

**BEFORE THE
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION
UNITED STATES DEPARTMENT OF TRANSPORTATION**

**COMMENTS OF
THE OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC.**

**IN RESPONSE TO
A NOTICE,
REQUEST FOR PUBLIC COMMENT**

[FMCSA Docket No. FMCSA-2007-28055]

**Demonstration Project on NAFTA Trucking Provisions
Pre-Authority Safety Audit Data Published October 17, 2007**

**JAMES JOHNSTON
President
Owner-Operator Independent
Drivers Association, Inc**

**PAUL D. CULLEN, JR
The Cullen Law Firm PLLC
1101-30th Street, N.W. #300
Washington, DC 20007**

November 1, 2007

BEFORE THE
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION

I. INTRODUCTION

A. Procedural Statement

These comments are submitted by the Owner-Operator Independent Drivers Association, Inc. (“OOIDA” or “Association”) in response to the Notice and Request for Public Comment under Docket No. FMCSA-2007-28055, published by the Federal Motor Carrier Safety Administration (“FMCSA” or “Agency”), in the Federal Register on October 17, 2007,¹ concerning the publication of data from the Pre-Authority Safety Audits of several Mexico-domiciled motor carriers.

B. The Interest of the Owner-Operator Independent Drivers Association, Inc

The Owner-Operator Independent Drivers Association, Inc. is a not-for-profit corporation incorporated in 1973 under the laws of the State of Missouri, with its principal place of business in Grain Valley, Missouri. OOIDA is the largest international trade association representing the interests of independent owner-operators, small business motor carriers and professional drivers. The more than 157,000 members of OOIDA are professional drivers and small business men and women located in all 50 states and Canada who collectively own and operate more than 240,000 individual heavy-duty trucks and small truck fleets. One-truck motor carriers represent nearly half the total number of active motor carriers operating in the United States while

¹ 72 Fed Reg. 58929

approximately 96 percent of active motor carriers operate 20 or fewer trucks. The address of the Association is:

Owner-Operator Independent Drivers Association, Inc.
P.O. Box 1000
1 NW OOIDA Drive
Grain Valley, Missouri 64029
www.oida.com

The Association actively promotes the views of small business truckers and professional drivers through its interaction with state and federal government agencies, legislatures, the courts, other trade associations, and private businesses to advance an equitable and safe environment for commercial drivers. OOIDA is active in all aspects of highway safety and transportation policy, and represents the position of small business truckers and professional drivers on numerous committees and in various forums on the local, state, national, and international levels.

Allowing Mexico-domiciled motor carriers and drivers to operate beyond the commercial zones along the U.S.-Mexico border, even under a limited demonstration project or pilot program, will have a significant impact on the safety and security of the American public, as well as the safety, security and the economic well being of U.S.-domiciled small business truckers and commercial drivers, including members of OOIDA. The publication of Pre-Authority Safety Audit (“PASA”) data is potentially one method for the public to be informed of the process being used by FMCSA to approve Mexico-domiciled motor carriers for operation beyond the border areas of Mexico and the United States.

II. SUMMARY

OOIDA continues to maintain its position in the ongoing litigation in the U.S. Court of Appeals for the 9th Circuit that the United States' obligation under NAFTA is to afford Mexico-domiciled motor carriers and drivers with "national treatment." This means no less than permitting carriers and drivers from Mexico to operate in the United States in compliance with all U.S. laws. The U.S. is not obligated under NAFTA to provide Mexican motor carriers and drivers with exemptions to the rules. Nor does FMCSA have any authority under 49 U.S.C. §13902 to grant authority to any motor carrier that is not willing and able to comply with each U.S. motor carrier law and regulation. Pending the outcome of the litigation, however, these comments are focused on FMCSA's disclosure that several Mexico-domiciled motor carriers have passed a Pre-Authorization Safety Audit ("PASA").

FMCSA has published so little data concerning its PASA activities that the public has been denied any meaningful opportunity to review and comment on the findings of the agency. The inspection records that are public do not support a finding that the Mexico-domiciled motor carriers listed in the Notice are prepared to comply with either the U.S. motor carrier safety rules or the Mexican safety rules that FMCSA believes are equivalent to U.S. rules. OOIDA requests that the agency disclose the data it relied upon during each PASA, the way that such data was scored, and how that score factored into determining that each motor carrier passed its PASA. OOIDA also asks FMCSA to explain how certain carriers passed their PASA in light of the negative data that is available for public inspection.

Without the disclosure of substantive motor carrier data information in the Notice, OOIDA sought information elsewhere, namely online FMCSA records of inspections performed on trucks and drivers of the subject motor carriers operating within the 25-mile border zone of the United States. In some cases, OOIDA found that the drivers and vehicles of motor carriers who, according to the Notice, “passed” their PASA, had been found in violation of the safety rules dozens and dozens of times in just the last few months. Other carriers, whose records are less numerous, had been found in violation of critical and acute safety violations. To make the docket a more complete record of particular motor carriers, OOIDA will separately submit this data as a supplement to its comments.

III. COMMENTS OF THE ASSOCIATION

A. PASA Requirements

The requirements for PASAs originated in Section 350 of Public Law 107-87, the fiscal year 2002 DOT appropriations law. That section requires Mexico-domiciled motor carriers to undergo a safety examination as a condition for receiving conditional operating authority to operate throughout the United States. That safety examination must include, among other things:

(I) verification of available performance data and safety management programs;

* * *

(v) a review of available data concerning that motor carrier's safety history, and other information necessary to determine the carrier's preparedness to comply with Federal Motor Carrier Safety rules and regulations and Hazardous Materials rules and regulations;

In the October 17th Notice, FMCSA cites to its review of six regulatory factors that are intended “to evaluate the adequacy of a carrier’s management controls.” Factor 4 describes, as within the scope of the review, “vehicle inspection and out-of-service data for the past 12 months.” Interestingly, the 12 month scope of review is less thorough than the 30 month scope of review performed of U.S. carriers. Wouldn’t this more narrow review of Mexican carriers’ record be less than equivalent to the standards applied on U.S. carriers?

The safety audit is also required to include a review of a motor carrier’s compliance with certain “acute” and “critical” regulations as outlined in 49 CFR Part 365, Subpart E, Appendix A. Subsection IV describes a scoring system for assigning points for certain percentages of out-of-service orders and for certain numbers of acute and critical safety violations. The types of violations considered acute or critical are listed in Title 49, Part 385, Appendix B.

FMCSA has stated that it accepts Mexican CDLs, driver qualification, and drug testing requirements as equivalent to U.S. requirements. If those rules are truly equivalent, then, just as the U.S. rules require, the Mexican rules must also require that motor carriers maintain records and data concerning their compliance with those rules. Such records would be used to determine whether the motor carrier is in compliance with most of the critical and acute regulations listed in Part 385, Appendix B. These include, for example, “[f]ailing to maintain inquiries into driver’s driving record in driver’s qualification file,”² “[u]sing a driver not medically examined and certified during the

² 49 CFR § 391.51(b)(2)

preceding 24 months,”³; and, “[u]sing a driver known to have used a controlled substance.”⁴ There is no evidence that U.S. inspectors had access to, or relied upon, any such data or records.

On September 6, 2007, the DOT Inspector General reported that the data related to inspection of Mexican carriers or drivers was not available to inspectors:

*While the FMCSA officials conducting the PASA took steps to verify the on-site data, we noted that certain information was not available to them. Specifically, information pertaining to vehicle inspections, accident reports, and driver violations maintained by Mexican authorities was not available to FMCSA unless such information was included in company records. An FMCSA official stated that either such information was not available from the Mexican authorities or the databases containing such information were still under development.*⁵

The Inspector General’s report also pointed out that during a one month test, 16 percent of license checks on Mexican CDL holders returned a "not found" response through a database query. FMCSA’s response was to minimize the actual severity of this issue by blaming data-entry errors. Whatever the reason, the incompleteness of data concerning the performance of these motor carriers and their drivers is a major obstacle to fully assessing a motor carrier’s safety experience. Without a more complete record of these motor carriers’ performance, how could FMCSA inspectors have performed all the necessary components of a PASA under Part 365?

³ 49 CFR § 391.45(b)(1)

⁴ 49 CFR § 382.213(b)

⁵ Issues Pertaining to the Proposed NAFTA Cross-Border Trucking Demonstration Project." OIG Report Number MH-2007-065, September 6, 2007 (emphasis added)

D. The Limited Data Available to PASA Inspectors

Without evidence that PASA inspectors had access to any Mexican safety data, they could only have relied upon data collected in the United States. Most of the Mexico-domiciled motor carriers listed in the October 17th Notice have a history of operating within the border zone area of the United States. Therefore, many of their trucks, trailers, and drivers have undergone U.S. inspections. Data from those inspections should be uploaded into the Motor Carrier Management Information System (“MCMIS”). States are also required to submit driver-related violations to the 52nd-State database.

In the SafeStat data, each of these inspections recorded indicates that it was either conducted by “US” or “TX” “NM” or “CA “ There is no evidence that the inspections reported in SafeStat include those performed by state enforcement officials in Arizona.

Not only does the SafeStat inspection data appear to be limited to inspections carried out by only some of the border state officials, but the DOT Inspector General has raised concerns over the completeness of the data in the 52nd-State database of driver violations. At a hearing before the United States Senate this year the IG stated:

We have found reporting problems and other inconsistencies with this system at the four border states. In one example, data reported by Texas showed a steep decline in traffic convictions between January and May of 2006. When we brought this to FMCSA's attention, it turned out that Texas had stopped reporting these data. After developing an action plan with FMCSA, Texas subsequently eliminated a backlog of some 40,000 Mexican commercial traffic convictions.⁶

⁶ Testimony of Calvin Scovel, Inspector General of Department of Transportation, before the Senate Committee on Appropriations, Subcommittee on Transportation, Housing and Urban Development and Related Agencies, March 8, 2007.

The IG's statement illustrates that the data available in U.S. databases concerning the operations of Mexico-domiciled motor carriers appears to capture only a fraction of their safety record in the United States and an even smaller fraction of their total operation (in both the U.S. and Mexico). What percentage of the motor carrier's miles were driven in the United States as compared to Mexico? If the data for inspections conducted in the U.S. is the only data available to inspectors, should it be used to project the safety record of the carrier's entire operation? Reliance on data that represents only a portion of the carrier's total operations would not result in a reliable PASA score – especially when points are scored for raw numbers of violations, as described in Title 49, Part 366, Subpart E, Appendix A, (III)(I). Even using data available in MCMIS, such an analysis does not result in a complete or accurate assessment of the motor carrier's management and safety practices. One Mexico-domiciled motor carrier, Tranportes Selg SA DE CV, was listed as “inactive” on the SafeStat web site. What information, if any, could FMCSA have reviewed for the PASA?

Motor carriers are required to maintain files of their drivers driving records, and a review of such files is part of the PASA. Did the PASA inspectors find that these motor carriers maintained such files? Did these files include their driver's violations in the U.S.? Did they check U.S. data on those drivers? If so, how was it scored in the PASA? Would the PASA scores have been different had the states reliably submitted data as is intended by 52nd State database? Does the MCMIS database suffer from the same state reporting problems as the 52nd-State database?

FMCSA has consistently stated that the safety performance of Mexican motor carriers is better than that of U.S. motor carriers. With data that is, at best, incomplete, OOIDA strongly challenges the validity of this claim.

E. The Available Data On Carriers Who Passed a PASA

The only information disclosed in the Notice is whether Mexico-domiciled motor carriers “passed” certain categories reviewed as a part of a PASA. Because FMCSA did not disclose the data it relied upon to perform the PASA, OOIDA looked at the SafeStat data available concerning the motor carriers listed in the Notice. This data raises many questions as to how certain motor carriers passed their PASA.

1. Critical and Acute Regulations

For those critical and acute regulations that can be discovered during border or roadside inspections in the United States, SafeStat data reveals many instances of critical violations by drivers of Mexico-domiciled motor carriers. These include 49 CFR § 383.23(a) “Operating a commercial motor vehicle without a valid commercial driver’s license...” and 49 CFR § 392.2 “Operating a motor vehicle not in accordance with the laws, ordinances, and regulations of the jurisdiction in which it is being operated...” These violations are frequently cited in the inspections available in SafeStat. This Notice does not disclose whether and how these records of violations were used to score motor carriers during their PASAs and what score each motor carrier received.

2. Out of Service Violations

SafeStat inspection records also reveal that these carriers have received many out-of-service orders. These include failing to repair or maintain parts and accessories, inoperable required lamps, brake hose/tubing chaffing and/or kinking, and brakes out of adjustment. Many inspection records show violations that trigger an out-of-service

orders, but that no such out-of-service order was issued. For example, in just one inspection of a Trinity Industries truck on June 4, 2007, it was cited for:

- * 11- No/defective lighting devices/projected,
- * 2 -No/improper mounting of clearance lights,
- * 1- Brake hose/tubing chaffing and/or kinking, tire-cut exposing ply and/or belt material,
- * 1- inadequate floor condition
- * 2- inspection/repair and maintenance parts and accessories.

Despite these violations, this trailer was, inexplicably, not put out of service.

Numerous inspections of Trinity trailers indicate torsion bars cracked and/or broken, frames cracked/loose/sagging or broken, and inadequate brakes for safe stopping. For many of those violations, no out-of-service orders were issued.

One of the violations regularly cited to among the violations listed in SafetStat is the failure of the driver to speak English as required of 49 CFR Part 391.11 (b)(2). Under the Commercial Vehicle Safety Alliance's Out-of-Service Criteria, a violation of this rule merits an out-of-service order. In the last four months of available data, Trinity Industries was cited for 25 violations of using a driver who does not speak English.

OOIDA is also aware that California has never enforced this language requirement. Given the extensive use of California highways by Mexican motor carriers, how different would the inspection record of these carriers be if this rule had been enforced by California?

FMCSA has a record of 604 inspections of Trinity's trucks and drivers in the 12 months preceding September 21, 2007. In those inspections, Trinity was cited for 1,120 violations of the FMCSRs. Of those, 74 inspections resulted in an out-of-service order being issued. From OOIDA's review, it appears that many serious violations were found on Trinity's trucks, trailers and drivers that would merit an OOS order, but that no order

was issued. Having operated 10 trucks in the United States, each Trinity truck has been cited for an average of 112 violations in the last year.

Did FMCSA inspectors review these violations during the PASAs? Were the inspections scored as if the driver had been ordered out-of-service, when he or she should have been? If not, then why not? Would the final PASA scores of the motor carrier have changed if they had received the appropriate out of service orders? With this inspection record, on what basis could FMCSA have found Trinity to have the basic safety management controls necessary to pass a PASA?

3. Patterns of Vehicle Violations

The inspection records on SafeStat also reveal motor carriers with patterns of vehicle and driver safety violations that demonstrate a lack of basic safety management controls. It is an acute violation to fail “to promptly maintain or repair equipment not meeting minimum periodic inspection standards.”⁷ Inspections of the vehicles of motor carrier Avomex Internacional SA DE CV from just April to August of this year demonstrates just such a pattern.

<u>Tractor #</u>	<u>Inspection date</u>	<u>Citation</u>
88671	4/16/2007 5/16/2007	Brake connections with leaks/constrictions No/discharged/unsecured fire extinguisher Spare fuses not as required
88672	8/21/2007	Tire flat and/or audible air leak Oil and/or grease leak
88670	4/3/2007 4/12/2007	Operating without operating authority (placed Out-Of-Service) Oil and/or grease leak Not marked in accordance with regulations Brake connections with leaks/constrictions

⁷ 49 CFR § 396.17(g)

	5/14/2007	No/discharged/unsecured fire extinguisher
	5/18/2007	Damaged or discolored windshield
	6/18/2007	Damaged or discolored windshield
	6/18/2007	No copy of certificate of registration
88669	3/30/2007	Not marked in accordance with regulations
	6/6/2007	Brake hose/tubing chaffing and /or kinking
	7/2/2007	Brake hose/tubing chaffing and/or kinking
		Brake hose/tubing chaffing and/or kinking
		No/discharged/unsecured fire extinguisher
88668	6/15/2007	No/defective turn/hazard lamp as required
		Stop lamp violations
	8/23/2007	No/insufficient warning devices
88667	7/3/2007	Brake hose/tubing chaffing and or kinking
		Brake hose/tubing chaffing and or kinking
	7/11/2007	Brake connections with leaks/constrictions
88664	4/17/2007	Brake hose/tubing chaffing and or kinking
4708	1/8/2007	Exhaust discharge under truck cab and/or sleeper
	1/22/2007	No/defective turn/hazard lamp as required (OOS)
		Stop lamp violations (OOS)
394SP8	7/25/2007	Brake connections with leaks/constrictions
R6JK67	7/11/2007	No/Defective lighting devices/ref/projected
		No/discharged/unsecured fire extinguisher

Avomex truck 88669 was issued a citation for brake hose/tubing chaffing/kinking within three weeks of being cited for the same violation. The “operating without authority” violation listed on 4/3/2007 is an out-of-service violation that could not have possibly been corrected within the nine days that elapsed between that inspection and that vehicle’s next inspection. The damaged and discolored windshield citation on 5/14/2007 and then the same citation on 5/18/2007 indicates a failure to promptly repair parts and accessories. Avomex has had fifteen vehicles and two driver OOS violations in the last 12 months. Many of the violations cited above (i.e. brake hose/tubing chaffing and/or

kinking) could have resulted in additional out-of-service orders which would have affected their safety score.

Avomex's driver inspections also reveal the carriers' tolerance for violations of the Hours of Service and driver qualification rules:

7/16/2007	14 hour rule violation
7/18/2007	Log violation Drivers record of duty status not current
9/13/2007	Non-English speaking driver
7/11/2007	14 hour rule violation
6/19/2007	Size and weight
4/27/2007	Log violation Log violation
6/6/2007	Log violation Log violation
8/21/2007	Log violation Drivers record of duty status not current
8/21/2007	Log violation
9/10/2007	Non-English speaking driver Drivers record of duty status not current
4/2/2007	Log violation Log violation

On what basis did FMCSA determine that certain Avomex drivers were qualified to operate in the United States? Did they observe a sufficient proficiency of the English language and an understanding of the hours-of-service rules? During 172 driver and vehicle inspections conducted between September 21, 2006 and September 21, 2007, Avomex was cited for 206 violations. Running five trucks in the U.S., Avomex received slightly more than an average of 40 violations per truck in the United States last year.

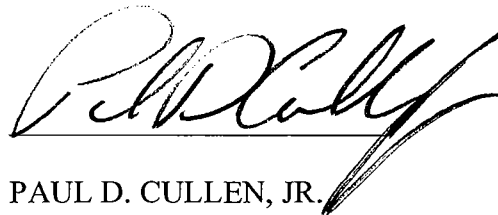
On the same subject of driver violations, motor carrier Fidepal S. DE R L DE IP Y CV has a driver SEA value of 99.29 - well above the score of 75 that triggers closer scrutiny by FMCSA. In the five inspections of Fidepal drivers, three cited the driver for not possessing a CDL or a license to drive the type of vehicle being driven. In two inspections, the driver had no current log book. And in three of the inspections, the

driver was placed out of service. SafeStat records show that Fidepal only operates one truck with one driver. Is this the same truck and driver that passed a PASA? On what basis did FMCSA justify granting authority to this motor carrier?

IV. Conclusion

FMCSA has only published conclusory statements that certain motor carriers have passed a PASA. The Notice contains no data to support these conclusions. The regulations require a PASA to include a review of certain records, data, and information about a motor carrier's safety record. The testimony and reports of the Inspector General raises serious questions as to whether that data is available. The lack of data demonstrating a motor carrier's safety record does not justify a determination that a carrier passed a PASA. No authority should be granted to any Mexico-domiciled motor carrier on this basis. Under such a circumstance, the only proper finding would be that there is insufficient evidence to complete the PASA. Furthermore, FMCSA's conclusions are not supported by the data OOIDA obtained through the SafeStat website. The safety records of many carriers who have passed a PASA are lamentable and raise serious questions as to the standards being used by FMCSA in this process.

Respectfully submitted,



PAUL D. CULLEN, JR.
The Cullen Law Firm, PLLC
1101 – 30th Street, N.W. Suite, #300
Washington, DC 20007
(202) 944-8600

JAMES J. JOHNSTON
President
Owner-Operator Independent
Drivers Association, Inc.

November 1, 2007