TIA STRATEGY TO REDUCE 3PL LIABILITY

Lawsuits, CSA and A Comprehensive Solution

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LAWSUITS, CSA AND A COMPREHENSIVE SOLUTION

INTRODUCTION

Since the *Schramm v. Foster*[1] decision in 2004, 3PLs have become aware of new risks associated with hiring a truck. The liability stems from the law of responsibility of those entities engaging independent contractors (carriers), to exercise some "due diligence". Doing something less, may be deemed by certain courts in certain districts, as "negligent entrustment" or "negligent hiring." Courts have also changed the nature of the engagement between 3PLs and carriers to that of agency creating a vicarious liability.

Users of federally licensed carriers need a single, clear cut safety standard from the Federal agency responsible for motor carrier safety – the Federal Motor Carrier Safety Administration (FMCSA). FMCSA itself seeks to develop a clear cut safety determination through its Compliance, Safety and Accountability program (CSA), initiated in 2010. The CSA process, however, has been unsettling, and has raised much concern in the entire transportation industry. TIA has been the voice of the third party logistics industry since its founding in 1978. Since the 2004 *Schramm* decision, TIA has been actively engaged with our members and FMCSA to understand and mitigate the risks. TIA continues to be the lead voice in understanding and mitigating the risks, as well as finding a comprehensive solution for the industry.

TIA STRATEGY

As the voice of the third party logistics industry, TIA will remain the strong, clear voice in Washington, DC seeking a comprehensive solution to the issues of negligent hiring and vicarious liability guided by the following tenants:

1. TIA seeks to promote improved standards of safety for motor carriers on American highways.
2. TIA will work with its members to understand and minimize their risks through analyses of court proceedings, the establishment of carrier selection procedures based on current law and interpretation of that law.
3. TIA will work with FMCSA to make CSA the best possible tool to meet its statutory obligation as the sole Agency empowered to determine which carriers are UNSAFE.
4. TIA will work with FMCSA to create a rating system through which ALL carriers are rated either SAFE TO USE (green light) or UNSAFE TO USE (red light), thereby eliminating the traps that exist in the four part rating system: satisfactory, unsatisfactory, conditional, and unrated.
5. TIA will pursue legislation to protect 3PLs and shippers that utilize the services of carriers rated SAFE TO USE by FMCSA from liability associated with carrier selection.
6. TIA will assist in cases where appropriate to protect the interests of the industry.

[1] *Schramm v. Foster*, 341 F. Supp. 2d 536 (D. Md. 2004)

TIA POLICY: LAWSUITS, CSA AND A COMPREHENSIVE SOLUTION

1. TIA seeks to promote improved standards of safety for motor carriers on American highways.

There can be no question that TIA members seek to promote improved standards for safety on American highways. TIA members have been promoting high standards for their own industry since the Association's founding in 1978 by establishing and enforcing the TIA Code of Ethics. Over the ensuing years, TIA members created a Certified Transportation Broker designation to promote excellence and high standards for individuals. TIA members began certifying company excellence through the TIA Performance Certified program. Most recently, TIA members wrote the TIA New Broker and New Agent courses to teach new industry entrants the right way to conduct this business. This promotion of excellence within the brokerage-based 3PL industry, and the development of the *TIA Carrier Selection Framework* are indicative of TIA members' commitment to safety and excellence. TIA members know that a safe supply chain is a productive supply chain. And, TIA members reject the notion that only the largest of carriers can meet federal safety standards. TIA supports a safety system that recognizes that 80 percent of the motor carrier industry operates five or fewer trucks.

2. TIA will work with its members to understand and minimize their risks through analyses of court proceedings, the establishment of carrier selection procedures based on current law and interpretation of that law.

TIA will continue to work with its members to understand evolving court decisions, and to maintain carrier selection frameworks that meet the needs of individual members. This is not a one-size-fits-all industry, and TIA cannot establish a one-size-fits-all strategy for every member to use. TIA will continue to develop and refine its *TIA Carrier Selection Framework* to help its members stay on top of the evolving liability risk. TIA will also work with the insurance industry to help members insure against risk if they so choose.

3. TIA seeks to re-set the vicarious and negligent hiring liabilities created by courts relying on the current FMCSA system to a clear cut standard.

TIA members are not happy with the current state of affairs with courts holding 3PLs and shippers to an ever changing standard in carrier selection. But only a higher court or Congress can re-set this standard to one that is more reasonable and static. TIA, through its Legal Committee, will work with members and non-members involved in liability suits to coordinate defenses to minimize the furtherance of bad law through legal precedent. No Administrative agency can limit a court's reach. TIA seeks, therefore, to limit that reach through Congressional action.

4. **TIA will work with FMCSA to make CSA the best possible tool for the AGENCY to use to meet its statutory obligation to determine which carriers are UNSAFE.**

CSA, like SafeStat, are internal Agency tools that have been corrupted by courts looking for a clear cut, empirical scale for determining whether a carrier is safe to operate or not. 3PLs and shippers also seek an empirical scale rather than the slippery slope on which the industry currently finds itself. The problems with CSA are well documented; TIA's approach to fixing these problems is to address them with the agency to find practical solutions. TIA's goal is to work with FMCSA to make CSA the best possible tool for the AGENCY to use to meet its statutory obligation to determine which carriers UNSAFE.

5. **TIA will work with FMCSA to create a rating system through which ALL carriers are rated either SAFE TO USE (green light) or UNSAFE TO USE (red light), thereby eliminating the traps that exist in the four part rating system: satisfactory, unsatisfactory, conditional, and unrated.**

TIA seeks a rating system from FMCSA that rates ALL carriers either SAFE TO USE (green light) or UNSAFE TO USE (red light), which would eliminate the traps existing in the previous four part rating system (satisfactory, unsatisfactory, conditional, and unrated). TIA will oppose attempts by FMCSA to foist its statutory obligation on 3PLs and shippers. It is the Agency charged with issuing motor carrier licenses and insuring motor carrier safety. We need one FMCSA not several hundred thousand.

6. **TIA will pursue legislation to protect 3PLs and shippers that utilize the services of carriers rated SAFE TO USE by FMCSA from liability associated with carrier selection.**

Specifically, TIA seeks:

- Federal legislation to limit the application of state and local laws to interstate commerce.
- Federal legislation to prohibit federal courts from interpreting the business relationship between 3PLs and motor carriers with whom they contract, as an agency relationship, unless either (a) one has an ownership interest in the other, or (b) a written agreement between the parties expressly waives this right.
- To expand upon the current effort by the trucking industry at the state level to prohibit indemnity provisions for the actions of others in contracts.
- Federal legislation to require FMCSA to rate ALL for hire motor carriers either SAFE TO USE or UNSAFE TO USE in place of any current rating system.
- Federal legislation to state that 3PLs and shippers that hire a carrier rated SAFE TO USE have met the competence and reasonable care criteria in the selection of an independent motor carrier.

7. TIA will assist in cases where appropriate to protect the interests of the industry.

Through its Legal Committee, TIA will seek to assist members and non-members involved in liability cases to share defense strategies and file *amicus* briefs to minimize the risk of more bad law being created through misguided court decisions. Interstate commerce cases should not be litigated in state courts. Judges need to be educated to understand the industry and how it works.

SUMMARY OF COURT DECISIONS

Courts began bending the broker's roles and responsibilities for hiring a federally licensed motor carrier, in the 2004 *Schramm v. Foster* case. The responsibility is known as the duty of reasonable care. According to Paul Stewart[2], "a broker's duty with slight exception was usually construed to mean that brokers had to confirm that carriers they hired satisfied the following requirements:

1. Authorized by what is now FMCSA;
2. Had regulatory mandated minimum insurance coverage; and
3. Were competent insofar as any knowledge the broker had or with reasonable care could ascertain.

Historically, negligent hiring cases applied only to inherently dangerous activities, such as a general contractor's hiring of an explosives expert. Before *Schramm*, negligent hiring never applied to commercial driving. It should be noted that state laws, not intended for either the trucking industry or to govern interstate commerce, are being applied to federally licensed entities involved in the movement of interstate freight.

A second liability, also threatening the regulatory and contractual landscape in transportation is that of vicarious liability. Increasingly, these courts have allowed federally licensed, independent motor carriers to be seen as a federally licensed property broker's agent, which allows a plaintiff to pursue vicarious liability judgments.

Increasingly, courts have expanded and redefined the responsibilities of parties engaging independent contractors, and settlement/jury awards have grown exponentially.

NOTHING IN THIS STRATEGY REPORT IS INTENDED, NOR SHOULD BE USED AS LEGAL ADVICE OR AS A SUBSTITUTE FOR LEGAL ADVICE, WHICH EACH MEMBER SHOULD OBTAIN FROM QUALIFIED COUNSEL FAMILIAR WITH THE MEMBER'S BUSINESS AND LAWS APPLICABLE TO IT. THE STRATEGY IS NOT INTENDED TO DEFINE OR PROVE COMPLIANCE OR NON-COMPLIANCE WITH ANY LEGAL STANDARD OF CARE OR DILIGENCE, AND IT SHOULD NOT BE USED OR RELIED UPON BY ANYONE FOR ANY SUCH PURPOSES. THIS STRATEGY IS UNDERSTOOD BY TIA TO BE A "WORKING DRAFT" AND EVOLVING DOCUMENT AND FRAMEWORK FOR ACHIEVING A COMPREHENSIVE SOLUTION TO ISSUES AFFECTING THE INDUSTRY.

[2] Paul Stewart, Of Counsel, *Jackson shields Yeiser & Holt*, Memphis, TN.

Schramm v. Foster

The *Schramm* case involved a motor carrier selected by a 3PL, which was involved in an accident in Maryland. A number of charges were levied against the 3PL, and upon petition for summary judgment, only one, that relating to negligent hiring, was held over for trial.

> **This duty to use reasonable care in the selection of carriers includes, at least, the subsidiary duties (1) to check the safety statistics and evaluations of the carriers with whom it contracts on the SafeStat database maintained by FMCSA, and (2) to maintain internal records of the persons with whom it contracts to assure that they are not manipulating their business practices in order to avoid unsatisfactory SafeStat ratings.[3]**

Thus, the *Schramm* court suggested that there might be an obligation to check the FMCSA database for information about carrier safety ratings, which are measurable; but vague. The duty to check the "safety statistics and evaluations" is also vague.

Puckrein

While the *Puckrein* case is a New Jersey Supreme Court decision it has relevance to the evolution of how courts have looked at the independent contractor liability when it involves truck transportation. A Virginia court applied *Puckrein* in the *Jones* case. In its decision, the New Jersey Supreme Court held Puckrein, a company whose core purpose is the transportation of materials on highways to a duty to use reasonable care in the hiring of an independent trucking company, including a duty to make an inquiry into that carrier's ability to travel legally on the highways. The court expanded the independent contractor exception:

> **Companies whose purpose is transportation are held to a higher standard when hiring trucks. Puckrein went so far as to find it reasonable for a company to inspect the physical truck and driver's paperwork, and not only the motor carrier parent.**
>
> **Or should have known of the incompetence.[4]**

Jones v. C.H. Robinson Worldwide, Inc.

The *Jones v. C.H. Robinson Worldwide, Inc.* case arose from *Jones v. D'Souza*, and involved an accident in Virginia involving two tractor trailers. In 2004, Jones was traveling southbound on I-81 in a tractor trailer owned by his employer. Traveling northbound was a tractor trailer owned by AKL Enterprises, which was driven by Kristina Arciszewski who crossed the median and hit Jones head-on. Arciszewski was killed in the accident. Jones alleged both vicarious liability and negligent hiring by C. H. Robinson Worldwide in state court. The Virginia court found that Robinson could not be held liable for the driver's negligence and concluded that AKJ was an independent contractor under the contract carrier agreement. The court noted that Robinson did not exercise a sufficient degree of control over AKJ to "convert their contractual relationship to

[3] *Schramm* at 551, citing *Foster*, supra.
[4] *Puckrein* at ?

one of employer-employee."[5] With regard to the issue of negligent hiring, the court citing *Puckrein*, stated that in order to "succeed on a claim of negligent hiring of an independent contractor, the plaintiff must also be able to prove that the contractor was in fact, incompetent or unskilled to perform the job for which he/she was hired, that the harm that resulted arose out of the incompetence, and that the principal knew or should have known of the incompetence."[6] The court stated that Robinson knew of AKJ's deficient safety rating and conducted no additional investigation to determine their professional reputation and experience.[7] The court further found that Robinson knew that the driver was inexperienced and had recently received her commercial driver's license.[8] The court concluded by stating that there is a "common law duty upon third party logistics companies to use reasonable care in selecting carriers" based on the "critical federal interest in protecting drivers and passengers on the nation's highway."[9] The court also addressed the issue of negligent entrustment of an activity under Virginia law citing a Virginia Supreme Court decision finding

> It is negligent to permit a third person to use a thing or to engage in an activity which is under the control of an actor, if the actor knows or should know that such person intends or is likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others.[10]

Broker knew of carrier's deficient safety rating and conducted no additional investigation to determine their professional reputation or experience.

"There is a common law duty upon third party logistics companies to use reasonable care in selecting carriers."

Sperl v. Henry et al.

Sperl is an Illinois state case stemming from a 2004 accident in which DeAnn Henry (Henry) was driving a tractor trailer on I-55 where she lost control and rear ended multiple vehicles. The collision resulted in two deaths and caused serious injuries to a third person. Henry was driving for Dragonfly Express on a suspended license and had falsified her logbooks. Both Henry and Dragonfly admitted liability. Plaintiffs sought deeper pockets, however, and filed suit against the broker. Plaintiffs contend that the broker entered into an agreement directly with and controlled the driver creating an agency relationship that resulted in vicarious liability. The trial court found that agency did exist, because the broker dispatched the driver, the driver had constant contact with the broker, and the driver knew that the broker would impose fines for missed calls and delivering late. The broker appealed. The appellate court, in its analysis, cited that a principal may be held liable for the negligent actions of an agent that caused a plaintiff's injury, even if the principal does not himself engage in any conduct in relation to the plaintiff.[11] The appellate court found that the broker controlled the manner of the driver's performance and owned the product being shipped. "These

[5] *Jones*, 558 F. Supp. 2d at 638-639.
[6] *Jones*, at 642-643, citing *Puckrein* at 897.
[7] *Jones*, at 648.
[8] *Id.*
[9] *Id.*, at 645, citing *Schramm*, 341 F. Supp. 2d at 552-553.
[10] Virginia Supreme Court Restatement (Second) of Torts §308.
[11] *Woods v. Cole*, 181 Ill. 2d 512 (1998).

facts support the inference that [broker] controlled the details of [the driver's] operations, schedule and compensation."[12]

Broker controlled the details of the driver's operation, schedule and compensation creating agency and, therefore, vicarious liability.

Other Cases

In two other cases, both involving brokers, the cases turned on a blurring of the line between authorities held by brokers. The result is that brokers that are also associated with carrier operations may be held to an even higher standard of care.

The TIA Carrier Selection Framework addresses these points and helps TIA members establish and maintain their own carrier selection framework.

[12] *Sperl v. C. H. Robinson Worldwide, Inc.*, _____

CSA AND A CARRIER SAFETY FITNESS DETERMINATION

There has been much debate surrounding FMCSA's Compliance, Safety and Accountability (CSA). The debate centers not only on the methodology used in CSA, but also about the desirability of having the CSA system altogether. This is a predicable outcome since, whenever there is a major change, one segment of the industry or another will see this change as cataclysmic. When the change agent is Washington policy, there are two options. You can fight to the death against the change and take your chances. Or you can work to mitigate the risk, make the change the best it can be, and find the opportunities for success on the other side of the change. TIA has chosen the latter path. TIA understands that CSA is far from perfect, and as will be seen, TIA seeks very specific changes to the system. We also seek a comprehensive solution to this new 3PL liability.

The Previous System

CSA is far from perfect, but it has the potential to be better than what preceded it. Under the previous FMCSA system, the agency relied on physical audits – of which it could only audit two to three percent of the carrier population annually.[13] To prioritize the carriers that should receive an audit, FMCSA created the SafeStat system to gather data from various sources and develop a score. Carriers with a SafeStat score of 75 or higher entered a priority queue for audits. The problem with this system was that it was solely designed to trigger audits whether they were needed or not. If, for example, there were 100 carriers, and these carriers were all perfect – they never received a speeding ticket, or had a bad tire, they complied with every rule – 25 of these carriers would still be rated from 75 to 100, because that was the system. Of the other 75 carriers, 25 might be rated satisfactory, but the other 50 would be unrated or rated conditional.

While it became standard practice to avoid carriers with a rating of 75 or higher, courts like that in *Jones* began to question brokers when they hired carriers with scores close to 75. The previous system also left two huge traps for 3PLs and shippers – many carriers were unrated; and some were rated "conditional." And, the Inspector General for the U. S. Department of Transportation report issued six months before the issuance of the *Schramm* decision revealed the following findings and recommendations with regard to SafeStat:

- Of 645,551 active interstate carriers on record, only 26 percent had sufficient data represented to compute a value for one or more of the four safety evaluation areas.
- One-third of crash reports, including 37,000 crashes involving interstate carriers were missing from the FMCSA's database.
- As of January 2003, 42 percent of the reporting on active carriers contained outdated data.
- For the fiscal year 2002, the average time in which to upload crash data on carriers took 158 days.
- Thirteen percent of the 21,000 crashes and over 70,000 of the inspection transactions occurring in our 6-month sample period contained carrier identification errors, such as failure

[13] Committee on Transportation & Infrastructure Subcommittee on Highways and Transit U.S. House of Representatives; *Statement of Anne S. Ferro, Administrator, FMCSA;* June 23, 2010

to identify a carrier associated with the violation, or in a smaller number of instances, identifying the wrong carrier.

- In an estimated 11 percent of the inspection errors the wrong carrier was held accountable for the SafeStat related violation.
- Problems with the inaccurate data are compounded because no effective system is in place now to facilitate the correction of errors in data reporting.
- Missing crash reports may place a lower risk carrier in a deficient category because data for a higher risk carrier is not included in the calculation.
- The effectiveness of the SafeStat scoring and ranking calculations is highly dependent on the quality of the crash data file, which in the past was missing a substantial number of reportable crashes.
- If public dissemination of SafeStat results is to continue, the data must meet a higher standard. The types and magnitude of data problems we found argue for immediate and effective action.[14]

Even with these annotated flaws, the *Schramm* court imposed a duty on those that hire trucks to use the SafeStat system to evaluate carriers before they were hired. Without act of Congress, and with warts and all, SafeStat became the law of the land.

FMCSA, however, recognized the flaws in what to them was an internal system. The Agency posted the following disclaimer

> *BECAUSE OF STATE DATA VARIATIONS, FMCSA CAUTIONS THOSE WHO SEEK TO USE SAFESTAT DATA ANALYSIS SYSTEM IN WAYS NOT INTENDED BY FMCSA. PLEASE BE AWARE THAT USE OF SAFESTAT FOR PURPOSES OTHER THAN IDENTIFYING AND PRIORITIZING CARRIERS FOR FMCSA AND STATE SAFETY IMPROVEMENT AND ENFORCEMENT PROGRAMS MAY PRODUCE UNINTENDED RESULTS AND NOT BE SUITABLE FOR CERTAIN USES.*[15]

SafeStat scores were removed due to a U.S. Inspector General report showing that the accident score was faulty. However, FMCSA left viewable 3 of the 4 subsets of SafeStat, which together in an FMCSA formula, made a SafeStat score. This caused misunderstanding and misuse of the subsets of data, and created significant confusion. The *Schramm* requirement to, "check the safety statistics and evaluations of the carriers with whom it contracts on the SafeStat database" remains adding to the confusion in the industry. The *Puckrein* and *Jones* courts added the requirement to look beyond the obvious to what "you should have known" further adding to the current state of confusion.

Compliance, Safety & Accountability (formerly Comprehensive Safety Analysis)

In their 2006 – 2011 Five Year Plan, the Agency announced its intention to develop the Comprehensive Safety Analysis 2010 (CSA), stating

[14] U.S. Department of Transportation, Office of Inspector General: *Executive Summary Audit Report No. MH-2004-034,* February 13, 2004; http://www.oig.dot.gov/sites/dot/files/pdfdocs/mh2004034.pdf.
[15] FMCSA, *Safety Measurement System*, http://ai.fmcsa.dot.gov/SMS/.

> *THE INTENT OF CSA 2010 IS TO ESTABLISH AN OPERATIONAL MODEL THAT WILL DETERMINE THE RELATIVE SAFETY FITNESS RISK ATTRIBUTABLE TO EVERY MOTOR CARRIER AND DEVELOP STREAMLINED APPROACHES TO CHANGE THE BEHAVIOR OF POOR MOTOR CARRIER OPERATIONS AND THEIR DRIVERS. THE CSA 2010 WILL ULTIMATELY PROVIDE FMCSA A NEW MODERN OPERATIONAL MODEL THAT WILL GREATLY ENHANCE THE AGENCY'S EFFICIENCY AT GATHERING AND PROPERLY EVALUATING A GREATER PROPORTION OF THE REGULATED POPULATION.*[16]

CSA is an attempt by FMCSA to meet its statutory obligation to issue a safety fitness determination for motor carriers. The problems with CSA and the evolving liability facing 3PLs when hiring motor carriers are well documented, so for our purpose, we will assume these problems into fact, and discuss how TIA plans to address them.

TIA's Desired Outcome

The Department of Transportation is the single government department responsible for building roads, issuing licenses to motor carriers to operate on those roads, and determining the safety fitness of those carriers. Hundreds of thousands of 3PLs and shippers depend on the FMCSA to tell them which carriers should and should not be used. These entities make goods, or arrange transport of goods by FMCSA licensed motor carriers. They should not be placed in the untenable current position to second guess FMCSA decisions, analyze subsets of partially hidden FMCSA data for which they are not qualified to do; or become their own safety audit agency.

It should be enough to rely on the Agency's safety fitness determination, and from that determination, the Agency should determine whether EVERY for hire carrier is either SAFE TO USE (green light) or UNSAFE TO USE (red light). Shippers and 3PLs should be able to rely on a carrier as being found by FMCSA to be SAFE TO USE as meeting the competence and reasonable care criteria in the selection of an independent motor carrier. To get to this point, however, will take a multi-layered approach: CSA needs to be improved, the Agency needs to finalize its safety fitness determination rulemaking, and the standard for hiring independent contractors (carriers) as interpreted by courts needs to be re-set.

Getting to TIA's Desired Outcome

Working Within the System:

TIA is the voice of the third party logistics industry. TIA has chosen to work within the system to create an on-going dialogue with FMCSA and leading carrier organizations. TIA's approach to all issues is to find practical solutions to industry issues. By maintaining good relations with FMCSA and leading carrier and driver associations, TIA is able to talk informally with FMCSA and the other associations about CSA concerns. TIA will file comments when the Safety Fitness Determination rulemaking is released by FMCSA. TIA talks with and coordinates with other associations, but like other leading industry associations, TIA must maintain its strong, independent voice.

[16] Federal Motor Carrier Safety Administration, *FMCSA Strategic Plan 2006 – 2011*, http://www.fmcsa.dot.gov/fmcsa-strategic-plan-102907.htm.

Why Hiding the Information Will Not Work:

Some have suggested that CSA data be hidden from view. The *Schramm* court created a legal liability for a 3PL to "check the safety statistics and evaluations of the carriers with whom it contracts on the SafeStat database maintained by FMCSA…" The *Puckrein* and *Jones* courts expanded this requirement to "what you should have known." These requirements will continue until overturned by either a higher court or Congress. Hiding the BASICS, therefore, will just create new challenges in meeting the *Schramm*, *Puckrein*, and *Jones* requirements. Carriers need to monitor their BASICS so that they can challenge wrong data. Since 3PLs and shippers know the BASICS exist, and since 3PLs and shippers also know the carriers need to monitor their scores, even if FMCSA was to hide the information from the general public, it seems logical that shippers will require their 3PLs to request a carrier's BASICS. If a carrier refuses to provide its BASICS, the shipper may be forced to request a copy through the Freedom of Information Act (FOIA). This requires requesting hundreds or thousands of such requests each month. Such processes are incredibly time consuming. It's very hard to put toothpaste back in the tube once it has been squeezed out.

In addition, if the data is hidden, FMCSA will still be making their Safety Fitness Determination based on data that may be incorrect without a system in place for carriers to appeal their rating.

Eliminating Traps:

Under the current, and soon to be replaced rating system, over 80% all federally licensed motor carriers are rated either "conditional" (about 3%) or have no rating (about 77%). This situation creates a significant trap for 3PLs and shippers which has been exploited in court, by suggesting 3PLs and shippers analyze other subsets of FMCSA data, much of which is purposefully hidden by FMCSA. The industry needs a single, clear cut system in which all carriers are rated either safe to use or unsafe to use. The current licensing system used by FMCSA assumes that all new carriers are safe – they apply and receive a license to operate. This assumption should apply to all operating carriers unless a carrier is found to be unsafe.

Safety Fitness Determination:

The next step in the regulatory process is the Safety Fitness Determination (SFD) rulemaking, which is expected in 2012. It is during the SFD rulemaking that the industry can seek specific changes in the BASICS and the algorithms used to determine BASICS alerts. TIA will file comments in this rulemaking based on concerns raised by TIA members, and in consideration of comments filed by other organizations.

ANNEX 1: SPECIFIC CHANGES TO CSA SOUGHT BY TIA

As the industry gains more experience with CSA, additional stress points will be discovered. TIA maintains regular contact with FMCSA and brings to the attention of the agency problems with CSA through formal and informal comments. TIA also works with the Owner Operator-Independent Driver Association (OOIDA) and the American Trucking Associations (ATA) on CSA. TIA will file its own comments and maintain its own voice with the Agency, but will work with leading associations to develop common positions where appropriate. Many of the specific points listed below, for example, were developed by OOIDA. This list of specific changes will remain an evolving document.

1. Any violation and weighting contained in the methodology is supposed to "reflect the relative importance of each violation in each BASIC and be related to increasing crash risk."

2. Driver Scores – driver scores should follow the driver, not remain with the trucking company, if the driver leaves or is released by the trucking company. It is unfair to penalize the trucking company for the actions of a driver that is no longer employed by the company, while that driver is able to go to work for another company and leave his scores behind. This policy encourages bad drivers to hop from carrier to carrier. It would be a better policy to encourage driver stability and reward carriers for training drivers to avoid problems, and to learn from their mistakes. Carriers that engage in on-going safety training should be able to eliminate bad driver scores unless the driver shows a continuing pattern of violations.

3. Driver Scores – drivers should not receive negative scores for non-driving related issues such as failure to pay child support, or sign paperwork, etc.

4. Driver Scores – driver scores should be based relative to the driver pool of a company. A company with 100 drivers, of which three have bad scores, should show a three percent risk.

5. Crash Accountability – crash involvement by drivers and motor carriers is currently presented prejudicially because the agency does not take into account who was "at fault" (this BASIC is currently hidden from public view). FMCSA is developing a system (reliant on DATA Q process) where a driver/motor carrier would need to submit a Police Accident Report (PARS) to the agency for a "fault" determination review by a third party contractor. Supposedly, failure to submit a PARS would automatically default to an assumption the carrier/driver had liability.

6. Cargo Related BASIC – this BASIC was also removed from public viewing because it was too prejudicial to the open equipment segment of the industry based on the fact that the open equipment segment accounts for the vast majority of violations simply because they are easily viewable. Supposedly, FMCSA is considering a merger of this BASIC with the Unsafe Driving BASIC with the belief that merger will somehow "dilute" the impact on flatbed operations. This merger, however, may still result in open equipment carriers being over represented.

7. Improper Assignment of Accountability of Violations in both the Carrier Safety Measurement System (CSMS) and Driver Safety Measurement System (DSMS) – if a driver is assigned a violation in the DSMS, the motor carrier will automatically be assigned the same violation in the CSMS. There are many violations, however, that are currently attributed to the driver, which arguably are more

properly assigned only the motor carrier if at all. For instance, drivers are held accountable for FMVSS violations. No driver is going to know whether "fuel tanks" have been attached in accordance with FMVSS. It can also be argued that many of the FMVSS type of violations have little or no corollary to increased crash risk hence they should not even be included in the methodology. FMCSA is still struggling with proper accountability for violations noted on intermodal equipment. Since drivers are not required by regulation to perform the equivalent of a North American Standards Level I inspection as part of their pre-trip, many "hidden" violations found at roadside are supposed to be assigned to the intermodal equipment provider – this is not uniformly happening as a result of roadside law enforcement NOT making the proper notations on inspection reports. While decent motor carriers are savvy enough to monitor and make DATA Q challenges – not enough follow this lead because of the heavily ingrained belief that the DATA Q process is not fair.

8. Violations are included in the methodology that have no correlation to increased crash risk - This is especially true in the "all important" Fatigue BASIC where 70% of the violations captured are not true hours-of-service violations but "form and manner" violations (e.g. driver forgot to write down a bill-of-lading number). During the SBA Roundtable, Bryan Price from FMCSA admitted the agency has not looked at how the methodology could be improved by narrowly focusing this BASIC on "true HOS violations." He did state a mathematical probability exists between increased crash risk and those above the deficiency threshold. Another example of a violation included in the Fatigue BASIC methodology that has absolutely no correlation to increased crash risk is a driver not signing his Daily Vehicle Inspection Report (DVIR). This is also assigned a severity weighting of 4.

9. Unsafe driving BASIC - probable cause states (like Indiana) are making traffic stops for one mile per hour over the limit (allegedly) and noting the violation on inspection reports (this gets noted as a 392.2-SLLS1 with a severity weighting of 1). This type of unfair enforcement action unduly tarnishes the safety records of both drivers and motor carriers. Also, "clean inspections" will not help lower percentile rankings – even if the inspection was the result of a traffic stop where driving behavior was not a factor for the stop/inspection (clean inspections help out in most other BASICs). A handful of "probable cause" states are actually responsible for the majority of negative data compiled in this BASIC thus skewing the validity of this BASIC. Drivers and motor carriers who operate primarily in those states will actually have worse profiles simply because FMCSA has done nothing to "normalize" the disparate treatment between jurisdictions.

10. DATA Q challenge system – the entire system needs over-haul because it gives too much discretion to law enforcement since often the very officer who noted a violation is the one asked whether it existed! Additionally, many state partners refuse to remove court adjudicated violations (not guilty/dismissed…etc.) from the data system.

NOTES:

THIS DOCUMENT IS A WORKING DRAFT OF A STRATEGIC POLICY STATEMENT. IT IS NOT INTENDED TO BE A RECOMMENDATION TO MEMBERS AS TO HOW TO CONDUCT THEIR INDIVIDUAL BUSINESSES.

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