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FHWA-97-2299-25

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July 20, 1996

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LEGIS. REGS. DIV.
FEDERAL HIGHWAY
ADMINISTRATION

Federal Highway Administration
Office of the Chief Counsel
HCC-10, Room 4232
400 Seventh Street SW
Washington, DC 20590

In RE: Docket No. MC-96-18.

Enclosed find original and (1) copy of Response to the above Rule Making Proceeding.

Also find enclosed duplicate of this letter together with self addressed postage paid envelope. Please affix the received stamp of your office and return to me for my files.

Thank you.

Yours very truly,

James F. Fitzpatrick
James F. Fitzpatrick

JFP/rcw

~~ATTACHMENT TO DOCKET~~ _____
~~PAGE~~ _____ ~~OF~~ _____

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PAGE 1 OF 50

SEE SUPPLEMENTAL FILE
FOR ATTACHMENTS AND "APPENDIX C"

BEFORE THE
DEPARTMENT OF TRANSPORTATION
FEDERAL HIGHWAY ADMINISTRATION

IN THE MATTER OF:

FEDERAL HIGHWAY ADMINISTRATION
PROPOSED RULE MAKING
PROCEEDING

DOCKET NO. MC-96-18

BRIEF AND ARGUMENT OF
JAMES F. FITZPATRICK
SAFETY/ MOTOR CARRIER MANAGEMENT CONSULTANT,
IN RESPONSE TO
PROPOSED RULE MAKING PROCEEDING

DATE: JULY 20, 1996

DATE: JULY 29, 1996

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BEFORE THE
DEPARTMENT OF TRANSPORTATION
FEDERAL HIGHWAY ADMINISTRATION

RESPONSE TO PROPOSED RULE MAKING PROCEEDING
AS PUBLISHED IN THE FEDERAL REGISTER OF
APRIL 29, 1996.

INTRODUCTION.

In order to maintain a cohesive national motor carrier system which conforms to The National Transportation Policy as stated in the several Interstate Commerce and Department of Transportation Acts, the rules of practice governing the OMC must in like manner conform to that same National Transportation Policy to the end that the motor carrier industry, individual motor carriers and the regulatory agencies charged with responsible and responsive implementation of effective regulation must ALL be shooting for the same goals. These rules for reaching these goals must conform to that National Policy and the agencies exercising them must ALL have and follow clearly stated policy statements, mission statements, rules of practice (application), with uniformity and good reason and resolve in performing the investigative, disqualification and penalization functions of the agencies (State and Federal). To perform otherwise will defeat the National Transportation Policy and will defeat Due Process to which all persons, natural or artificial, affected by these proposed rules are entitled by law.

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The following are for convenience at this juncture paraphrased excerpts of or from The National Transportation Policy and a Mission Statement taken from and FRA Mission statement, which both have their origin in the Interstate Commerce Act and The Department of Transportation Act. Emphasis is placed thereon as the preponderance of the matters and issues raised hereinafter bear heavily on these areas and on the Constitutional aspect of Due Process of Law in the exercise and implementation of regulatory activities.

It is beyond discussion that the nation must have "safe, adequate, economical, and efficient transportation." 49 U.S.C. §10101. Such transportation will hereinafter be referred to as SAEE transportation.

The nation needs and requires an overall advocacy from within the DOT with modal responsibility, the fulfillment of which provides visibility for the motor carrier industry to see that The National Transportation Policy is achieved in the framework set forth above and as referred to hereinafter.

Important elements of responsible process described are the development, implementation, monitoring, and meaningful evaluation of safety standards and applications thereof, and of policies, missions, programs and related activities to enhance the atmosphere for motor carriers to move the freight SAEE through the system and meet the following criteria in order to preserve the spirit of The National Transportation Policy:

(1) That established safety standards must continuously pass the SAEE test as amplified in "All provisions of the Act shall be administered with a view of carrying out the above declaration of policy";

(2) That there must exist certain valid enforcement powers which as incidental thereto must be supported by powers to inspect, investigate, and perform such other functions naturally and legally following, BUT which powers and procedures, and the techniques employed must stand the muster of the "Policy" and not be allowed to wander outside strict agency guidelines set forth in their rules.

(3) That each Budget Cycle require the FHWA within the ambit of motor carrier principals and practices, to develop as targets for elimination impediments to moving freight through the system SAEF including regulations, policies, programs, procedures and activities imposed by regulatory acts inimical thereto which deter or otherwise unduly burden the movement of freight through the system SAEF.

(4) That industry and government cooperatively prioritize and coordinate countermeasures all to the end that better SAEF is achieved in cost benefot terms.

(5) That industry personnel and government agents be trained in how to administer the coordinated education assistance and enforcement programs, projects and activities to meet agreed upon accident rate goals, and that agencies and agents not be allowed to unilaterally wander into fruitless obscure technical types of compliance/non-compliance enforcement activities that cannot be related back to accident rate goals consistent with The National Transportation Policy, and cannot allow those activities themselves to become obstacles to the very basic achievements sought - SAEF.

An important element to keep in sight is that education and assistance be clearly distinguished from enforcement per se administered by non-enforcement, non-investigative types, to the end that The Policy (SAEE) be preserved and observed. Investigative and enforcement actions of situations not responding to or meeting National Policy tests should be investigated and enforced by enforcement type personnel.

In summary, sometimes the agency in its efforts to be efficient in searching for and prosecution of violations overlooks the primary objective - to wit - to move the freight through the system SAEE, and that the true objective is not the processing of violations through the civil prosecution system. Inspections and investigations are different arenas, and education and assistance personnel as well as enforcement personnel need to be different too for that reason.

Even roadside inspections should not be performed by police, but by civilians. Police are trained to deal with criminals. All truck drivers are not criminals and should not be treated as suspects unless there is reasonable cause. Neither should compliance reviews and audits be conducted by police but by civilians only. When either drivers or carriers appear not to be following National Policy, the matter (after review by higher level personnel) should be assigned for investigation.

One of the purposes of this response is to address the matter of safety standards in and of themselves and compliance with supporting paperwork regulations, and the distinction between compliance for the sake of compliance and effective safety management.

Focus must be brought to bear on establishing truly safety effective practices, which in fact have a direct causal connection with accidents and their prevention, as opposed to burdensome and unproductive enforcement of crossing "t's" and dotting "i's" when almost none of such regulatory requirements have any such causal connection.

By way of illustration and to set the tone for this presentation the statistics show that 98% of all accidents are not caused by a direct violation of any Federal Motor Carrier Safety regulation. The following examples are cited:

A. Compliance - misapplied to safety:

1. One hour plus or minus log discrepancies do not contribute to accidents.
2. Display of insurance form MCS 90 form does not prevent accidents. Yet, a \$500 fine is recommended.
3. Failure to fill in every blank on a form does not contribute to accidents. Conversely, filling in all the blanks does not prevent accidents.

PREMISE: Compliance for the sake of compliance accomplishes nothing, and in fact, has the opposite effect on safety. It actually diverts focus and scarce resources away from accident prevention activity, conditions and issues which would in fact reduce accident rates.

B. What compliance does prevent accidents?

1. Proper qualification, maintenance and use of personnel to

achieve commercial motor vehicle operation without a preventable accident.

2. Proper qualification, maintenance and use of vehicles to avoid mechanical failure or accident from such.
3. Proper and safe operations of vehicles on highways done in manner to avoid collision or upset.
4. Proper care and handling of cargo to avert DI & PD event.

PREMISE: Distinguish regulations which establish safety standards from the paperwork issues/requirements which are merely to show that safety standards are being met. Concentrate resources on important issues: Is the driver safety qualified and the paperwork incomplete, or is the driver an unsafe driver? Is the truck equipped with the required workable parts and accessories but the paperwork is incomplete? Which of these elements really affect safety?

PAST, PRESENT AND FUTURE CONSIDERATIONS:

Long recognized as a prime guideline for determination of matters such as are at hand herein is The National Transportation Policy, as historically set forth in The Interstate Commerce Act. Attached are copies of recitations of and related to such Policy. It is noteworthy that 49 USC §302 states: (A) The Secretary of Transportation is governed by the transportation policy of section 10101.

It is also noteworthy that the very spirit of the policy requires a balance of the many economic, regulatory and commercial enterprise factors

which must be recognized and administered "to preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation", to meet the needs of commerce of the United States and to serve the National Defense. It is further stated that: "All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

Senseless details required in the name of compliance and which do nothing to enhance safety itself, hinder, and in fact undermine the National Transportation Policy. This is not to advocate the abandonment of keeping accurate logs, and having on hand the regulations and making them available to the employees, and the filing of various reports.

The emphasis here is on those practices and requirements which help carriers hire and retain good drivers and equipment and is not on paperwork requirements which are fruitless when safety is not in fact a direct benefit of such practices. Certainly such records should be maintained but their various deficiencies are not and should not be classified as grounds for non-compliance with SAFETY regulations.

Let us not be mis-understood. If a driver falsifies his log, showing a rest period when in fact he had not been resting, that is directly related to safe operations and should carry severe penalties for the carrier if the carrier required it, and should also penalize the driver severely if the carrier did not require such practices. As is now, the carrier is the only one whose hide is at stake. By contrast, if a driver records a slightly incorrect total miles operated, or makes such other meaningless entry,

such departures are far from interfering with safety itself, and should be measured for compliance purposes only as such and not as safety violations. Even where there are numbers of such meaningless entries, NOTHING has been done or omitted which disturbs the safety concept.

One of the aims of this presentation is to bring to bear attention to the fact that present practices by government personnel do not distinguish between that compliance which contributes to safety and that non-compliance which does not contribute to lack of safety. The distinction is required by The National Transportation Policy and by common sense. The entire regulatory framework of motor carriers would thus be focused on issues that augment moving freight through the system as described by the Policy. This is the efficiency the Policy calls for as contrasted to bureaucratic efficiency of prosecuting for nebulous non-accident causing violations creating an unproductive morass of details for carriers.

SUGGESTED AUGMENTATION OF DEFINITIONS:

In addition to those definitions given at §361.104, serious consideration should be given to sharpening the meaning of various words to serve as supplemental guidelines to Federal and State personnel.

The following definitions are urged:

1. Person - A natural or corporate entity subject to the regulations of the DOT and the FHWA.

2. Safety - The art of moving persons and/or property from one place to another over public roads without causing death or injuries to persons or property damage.

3. Inspection - Routine examination of records and/or equipment to determine whether there is a pattern of non-compliance with standards which if continued will likely result in collision resulting in injury or death to person or persons, and/or causing property damage, the result of which inspection cannot be used as a basis for adverse action against a carrier or person until documented in an investigation to be conducted by civilian personnel only.

4. Investigation - The process of documenting facts to support direct significant accident prevention related to non-compliance which demonstrates justification for adverse action of any kind against a carrier or person and which if subjected to the tests of due process survives, else no prosecution shall flow therefrom to be conducted by trained investigator separate from inspections and reviews..

5. Substantial - That measure required to establish any facts or allegations in a complaint out of which any financial penalty, reduced rating, or other detriment may be inflicted upon a carrier or other entity subject to the regulations of the FHWA.

6. Safety Related Compliance - That condition which results from conducting operations and supervising personnel in a manner which prevents recordable preventable accidents and injuries.

7. Non-safety related Compliance - Form and manner types of paperwork entries and records customarily used to assure the qualifications and proper use of personnel, maintenance and use of equipment and hazardous material containers when used to complete transportation operations without bodily injury or property damage.

8. Accident - An event causing failure to complete the movement of persons or property from one place to another over public roads without injuries treated immediately away from the scene or without death as result of a collision or upset.

9. Preventable Accident - Same definition as No. 8, with the added characteristic that the accident would have been avoided by a reasonable and prudent person acting under the same circumstances and conditions.

10. Performance based measure - that measure which is based on properly evaluated indicators and on true and accurate input of critical data, generated under total quality control conditions as opposed to incidental data.

SPECIFIC RECOMMENDATIONS FOR CHANGES

IN PROPOSED RULE MAKING:

1. §361.102(a) Should be modified to make the purpose of and limit the authority to actions promoting and complying with The National Transportation Policy.

2. §361.102(c) and (d):

Add language which ensures accountability of both Federal and State level employees involved in the field activities leading to inspections and investigations, and therefore including those to whom delegation of authority is made. Accountability includes the requirement that reports by said personnel be true, accurate and in compliance with the criteria laid down by the FHWA and in manner to ensure exercise of due process for the benefit of persons subject to being adversely affected by action taken on

the information assembled. In many cases the knowledge, or lack thereof, on the part of such personnel, both Federal and State, is inadequate and has OFTEN resulted in charges which should never have been brought. Experience tells us that when the knowledge has run short, that the missing elements have simply been implied by such field personnel when there has been no justification for such implication. These acts complained of have occurred from ignorance and/or wilful improvisation.

Example: Six FHWA managers in different states took the position that there are only 2 kinds of non-preventable accidents, i.e. being rear ended and being struck while parked. Such position is untenable and incorrect and resulted in a less than satisfactory rating based on that one factor. Over 30% of state inspection reports contain errors which result in unwarranted and unjust out of service declarations or citations and/or penalties on interstate carriers.

To ensure elimination of such harmful errors, there should be imposed penalties on the FHWA and its personnel, and upon the redelegated agencies and their personnel, and therefore there should be regulations imposing such penalties, and the penalties should be assessed and collected; all to the end that collected performance data be true and accurate and that it depict the actual conditions and circumstances that exist. It is the agency's responsibility to achieve its accuracy. It is not the role of industry to do it for them. For industry to correct all the errors cited in state inspections conducted under MSCAP would cost the industry in excess of \$100 million annually conservatively. \$500 million is more accurate.

Retaliation occurs, by both Federal and state agencies and their personnel which must be eliminated and prevented from recurring.

3. §361.103 Inspection and Investigation. Change to read: The FHWA should act on its own initiative or on sworn complaint with allegations verified by FHWA to meet criteria of The National Transportation Policy and the OMC Mission Statement when duly adopted. If allegations are not likely to lead to death or injury the complaint will be classified as frivolous; and, shall be classified as non-frivolous should the nature and extent of the allegations be unlikely to lead to death or injury.

4. §361.103 (a)(1); Strike "or other person" as too vague.

5. §361.103 (a)(2)(i) and (ii): Should be worded to apply to carriers and persons subject to FHWA regulation; agent should not be cloaked with sole determinative powers as to relevancy, which calls for legal conclusions.

6. §361.103(b): Strike words "..whether or not.." and insert word "if" in place thereof. Add language as follows: Proprietary records shall not be subject to this provision, as they usually are not original records and are maintained for economic good, and are not kept to demonstrate compliance. To require access to these and expect the same accuracy required by FHWA's record of duty status is to do so contrary to The National Transportation Policy by interfering with the requirements thereof as to economies. Such requirement of access will cause carriers to either cease the use of such economic and technological aids or endure a vastly enlarged financial burden for regulatory accuracy, and therefore will have had their rights under The National Transportation Policy breached. This event will lead to less rather than more safety. Industry needs and is

entitled to experiment with new technologies without fear that such tools will be misused by some agent.

7. §361.103(e): Strike the entire provision as being so broad as to be arbitrary and capricious and therefore unlawful. If not stricken, then provide that erroneous determination by agent as "related to transportation safety" shall result in penalties against the agent and FHWA for such wrongful determination. Such a requirement alone will cost industry and government tens of millions of dollars annually.

8. §361.103(f): Provide that carrier is entitled to have disclosed any information pertaining to the carrier or its personnel, excluding the name of the complainant, and require FHWA to advise carrier before making public any investigatory information.

No information relating to any specific carrier or person may be made public or released before it is warranted by FHWA to be truthful and accurate, failing in which penalties should be imposed on FHWA and its agents and delegated agencies for inaccuracies and damages and negative effects had upon the carrier or person.

9. §361.105(a): Words "other person" is too broad to be defined in this context and is therefore too vague to be lawful. Insert words "contract driver" or other specifics if subject to FHWA regulation.

10. §361.105(b): Delete entire text as material which does not promote safety, harms morale, creates doubts, and serves no useful safety or any other accident reduction purpose. Annual costs under this provision will readily exceed \$100 million annually in causing existing drivers and others

and prospective drivers and others to exit employment or to refuse employment.

11. §361.105(d) and (e): Reword: The records requested to be reviewed must be records required to be maintained by FMSCR. Delete access to employees, as though they were property; excessive authority is proposed and should be deleted to gain access to banks, buildings, equipment and other items or records not required to be maintained by FMSCR.

12. §361.105(e): Require that such be subject to provisions as added to §361.105(d)(1).

The thrust of these recommended changes lies in part in the economic damage to be inflicted on the nation's economy, that's right, the nation's economy. The FHWA in its preliminary discussion of this proceeding and in reference to Executive Order 12866, Register page 18880 states that there would not be impacted an effect on the national economy in excess of \$100 million. Rest assured that the sacrifice of all these economy related technology aids now paid for by carriers and provided by numerous service companies will aggregate far more than \$100 million in adverse economic impact. Thus, this proceeding should be subject to OMB rules. Otherwise The National Transportation Policy forbids such requirements by rule making by FHWA.

Provision should be made for wrong doing driver to be accountable financially to carrier, especially in connection with violations which tend to lead to death or injury.

13. §361.106: Strike as duplicating §361.103.

14. §361.107(a) & (b): Add language to require financial and other responsibility on the part of a frivolous complaint filer for false, misleading, unfounded complaint, Distinction should be made between mere record keeping complaint as compared to one which pertains to true safety and which describes facts which if true and not remedied are likely to lead to death or injury. If frivolous complaint is filed, complainant's name should be made available to carrier and carrier should be entitled to recover expenses, damages, etc, resulting from such investigation and complaint. Establish basis for application of Congressional declaration in The National Transportation Policy as to transportation and the same for employee safety.

15. §361.107(c): Require that Associate Administrator "shall" dismiss a complaint determined to be groundless or frivolous. Complaints now waste millions of dollars annually.

16. §361.107(d): Require carrier to be notified also.

17. §361.107(f): Add provision that if driver is engaged wilfully in unlawful activities that FHWA shall take appropriate action against that driver and not the carrier unless carrier aided and abetted driver.

18. §361.108(c): Delete imprisonment as far too harsh for administratively generated subpoenas. Flagrant frustration of the subpoena would justify some penal provision. Many full scale Courts can only punish by ten days in jail for contempt of court if a witness ignores a subpoena. It is unconscienable that an administrative agency engaged in motor carrier regulatory activities should even think about such a power. It is meritorious to dispense with all ratings, including unsatisfactory. If carrier or driver

or vehicle is in imminently hazardous situation, should be shut down. Provide agents at all levels must operate according to policies and procedures. If ratings required provide that A.M. Best or Dun and Bradstreet make them. Keep government out of ratings.

19. §362.103: In the first place, this type of rule change cannot be achieved by a behind closed doors process. This type of change requires a full blown hearing of experts with scientific study covering countless statistics maintained by various industry and governmental agencies. Only by scientific data studies can the criteria and norms and indicators be determined and then refined for practical use. Since such a regulation requires that the agency be entirely accurate in its determinations as to fitness, the agency can make proper assessments only if it is fortified with all of the proper background and underlying data available, and this can be secured only by public hearings as described.

In the second place, if FHWA chooses to ignore this position then it must necessarily impose upon itself the burden of absolute accuracy in its basis for fitness findings, and appropriate penalties for its failure to properly assess fitness matters. This is mandatory in view of the severe penalties which may be imposed by findings of unfitness. Without the fortification proposed herein, any penalties would become confiscatory at the least and on the other end of the spectrum would amount to irreparable economic harm to carriers.

Bear in mind, such unsatisfactory rating can have a terminal disease effect on \$200 million a year carriers, or carriers of any size, brought unjustly about by action by one or more of the lesser trained and lesser

supervised Federal and state personnel. This may happen without any accountability on the part of such personnel. Thus, such personnel should be held accountable for such unjust results in failing to provide professionally true and accurate work. They should conduct their activities under close monitoring and supervision.

This is particularly problematic in instances when State level field personnel provide the data for fitness determinations. Numerous instances are available wherein gross lack of knowledge has wrought totally unwarranted penalties upon carriers. Examples involve lack of knowledge of push rod measurements for checking brakes, lack of knowledge of pressures at which to check the brakes, careless or otherwise poorly taken measurements of the thickness of brake linings, to mention a few.

Hence, not only must the Federal agents be in total command of the minutest details, but so must the state agents, to whom most of the checking has been delegated. Think about it.

20. §362.103(a): "Compliance" as used herein must be equated to safety related, not paper work safety, functions. Add language just before "compliance" so that it will read "safety related compliance."

21. §362.103(b): Such data must be assembled by knowledgeable persons and in manner to correctly reflect facts, not guess work.

22. §362.103(b)(1): Add language after "regulatory compliance and .." to make it read regulatory compliance and safe operation and" The alternative to this is to distinguish between non-safety compliance and true safety compliance.

23. §362.103(b)(1)(i): Show CDL violations as those in 49 CFR 383.51 to be specific.

24. §362.103(b)(1)(iii): Refer to accidents as "recordable preventable accidents. Also, strike "incidents", as too vague for enforceability. Strike word "track" as vague and without meaningful definition in these premises. Agents, Federal and state, should be held accountable for for failure to distinguish the accident classification. Untrained and unsupervised agents presently exercise a non-accountable attitude regarding such classifications.

25. §362.103(b)(1)(iv): Refer to 49 CFR 383.51 instead of 49 CFR 391.15 and describe them as disqualified as opposed to unqualified.

26. §362.103(b)(1)(v)&(vi): Both of these should be tied to reckless disregard for safety as in 364.201 (a)(4).

27. §362.103 (b)(1)(vii): Fatigued driver definition and test of excessive hours for this purpose should be that provided for under the maximum permissible hours under the most extreme conditions allowed under Part 395 and not just that set forth in 49 CFR 395 as the 10, 15 and 70 hour rule.

28. §362.103(b)(2): Strike compatible "state regulations and orders". Provide for distinction between true safety compliance and non-safety related compliance.

29. §362.103(b)(3): This section too broad and should be limited to description of disqualified drivers as in 49 CFR 383.51. Agents should be held accountable for any charges resulting in out of service when not properly made or which are unfounded. Response on inquiry in the past

about such events of this kind where out of service order given without justification has been from the FHWA: "Show us and we'll change it."

Example is lack of knowledge about air pressure guidelines for applying brakes and measuring push rod travel, plus using a piece of chalk, instead of something that puts down a fine line when a fine measurement is called for, resulting in absolutely erroneous measurements. Brake adjustment charges should depend on the conditions in 49 CFR 396 Appendix G.

30. §362.103(b)(4): Strike "the recordable accident rate per million miles" and scratch reference to "incidents". The true measure is the recordable preventable accident rate per million miles. FHWA personnel all too often are inadequately trained and supervised, and when erroneous ratings of non-preventable accidents are handed out those same personnel are not admonished adequately if at all. Yet, this should be the most indicative of performance data.

31. §362.103(c): Strike entire section, including subsections (1) and (2) as vague and which cannot be enacted without adequate hearings to establish proper criteria. Example: "A pattern is evident when violations are occurring at a rate in excess of 10 percent." There is no criteria for what the 10 percent applies to. Any action pursuant to these sections would be unlawful. Experience has revealed that the "ten percent" bracket is not based on random sampling but instead has become an investigative sample manipulated by agents resulting in false impressions.

If sections are not stricken they should be tied to the maximum legally allowable hours under any and all conditions and by any regulation.

32. §362.104: The entire section should be subject to separate rule making proceeding after adequate hearings, else there is no well founded criteria for assessment. The term "inordinate ratios" has no scientific safety basis by which any determination may be reached. In any event language should be modified to read "inordinate ratios of standards violations." Also, in any event after "with applicable safety standards" words "regulations and orders" should be stricken.

Language should be added to require documentation of any allegation supporting any violation which will influence any safety rating. FHWA should be held accountable and liable for errors which result in unsatisfactory ratings.

33. §362.104(a)(1): See above discussion of inordinate ratios.

34. §362.106(d): Add at end following §362.110: ".. or on any other basis except when compelled by court order."

35. §363.102(a)(2): Require that "material" be "verified material."

36. §364.102 Policy: No non-safety violations should be recorded or made public or prosecuted or used for any adverse purpose unless each type of such violation(s) cited are directly related to accident prevention safety regulations.

The purpose should be that the agency along with the modal coordinator determine the most frequent causes of accidents and develop countermeasures against them. Once identified, the most frequent causes and recommended countermeasures should be distributed to both industry and agencies involved in MCS. State and Federal programs along with industry should work together to satisfactorily address these areas.

When industry companies (motor carriers) or persons subject to FHWA regulation fail to live up to their good faith efforts and responsibilities in specific areas affecting safe, adequate, efficient, and economical movement of transportation services, then civil action should be taken for knowingly disregarding safety practices. In this event, carriers or persons should either operate safely or agree to be placed out of service. There should be no monetary penalty, However, if that option is not adopted, then this rule should be determined by separate rule making proceeding.

Along this same line, and since this is a national program, FHWA, state and local agencies and personnel must be held accountable and responsible for closely following and sticking to the directives provided in the agreement between government and industry.

At the regional (Federal), state and local levels, agencies and their agents must be held accountable and required to make every good faith effort to promote safe, adequate, efficient and economical transportation throughout their areas, and should not be allowed to seize the regulation book and unilaterally interpret, even twist, the regulations to suit an agent's whim. Nor should their inspections and investigations and actions be considered until such inspections, investigations and actions meet the test of reducing accident rates, not in terms of reduced violations or reduced non-compliance rates, but in true, safety related terms. In the event a FHWA regional, state or local agency, or any of their agents, fail to follow the plan as agreed, Federal funds must be withheld and corrective action taken to remove the information gathered by such

activities from the MCMIS and progressive corrective action should be taken against the responsible agents and agencies.

This program must provide safe, adequate, efficient and economical transportation to our society. Independent entrepreneurial actions to generate jobs and revenues are and will be diluted, even sidetracked, by having to address non-productive collateral issues herein called non-safety related compliance. This diversion of interest and capital must be eliminated to accommodate attention to mainstream safety matters.

Example: (1) An incomplete or no medical certificate charge on a medically qualified driver would be eliminated by this provision. However, if a medically unqualified driver charge were made and no certificate or an improperly completed medical certificate existed, then the supporting non-safety related violation could also be cited. (2) Assume a vehicle is equipped with proper parts and accessories and is properly maintained, but every vehicle condition report and maintenance file is not complete or on file. With no safety related violation, the poor record keeping could not be cited. On the other hand, if the same vehicle has slick tires, thin brake linings, or excessive steering wear and the record keeping is poor as given above, then the record keeping violations could and should also be cited.

37. §364.201: A separate rule making proceeding is required to determine what will provide the lowest DI & PD for resources expended.

38. §364.201(a): Separate violations accrue for each day of "health and safety" violations is stated in (a)3 only. It must also be required that the provisions apply to the driver for wilful acts of the driver when he is the

culprit and the carrier is not the culprit. Individual driver patterns should apply to wilful acts of driver not accompanied by wilful acts of carrier.

39. §364.201(a)(1): Record keeping violations should never be used by themselves as charges. They should only be used in conjunction with substantial health and safety violations which resulted in or could have resulted in serious personal injury or death. The terms "incomplete" and "inaccurate" should be stricken or used only in situations where there is uncontrovertible evidence that the omission or error was committed to evade some significant safety function.

The \$500 per day per violation penalty should only be charged when the purpose is to penalize for an act(s) likely to cause substantial health and safety violations, or which in fact resulted in or could reasonably have resulted in serious personal injury or death and in addition when the act complained of was done to evade a significant safety function.

From "Actual or constructive" to the end of the section should be stricken as the documents referred to are not required documents.

40. §364.201(a)(2): Serious pattern - Assuming §364.201(a)(1) is rewritten as above, then §364.201(a)(2) should be stricken in its entirety. The language: "All that is needed is a basis to infer that the acts are not isolated or sporadic." This terminology is vague - too vague for enforcement. The use of the term "mid-range" is a bureaucratic way of skirting the real safety issue.

Instead, resources of those regulated should be devoted to cracking the real safety issue, and not fruitlessly spent on compliance with vague, unrelated and unproven surrogates.

41. §364.201(a)(3): Substantial Health and Safety Violations - Separate rule making, based on hearings at which scientific data establishes those situations should be resorted to, and should not be left to individuals without the proper findings and background. Example: Driver is unqualified because he is incapable of safe operation is one circumstance. Declaring a driver unqualified because he has a license suspension resulting from some Compact revocation for unpaid fine or failure of Compact to record payment is another circumstance.

Patterns - should be incorporated in this provision.

The abuse is excessive by Compact states on CDLs now with no hazard related causes or basis as provided in 49 CFR 383.51.

Fatigue- Current studies show that fatigue is related to how much, how well and how long one sleeps, as opposed to how long one works. Fatigue is believed by many law enforcement personnel to result from any amount of time, no matter how little, a driver drives over the usual 10 hours. However, the regulations permit driving up to 15 hours; and permit working for 5 hours and then driving 10 more hours; and permit driving up to 12 hours in certain weather or traffic conditions. Some believe a driver is fatigued after 70 hours when the regulations provide for situations when a driver may drive when legally on duty 80 hours in 8 days, or in the case of oil field haulers, drivers are allowed after a 24 hour restart to drive over 100 hours in 8 days. Current studies show it is

not hours worked that causes fatigue, but rather how well, how long and how much one sleeps.

In short, over hours or false or incorrect logs do not prove fatigue and do not establish a health and safety risk. Until scientifically linked the provision requiring up to \$10,000 fines should be deleted.

42. §364.201(a)(4): Note the language here. "...no civil penalty may be assessed against an employee of a motor carrier unless it is determined that the employee's actions amounted to gross negligence or reckless disregard for safety." This language is on target from the standpoint of what the FHWA should be focusing on, real safety versus paper compliance. Gross and reckless are suitable terms to describe what the targets should be. However, in this case the carrier should have the protection that would help carriers control drivers if they the drivers faced some serious penalties for gross and reckless conduct. Then why should the driver be able to skirt along just shy of gross or reckless, yet engage in damaging activity without responsibility. Strike the word "gross".

43. §364.201(a)(4)(i): Owner-operator - This provision would classify owner-operators as carriers or employers. This regulation without appropriate legal basis nor proper enlargement of applicable statutes and general legal principals sweepingly embraces owner operators as persons to be regulated under the FHWA proposal when they should not be so included. The applicable regulations cover for-hire, private, and exempt carriers, and hazardous materials shippers only. This agency does not have any legal basis to usurp existing laws establishing independent contractor relationships and the various legal considerations that flow therefrom.

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44. §364.201(b): Violations pertaining to CDLs - This section provides for penalties up to \$2500.00. However this section does not say upon whom such penalties will be imposed. They should be imposed on the driver. Carrier is required to check with state agency and previous employer only. Carrier should not be involved in this exposure unless carrier aided and abetted driver. Thus, the penalties imposed herein should be on the driver, not the carrier.

This is one of the reasons national CDLs were instituted, and \$100 million of taxpayer funds expended thereon.

45. §364.201(c)(3): Proof of financial responsibility - This section should provide that carrier must furnish proof of financial responsibility within ten days of request therefor, when such financial responsibility coverage in fact exists. No action should be taken under these facts.

If after the ten (10) days carrier does not produce evidence of existing financial responsibility, the MCS 90 or MCS 82, and such failure causes harm of some sort, then a \$500 civil penalty should be imposed.

This is a paper work violation, and bears no connection to accident prevention. There is no harm done IF the carrier in fact is covered. There is no harm in any respect just because a piece of paper is not on hand. Where is the harm to DI & PD? Where is the accident rate to be lowered simply by having that piece of paper?

These useless high handed, power processes for technical compliance directly sucks away carrier resources from true safety compliance, and results in wasteful use of FHWA man hours and its resources. These results are inconsistent with The National Transportation Policy.

46. §364.201(d)(1): Violations compounded - Violations should NOT be compounded each day unless the actual threat to health and safety continues on a day to day basis because of the incident of the violation.

Example: A truck actually loaded with explosives is parked for more than one day. This is one offense and should be compounded. HOWEVER, assume that the same truck is parked, but the papers on the truck employ an abbreviation, contrary to regulations, yet there can be no mistake that the papers describe the lading as explosives. This paperwork omission or error should not be compounded. Principle - To compound, the harm itself must continue. There is no harm in the paperwork, only the parking.

Provision should be made that a civil penalty shall only be assessed when a true threat to health and safety exists, and should not be assessed for a paperwork violation from which there is no harm.

If a reasonably intelligent emergency response person can determine the nature of the hazard by examining the placard or the shipping papers, even with an abbreviation, then no harm exists from the paperwork. If a hazard does exist and the communication system is not adequate, then a civil penalty should be applied.

Let's get proficient on the basics before getting carried away with the technical.

47. §364.201(d)(2): Containers - penalties - Civil penalties should apply only if a container does not meet safety performance testing and the marking or certification is designed to conceal safety defects, or if a manufacturer or reconditioner refuses to test, mark or certify. Then the penalty should apply.

48. §364.201(d)(3): The penalty provided for herein should only apply in the event the violation creates an extra health and safety risk. If the risk is not enhanced, the penalty should not be enhanced.

49. §364.201(e)(2): Notice to post. This provision should be stricken. Such requirement in no way correlates with reduction of DI & PD rates. Such postings tend to cause opposite effects on an operation by reduced morale and lost confidence. Personnel turnovers increase. The ability to attract and retain qualified personnel declines. These factors portend increases, not decreases in accidents, and likely would cause the demise of the business entity.

Even the government is cast in a bad light by posting, as a high handed, arrogant government or governmental agency.

50. §364.201(e)(3): Providing for immediate restoration to an original assessed penalty is a means of threat and intimidation by government agents.

Such restoration of assessment in no way contributes to accident prevention. Such summary action deprives respondent of due process under the law. If there had been a basis of fact to reduce the assessment in the first place, then what positive effect on safety can be had by arbitrarily extracting more funds from the respondent.

51. §364.201(e)(4)(i)(ii)(iii)(iv): Agent declaring driver out of service in the first place must be held accountable for accuracy in interpretations as applicable with complete and accurate inspection and reports completed in the prescribed form and manner and which must establish imminently hazardous conditions, failing in which the agencies and agents should be held financially liable for improper actions.

52. §364.201(e)(4)(v)(vi): These two provisions should be stricken completely. The required return of written certification of out of service reports or any other reports other than for out of service serves no useful purpose for the government, for the industry, nor for anyone else, and certainly does not address reducing the DI & PD rate.

It does by contrast create an economic burden for both the industry and agencies and produces no safety benefit. Some agencies even waste threats for not making the certification involving clear reports.

53. §364.202(a): Violations complained of must show the nature, circumstances, extent and gravity in terms of the harm caused towards safely moving freight through the system, (adequately, efficiently and economically), and not be violations which arise out of paperwork errors or omissions. Even a non-paperwork violation will not suffice for this purpose without agent's demonstrating the actual harm or potential harm of each act committed, all before a penalty should be assessable. The terms "magnitude, blatancy, frequency and potential for immediate consequences" must by the agent be demonstrated to show imminently hazardous conditions, and not be paperwork matters where no harm occurred or was about to occur.

54. §364.202: The agency should be required to show the positive effect the application of the civil penalty assessment factor has on improvement in accident rates. Otherwise, such a practice will turn out to be a "feel good" activity to relieve the frustration from "compliance for the sake of compliance", and in turn will subject the industry to enduring costly governmental activities.

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This program has the potential for being very effective if accountability of those administering it is enforced. Otherwise, it will just be another drain.

55. §364.202(a): There is no scientific or other proven basis for use of the terms "acute and critical" These terms should be stricken as vague and beyond definition in this proceeding.

56. §364.202(a)(5): Terminology herein is badly lacking. "Cooperation or the lack thereof" and "general attitude towards compliance", should be stricken as too vague to be of probative use or definable. They are too subjective.

Employment of such terms would require guidelines and definitions, else application of those terms in the sense of imposing penalties fall outside the ambit of enforceability. To propose punishment for lack of cooperation or general attitude would be a general affront to our United States Constitution. Non-safe conditions if present will speak for themselves.

57. §364.202(b)(5); The term "justice" should be stricken from this provision. These are administrative matters and are not properly couched in terms of "justice". There is no criminal aspect to these rules in and of themselves. The term is totally foreign.

58. §364.301(a): This provision must be tied down to those actions which have led or could or would lead to death or serious injury.

59. §364.303: How is a serious traffic violation defined? This terminology is too vague. If this is a safety function why would certain preventable accidents be excluded or not be included while traffic and other factors are used.

THE MISSION STATEMENT: (SPECIFIC RECOMMENDATIONS CONTINUED)

The following should be made part and parcel of the rules and the rule making process and need address only the motor carrier industry and matters of safe, adequate, efficient and economical transportation.(SAEE)

(1) Element number one - Develop through rule making the manner in which the agency, and all its delegates, will go about assembling a catalog of the most frequent causes of preventable truck/bus accidents resulting in death, injury and or property damage. In doing so, such causes must be prioritized as to countermeasure development, implementation, monitoring, evaluations, reporting, recommendations and recycling for budgetary and program management purposes.

(2) Element number two - Determine by rule making how the agency, and all its delegates, will actually go about implementing the agency's accident (DI & PD) prevention program to achieve and promote adequate, efficient and economical transportation through education, assistance and enforcement.

(3) Element number three - Determine by rule making the manner in which the agency, and all its delegates, will endeavor to monitor the effectiveness of its educational, assistance and enforcement program to assure SAEE transportation.

These elements must be considered together and used together. Education, assistance and enforcement need to be developed, implemented, monitored, evaluated and reported in separate categories, even though some overlap will occur.

While enforcement will be the ultimate result, it must -indeed must- be understood clearly that the public, shippers and others, The Congress, and the motor carrier industry (as well as good common sense and propriety) demand that the program be more than mere compliance and enforcement absent the refinements dictated by today's accident causing conditions and circumstances. The program must promote SAEЕ transportation in quantifiable terms to objectively support budgetary considerations.

All delegations at all levels must achieve and demonstrate responsibility and accountability for consequences, good and bad, for any and all administrative, including enforcement, actions taken.

Any and all information made available by agents at all levels to another person or organization or to the public which may have any adverse affect upon another, person or carrier, shall be documented and administratively approved before release in order to eliminate unwarranted damage to the potentially affected party; and, to avoid the accompanying penalties which may result from such action, the damage resulting without due process. Such action taken in violation hereof must subject the perpetrator and the agency, at all levels, to significant penalty, whether the act be done or permitted or required to be done by another. If the information involved is false or inaccurate, whether or not done wilfully, the disclosure should carry the same or greater significant penalty.

(4) Element number four - Rule making should therefore take place on inspections, reviews, investigations, and should enforce safety standards and how such polices are communicated to:

- (a) Industry.
- (b) Federal regional office and state directors and agents,
- (c) State and local agencies and their agents,

All is to the end that all activities shall be administered and enforced in such manner as to comply with The National Transportation Policy and the OMC Mission Statement to be adopted, and published.

The rules governing the policies and practices of the OMC must deal with the fundamental issues of:

(1) DI and PD causes and contributing factors as impeding SAEЕ transportation in quantifiable terms so that the same may be prioritized, countermeasures developed, implemented, monitored, evaluated, periodically reported releasing the results, and listing options to achieve better results with recommendations for improvement and for future budgetary purposes.

The above reporting should be made to senior motor carrier management as well as government officials to ensure that programs are meeting and passing the SAEЕ tests before presentation to the next eschelon of government officials for budgetary or any other purposes.

(2) In what manner the OMC will administer the aforesaid implementation process as to the following:

- (a) Research and development to fulfill its obligation in assisting the movement of freight through the system SAEЕ.
- (b) Prioritizing all data and objectives.
- (c) Development of countermeasures to induce safety by decreasing preventable accident rates.
- (d) Countermeasure implementation factors to be weighed:

- (i) Marketing.
 - (ii) Sales.
 - (iii) Budgets, Federal, state, local agencies.
- (e) Countermeasure monitoring as related to problems each designed to address.
- (f) Countermeasure evaluation.
- (i) Cost/benefit based on resources expended on target problems and change of SAEE rates.

(3) Spell out in the rules the practices, giving the powers, responsibilities and accountability for acts and omissions of governmental agencies and agents as well as companies and individuals regulated hereby. Such spelling out shall cover at the least:

- (i) Inspection and review.
- (ii) Investigation and documentation.
- (iii) Legal actions to remedy specific unsafe acts or operations of commercial vehicles upon public highways, whether imposed on driver or operating company.

OBJECTIVES:

It is urgent that federal and state agencies involved in the functions of motor carrier safety by any definition become more effective and more focused on DI & PD, the real DI & PD issues and elements, not the fragmentary, collateral and disconnected matters.

Entertain the proposal to eliminate fines altogether, except perhaps in matters of gross or criminal regard, follow the true avenues of safety

enforcement advocated herein, and then measure the effectiveness of the Federal/State FMCS program on preventable accidents and the change in the rate thereof. (Preventable accident rate changes of course should be more clearly stratified by causes and contributory factors as will be the effectiveness of countermeasures developed and implemented, and then evaluated in terms of SAEЕ transportation.)

The use of government monetary and manpower resources must then be contrasted to prior periods and also be measured from the standpoint of benefits derived in the SAEЕ sense, without cluttering up the true picture with unrelated and unproductive activities related to such details as non-accident contributory violations, enforcement cases and fines.

Drivers who do not safely operate commercial motor vehicles should lose their CDLs.

Motor carriers which do not provide SAEЕ (this term embraces safety) transportation service in like manner should suffer.

SUMMARY, ARGUMENT AND CONCLUSION:

It must be noted that without established policy and adopted Mission Statement, unbridled authority rests in the hands of state and federal agencies and agents, which is daily administered in highly inconsistent manner, and which frequently results in literally confiscatory consequences, intentional or not, and which cannot be readily remedied when wrongs occur, but nevertheless the infliction of the wrongs is easily and summarily and often irreparably imposed.

Normal order of accomplishments requires that the OMC and all its delegates and sub-delegates must follow or comply with the following:

(1) The National Transportation Policy as stated in Title 49, in the I.C. Acts and D.O.T. Acts, as they relate to promoting (specific words in the acts) safe, adequate, efficient, economical (SAEE) motor carrier transportation for commercial benefit.

(2) The Office of Motor Carriers establish, as herein set forth in the attachments, or create, a Mission Statement, patterned from the IC Act and the FRA's Mission Statement as set forth in Title 49 USC 10101a, and dedicated to promoting motor carrier transportation and to do this under a rule making proceeding adjunct to hearings and Congressional action.

(3) FHWA must develop a process which cooperatively with the motor carrier industry and FHWA's delegated agencies to implement that process with the industry and develop an orderly methodology that pursuant to the Mission Statement policy is carried out and goals achieved through rule making.

Attached hereto are copies of The National Transportation Policy as set forth in 49 USC §10101, a portion of the Department of Transportation Act and a restatement of the Mission Statement by the Federal Highway Administration Office of Motor Carriers, the latter being Appendix C.

Attention is invited to the first of these, identified as Appendix A hereto. 49 USC §10101(a) (2), (3) and (7), and 49 USC 10101(b) are most pertinent.

Two(2) and three(3) deal with safe, efficient, adequate transportation and most notably the promotion thereof while seven (7) deals with such things as shipper benefits and most productive use of equipment.

49 USC 10101(b) states: "This subtitle shall be administered and enforced to carry out the policy of this section." (Emphasis supplied.)

The successor agency to the Interstate Commerce Commission is the Department of Transportation. The DOT enjoys its own policy provision, to wit: "Sec. 1651. Congressional declaration of purpose." See Appendix B.

This section restates the same things for all practical purposes as does 49 USC 10101. However, Sec. 1653(b) goes a step further. That section is entitled; "(b) Congressional policy standards for transportation; prohibition against adoption of standards or policy without appropriate Congressional action." This section prohibits the Secretary of the DOT from formulating any transportation policy without "appropriate action by Congress". 49 USC §1653(b)(2).

Such language is found in 49 USC §1653(b)(2):

"Nothing in this chapter shall be construed to authorize, without appropriate action by Congress, the adoption, revision or implementation of-

(A) any transportation policy, ...".

There is no argument that the proposed rule making proceeding herein seeks to establish numerous standards and set numerous policies, all without benefit of evidence to justify such actions.

This same section clearly binds the Secretary to the words of The National Transportation Policy of the Interstate Commerce Act. 49 USC §1653 (b)(1) as follows:

"In carrying out his duties and responsibilities under this chapter, the Secretary shall be governed by all applicable

statutes, including the policy standards set forth in the Federal Aviation Act of 1958; the national transportation policy of the Interstate Commerce Act, as amended;.."

The vast majority of the rules proposed in this proceeding in fact are policy making rules. The deficiencies thereof from the standpoint of the National Transportation Policy and the Mission statement have been discussed throughout this response.

The economic impact on this nation and in particular the vast transportation industry has been stated herein to be in excess of \$100 million. That is the tip of the iceberg. Many times that figure is at stake in connection with the issues raised herein regarding carriers' use of high technology and to which agents are demanding access when the documents generated thereby are not even required to be maintained by the DOT regulations. Is this type of action required by the Secretary? If so, it goes beyond the authority of the DOT as it now stands. To circumvent that hurdle this Rule Making Proceeding seeks to formulate policy, devastating policy, when in place are all the effective tools needed for DOT purposes of enforcement.

Such actions as exemplified just above and such actions as have been outlined in example form throughout this response fall in the same category. This proceeding is the wrong vehicle. Instead, hearings should be held, scientific data gathered, and Congress should be called upon to act in the appropriate manner.

PRAYERS:

Premises considered, Respondent urgently prays as follows;

- (1) That this proceeding for Rule Making be continued, suspended and held in abeyance pending proper hearings, the gathering of competent expert and lay testimony and other evidence, and Congressional action.
- (2) That the proposed rule making be modified and adapted to afford motor carriers protection and relief from the confiscatory tactics which inevitably will result from the rules as proposed.
- (3) For such other and further relief which the equities of this cause and the exigencies of the circumstances herein require.

Respectfully submitted,


James F. Fitzpatrick

CERTIFICATE OF SERVICE:

I, the undersigned, do hereby certify that I know of no parties of record to whom copies of the foregoing Response should be mailed, and I therefore certify that none are required to be mailed.

Done this 20th day of July, 1996, at Memphis, Tennessee.


James F. Fitzpatrick

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CHAPTER 101—GENERAL PROVISIONS

Sec.

- 10101. Transportation policy.
- 10101a. Rail transportation policy.
- 10102. Definitions.
- 10103. Remedies as cumulative.

Historical Notes

1960 Amendment. Pub.L. 86-448, Title
I, § 101(c), Oct. 14, 1960, 94 Stat. 1808,
added item 10101a.

§ 10101. Transportation policy

(a) Except where policy has an impact on rail carriers, in which case the principles of section 10101a of this title shall govern, to ensure the development, coordination, and preservation of a transportation system that meets the transportation needs of the United States, including the United States Postal Service and national defense, it is the policy of the United States Government to provide for the impartial regulation of the modes of transportation subject to this subtitle, and in regulating those modes—

- (1) to recognize and preserve the inherent advantage of each mode of transportation;
- (2) to promote safe, adequate, economical, and efficient transportation;
- (3) to encourage sound economic conditions in transportation, including sound economic conditions among carriers;
- (4) to encourage the establishment and maintenance of reasonable rates for transportation without unreasonable discrimination or unfair or destructive competitive practices;
- (5) to cooperate with each State and the officials of each State on transportation matters;
- (6) to encourage fair wages and working conditions in the transportation industry; and
- (7) with respect to transportation of property by motor carrier, to promote competitive and efficient transportation services in order to (A) meet the needs of shippers, receivers, and consumers; (B) allow a variety of quality and price options to meet changing market demands and the diverse requirements of the shipping public; (C) allow the most productive use of equipment and energy resources; (D) enable efficient and well-managed carriers to earn adequate profits, attract capital, and maintain fair wages and working conditions; (E) provide and maintain service to small communities and small shippers; (F) improve and maintain a sound, safe, and competitive privately-owned motor carrier system; (G) promote greater par-

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Appendix "A"

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icipation by minorities in the motor carrier system; and (H) promote intermodal transportation.

(b) This subtitle shall be administered and enforced to carry out the policy of this section.

Pub.L. 95-473, Oct. 17, 1978, 92 Stat. 1337; Pub.L. 96-296, § 4, July 1, 1980, 94 Stat. 793; Pub.L. 96-448, Title I, § 101(b), Oct. 14, 1980, 94 Stat. 1898.

Historical and Revision Notes

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
10101	49:1 (note)	Feb. 4, 1887, ch. 104, 24 Stat. 379; added Sept. 18, 1940, ch. 722, § 1 (2d unnumbered par.), 54 Stat. 899.

In the introductory matter before clause (1) of subsection (a), the words "To ensure" are substituted for "all to the end of" for clarity. The words "by water, highway, and rail, as well as other means" are omitted as unnecessary. The words "that meets" are substituted for "adequate to meet" for clarity. The words "transportation needs of the United States" are substituted for "the needs of the commerce of the United States" for clarity. The words "including the" are inserted for clarity. The words "United States Postal Service" are substituted for "Postal Service" to reflect the complete name of the Government agency. The words "It is the policy of the United States Government" are substituted for "It is hereby declared to be the national transportation policy of the Congress" for clarity since the policy has been enacted into law. The words "fair and" are omitted to eliminate redundancy. The words "subject to this subtitle" are substituted for "subject to the provisions of this act" for clarity and to conform to the revised title.

In subsection (a)(2), the words "efficient transportation" are substituted for "efficient service" for clarity and consistency in view of the definition of "transportation" in section 10102 of the revised title.

In subsection (a)(3), the words "encourage sound" are substituted for "foster sound" for clarity. The words "including sound economic conditions among carriers" are substituted for "and among the several carriers" for clarity.

In subsection (a)(4), the word "rates" is substituted for "charges" for clarity and consistency. The words "unreasonable discrimination" are substituted for "unjust discriminations, undue preferences or advantages" for clarity, consistency, and to conform to modern

usage. See the note after the revision note for subsection (b).

In subsection (a)(5), the words "officials of each State" are substituted for "duly authorized official thereof" for clarity.

In subsection (a)(6), the words "in the transportation industry" are inserted for clarity.

In subsection (b), the words "with a view" and "the above declaration" are omitted as unnecessary. The word "subtitle" is substituted for "Act" to conform to the revised title.

Clarification of use of "reasonable" and "discrimination"

Throughout the bill, the term "reasonable" is substituted for "just and reasonable" and "discrimination" is substituted for "preference", "prejudice", "advantage", and "disadvantage" for clarity, consistency, and to conform to modern usage. See *Missouri, Kansas & Texas Railway Co. v. Harriman*, 237 U.S. 657, 1915; *United States v. P. Koenig Coal Co.*, 270 U.S. 512, 1926; *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Railway Co.*, 294 U.S. 370, 1932; *Union Pacific R. Co. v. United States*, 313 U.S. 450, 1941; *Federal Power Commission v. Natural Gas Pipeline Co.*, 315 U.S. 576, 1942; *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 1944; *United States ex rel. Morris v. Delaware, L. & W. R. Co.*, 40 F. 101, Cir.Ct.N.Y., 1889. The change does not affect the substantive law. The words for which the substitutions are made are used inconsistently throughout the Interstate Commerce Act and related laws and are often used in series with other synonymous words. As the editors of the U. S. Code Service point out in an explanatory note to section 2 of title 49:

Explanatory note.—In using the annotations following, it must be borne in mind that the words "unjust dis-

PART I. DEPARTMENT OF TRANSPORTATION ACT

Title 49, United States Code, "Transportation"

Chapter 23.—DEPARTMENT OF TRANSPORTATION [New]

Sec.

1651. Congressional declaration of purpose.

1652. Establishment of Department.

- (a) Designation and appointment of Secretary of Transportation.
- (b) Deputy Secretary; appointment; functions, powers and duties.¹
- (c) Assistant Secretaries; General Counsel; appointment; functions, powers, and duties.
- (d) Assistant Secretary for Administration; appointment; functions, powers, and duties.
- (e) Federal Highway Administration; Federal Railroad Administration; Federal Aviation Administration; establishment; Administrators and Deputy Federal Aviation Administrator; appointment; functions, powers, and duties; transfer of functions.
- (f) National Traffic Safety Bureau; National Highway Safety Bureau; establishment; appointment of Directors; transfer and continuation of office of Federal Highway Administrator under title of Director of Public Roads.

1653. General provisions.

- (a) Responsibilities of Secretary of Transportation; leadership, consultation, and coordination.
- (b) Congressional policy standards for transportation; prohibition against adoption of standards or policy without appropriate Congressional action.
- (c) Judicial review of orders of the Secretary and Administrators.²
- (d) Carryover of authority to Secretary and Administrators from departments and agencies formerly exercising functions and duties.³
- (e) Safety record of applicants seeking operating authority from Interstate Commerce Commission.
- (f) Maintenance and enhancement of natural beauty of land traversed by transportation lines.
- (g) Consultation with Secretary of Housing and Urban Development; annual report to the President for submission to Congress.

1654. National Transportation Safety Board.⁴

¹ Amended by sec. 16(a) of Public Law 93-496, Oct. 28, 1974 (88 Stat. 1533).

² Amended by the Independent Safety Board Act of 1974, sec. 308(2) of Public Law 93-633, Jan. 3, 1975 (88 Stat. 2173).

³ Amended by the Independent Safety Board Act of 1974, sec. 308(3) of Public Law 93-633, Jan. 3, 1975 (88 Stat. 2173).

⁴ Deleted by the Independent Safety Board Act of 1974, sec. 308(1) of Public Law 93-633, Jan. 3, 1975 (88 Stat. 2173).

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Appendix "B"

Chapter 23.—DEPARTMENT OF TRANSPORTATION [New]—Continued

Sec.

1657. Administrative provisions.—Continued

- (i) Lapse of transferred offices and agencies; compensation of executive positions upon continuity of service.
- (j) Administrative services; establishment of capital fund; transactions involving the capital fund.
- (k) Seal of office.
- (l) Authority to provide facilities and services for personnel stationed in remote localities.
- (m) Authority to accept and hold gifts and bequests for purposes of aiding or facilitating the work of the Department.
- (n) Authority to fill requests for statistical compilations covering Department matters on reimbursable basis.
- (o) Advisory committees; appointment, compensation.
- (p) Appointment of Coast Guard personnel on active duty to serve with Department; retired Coast Guard personnel.
- (q) Contracts with private agencies for research; capabilities of research agency; dissemination of resulting data.

1658. Annual reports.

1659. Separability of provisions.

Sec. 1651. Congressional declaration of purpose.

(a) The Congress hereby declares that the general welfare, the economic growth and stability of the Nation and its security require the development of national transportation policies and programs conducive to the provision of fast, safe, efficient, and convenient transportation at the lowest cost consistent therewith and with other national objectives, including the efficient utilization and conservation of the Nation's resources.

(b) (1) The Congress therefore finds that the establishment of a Department of Transportation is necessary in the public interest and to assure the coordinated, effective administration of the transportation programs of the Federal Government; to facilitate the development and improvement of coordinated transportation service, to be provided by private enterprise to the maximum extent feasible; to encourage cooperation of Federal, State, and local governments, carriers, labor, and other interested parties toward the achievement of national transportation objectives; to stimulate technological advances in transportation; to provide general leadership in the identification and solution of transportation problems; and to develop and recommend to the President and the Congress for approval national transportation policies and programs to accomplish these objectives with full and appropriate consideration of the needs of the public, users, carriers, industry, labor, and the national defense.

(2) It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. (Pub. L. 89-670, § 2, Oct. 15, 1966, 80 Stat. 931.)

Declared Policy

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under the title Director of Public Roads. The Director shall be the operating head of the Bureau of Public Roads, or any other agency created within the Department to carry out the primary functions carried out immediately before the effective date of this Act by the Bureau of Public Roads. (Pub. L. 89-670, § 3, Oct. 15, 1966, 80 Stat. 931, amended Pub. L. 90-83, § 10(b), Sept. 11, 1967, 81 Stat. 224.)

Sec. 1653. General provisions.

(a) Responsibilities of Secretary of Transportation; leadership, consultation, and coordination.

The Secretary in carrying out the purposes of this chapter shall, among his responsibilities, exercise leadership under the direction of the President in transportation matters, including those affecting the national defense and those involving national or regional emergencies; provide leadership in the development of national transportation policies and programs, and make recommendations to the President and the Congress for their consideration and implementation; promote and undertake development, collection, and dissemination of technological, statistical, economic, and other information relevant to domestic and international transportation; consult and cooperate with the Secretary of Labor in gathering information regarding the status of labor-management contracts and other labor-management problems and in promoting industrial harmony and stable employment conditions in all modes of transportation; promote and undertake research and development relating to transportation, including noise abatement, with particular attention to aircraft noise; consult with the heads of other Federal departments and agencies on the transportation requirements of the Government, including the procurement of transportation or the operation of their own transport services in order to encourage them to establish and observe policies consistent with the maintenance of a coordinated transportation system; and consult and cooperate with State and local governments, carriers, labor, and other interested parties, including, when appropriate, holding informal public hearings.

(b) Congressional policy standards for transportation; prohibition against adoption of standards or policy without appropriate Congressional action.

(1) In carrying out his duties and responsibilities under this chapter, the Secretary shall be governed by all applicable statutes including the policy standards set forth in the Federal Aviation Act of 1958, as amended; the national transportation policy of the Interstate Commerce Act, as amended; Title 23, relating to Federal-aid highways; and Title 14, titles LII and LIII of the Revised Statutes, the Act of April 25, 1940, as amended, and the Act of September 2, 1958, as amended, relating to the United States Coast Guard.

(2) Nothing in this chapter shall be construed to authorize, without

Handwritten notes: "not in act"

appropriate action by Congress, the adoption, revision, or implementation of—

- (A) any transportation policy, or
- (B) any investment standards or criteria.

(3) In exercising the functions, powers, and duties conferred on and transferred to the Secretary by this chapter, the Secretary shall give full consideration to the need for operational continuity of the functions transferred, to the need for effectiveness and safety in transportation systems, and to the needs of the national defense.

(c) Judicial review of orders of the Secretary and Administrators.

Orders and actions of the Secretary in the exercise of functions, powers, and duties transferred under this chapter, and orders and actions of the Administrators pursuant to the functions, powers, and duties specifically assigned to them by this chapter, shall be subject to judicial review to the same extent and in the same manner as if such orders and actions had been by the department or agency exercising such functions, powers, and duties immediately preceding their transfer. Any statutory requirements relating to notice, hearings, action upon the record, or administrative review that apply to any function transferred by this chapter shall apply to the exercise of such functions by the Secretary or the Administrators.⁷

(d) Carryover of authority to Secretary and Administrators from departments and agencies formerly exercising functions and duties.

In the exercise of the functions, powers, and duties transferred under this chapter, the Secretary and the Administrators shall have the same authority as that vested in the department or agency exercising such functions, powers, and duties immediately preceding their transfer, and their actions in exercising such functions, powers, and duties shall have the same force and effect as when exercised by such department or agency.⁸

(e) Safety record of applicants seeking operating authority from Interstate Commerce Commission.

It shall be the duty of the Secretary—

- (1) to promptly investigate the safety compliance records in the Department of each applicant seeking operating authority from the Interstate Commerce Commission (referred to in this subsection as the "Commission") and to report his findings to the Commission;
- (2) when the safety record of an applicant for permanent operating authority, or for approval of a proposed transaction involving transfer of operating authority, fails to satisfy the Secretary, to intervene and present evidence of such applicant's fitness in Commission proceedings;
- (3) to furnish promptly upon request of the Commission a statement

⁷ Amended by the Independent Safety Board Act of 1974, sec. 308(2) of Public Law 93-633, Jan. 3, 1975 (88 Stat. 2173).

⁸ Amended by the Independent Safety Board Act of 1974, sec. 308(3) of Public Law 93-633, Jan. 3, 1975 (88 Stat. 2173).

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FEDERAL HIGHWAY ADMINISTRATION OFFICE OF MOTOR CARRIERS

A. MISSION

1. To minimize the loss of life, personal injury, and property damage in the conduct of commercial passenger and freight operations by highway.

Determine the most frequent causes of bus/truck accidents and develop counter-measures against them.

Work toward an expanded and more effective State Participation Program in preventable accident rate reductions and prevent Federal and state programs from becoming unrelated revenue activities.

2. To promote and assist the development of the motor carrier industry as an efficient, economically sound, and privately owned national network that can attract that share of the market for freight movement which is commensurate with its inherent economic advantages.

Alleviate inequitable treatment of the motor carriers caused by uneven governmental policy toward the modes, and remove or reduce institutional barriers which impede innovation and improvement in the motor carrier industry.

Encourage increased utilization of fast, efficient, economical, adequate motor carrier movement of intercity freight, including long-haul freight, where their economic advantage has not be fully realized.

Develop, in cooperation with the motor carrier industry and trucking supply industries, the technology necessary to modernize the motor carrier system.

Promote the motor carrier industry to conform more closely with the requirements of today's and tomorrow's transportation markets.

3. To promote and assist the privately owned movement of passengers by highway in providing efficient, improved intercity passenger service in those markets where demand warrants and net public benefits justify the investment.

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Appendix "c"

Determine the appropriate role for highway passenger service in the nation's transportation system, and devise a set of capital and budgetary guidelines that will structure the corporation's planning and operations to be responsive to that role.

Assist in improving the application of technology to intercity truck operation and keep in the hands of the private sector.

4. To facilitate motor carrier transportation's contribution to the nation's goals, including those relating to national security, social and economic needs, energy conservation, and environmental protection.

Ensure that defense needs are adequately considered as FHWA's role in motor carrier system planning and restructuring is carried out.

Recognize the importance of the nation's social and economic goals as an integral part of programs aimed at improving the motor carrier industry.

Promote the energy-efficient potential of motor carrier transportation.

Maintain and improve environmental quality as directly affected by and associated with the motor carrier industry.