

**GUIDELINES FOR TERMINATION OF
DEMONSTRATION PROJECT ON MEXICAN TRUCKS**

Under the Bush Administration, FMCSA implemented a so-called “Demonstration Project” to evaluate the feasibility of allowing Mexican-based motor carriers to operate within the United States beyond the border area. As part of its Demonstration Project, FMCSA accepted compliance by Mexican motor carriers and drivers with Mexican laws and regulations governing CDL’s, driver medical qualification standards and driver drug testing procedures in lieu of compliance with corresponding U.S. laws and regulations.¹ This paper addresses obligations of the United States under the North American Free Trade Agreement (NAFTA) respecting cross-border trade in transportation services and outlines a framework for going forward in a manner that is faithful to the proper application of U.S. statutes and regulations to participants in such cross-border trade. We show that affording special treatment under the Demonstration Project is not required by our national treatment obligations under NAFTA and conflicts with FMCSA’s authority under 49 U.S.C. § 13902(a)(1), (4) and (c).

The obligation of signatories to NAFTA with respect to cross-border trade in transportation services is set forth in Article 1202(1) which provides:

“each Party shall accord to service providers of another Party treatment no less favorable than it accords, in like circumstances, to its own service providers”

This provision establishes an obligation on the part of signatories to NAFTA to accord other signatories “national treatment.” This means that the United States is only obliged to treat foreign motor carriers and drivers the same as it treats U.S.-based motor carriers and drivers – no better, no worse.

¹ 72 Fed.Reg. 31, 877, 31884 (June 8, 2007).

On February 6, 2001, an International Arbitral Panel (established pursuant to NAFTA Chapter 20) found unanimously that:

“the U.S. blanket refusal to review and consider for approval any Mexican-owned carrier applications for authority to provide cross-border trucking services was and remains a breach of the U.S. obligations under Annex I . . . Article 1202 (national treatment for cross-border services), and Article 1203 (most-favored-nations treatment for cross border services) of NAFTA.”²

The International Arbitral Panel was careful to note that it was making no determination that “the parties to NAFTA may not set the level of protection that they consider appropriate in pursuit of legitimate regulatory objectives.”³

The International Arbitral Panel’s decision is in complete accord with FMCSA’s statutory obligations under 49 U.S.C. § 13902(a) which requires the Secretary to treat all applicants for motor carrier operating authority alike. 49 U.S.C. § 13902(a)(4) is quite specific with respect to how the Secretary must deal with an applicant for operating authority who is unwilling or unable to meet all statutory and regulatory requirements.

Withholding – If the Secretary determines that a registrant under this section does not meet, or is not able to meet, any requirement of paragraph (1) . . . the Secretary shall withhold registration.

Indeed, if there were any doubt about the Secretary’s authority to act with respect to foreign-based motor carriers, that doubt was resolved in 49 U.S.C. § 13902(c)(8) which provides:

Limitation of statutory construction – This subsection shall not be construed as affecting the requirement for all *foreign motor carriers* and foreign motor private carriers operating in the United States *to comply with all applicable laws and regulations* pertaining to fitness, safety of operations, financial responsibility, and taxes imposed by section 4481 of the Internal Revenue Code of 1986.

² *In the Matter of Cross Border Trucking Services*, See File No USA-MEX-98-2008-01 (NAFTA Arbitration Panel Feb. 6, 2001) at 90, ¶ 295.

³ *Id.* at 90, ¶ 298.

Curiously, the Bush Administration’s Solicitor General specifically renounced any authority on the part of FMCSA to alter the terms and conditions of entry of Mexican motor carriers. In arguing the case of *DOT v. Public Citizen*, 541 U.S. 752 (2004), before the U.S. Supreme Court, the Solicitor General of the United States took the position that “Congress did not empower FMCSA to change the fundamental conditions for entry”⁴ of Mexican motor carriers and that “FMCSA had not claimed any power to determine whether or under what conditions Mexican carriers should be allowed to operate in the United States.”⁵ By proposing to exempt foreign-based drivers and motor carriers from the requirements of U.S. statutes and regulations, FMCSA exercises in its Demonstration Project the precise power that it renounced before the Supreme Court in *DOT v. Public Citizen*.

There are a number of legal flaws with the way that the Bush Administration implemented its Demonstration Project. The legal implications of those flaws are currently being litigated before the U.S. Court of Appeals for the 9th Circuit.⁶ However the 9th Circuit views the Bush Administration’s Demonstration Project, it is time to look forward to new policies and programs that will insure that all commercial vehicles on our nation’s highways follow the same high standard of safety that we impose on U.S.-based motor carriers and drivers.

Past approaches to the problem of allowing Mexican-based motor carriers and drivers to operate within the United States have been problematical. On the one hand, a blanket refusal to entertain applications for operating authority by Mexican-based motor carriers was found by the International Arbitral Panel to violate our national treatment obligations under NAFTA. On the other hand, the Bush Administration’s decision to grant special treatment to Mexican-based

⁴ Reply Brief for Petitioners at 5.

⁵ *Id.* at 3

⁶ *Owner-Operator Independent Drivers Association v. U.S. Department of Transportation*, United States Court of Appeals for the 9th Circuit Case No. 07-73987 (appeal pending).

motor carriers by accepting compliance with Mexican laws and regulations in lieu of U.S. laws and regulations conflicts with controlling U.S. statutory law that requires all applicants for operating authority to be willing and able to obey all U.S. laws and regulations.

FMCSA relies upon a 1991 memorandum on understanding (MOU) with Mexico⁷ finding that Mexican and U.S. standards for CDL's were comparable at that time as a basis for concluding that it must accept those same CDL's today.⁸ FMCSA's position is simply unsustainable. Subsequent to the 1991 MOU, Congress has enacted numerous laws that have raised the standards for licensing, qualification and certification (health and drug testing) of commercial truck drivers. For example, 49 U.S.C. § 31302 now states unequivocally:

No individual shall operate a commercial motor vehicle without a valid driver's license issued in accordance with Section 31308.

Such later-enacted statutes trump the prior MOU. Where Congress unambiguously passes legislation that conflicts with an earlier international agreement, the latter Congressional action controls.⁹ Since Congress has the authority to “regulate Commerce with foreign nations, ‘[it]’ can denounce treaties if it sees fit to do so, and there is nothing the other branches of government can do about it.”¹⁰ Congress in effect renounced previously entered reciprocity agreements when it enacted mandatory provisions respecting requirements for CDL's as well as standards for medical examiners who certify the fitness of individuals to operate commercial motor vehicles within the United States. 49 U.S.C. §§ 31144, 31149.

⁷ See 57 Fed.Reg. 31454, 31455 (July 16, 1992).

⁸ National Registry of Certified Medical Examiners, NPRM, 73 Fed.Reg. 73129, 73131 (Dec. 1, 2008), FMCSA Docket No. 2008-0363.

⁹ *South African Airways v. Dole*, 817 F.2d 119, 126 (D.C. Cir. 1987).

¹⁰ *Id.* (citing *Diggs v. Shultz*, 470 F.2d 461, 466 (D.C. Cir. 1972)). See also *Reid v. Covert*, 354 U.S. 1, 18 (1957); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (“By the constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation . . . [I]f the two are inconsistent, the one last in date will control the other. . . .”).

U.S. laws and regulations governing truck safety represent the gold standard in this area and are light years ahead of corresponding laws and regulations followed elsewhere.¹¹ Under NAFTA, FMCSA must entertain applications for operating authority while under Section 13902(a) it must decline to issue authority to motor carriers unable to comply with our safety standards. While this would potentially delay a significant presence by Mexican trucks on our highways until it catches up with our standards, it would be faithful to current U.S. statutory requirements and completely consistent with our NAFTA obligations. From a policy perspective, it would avoid the untenable situation where one group of commercial truck drivers operates on our highways following the Gold Standard established under FMCSA's current regulations while another group of drivers follows a lesser standard.

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¹¹ A summary of recently enacted safety statutes which we refer to as the "Gold Standard" is attached.

The Gold Standard
Post 1992 Statutes and Regulations
Commercial Drivers License

49 U.S.C. § 31306	Commercial motor carrier, motor vehicle and driver information systems.
49 U.S.C. § 31308	Commercial Driver's License (requirement to promulgate rules meeting specific minimum standards)
49 U.S.C. § 31309	Commercial Driver's License Information System (requirements on state sharing of CDL information)
49 U.S.C. § 31302	Commercial Driver's License Requirement (requirement on individual to have a CDL as a condition on driving.
49 U.S.C. § 31305	General driver fitness and testing
49 CFR 383	Commercial Driver's License Standards; Requirements and Penalties.
49 CFR 384	State Compliance with Commercial Driver's License Program
72 FR 73225	Additional Proposed Comprehensive Driver Training Rules Pending published December 26, 2007

The Gold Standard
Post 1992 Statutes and Regulations
Drug and Alcohol Testing

49 U.S.C. § 31306	Alcohol and controlled substances testing
49 U.S.C. § 31310	Disqualification
49 CFR 40	Procedures for Transportation Workplace Drug and Alcohol Testing
49 CFR 382	Controlled Substances and Alcohol Use and Testing

The Gold Standard
Post 1992 Statutes and Regulations
Medical Qualification

49 U.S.C. § 31136	United States Government Regulations (a) Minimum Safety Standards (3) the physical condition of operations of commercial motor vehicles is adequate...
49 U.S.C. § 31149	Medical Program
49 CFR 391 Subpart E	Physical Qualifications and Examinations