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Before the**UNITED STATES DEPARTMENT OF TRANSPORTATION****Federal Motor Carrier Safety Administration**

— Docket No. FMCSA-2001-11060 — 17
Docket No. FMCSA-2001-10886

**Parts 350 and 385: Certification of Safety Auditors,
Safety Investigators, and Safety Inspectors**

and

**Part 393: Parts and Accessories Necessary for Safe Operation;
Certification of Compliance With Federal Motor Vehicle Safety Standards**

COMMENTS OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS

These comments are submitted in responses to the above referenced dockets, published in the Federal Register on March 19, 2002 at 67 Fed. Reg. 12776 and 67 Fed. Reg. 12782. The International Brotherhood of Teamsters (the "IBT") is a labor union whose membership includes hundreds of thousands of truck drivers. The IBT accordingly has a direct and substantial interest in these dockets.

A. Background

On March 19, 2002, the Federal Motor Carrier Safety Administration (FMCSA or the Agency) published five items in the Federal Register relating to the opening of the U.S.-Mexico border to Mexican domiciled motor carriers following a NAFTA Panel report that found the wholesale refusal to process such applications to be contrary to U.S. obligations under the NAFTA. The first item was published in final form, and related to the application of Mexican domiciled motor carriers to operate within the

commercial border zones. The second two items were interim final rules, and related (a) to the safety monitoring of all Mexican domiciled carriers operating in the U.S. and (b) to the application of Mexican domiciled carriers to operate in the U.S. beyond the commercial zones. The IBT filed comments in those dockets on April 18, 2002. Although the rules in those dockets went into effect on an interim final basis on May 3, 2002, final rules in those dockets have not yet been issued.

The final two items published by FMCSA in the March 19, 2002 Federal Register are those addressed herein. The first is an interim final rule which addresses the Certification of Safety Auditors, Safety Investigators, and Safety Inspectors. 67 Fed. Reg. 12776. The second is a proposed rule relating to Parts and Accessories Necessary for Safe Operation; Certification of Compliance With Federal Motor Vehicle Safety Standards (FMVSSs). 67 Fed. Reg. 12776. We will address each in turn.

B. Certification of Safety Auditors, Safety Investigators, and Safety Inspectors; Final Rule.

Section 211 of the Motor Carrier Safety Improvement Act of 1999 (MCSIA or the Act) amended Chapter 311 of Title 49, United States Code, to require the Department of Transportation to “complete a rulemaking to improve training and provide for the certification of motor carrier safety auditors, including private contractors, to conduct safety inspection audits and reviews . . . required by or based on the authority of [chapter 311], or chapter 5, 313 or 315 of [Title 49].” Pub. Law. 106-159 at § 211 (Dec. 9, 1999). The rulemaking was to be completed no later than December 9, 2000, except that if necessary, the Secretary could request a one year extension of the deadline. The statutory deadline was not complied with and Congress again in 2001 directed the Department of Transportation to publish interim final regulations “that implement measures to improve training and provide for the certification of motor

carrier safety auditors.” Pub. Law 107-87 at § 350(a)(10)(B) (Dec. 18, 2001). The latter Congressional direction was included as part of the Murray-Shelby legislation which prohibits DOT from using appropriated funds to process Mexican motor carrier applications for authority to operate beyond the commercial zones until various conditions and requirements are met.

The Interim Final Rules published in docket number 11060 (hereinafter “the Training and Certification Rules”) seek to respond to the above Congressional mandates. They do not, however, entirely comply with either the intent or clear wording of the law.

1. *Training requirements must be addressed and improved in the rulemaking.*

First, while the rulemaking does address certification of auditors, it does not in any way “improve training” as explicitly required by both statutes. Indeed, training requirements are not even addressed in the Training and Certification Rules. Rather the Rules simply include a reference to “detailed” training requirements maintained on the FMCSA website. *See* § 385.203(a), 67 Fed. Reg. 12779. The preamble explains that it was necessary to forgo notice and comment on the specific requirements because the Agency wishes to retain the ability to alter the requirements in the future without having to again comply with notice and comment procedures. Specifically, the Agency wants flexibility to modify course content to conform to changes in the Federal Motor Carrier Safety Regulations (FMCSR) or in the Hazardous Materials Regulations (HMR) should those rules change in the future. *See* 67 Fed. Reg. 12777. The IBT does not, however, expect substantive course content to be codified.¹ What it does expect, and what the law requires, is that the procedural requirements for

¹ The FMCSA’s rationale is also belied by the fact that the training requirements published on its website do not, in fact, address substantive course content.

training and certification be established via a rulemaking subject to notice and comment procedures. The Agency has failed to explain why this could not be done.

Even if the training procedures had to be changed to conform to changes in the law or other changed circumstance, the FMCSA has failed to explain why this could not be accomplished in a timely fashion. If changes are made to the HMR or FMCSR, this would need to be accomplished via a rulemaking. Commensurate changes could be made to the training requirements via the same or a related rulemaking. If the Agency believes unforeseen circumstances could create the need for additional or specialized training on an emergency basis, the regulations could include a contingency for the temporary provision of such additional or specialized training if determined necessary by the Secretary. What the FMCSA cannot do, however, is simply refuse to set minimum requirements. A mere desire for “flexibility” does not exempt an agency from the requirements of the Administrative Procedure Act or from enacting statutorily required rules.

The requirement that the criteria should be subject to notice and comment is reinforced by the fact that the criteria proposed by FMCSA on its website are not sufficient. In this regard, the proposed requirements are not as comprehensive as existing CVSA criteria. For example, the FMCSA requirements do not contain any testing or practical training prior to certification. Also, unlike the CVSA standards, the FMCSA requirements have no set mandatory minimum refresher training as a maintenance requirement. Rather inspectors must only attend training if it is required. The FMCSA should use the CVSA criteria as a model and make an effort to establish commensurate requirements.

The purpose of § 211 of the MCSIA was to improve training. Yet the preamble to the Training and Certification Rules indicates repeatedly that this is not the case.

The FMCSA states that state and federal officials will be certified if they have completed certain training programs and that:

These training requirements have been in effect for a number of years, and the rule imposes *no new burdens* on such officials. The rule also creates a new kind of review—the “safety audit”—and a corresponding certification, but the training required to be certified as a safety auditor is simply a *less comprehensive* version of that required to conduct compliance reviews and driver/vehicle roadside inspections.

67 Fed. Reg. 12777 (emphasis added). Later in the preamble the FMCSA again states that:

The agency believes that the training required for initial certification of new Federal or State employees assigned to conduct safety activities will be similar to the training that these individuals currently undergo. While there may be some additional training material developed and taught due to regulatory or program changes, it is unlikely that there will be any measurable increase in the amount of time trainees must spend in class. Any extra material would most likely be offset by reduction in the amount of time spent on topics that require less classroom instruction to master the concepts.

67 Fed. Reg. 12778. Moreover, in case there is any question, the FMCSA makes clear that it has not previously improved training requirements in compliance with the MCSIA when it indicates its intent to grandfather employees trained up until June 17, 2002, on the grounds that those employees “received the kind of training” as those trained on or before December 9, 1999. *See* 67 Fed. Reg. 12776.

Given that the FMCSA admittedly has not, and is not now materially altering training requirements (except to the extent it has developed less comprehensive training for auditors), it clearly has not improved training in accordance with the mandates of the MCSIA and the Murray-Shelby legislation. By law this must be done before the border can be opened.

2. *The grandfather provision is contrary to law.*

The MCSIA included a grandfather provision exempting state and federal employees who were qualified to conduct an audit or review as of December 9, 1999.

The FMCSA has, however, extended the grandfather clause to cover employees qualified to conduct audits or reviews as of the effective date of the regulations (i.e., June 17, 2002). In other words, the FMCSA has extended the grandfather clause an additional 2½ years. There is no legal authority for this unilateral extension.

Although the Agency claims that the intent of the Act is met by grandfathering employees trained prior to the effective date of the regulations, that is manifestly not the case. The plain language of the MCSIA only grandfathers those employees trained prior to enactment of the Act. Had Congress intended to extend the grandfather rights to employees trained up until the effective date of the regulations, it could easily have done so.

While the Agency claims that it would be unduly burdensome to retrain all the inspectors, investigators, and auditors that have been trained since enactment of the MCSIA, it has no one to blame but itself. The Agency was well aware of the statutory requirement to enact improved training and certification requirements, as well as the deadline for doing so, but simply failed to act. To avoid complying with a statutory requirement based on its failure to comply in a timely manner is entirely improper.

3. *Private Inspectors*

The FMCSA requested comment on “the advisability of certifying non-government employees that meet all training and experience criteria to conduct safety [audits].” The reason for this request is somewhat unclear as the MCSIA explicitly requires the regulations to provide for certification of private contractors. § 211(a). It did not provide for the Agency to consider certifying such auditors. Thus, the Training and Certification Rules correctly provide for such certification. The final rules should, however, make clear that private contractors may not conduct compliance reviews or

engage in any other inspection activities that involve the issuance of ratings or the grant of operating authority as per the limitations set forth in MSCIA § 211(a).

C. Parts and Accessories Necessary for Safe Operation; Certification of Compliance With Federal Motor Vehicle Safety Standards (FMVSSs); Proposed Rule

The final FMCSA rulemaking published on March 19, 2002 relates to the three companion rulemakings issued by the National Highway and Traffic Safety Administration (NHTSA) in the same Federal Register.² In those rulemakings, NHTSA codifies its longstanding policy that foreign domiciled commercial motor vehicles operating in the U.S. are considered “imports” and, therefore, must comply with U.S. Federal Motor Vehicle Safety Standards (FMVSSs). The IBT agrees with NHTSA’s definition of import. The NHTSA requirements are oriented toward manufacturers, while FMCSA is generally the agency responsible for enforcing standards with respect to vehicles actually operating on U.S. highways. The FMCSA has thus issued this proposed rule requiring all CMVs operating in the U.S. to display a manufacturer certification of compliance with the FMVSSs to complement the NHTSA regulations and aid in their enforcement. The IBT fully supports FMCSA’s efforts in this regard, and only suggests minor changes to the substance of the proposed rule, as discussed further below.

From a procedural standpoint, however, the IBT is concerned about the timing for implementation. If the border is opened before the manufacturer certification requirements are made effective, there will be no way to ensure that trucks entering the U.S. were manufactured in accordance with the FMVSSs. Although the application form for operating authority contains a self certification regarding

² The IBT is filing separate comments with NHTSA with regard to those rulemaking proceedings.

compliance with the FMVSSs, without the certification label requirement there is no way to verify compliance. Further, the Agency has proposed that vehicles operated in the United States by Canadian or Mexican based carriers prior to the effective date of the rule be given a 24 month grace period to bring their vehicles into compliance with this rule. We understand that with regard to Mexican trucks, the grace period is intended to apply primarily to those trucks that have operated exclusively in the commercial border zones since, with few exceptions, those are the only Mexican trucks that have been permitted to operate in the U.S. However, if the border is opened and Mexican domiciled trucks begin operating beyond the border zones before the effective date of the rule, the grace period will also be extended to those trucks. This would have the unintended consequence of exempting any number of Mexican domiciled carriers operating throughout the U.S. from certifying compliance with the FMVSSs for a potentially extended period of time (i.e., from the border opening until two years after the effective date of the regulations). For these reasons, the border must remain closed until the FMCSA and NHTSA rulemakings are complete and compliance with manufacturing safety standards for all Mexican trucks operating beyond the commercial border zones can be ensured.

As indicated above, the IBT is supportive of the proposed rule and only recommends a few minor changes. First, the IBT believes the “grace period” for carriers already operating in the U.S. should be shortened. There is no reason to believe a manufacturer would take two years to determine whether a vehicle could be retroactively certified in accordance with the NHTSA rules. Nor is there any reason to believe it would take that long for carriers to lease or purchase new vehicles that are properly certified. The grace period, therefore, simply allows carriers additional time to seek to have these things done. We see no reason why carriers already operating on

our roads and already potentially creating unacceptable safety risks, should be allowed such extra time. The IBT, therefore, believes that the time for allowing certification should be reduced to a more reasonable period of 12 months. This should allow plenty of time for the carriers to either retroactively certify their current fleet or arrange for substitute vehicles without major disruption to their operations.

In addition, although we understand that it is the FMCSA's intention that the grace period only apply to Mexican domiciled carriers that have operated in the commercial border zones and will continue to do so (i.e., carriers currently operating in the commercial border zone that apply for authority to operate beyond the zone will lose the exemption), that intent is not made clear in the actual language of proposed section 393.8(c). We suggest that the rule be clarified in this regard.

Also, we note that the rule should be revised to allow a grace period for U.S. carriers operating vehicles that properly displayed certification labels at one time, to replace any labels that have been lost, damaged, or destroyed.

The IBT suggests that the following language be substituted for proposed section 393.8(c) in order to clarify and correct these issues:

(c) Additional Time for Compliance for Certain Vehicles.

(1) Any U.S. domiciled carrier that has one or more commercial motor vehicles in its fleet that (i) operated on U.S. highways on or before [effective date of the final rule] and (ii) properly displayed a manufacturer certification label at the time of purchase or import, but such label has since been lost, damaged, or destroyed, shall have until [date 12 months after effective date of the final rule] to replace such certification labels. Any commercial motor vehicle purchased, leased, imported, or otherwise entered into the carrier's fleet subsequent to [effective date of the final rule] is not entitled to the additional time for compliance set forth in this paragraph.

(2) Any Canadian domiciled carrier that has operated commercial motor vehicles in the U.S. pursuant to valid operating authority on or before [effective date of the final rule] has until [date 12 months after effective date of final rule], to ensure that all such vehicles properly display a valid certification label. Any vehicle that is purchased, leased, or otherwise entered into the carrier's fleet, or that is first employed in the carrier's U.S. operations subsequent to [effective

date of final rule], is not entitled to the additional time for compliance set forth in this paragraph.

(3) Any Mexican domiciled carrier that has operated commercial motor vehicles in the U.S. commercial border zones pursuant to valid operating authority on or before [effective date of final rule] has until [date 12 months after effective date of final rule] to ensure that all such vehicles properly display a valid certification label. Any vehicle that is purchased, leased or otherwise entered into the carrier's fleet, or that is first employed in the carrier's U.S. operations subsequent to [effective date of final rule], is not entitled to the additional time for compliance set forth in this paragraph. If a Mexican domiciled carrier that would otherwise be entitled to additional time for compliance because it operated in the U.S. commercial border zones prior to [effective date of final rule], applies for and obtains authority to operate beyond the commercial border zones, such carrier will not be entitled to the additional time set forth in this paragraph, but must instead ensure that all of its vehicles (including those operated in the commercial border zones) display valid certification labels before entering the United States as of the date the new authority is granted.

D. Conclusion

The IBT requests that the proposed and interim final rules be amended as set forth above. We also ask that the border opening be delayed until the rules are finalized and comply with the law.

Respectfully submitted,



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