



Walt Metz Transportation Legal Developments Journal October 10, 2012



Legal/Regulatory Developments Are Changing The Economic Landscape of Trucking

“The first thing we do, let's kill all the lawyers”.
- William Shakespeare¹

Many trucking executives are becoming true Shakespeare fans these days, as the cost of the legal regulatory burden on trucking companies keeps increasing. Changes to U.S. laws, primarily changes to FMCSA, EPA and NHTSA regulations, are “driving” up the cost of conducting the business of trucking and forever changing the economic landscape of trucking. The regulatory changes seem to be tipping the scales to the advantage of larger carriers, which may lead to substantial further consolidation of the industry. This article summarizes the regulatory changes and other factors having this impact.

INTRODUCTION

The sluggish economy is not the only factor making it increasingly harder to profit from the trucking business. The increasing regulatory burden is also having a substantial impact. Former Governor Bill Graves, ATA’s President, very recently told those attending ATA’s Annual Management Conference & Exhibition in Las Vegas that: “[t]he long-term macro outlook for trucking has never been better, but the near-term micro view continues to be very challenging.²” The near term challenge arises, according to Graves, in part from “sluggish economy”³ and in part from the increasing regulatory burden. He stated specifically that “ ... anyone who is operating in the trucking industry is at a crossroads – in fact you’re facing an entire series of crossroads – each one a decision point sending you in directions that will ultimately determine success or failure, profitability or loss, growth or stagnation⁴.”

Graves specifically mentions CSA,⁵ but CSA is only one of many actual or proposed regulatory changes posing a threat to trucking’s profitability. For a summary of CSA and its recent developments, see this author’s previous articles⁶. This legal regulatory threat is definitely more serious for smaller carriers, who are less able to shoulder the increasing burden and are likely to have smaller profit margins to begin with.

Aside from CSA, various other legal regulatory changes and implementations are also tipping the scales in favor of larger carriers, because of their impact of decreased efficiency or of

increasing the cost doing business. The FMCSA has made recent changes to the Hours of Service regulations, which could have detrimental impact by July 1, 2013 and is planning on introducing a new rule mandating electronic logging. In addition, various new or proposed regulations mandating additional or updated equipment to tractors and trailers will be adding to the cost of purchasing and maintaining trucking equipment, to the disadvantage of smaller carriers. Compounding the increased regulatory burden are the increased equipment costs that may result from the advent of the use of Liquefied Natural Gas (“LNG”) as a substitute for diesel.

THE INCREASED REGULATORY IMPACT

CSA Implementation

According to a study performed by ATA’s research group ATRI, “[t]he driver shortage, increasing insurance costs and Compliance, Safety, CSA impacts has been putting upward pressure on industry costs, as carriers increased wages to recruit and retain qualified drivers. After falling in 2008 and 2009, driver wages increased in 2010 and 2011⁷.” The ATRI Study recognizes CSA as an agent of increased costs to the trucking industry as a whole. In addition, CSA has generally been received less favorably by smaller carriers than by large carriers. Smaller carriers have been opposed to the SMS scoring system as giving larger carriers an advantage because larger fleets reduce the impact of single violations on the overall category scores⁸. The ATA, which represents both large and small carriers, supports the FMCSA’s safety goals, but would like to see further changes in the scoring system and has directed staff to continue taking a constructive approach toward improving the program⁹.

But the relative impact of a few violations is not the only aspect of CSA that concerns small carriers and their logistics broker and shipper customers. Some broker and shipper executives have been highly critical of CSA, and its use of SMS data and methodology. The criticisms have included challenges to the validity of the studies backing SMS, the lack of a proven nexus between CSA BASICs comparative percentile ratings and the frequency of carrier crashes, and the lack CSA ratings for thousands of the smallest carriers.

Thomas Sanderson, CEO of Transplace, and lawyer Henry Seaton contend that the CSA SMS scoring system is unfair, because it applies to a small percentage of carriers and is based on flawed statistical calculation of driving infractions. As a result, they claim that small carriers are being hurt and brokers, as well as fleets, are losing substantial business¹⁰. Sanderson is also the President of ASECTT, a group of small carriers and logistics brokers, who recently sued the FMCSA over its statements encouraging the public to rely on ALL FMCSA generated safety data in judging the safety fitness of a potential carrier to use, and NOT solely on CSA SMS BASICs scores and FMCSA acceptable threshold levels. According to the position of ASECTT, this creates potential liability for logistics brokers or shippers who use carriers above or below the CSA BASICs thresholds, because the brokers or carriers must judge for themselves who is a safe carrier. This ultimately discourages the use of small carriers, who, as a group, have lower

BASICs scores than larger carriers, ultimately putting them at an economic disadvantage to larger carriers.

Hours of Service Changes

The scheduled changes to the HOS regulations which go into effect on July 1, 2013, are also expected to reduce efficiency and drive up costs, which smaller carriers are less able to absorb (unless lawsuits filed challenging the regulatory validity of these changes are successful). For a complete summary of changes being made to Hours of Service (“HOS”) regulations see my summary article on the HOS regulations changes.¹¹ See also my summary article on the lawsuits filed this year challenging the validity of these regulatory changes¹².

The main concern is with the limitations placed on the 34 Restart Rule, whereby drivers may restart the 60 or 70 hour clock on the maximum number of hours under which a driver can be on duty within a 7 day or 8 day window. Under the new 34 hour restart limitations, which are scheduled take effect in July of 2013, there can be only one restart within a week’s 168 hour time frame and the 34 hours must span two periods between 1 AM and 5 AM. This provision, according to the FMCSA, is aimed at long haul FTL drivers who are now able to log over 70 hours of on-duty time within a 7 day period and thereby may be subject to chronic fatigue. There is also a new requirement that a driver may not drive longer than 8 hours without taking a 30 minute break (beginning in July of 2013) and high fines for both drivers and their companies for serious violations (which took effect on February 27, 2012).

According to the ATA, which filed one of the pending lawsuits, the hours-of-service rules set to take effect next year for truck drivers will add a significant cost to the trucking industry without providing much of a benefit¹³. Small carriers are less able to weather the storm of these increased costs, putting them at an economic disadvantage.

Regulatory Mandates Regarding Equipment

There have been numerous recent and planned regulatory mandates requiring increased or updated equipment on tractors and trailers. There will be a new rule mandating EOBR equipment for electronic logging. The National Highway Traffic Safety Administration (“NHTSA”) is moving closer to announcing a proposed rulemaking focusing on preventing truck rollovers, by requiring additional anti-roll over equipment to be installed in trucks.¹⁴ New braking stopping distance standards have been adopted¹⁵, and requirements for the installation and maintenance of Diesel Particulate Filters have been implemented. National carbon emission standards for new heavy trucks will go into effect in 2018. California plans to go ahead with the phasing in of new CARB regulatory requirements on temperature controlled trailers and their tractors. Finally, the National Transportation Safety Board (“NTSB”) is making plans for a regulatory mandate that all heavy trucks have video event recorders to document crashes. More detail on these regulatory changes is provided below.

With an eye toward the enforcement of current and planned HOS regulations, the FMCSA is moving forward with development of a new rule requiring electronic onboard recorders. The

initial rule, promulgated in 2010, called for a phase-in of the requirement, but it was thrown out by an appeals court due to privacy concerns voiced by owner/operators. However, now with a Congressional mandate to develop such a rule, the rulemaking process is moving forward and the process will take into account the concerns of the Owner/Operators toward privacy. The transportation reauthorization law passed this summer requires that the FMCSA have a final rule for the electronic logging devices by October 2013. The rule would take effect in 2015¹⁶.

Before the Bill's passage, the American Trucking Associations urged Congress to require drivers to use electronic onboard recorders ("EOBRs") within the recently passed highway funds authorization bill, while independent owner-operators argued against it on the basis that the technology has no safety or cost benefits¹⁷. ATA President Bill Graves said that the EOBRs could help drivers better manage fuel use, routes and other fleet operations. The Owner/Operators Association ("OOIDA") argued that the requirement is a "big brother" mandate that further burden struggling independent owner-operators. According to OOIDA Executive Vice President Todd Spencer "[t]his is being done under the guise of compliance with federal hours-of-service regulations, but it is actually a way for large motor carrier companies to squeeze more 'productivity' out of drivers and increase costs for the small trucking companies they compete with." Regardless, we do know that these recorders will add to the cost of trucks without them, which will be more burdensome for smaller carriers.

A stability control initiative by the NHTSA has been set forth in a published notice of proposed rulemaking by NHTSA on May 23 "requiring truck tractors and certain large buses with a gross vehicle weight rating of greater than 26,000 pounds to be equipped with an electronic stability control system"¹⁸. Two systems are involved in the anti-rollover/stability control initiative. "The first system is Roll Stability Control, or RSC, which applies the brakes in a tractor. The second is Electronic Stability Control, or ESC, which is sometimes referred to as full stability control. ESC applies brakes in both the tractor and trailer¹⁹." It is estimated that these systems will increase the cost of a new tractor by \$2,000-3,000²⁰. This increases the cost of entry into the trucking business, or of increasing tractor capacity, to the detriment of smaller carriers.

Rules with regard to truck stopping distances have also been recently tightened. According to James Clark, Director of Engineering, TMD Friction Inc., "a new truck's brakes must pass two legal requirements as defined by Federal Motor Carrier Safety Standard No. 121 — a brake dynamometer certification and a full-vehicle stopping-distance test. This regulation includes torque output performance, fade and recovery characteristics and fully loaded stopping distance tests from 60 mph." Also, according to Clark²¹, "the latest stopping distance reduction has prompted the braking industry to make a significant effort to create new brakes, linings and vehicle air systems." Two new products have appeared on the market to meet the new standards-- high-torque drum brakes for the new reduced stopping distance regulations and air disc brakes. However laudable the safety objectives, this will result in more expensive new trucks and higher maintenance costs for brake systems.

Aside from newly mandated truck safety equipment requirements, other recent regulatory changes have also contributed to a more expensive price for new trucks and for higher maintenance costs. This includes regulations regarding emissions. All heavy trucks must now have the latest model of the Diesel Particulate Filter or DPF. This is the filter that removes 85% to 100% of the solid particulates that are produced by the combustion of the diesel fuel in order to meet EPA clean air standards. Experts I have spoken to say that these new systems simply add to the cost of maintaining trucks and do nothing for efficiency.

In addition, in 2010, the EPA and the NHTSA jointly announced the first national emissions and fuel economy standards for heavy vehicles applicable to new heavy trucks, which standards must be met by 2018²². According to David Broder of the *New York Times*, “[t]he standards draw from a study issued this year by the National Academy of Sciences, which found that existing technology — including low-rolling-resistance tires, improved aerodynamics, more efficient engines, hybrid electric drive systems and idling controls — could cut fuel use in trucks by a third to a half²³.” Although fuel costs may be reduced by the initiative, it is estimated that the needed manufacturing changes will add between \$5,000 and \$6,000 to the cost of a new tractor²⁴. This also increases the cost of entry into the trucking business, or of increasing tractor capacity, to the detriment of smaller carriers.

An example of state regulatory activity driving up the cost of truck equipment are the California CARB regulations phasing in a requirement for SmartWay technology to be used for 2010 and older model 53-foot box-type reefer trailers and the tractors that pull them,²⁵ in order to reduce carbon emissions. The California regulatory agency CARB estimates that the cost for retrofits will range from \$1,900 to \$4,200 per trailer and that the regulation will apply to as many as 1.5 million trailers operating on California highways²⁶.

Finally, in the future, the National Transportation Safety Board wants a regulatory mandate that all heavy trucks have video event recorders to document crashes. This obviously adds costs to manufacturing and maintaining trucks, but without the specifics of the proposed mandate, it is difficult to get cost estimate information.

I’m sure that I have not covered all the recently enacted or proposed government regulatory initiatives that will increase the initial cost of purchasing tractors and thereafter their maintenance. But these examples make the point that regulatory activity is now significantly increasing the cost of entering and operating in the trucking business, a fact which favors the larger trucking companies, which are more able to bear the additional costs and possess the market power to raise rates to compensate for the additional costs.

LIQUIFIED NATURAL GAS

Although not a regulatory issue (yet), the growing use of Liquefied Natural Gas (“LNG”), could also have the effect of increasing the cost of investments to be made by smaller carriers to purchase new trucks and therefore act as an agent of economic advantage for larger carriers.

The Liquefied Natural Gas alternative to diesel is becoming more practical as the result of increased supplies arising from the use of new fracking technologies that force natural gas from oil shale rocks. The extent of its long term use is still unknown, but the use of LNG is being seriously considered by significant numbers of trucking executives. The report of a recent survey of trucking executives bears this out²⁷:

"The survey results appear to be a mixed bag for natural gas supporters," says PLS Chairman and CEO Greg Burns. "On the one hand, LNG (liquefied natural gas) is clearly on the radar and is being actively evaluated by some of the largest trucking companies in the industrial sector. On the other hand, less than 10% of senior executives currently believe LNG will be widely adopted of over-the-road trucking."

Although LNG equipped stations are being built nationwide, the main obstacle seems to be the additional per tractor unit cost of between \$20,000 and \$30,000.²⁸ If widespread use of lower priced LNG as a substitute for diesel becomes a reality, this would certainly put smaller carriers with less access to investment capital at a major disadvantage in trying to increase capacity, or to replace existing equipment.

CONCLUSION

The cumulative impact of these regulatory initiatives will likely be to make the use of tractors and trailers less efficient, drive up the cost of complying with safety mandates and increase the cost of buying and maintaining trucking equipment. At the same time, regulatory initiatives such as CSA and the HOS changes may shift the makeup of carriers used by logistics brokers and shippers toward larger carriers. Not only will potential carrier customers be more likely to turn to larger carriers, but the already small profit margins of the smaller carriers will be squeezed, potentially bringing about a wave of consolidation in the industry. Developments driving up the cost of doing the trucking business, together with the growing tendency of customers to pay higher rates to larger carriers in order to lock down access to equipment in a tighter capacity market, will likely result in smaller carriers operating at a distinct disadvantage in relationship to larger carriers. Substantial further industry consolidation is likely to follow in the intermediate term.

This Journal is intended to give a unique perspective on the practical business impacts of developments in the law relating to transportation. The contents of this Journal are not intended to be and should not be relied upon as legal advice.

CONTINUED ON NEXT PAGE

WALT METZ BIO

Walt's employment profile shows a transportation, warehousing and supply chain executive in-house legal counsel with an established track record of accomplishments achieved for large and medium sized public and private company employers in the trucking, warehousing, logistics and retail industries. Walt was Vice President, General Counsel and Secretary of Americold Realty Trust/Americold Logistics in Atlanta for five years from 2005 to 2010, and has several years of experience working as in-house counsel for major trucking companies. At Americold he directed the legal affairs for North America's largest provider of temperature controlled food distribution and logistics services, Americold Logistics, LLC, including a small trucking operation. Before taking his position at Americold, Walt served in the legal departments of Sears, Roebuck and Company in the Chicago area and Werner Enterprises of Omaha. During Walt's seven plus years at Werner Enterprises he supervised the nationwide defense of high exposure trucking and transportation litigation for the large transportation carrier, and provided advice on claims, litigation and risk management issues, including the structure of self-insured liability and workers compensation programs and the associated layers of excess insurance policies. At Sears he continued to manage litigation, including high exposure commercial litigation and class actions. Walt also completed a short tenure in the Legal Department of Old Dominion Freight Lines in 2011. Since January 1, 2012, Walt has sought a permanent, full time position as a house lawyer for a major transportation/supply chain company and during that time period has published several timely transportation law journal articles, has made himself available for consultation on related issues and has been remotely employed on a short term assignment for a substantial full truckload transportation company. Prior to going in-house, Walt was a member of two Omaha law firms, where he practiced primarily in Commercial Litigation and General Practice. He graduated from the University of Nebraska-Lincoln with High Distinction and was elected to membership in Phi Beta Kappa. He also earned his JD at Nebraska. Walt continues to be a huge Big Red fan!

Walt is available for a new in-house legal opportunity. Walt's complete professional profile can be accessed at: <http://www.linkedin.com/in/waltmetz>.



ENDNOTES:

¹ William Shakespeare, Henry The Sixth, Part 2 Act 4, scene 2, 71-78

² "Graves Says Industry Faces Challenges From Regulations, Sluggish Economy," By, *Transport Topics*, Electronic Edition, October 8, 2012.

³ "Graves Says Industry Faces Challenges From Regulations, Sluggish Economy," By, *Transport Topics*, Electronic Edition, October 8, 2012.

⁴ "Graves Says Industry Faces Challenges From Regulations, Sluggish Economy," By, *Transport Topics*, Electronic Edition, October 8, 2012.

⁵ "CSA" first came into being in 2008 as the CSA Op-Model Test in a small number of pilot test states. During the time the FMCSA was continuing the pilot tests in a small number of states and readying CSA for nationwide implementation, it became known as "CSA 2010" (Comprehensive Safety Analysis 2010). In 2011, CSA 2010 expanded from pilot states testing to nationwide implementation and became known simply as "CSA", which now stands for "Compliance Safety Accountability".

-
- ⁶ “CSA and Motor Carrier Safety Ratings: The Past, Present and Future,” *JD Supra*, February, 2012; “Recent Developments Show CSA Continues To Be a Work in Progress” as published in the July, 2012 edition of *The Transportation Lawyer*, a prestigious quarterly legal journal by the Transportation Lawyers of America; “New Lawsuits and Interest Group Concerns Keep CSA Controversies Brewing”, *JD Supra*, August, 2012.
- ⁷ The study, completed in September of 2012, is an annual update to its annual report on the operational costs of trucking and can be obtained by ordering from the organization’s web site at www.atrionline.org. It is entitled: “An Analysis of the Operational Costs of Trucking: A 2012 Update.”
- ⁸ “Agency Safety Scoring Seen as Unfair to Fleets, Brokers”, *By Rip Watson, Senior Reporter, Transport Topics*, January 9, 2012, Page 9.
- ⁹ “Agency Safety Scoring Seen as Unfair to Fleets, Brokers”, *By Rip Watson, Senior Reporter, Transport Topics*, January 9, 2012, Page 9.
- ¹⁰ “Agency Safety Scoring Seen as Unfair to Fleets, Brokers”, *By Rip Watson, Senior Reporter, Transport Topics*, January 9, 2012, Page 9.
- ¹¹ “HOS Rules Changes Do Not Make a Gift Worth Keeping” *JD Supra*, January, 2012 (Rev March, 2012).
- ¹² “Recent Lawsuit Filings and Group Statements Reflect Strong Opposition to Revised HOS Rules from Almost Everyone,” *Transportation Lawyers Association Website, News at <http://www.translaw.org/Pages/News.aspx>*
- ¹³ “HOS Rule Will Add Significant Costs, ATA Says in Court Filing,” *By, By Timothy Cama, Staff Reporter, Transport Topics, Electronic Edition, July 24, 2012.*
- ¹⁴ “Fleets’ Use of Anti-Rollover Systems Climbs as NHTSA’s Proposed Rulemaking Nears,” *By Greg Johnson, Staff Reporter, Transport Topics, May 7, 2012.*
- ¹⁵ “Opinion: New Stopping Distances, New Technology”, *By James Clark, Director of Engineering, TMD Friction Inc., Transport Topics, April 23, 2012.*
- ¹⁶ “ATA Seeks Quick Action On DOT E-Log Mandate”, *By Michele Fuetsch, Staff Reporter, Transport Topics, August 20, 2012.*”
- ¹⁷ “EOBR Mandate in Transport Bill Divides Trucking Industry”, *By Mark Szakonyi, Associate Editor, The Journal of Commerce Online, May 1, 2012.*
- ¹⁸ “NHTSA Announces Public Hearing on Proposed Stability Control Systems Rule”, *By Truckinginfo Staff, the web site of Heavy Duty Trucking Magazine, July 3, 2012.*
- ¹⁹ “Fleets’ Use of Anti-Rollover Systems Climbs as NHTSA’s Proposed Rulemaking Nears,” *By Greg Johnson, Staff Reporter, Transport Topics, May 7, 2012.*
- ²⁰ “Fleets’ Use of Anti-Rollover Systems Climbs as NHTSA’s Proposed Rulemaking Nears,” *By Greg Johnson, Staff Reporter, Transport Topics, May 7, 2012.*
- ²¹ “Opinion: New Stopping Distances, New Technology”, *By James Clark, Director of Engineering, TMD Friction Inc., Transport Topics, April 23, 2012.*”
- ²² “U.S. Standards Take Aim at Truck Emissions and Fuel Economy,” *By David M. Broder, New York Times, October 25, 2010.*
- ²³ “U.S. Standards Take Aim at Truck Emissions and Fuel Economy,” *By David M. Broder, New York Times, October 25, 2010.*
- ²⁴ “New Truck Emission Standards Receive Wide Praise,” *By Jim Motavalli, New York Times, October 27, 2010.*
- ²⁵ CARB Pushes Back Compliance Deadline for Fleets to Phase in SmartWay Add-Ons, *By Eric Miller, Transport Topics, March 5, 2012.*
- ²⁶ CARB Pushes Back Compliance Deadline for Fleets to Phase in SmartWay Add-Ons, *By Eric Miller, Transport Topics, March 5, 2012.*
- ²⁷ “Natural Gas Support a Mixed Bag, Study Says” , *By Truckinginfo Staff, the web site of Heavy Duty Trucking Magazine, May 7, 2012.*
- ²⁸ Natural Gas Support a Mixed Bag, Study Says” , *By Truckinginfo Staff, the web site of Heavy Duty Trucking Magazine, May 7, 2012.*