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BY MESSENGER:

July 15, 1996

FHWA-97-2277-31

Office of Chief Counsel (HCC-10)
Federal Highway Administration
U.S. Department of Transportation
Room 4232
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Washington, DC 20590-0001

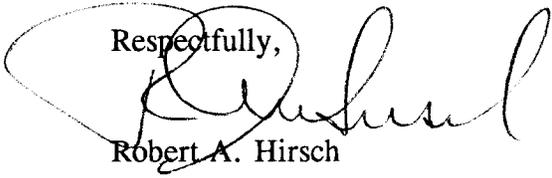
Re: Docket No. MC-96-6, Safety Performance History of New Drivers

To the Chief Counsel:

Enclosed is an original and two (2) copies of the Supplemental Comments of DAC Services in the above-referenced proceeding.

Please date-stamp one of the copies and return it to the undersigned in the self-addressed, stamped envelop which is provided for your convenience.

Respectfully,


Robert A. Hirsch

enclosures

DOCKET MC-96-6-30
PAGE 1 OF 13

BEFORE THE
U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL HIGHWAY ADMINISTRATION

FHWA DOCKET NO. MC-96-6, RIN 2125-AD66

SAFETY PERFORMANCE HISTORY OF NEW DRIVERS
[61 FED. REG. 10548]

SUPPLEMENTAL COMMENTS OF
DAC SERVICES

July 15, 1996

By its Attorneys:
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BEFORE THE
U.S. DEPARTMENT OF TRANSPORTATION
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SAFETY PERFORMANCE HISTORY OF NEW DRIVERS
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SUPPLEMENTAL COMMENTS OF DAC SERVICES

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INTRODUCTION

Although DAC submitted extensive comments to this docket previously, several issues were raised in the comments submitted by other parties which are of concern to DAC. For that reason, therefore, DAC is filing the following supplemental comments.

IDENTIFICATION AND INTEREST OF DAC SERVICES

As we previously advised, DAC Services (DAC) is a "consumer reporting agency" that, since 1982, has been assisting motor carriers to hire safe drivers and comply with the existing requirements of Part 391 and Part 382 of the Federal Motor Carrier Safety Regulations (FMCSR). DAC is the largest provider of automated driver screening services in the nation. Over 6000 motor carriers currently subscribe to DAC's services, the vast majority of which are truckload carriers. DAC's carrier subscribers include virtually all of the 200 largest motor carriers in this country.¹ DAC's services are also endorsed by the

¹ DAC's comments express the concerns and recommendations related to DAC by DAC's carrier subscribers. The following are among the 6000 plus carriers that subscribe to DAC's services (in alphabetical order): Builders Transport, Chemical Leaman Tank Lines, Contract Freighters, Crete Carrier Corp., Dart Transit, JB Hunt Transport, KLLM Transport Services, Morgan Drive Away, MS Carriers, Prime, Ranger Transportation, Rollins Transportation System, Ryder Dedicated Logistics, Southwest Motor Freight, Swift Transportation, Watkins Motor Lines, Werner Enterprises. References to "DAC" and to DAC's "motor carrier subscribers" are used interchangeably throughout these comments.

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American Trucking Associations and 39 state trucking associations.

DAC provides information which affects employment decisions and is considered a "consumer reporting agency." As such, DAC is regulated by, and the accuracy of the information it provides subject to, the stringent requirements and privacy protections of the Fair Credit Reporting Act (FCRA) (15 U.S.C.A. §§1681 *et seq.*). Because of this, the privacy rights of the individual drivers about whom DAC reports are at all times afforded rights and protections under the FCRA which are not otherwise available when employment-related information is disclosed directly between carriers rather than through a consumer reporting agency such as DAC.² A copy of the FCRA was appended to the comments DAC previously submitted in this proceeding.

SUMMARY OF ADDITIONAL POSITIONS TAKEN

For the reasons discussed in these supplemental comments, DAC takes the following

² In this regard, DAC read with interest the Owner-Operator Independent Drivers Association (OOIDA) praise of the FCRA as an "effective system of checks and balances . . . in the interest of protecting consumers from false reports." (OOIDA Comments at 6). At the same time, DAC was dismayed by OOIDA's criticism of DAC for its alleged handling of the employment history of one of OOIDA's members, Kenneth Parton, (OOIDA Comments at 4-6). While correctly summarizing the FCRA's requirements, OOIDA misrepresents the salient facts concerning DAC's procedures and handling of disputes by drivers of facts contained in the driver's employment history, including Parton's. Accordingly, the record must be corrected. In conducting its business, DAC adheres strictly to the requirements of the FCRA. Whenever a driver notifies DAC that he/she disputes facts contained in his record, the driver is immediately given the opportunity to provide a rebuttal statement for insertion into the driver's record. At this time, the driver's record would consist of three things: (1) the original statement provided by the prior employer, (2) the driver's rebuttal statement, and (3) the notation "employment history verification pending." Once informed of such a dispute, DAC contacts the prior employer to verify whether the employer's original statement or the driver's rebuttal statement is correct. If the prior employer agrees that the driver's statement more correctly states the facts, DAC's records are changed accordingly to reflect the driver's position. If the prior employer disagrees with the driver's statement, however, DAC reports both statements, *i.e.* the employer's and driver's, and the notation "employment history verification pending" is merely deleted since the verification is no longer pending. Therefore, the following OOIDA statement is not true: "If the motor carrier disagrees [with the driver's rebuttal], the 'rebuttal' is deleted and the motor carriers [sic] explanation stands!" (OOIDA Comments at 5.)

positions in addition to those discussed in DAC's prior comments to this rulemaking:

- **FHWA should not require the driver's written authorization for the disclosure of accident history and other basic safety-related information in general (excluding drug and alcohol test information).**
- **FHWA should not adopt a "daisy chain" requirement in any form.**

SUPPLEMENTAL COMMENTS

1. Part 391 should not require carriers to obtain the driver's written release as a condition of requesting or giving safety performance and other employment-related information unrelated to drug and alcohol tests. Although FHWA did not propose this in the NPRM, or even solicit comments in this regard, DAC recently became aware that comments have been made suggesting that FHWA's final rule require that "all information, which must be sought and released under Section 391.23(c), be subject to a written authorization of release by the driver that must be forwarded by the hiring employers to the prior employers." (Regular Common Carrier Conference Comments at 3.) This requested action is of significant concern to DAC's carrier subscribers and DAC, and, for the reasons discussed below, we strongly recommend against the adoption of a "general written release requirement" in any form.

a. The adoption of a general written release requirement could have an unanticipated, adverse impact on safety. While the current system has not worked perfectly for prospective employers across the board, nonetheless it has been DAC's experience that many past employers have been willing to provide much more safety-related information about a past driver-employee's safety performance than would be required to be given under the proposed rule. If a driver's release is required by the final rule, it is almost a certainty

that most of those past employers will immediately cease providing as much or any information without obtaining a signed release from the driver. And, this is not some idle speculation on the part of DAC's carrier subscribers, but a concern well-grounded on what carriers are currently experiencing on a wide-scale basis with respect to drug and alcohol test information. Indeed, even though Part 382 allows for a prospective employer to obtain whatever information they wish as long as the driver has consented to its release, many past employers are nonetheless refusing to give out anything more than the specific information which is required under §382.413, for fear that they will be subject to a lawsuit if they do. The same would be true for background investigations conducted under §391.23.

Therefore, while the premise for a general written release requirement may be to protect carriers and at the same time help foster the dissemination of essential and important safety-performance information, actual experience has shown that such a broad general requirement would promote the exact opposite result. Past employers would feel compelled to obtain a driver's release before releasing information, and for the majority of past employers the most information which they would be willing to release would be the information specifically required by FHWA. DAC's carrier subscribers do not believe that such a chilling effect of the flow of essential information is in the best interest of safety.

b. The substantive nature of the specific information that would be subject to such a general written release requirement does not warrant the imposition of such an administratively burdensome requirement. Unlike the sharing by past employers of information relating to the driver's previous drug and alcohol test history, the particular safety-performance information which would become subject to such a general written release

requirement is fundamentally basic safety information that is clearly non-invasive in its nature.

It has been DAC's experience that most carriers screen their driver-applicants using a two-staged process to comply with the current requirements of §391.23. The initial stage is used for determining whether the applicant is sufficiently qualified to be given a conditional offer of employment. For reasons of efficiency and cost, this initial determination is typically made solely on the basis of the applicant's driving and accident experience and the confirmation of the driver's prior employment record (*i.e.*, did the driver work for you when he/she said that he/she did; was he/she a good worker, etc.). Only if an applicant is considered sufficiently qualified to be hired, will he/she move on to the second stage and send the driver for his/her required DOT medical examination and pre-employment drug test. Also, to avoid potential and unnecessary ADA problems, carriers typically delay obtaining an applicant's past drug and alcohol test results information until the second stage of the process.

Assuming, *arguendo*, that the proposed rule is adopted in its original form, under a general requirement a driver's written authorization would be required for the disclosure of information concerning DOT accidents and hours-of-service violations which resulted in an out-of-service order.³ In both cases this information is purely factual (*i.e.*, "the driver had or did not have a DOT accident while he worked for us", or "the driver was or was not placed out-of-service") and, unlike drug and alcohol test information, does not in any way

³ Virtually all of the comments filed in this proceeding, including DAC, have expressed strong opposition against FHWA's proposal to require carriers to obtain and disclosure information concerning hours-of-service violations. DAC would hope that FHWA would agree with opponents and withdraw this aspect of the proposed rule.

bear upon a driver's character, impute fault, or potentially involve medical information that would become subject to the disclosure requirements of the Americans With Disabilities Act (ADA). Information of this sort is basic to a prospective employer's evaluation of an applicant's safety-performance. It is the information that carriers are currently looking to and must routinely have during the initial stage of their hiring process in order to pre-screen applicants in a timely and cost-effective fashion; a two-staged process which has worked well. Neither of these two categories of information, however, can be equated to information relating to drug and alcohol tests, and their dissemination by past employers hardly justifies the need to impose the same privacy protections and administrative burdens on carriers which FHWA has had reason to impose in the case of the disclosure of drug and alcohol information. Moreover, the rationale which has been suggested in support of a general written release requirement becomes strained even more than it already is if hours-of-service information is ultimately not required under the final rule.

c. Upon learning that a general written release requirement had been suggested to FHWA, DAC received numerous calls from its carrier subscribers expressing substantial concerns about the impact which having to comply with such a broad written release requirement would have on the efficiency and effectiveness of their hiring. DAC's carrier subscribers have advised DAC that the adoption of a general written release requirement would significantly impede the efficiency of many of their current hiring practices, and in some cases could force them from continuing to use these practices (described below) altogether.

It is DAC's experience that more and more carriers take applications over the phone

and then immediately initiate the background investigation of the driver. This is due in part to the high driver turnover in the trucking industry, particularly in the truckload sector. It is also attributable to the fundamental "long-distance" nature of truckload operations, where it is quite common for a driver to become employed by a truckload carrier for years without ever having been to the carrier's office or having met his or her supervisor in person. It is also quite common for a driver-applicant to apply over the phone and at that time give his/her permission -- indeed urge -- the prospective employer to begin its background check immediately. For many of the largest carriers, this happens hundreds of times each week. Adoption of a general written release requirement will foreclose carriers from taking applications over the phone, or (as is discussed below) make it so burdensome and costly that they will no longer be the efficient hiring tool they currently are.

Aside from the widespread use of phone applications, it is also quite common for carriers to accept a significantly greater number of applications than the driver positions they have available; typically (according to DAC's carrier subscribers) the ratio of applications taken to drivers hired is 5:1. This practice of over-screening driver-applicants ensures that only the best and safest drivers are hired and also provides a qualified pool of driver-applicants will be available when needed.

When you factor this altogether, the number of hiring transactions which would be affected by a generalized requirement is quite significant. It is not uncommon for a driver to have worked for as many as 9 carriers during a three-year period. At just the 5:1 ratio of applications obtained to drivers hired, prospective employers would have to conduct as many as 45 investigations just to hire one driver. This number is considerably more when you

multiply the 45 investigations by the number of driver applications which are screened each month, or each year. For example, during 1995 more than 200,000 driver-applicants were screened, on average, each month with DAC's assistance; and this number reflects solely the hiring transactions of DAC's 6000 carrier subscribers and not the total number of carriers throughout the industry.

Therefore, whether a prospective employer's costs are measured in terms of the time delays which a general written release requirement would impose on the processing of applications, additional paperwork, postage, or the long distance telephone expenses to send facsimile copies of releases, the costs which such a generalized requirement would impose on prospective carrier employers would clearly be substantial. Bear in mind, however, that thus far we have only been discussing the costs which would be imposed on the hiring carrier. Similar substantial costs and burdens would be imposed on past employers as well in the event that a general written release requirement is adopted.

d. However, there is another, and perhaps more fundamental, reason why a general written release requirement should not be adopted, aside from the several reasons mentioned above; in reality, the driver's authorization to obtain and release such information exists already. The safety background investigation which carriers conduct is required by the federal regulations. Drivers are also made well aware at the time they apply that the background investigation will be done as part of the hiring process. It goes without saying, therefore, that each time a driver applies for a commercial motor vehicle position he/she is implicitly authorizing the disclosure of information relating to the driver's employment and safety-performance history with past employers. To the extent that a more formalized notice

of this is nonetheless considered necessary and should be provided to all of the concerned parties (*i.e.*, to the prospective employer, to the past employer, and to the driver applicant), this can easily be done by adding a new subparagraph to §391.23 as follows:

(f) Except as otherwise required by paragraphs (c)(i)(iii) and (iv) of this section or by § 382.413(a)(1)(i) and (ii), a driver-applicant shall be deemed to have consented to the release by a previous employer or its agent of information which a motor carrier is required to obtain under this Part [49 CFR Part 391], except that a driver shall not be deemed to have authorized the release by a previous employer or its agent of information which the previous employer or agent knows is false.

Adoption of the foregoing language will strike the appropriate balance between the competing interests without imposing the substantial burdens which would be imposed by FHWA's adoption of a general written release requirement.

2. FHWA should not adopt either the "daisy-chain" requirement which it proposed in the NPRM or the alternative proposed by the American Trucking Associations. Virtually all of the commentators to the NPRM, including DAC and American Trucking Associations (ATA), opposed with good reasons FHWA's proposed "daisy chain" revision to §382.413. Under this proposed revision, past employer would be required to pass on to prospective employers drug and alcohol information which they (the past employers) previously received from other past employers.

While ATA expressed general opposition to the "daisy chain" requirement, ATA also suggested that, as an alternative to FHWA's proposal, §382.413(a)(2) be amended so that each prior employer would be required to provide the names of all known previous employers. (ATA Comments at 8.) However, in supplemental comments also being filed in this proceeding, ATA has since advised FHWA that "we no longer support this alternative

and urge FHWA simply to delete this provision in its entirety." (ATA Supplemental Comments at 6.)

DAC supports ATA's withdrawal of its alternative proposal. As DAC, ATA, and the other commentators have previously said to FHWA, a "daisy chain" requirement in any form is a bad idea which should not be adopted in any form.

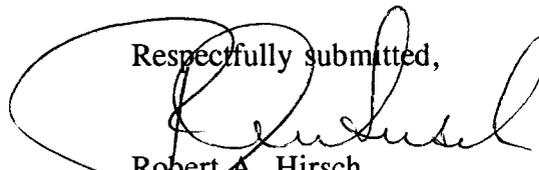
Even though ATA has withdrawn its proposed alternative, and even though we would therefore like to assume that FHWA will not consider it further, as ATA has asked, DAC believes it would be beneficial to point out some additional reasons why the alternative should not be adopted, in addition to the reasons which ATA discussed on page 7 of its Supplemental Comments.

Because ATA's "daisy chain" alternative would be adopted under Part 382, the naming by a prior employer of "all known previous employers" would be subject to the written authorization requirements of §382.413. As such, the disclosure of such information by any prior employer would be strictly forbidden unless the driver's authorization expressly allowed for that to occur, and, as FHWA has itself observed in the NPRM at 10553, employers which provided such information in the absence of the driver's authorization would be in violation of §382.405(f). Since the disclosure of the names of previous employers would be subject to the same three-year time frame governing the disclosure of other drug and alcohol testing information under §382.413 (currently it is a two-year period), in addition to having to ensure that the names of past employers fell within the governing three-year period, past and prospective employers would also have to screen their files to ensure that whatever information being disclosed would only cover tests administered during

the three-year period. FHWA well knows that compliance with the current requirements of §382.413 having proven difficult enough for carriers without the need to add such additional, significant administrative burdens of carriers, especially if the informational benefits to be gained by such a requirement would likely be at best minimal. This would be especially so since the number of drivers testing positive has been relatively small; according to FHWA's pilot roadside testing program, only 4.6 percent of drivers tested positive for drugs and less than ¼ of one percent tested positive for alcohol. Thus, the potential number of drivers who could possibly be ferreted out by this additional requirement would also be extremely small, even without factoring in the number of past employers which might have gone out of business during the interim period.

Accordingly, for the reasons discussed here and in ATA's Supplemental Comments, as well as in the prior comments submitted by DAC, ATA and the other commentators, ample reasons have been given to explain why a "daisy chain" requirement in any form is a bad idea and why such a requirement should therefore not be adopted by FHWA.

Respectfully submitted,



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