

## **VII. Legislation and Other Related Legal Issues**

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### **CSA 2010**

CSA2010 regulations established seven categories of behavior (called BASICS) used to document safety performance. Scores are being assigned through the Safety Measurement System (SMS). Only five categories are available to the public.

Currently, the scores are based upon an "absolute" standard for each carrier as opposed to the previous "relative" basis where carriers were rated against others. The relative scoring approach was removed from the public's view.

Thus, under the current "absolute" scoring system, a carrier's status is NOT affected by other carriers' performance ...

Nevertheless, BOTH methods - relative or absolute - are based upon a flawed methodology as mentioned elsewhere in this manual.

The FMCSA will not admit that their methodology is flawed.

***Initially, the FMCSA asked that brokers and others rely upon the new public scoring system in making carrier selections or carrier evaluations.***

In effect, the FMCSA, with their new BASIC categories of behavior and scoring, were pushing the carrier selection decision off onto brokers and others.

The result is we have people trying to "second-guess" what the FMCSA wants or is doing.

Some carriers were, and are, being denied work because of the confusion surrounding the accuracy of the SMS methodology.

***Some carriers were, and are, being charged higher insurance rates that are based upon what may be flawed BASIC data.***

In addition to the confusion, brokers and other third-parties were at the mercy of potential law suits as attorneys sought out brokers with deep pockets who were "negligent" in the process of carrier selection.

The challenge for brokers soon became learning how to avoid negligent carrier selection where a broker (or other third party) could become liable for the wrongful acts of the carrier.

***According to some industry experts, the seven BASIC scores were never meant to be a carrier safety "rating" mechanism. They were rather intended to set priorities to assist the FMCSA when intervening in a carrier's performance.***

Further, only a very small percentage of carriers have been, or are being, measured.

It has been, and will be, nearly impossible for brokers and others to use the BASIC scores for any practical purpose.

So, we come to the issue of Safety Fitness Determination (SFD).

### **Safety Fitness Determination (SFD)**

In order for motor carriers to travel the highways, they have to pass muster with the FMCSA which issues safety fitness determinations. There are a number of factors used to make these determinations such as adequacy of safety management controls, frequency and severity of regulatory violations, frequency and

severity of driver/vehicle regulatory violations identified during roadside inspections and several other such measurements.

About seven years ago, the FMCSA side-tabled dealing with some problems in determining safety ratings and the current safety rating remains - "satisfactory-conditional-unsatisfactory," There was a push back then to use two factors for the safety rating - "fit" or "unfit."

The one big problem that keeps anyone making headway on this issue is the fact that the methodology for determining behavioral scores has been found to be flawed. How can you build a house on sand?

***It's not our purpose here to delve too deeply into these issues as they pertain to dispatchers; however, there is recent movement to revive this topic with top regulators.***

And it would be wise to track what's going on. Probably the biggest reason to follow this topic is because freight brokers and other third parties (banks, insurance companies, etc.) are making decisions that may critically impact your owner operators.

## **MAP 21**

MAP-21 was signed into law in July, 2012 and established a Unified Registration System (URS) where each carrier, broker, or freight forwarder has to register a separate authority to conduct business in each respective business function.

It reauthorizes transportation funding and programs that were due to end among other things.

Of special interest to dispatchers, brokers and carriers include:

***Carriers are prohibited from brokering out excess loads without having their broker authority.***

They are not, however, mandated to set up a separate company (although a separate company set-up is highly encouraged).

No coercion - motor carriers are given some safeguards in the event of being coerced to break their hours of service.

Bond fund - increased the broker bond fund requirement from \$10,000 to \$75,000.

Three years' experience - not too well publicized is the requirement for brokerage officers to have three years' experience in the brokerage industry with knowledge of the rules, regulations and practices therein. Not much action has taken place on this issue.

### **FAST Act**

The FAST Act was introduced into law in late 2015. Much of this legislation deals with removing red tape in getting transportation projects underway and to accelerate the delivery of innovative financing options among other issues.

The FAST Act also "required the FMCSA to take down the 'relative' safety scores and not put them back up until it ensured that the scores accurately reflect a carrier's safety record".

The next day the scores were pulled from public view.

Shortly after the scores were removed from the public, the FMCSA replaced them with other scores that were not prohibited - which were the "absolute" scores. As mentioned earlier, the FMCSA was preparing to issue a ruling on using the CSA scores as the bases for determining carrier safety fitness.

***The FMCSA has ignored Congress' mandate in the FAST Act that told the FMCSA to review the shortcomings in the CSA methodology BEFORE attempting any further rule-making.***

AND, the FMCSA was charged with reporting back to Congress with its plans to address any shortcomings that became apparent.

Mind you, the purpose of any FMCSA safety rating is to identify high-risk carriers and to predict crash risk.

However, it's been found several years ago by independent studies - and I'm being repetitive here - that the CSA methodology is flawed and in no way can generate accurate results to satisfy the FMCSA's goals.

Refer back to the sessions on CSA2010 and Safety Fitness Determination.

### **CARB (California Air Resources Board)**

Effective January 2013, CARB requires every Transport Refrigeration Unit (TRU) (Reefer) that moves into, out of or through California to be compliant in its clean air performance standards.

Compliance includes installing an \$18,000 diesel particulate filter (DPF) in trucks or else face costly fines. Carriers also need to register with the state.

***Brokers may also be liable and subject to fines if they send a non-compliant TRU into, within or out of California.***

The Owner Operators Independent Drivers Association (OOIDA) has a pending lawsuit on this issue, claiming that the regulation violates the Commerce Clause in the U.S. Constitution.

Recently a federal court upheld a lower court's finding to dismiss OOIDA's law suit. OOIDA is assessing its options including a review by the Supreme Court.

In the meantime, brokers can check a carrier's registration in California by going to this link - DOT # is all you'll need:

<https://arber.arb.ca.gov/publicTCCReports.arb>

Brokers should also request hard copy or electronic documentation from the carrier on the carrier's registration.

#### CARB in Perspective

There is a lot more to CARB than their TRU regulations.

Numerous truck motor fires are believed to have been caused by faulty DP filters.

***The Alliance for California Business has been unable to get CARB to investigate the causes of these fires.***

Further, a researcher at UCLA was fired after learning - and publically announcing - the fact that there is no positive correlation between truck emissions and mortality rates in California.

His firing was overturned and he was reinstated with pay and privileges after surviving an "ideology-driven effort to crush dissent".

### **California's Assembly Bill 5 (AB5) Eliminating Independent Contractors Is LAW**

This issue is NEW.

California is set to put the end to independent contractors in the state. It started with California's AB5 - an Assembly Bill focused on eliminating independent contractors in California - and continued with the Supreme Court refusing to hear a case that might have overturned CA AB5.

***There is a long narrative on this topic - far too much to try and summarize in this training.***

Just understand that California is now requiring independents (think owner operators) to become employees.

Some trucking companies that have relied upon the independent contractor business model for decades have left the state. Others may follow. Many are in limbo without a lot of direction from the state.

To be sure, there are some definite regulations but there is a lot of confusion as well.

If you, as a dispatcher, plan to send a truck into California as an independent contractor, make sure you research the potential liability before doing so.

## **Be Aware of Broker/Shipper Coercion**

If a motor carrier, shipper, receiver, or a transportation intermediary is found to have been guilty of coercing a truck driver to violate their hours of service, for example, then he may be fined a sum of up to \$16,000.

There are other related topics some of which are in limbo such as speed limiters, speed differentials, etc.

## **Current Issues**

### Hours of Service (HOS)

Drivers, for quite some time, have been regulated for the number of hours they have driven in relation to mandated rest times.

The regulations have been blasted and applauded by motor carriers and drivers. Again, these regulations conform to the FMCSA's desire to make our highways safer.

Brokers do not want to coerce driver's to violate their hours of service; if found guilty, brokers face stiff penalties.

The new ELD mandate (see directly below) will help automate the recordkeeping for hours of service.

By turning to electronic devices to measure driving and rest time as compared to manual logging, brokers should expect to some loads to be moved more slowly than in the past.

Keep in mind - "reasonable dispatch". This concept allows the driver to be free from accepting loads that have tight deliver schedules.

### Electronic Logging Devices (ELDs)

Starting late 2017, most carriers are required to install electronic logging devices (ELDs) inside their trucks to track hours of service.

At issue here is the trucker's constitutional right to privacy and in early 2016 the Owner Operators Independent Drivers Association (OOIDA) filed suit against the mandate.

OOIDA asserted that this infringement constitutes unlawful search and seizure control in violation of the 4<sup>th</sup> Amendment to the U.S. Constitution.

The lower court upheld the government's requirement and now OOIDA is asking the Supreme Court to review the case.

In June of 2017, the Supreme Court upheld the government's ELD mandate. It will take effect in December of 2017.

The state of Texas may be implementing their own ELD requirements by 2019 for INTRASTATE truckers. Other states may follow suit. The state requirements would most likely follow federal guidelines with some twists.

### Speed Limiters

The Department of Transportation (DOT) is off on a fact-finding mission to see if and how different speeds affect crashes and/or safety.

The DOT rulemaking is attempting to learn about the pros and cons of three speeds - 60 miles per hour, 65 mph and 68 mph.

The Owner Operators Independent Drivers Association (OOIDA) opposes this type of study stating that speed limiters will "create congestion and speed differentials, which lead to higher accident involvement rates".

The new administration may put an end to this study and proposed mandate. Some truckers and industry analysts think that traffic that flows at about the same speed minimizes interruptions and accidents.

## **Other Active Issues**

- New Food Shipping Mandate
- Driver Training
- CDL Training for Military Vets
- National Carrier Hiring Standards
- Independent Contractors and Owner Operators
- Autonomous Trucks

### *Other - New food shipping mandate*

The Food and Drug Administration (FDA) has implemented new regulations regarding food transportation - it affects brokers as well as shippers and carriers.

The problem here is attempting to arrive at uniform standards that flow through the shipping, broker and carrier relationships.

Spot loads and smaller carriers and brokers would be at a possible disadvantage as they try to keep up with the "fire power" that large companies have.

There is established protocol called the Uniform Food Safety Transportation Protocol that contains minimum compliance standards that may be passed on to smaller players involved with these issues.

Carriers can formally commit to this protocol, allowing shippers and brokers to verify the carrier's commitment to food transport standards.

An article posted in JOC.com, (Journal of Commerce) states:

".. under the new regulations brokers are now charged with a greater duty that will not only expose them to potential sanctions for non-compliance with the regulations, but civil liability to the shippers on whose behalf the brokers act".

It might be wise for brokers to include some type of Statement of Position given to shippers to help reduce liability on this FDA regulation.

The statement might read as follows:

The shipper shall be completely liable for compliance and is responsible for making sure that all information and documents needed to make certain that the safe and sanitary transport of the shipper's food are in place as directed by The Food Safety Modernization Act of 2011.

"The requirements for the carrier will include documented training that provides awareness of potential food safety problems that may occur, basic sanitary practices, and carrier responsibilities under the rule".

The Owner Operators Independent Drivers Association (OOIDA) is working proactively with smaller carriers in education and compliance.

#### Other - Driver training

Driver training has been found lacking in many ways as trainers try to roll out as many drivers as possible in a rather quick manner.

A new rule, officially known as Minimum Training Requirements for Entry-Level Commercial Vehicle Operators, was slated to take effect Feb. 6, 2017 but has been delayed.

Classroom instruction, behind-the-wheel driving and a registry of CDL operators are at the core of this new rule. Carriers are calling for the restoration of the 30-hour minimum driving time behind the wheel.

#### Other - CDL training for military vets

There is a shortage of truck drivers and the shortage may continue for some time. There are also many new military veterans transitioning back into civilian life.

Is this a marriage waiting to happen?

Here's a good webpage with several related links:  
<http://atexfreightbrokertraining.com/cdl-training-military-veterans/>

Also, go to your favorite search engine and type in "vets becoming truck drivers" or something similar. Keep up to date on this.

#### Other - National Carrier Hiring Standards

Various advocates for setting carrier hiring standards into legislation have, once again, put the issue into the hands of legislators.

The standard would be simple and relieve the broker/shipper from liability in negligent carrier selection.

The three hiring standards proposed are:

- Ensure that the carrier is properly registered with the FMCSA,
- Ensure that the carrier has the minimum insurance, and
- Ensure that the carrier has not been given an unsatisfactory rating.

Follow this issue with industry sources.

#### Other - Independent contractors and owner operators

Recently here in 2022, California with their Assembly Bill 6 (AB5) just upended the independent contractor business model and it is now "the law" in California. Every worker (for the most part) is required to become employees and independent contractors are not allowed. Other states such as New Jersey may try to implement the same type of legislation.

There will and are lawsuits abounding and it may take years before some equity is served for those independents who DON'T want to become employees and who prefer to remain domiciled in California. Nevertheless ...

... there are both federal and state laws that regulate employee, employer, independent contractor and owner operator relationships. Some of these laws are in conflict with each other.

In the past, and currently, most motor carriers classify their drivers as independent contractors.

Thus, most operating expenses, including payroll taxes, were borne by the driver as an independent owner operator.

Now the federal government and some state agencies are making a move to get drivers reclassified as employees rather than independent contractors which would make carrier companies liable for the employees' payroll taxes, and more.

Some Owner Operators want to be classified as employees where they have benefits such as workers' comp, unemployment compensation, overtime pay - even mandated lunch breaks, etc.

Other Owner Operators want the freedom to do their "gigs" as they please, moving around without being strapped down to a particular company. This issue is an ongoing battle.

The main issue for freight brokers might be in the Broker-Carrier Agreement. Brokers should look at who will be signing this agreement and the confirmation for the carrier?

#### Other - Autonomous trucks

Transportation experts don't think driverless trucks will be fully operational for at least two decades. Don't fret, if you are a truck driver.

Here's a good resource:

<https://www.trucks.com/2017/06/14/self-driving-trucks-need-drivers/>