contact the former employer to settle disputes over allegedly incorrect information." It is precisely this inability to disabuse the decisionmaker of allegedly incorrect information upon which it has relied to make an employment decision that will fuel driver lawsuits challenging the accuracy of released information. Even assuming the information can be corrected with the former employer, the applicant's opportunity for employment with the prospective employer will have been lost.

The Conference's earlier comments adopted a perhaps naive position by advocating, at Pp.15-16, that the drivers' opportunity to review and comment be limited to the objective, safety-related information required in the Act to be obtained from prior employers. Such a limitation might be sufficient if carriers used only such information to determine whether a driver is qualified. It has become clear since the Conference filed its earlier comments, however, that carriers rely upon more than accident, drug and alcohol violation, and rehabilitation information before determining whether a driver is qualified. Before deciding whether to hire, carriers seek, from other carriers and from commercial information services, the kind of subjective information referred to above that may be revealed while conducting the investigation of a driver's employment file that is required pursuant to 49 CFR 391.23 (a) (2). The need for broad protection that covers all information a carrier is required to obtain is evident.

Some states have already recognized this employer need for protection from employment litigation by enacting laws providing limited immunity for reference information disclosed about a former employee's job performance. See, e.g., 26 Maine Revised Statutes Annotated Sec. 598. Such immunity can be lost by providing false or deliberately misleading information. Because motor carriers conduct business in numerous states, however, these state immunity laws will be of limited benefit because

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plaintiffs will "forum-shop" to bypass these employer-friendly jurisdictions.

**IV. A Release Is An Appropriate Measure Of Protection**

The Conference's earlier comments suggested, at Pp. 19-20, that carriers should be immunized against tort liability for the compulsory release of driver information. That still is the preferred measure of relief for full protection of employers who are obligated to disclose potentially damaging information. Such legislative relief is not imminently forthcoming, however. With an eye toward blunting potential litigation that will develop in the interim, the Conference, in cooperation with other trucking industry associations and suppliers to the industry, has developed release language for protection of potential and prior carrier employers. Carriers that are obligated to provide reference information and on whose behalf a release from a driver candidate is obtained would receive a measure of protection in the event the driver is subsequently denied employment and thereafter seeks to file a lawsuit since, pursuant to the terms of the release, the driver applicant will have consented to the release of information upon which the prospective employer bases its employment decision. The release and the protection that goes with it becomes the quid pro quo for the compulsory disclosure of driver employment records.

A specific authorization for the release of information is generally conceded to be an important tool for the protection of an employer named as a defendant in employment litigation. Many carriers that receive written driver applications have already incorporated in their application some sort of release language to which a driver applicant subscribes when he or she signs and submits the application. Other carriers, however, receive driver applications over the telephone, and cannot incorporate an appropriate release. These carriers, aware of the critical driver shortage, seek to investigate drivers' backgrounds as quickly as possible in order to expeditiously place safe, competent, qualified drivers behind the wheel.

To satisfy the concerns of carriers that accept applications in hand and over the telephone, the Conference suggests that FHWA adopt a new regulation through which driver candidates would impliedly consent to the release of information that carriers are required to obtain to make a considered employment decision. The new rule could appear as 49 CFR 391.23(f) and would provide as follows:

Except as otherwise provided by subparagraph (e) of this section and by Sec. 382.413(a)(1)(i) and (ii), a driver applicant shall be deemed to have consented to the release by a prior employer or its agent of information required to be obtained under this Part [49 CFR Part 391], except that a driver applicant shall not be deemed to have authorized the release by a prior employer or its agent of information that the prior employer or agent knows to be false.

Language similar to the foregoing was adopted by the ITCC's Labor and Human Resources Committee at its June 19, 1996, meeting. Similar language was adopted by the Labor and Human Resources Committee of the American Trucking Associations, Inc. ("ATA"), at its June 20, 1996, meeting. Moreover, the concept and substance of the language was agreed to by DAC Services, Inc., a member of ITCC and ATA and a major provider of driver information to the trucking industry. It is felt by all parties that the suggested rule will protect carriers obligated to supply driver information from exposure to unnecessary employment litigation. The limited nature of the consent will prevent carriers from asserting this defense when they have knowingly disclosed false information. At the same time, carriers will have access to driver information that will help them make informed decisions so that only competent, capable, and qualified drivers will operate commercial vehicles on the nations highways. Further, the concept of implied consent is consistent with 49 CFR 383.72, which recognizes such consent, implied in the operation of a commercial motor vehicle, to alcohol testing.

V. Conclusion

For the foregoing reasons, the ITCC urges FHWA to adopt its suggested rule by which driver applicants are deemed to impliedly consent to the release of information required by carriers to be

obtained in evaluating the qualifications and safety performance of drivers. The FHWA is also urged to adopt the recommendations and suggestions contained in ITCC's initial comments.

Respectfully submitted,

INTERSTATE TRUCKLOAD CARRIERS CONFERENCE



By: ROBERT G. ROTHSTEIN  
General Counsel

2200 Mill Road  
Third Floor  
Alexandria, Virginia 22314  
(703) 838 - 1950

saftperf.itc