

## Comments of the International Brotherhood of Teamsters

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### **Pilot Program on NAFTA Long-Haul Trucking Provisions [Docket No FMCSA-2011-0097] Department of Transportation Federal Motor Carrier Safety Administration**

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On April 13, 2011, the Federal Motor Carrier Safety Administration (FMCSA) published a notice in the Federal Register outlining its proposal for the initiation of a United States-Mexico cross-border long-haul trucking pilot program to test and demonstrate the ability of Mexican-domiciled motor carriers to operate safely in the United States beyond the currently permitted commercial zones. The Federal Register notice seeks public comment on the proposal. The International Brotherhood of Teamsters (IBT) files these comments in response to this notice.

#### **Introduction and Statement of Interest of the IBT**

The IBT is a labor organization whose membership includes hundreds of thousands of drivers who start their workday with the turn of a key, and whether they drive a school bus, a UPS van, an 18-wheeler or another type of vehicle, our nation's roads and highways serve as their workplace. They deserve as safe a work environment as any factory floor or office building. However, the cross-border pilot program, as outlined in this Federal Register notice, fails to adequately protect our members, their families and the traveling public from the potential danger of unsafe Mexican trucks and drivers, who do not meet or will not adhere to all U.S. safety standards while operating their vehicles in the United States. Further, it fails to protect our members and other U.S. workers from the loss of employment from both outright job displacement and inadequate enforcement of U.S. cabotage laws, potentially allowing Mexican drivers to deliver U.S. cargo point-to-point in the U.S., threatening the jobs of all U.S. commercial motor vehicle drivers. The cross-border program does not provide for adequate enforcement of U.S. safety regulations, nor do safety and security concerns on the Mexican side of the border permit the granting of "simultaneous and comparable" authority for motor carriers domiciled in the United States to operate within Mexico, as required by Section 6901 of the U.S. Troop

Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Act of 2007 (Section 6901). Because of these deficiencies and others as outlined below, the IBT strongly opposes the implementation of the cross-border program.

## **Pilot Program Description**

### ***Staged Pilot Program***

As described in the notice, a Mexican motor carrier can proceed from Stage 1 to Stage 2 after a minimum of 3 months. During that period, the motor carrier must receive at least 3 vehicle inspections. If that occurs, the motor carrier can proceed to Stage 2, at which point the carrier's vehicles are subject to an inspection rate comparable to other Mexico-domiciled motor carriers that cross the U.S-Mexico border. This process may allow a single truck of a carrier to escape inspection entirely, save for the one inspection occurring during the Pre-Authority Safety Audit, if the vehicle does not cross the border in the initial 3-month period, and then only be subject to random inspection as it proceeds all the way to Stage 3. How would a carrier with 12 trucks enrolled in the program be treated if only 1 truck participates? There appears to be a loophole for carriers to be granted permanent operating authority when only a small segment of its fleet is subject to more rigorous and supplementary inspections at the border in the initial 3-month period.

Additionally, the notice does not explain why inspections of motor carriers that progress to Stage 2 at "a rate comparable to other Mexico-domiciled motor carriers that cross the United States-Mexico border" will be effective at ensuring the safety of U.S. roads. Thus, if average inspection rates are extremely low, so too will the inspection rates for carriers in Stage 2 be low. This ultimately is a meaningless standard, one entirely divorced from the purported goals of verifying the safety of participating carriers and vehicles.

It also is not clear what level of inspection at the border these Mexican trucks will be subject to. Is it a Level 1, 2, or 3 inspection? The level of inspection should be specifically stated.

Mexican trucks operating under provisional operating authority for an 18-month period can be given permanent operating authority after a compliance review produces a satisfactory safety rating with no other pending enforcement or safety improvement actions. Mexico-domiciled motor carriers should not be given permanent operating authority while the

pilot program is on-going. All safety data obtained during the program should be evaluated to determine if the pilot program proved or disproved the ability of Mexican trucks and drivers to adhere to U.S. safety regulations and our cabotage laws, and to operate safely in the United States. Otherwise, Mexican carriers will be granted permanent operating authority regardless of the outcome of the pilot program, which would undermine the very point of having a pilot program.

### ***Reciprocity with Mexico***

Section 6901 limits funds to grant authority to Mexican-domiciled motor carriers to operate beyond the commercial zones to the extent that “simultaneous and comparable authority to operate within Mexico is made available to motor carriers domiciled in the United States.” The IBT maintains that “simultaneous and comparable” authority to operate is not possible under the current Travel Warning issued April 22, 2011, by the Bureau of Consular Affairs, U.S. State Department. The Travel Warning cautions that... “Violence along Mexican roads and highways is a particular concern in the northern border region. As a result, effective July 15, 2010, the U.S. Mission in Mexico imposed restrictions on U.S. government employee’ travel. U.S. Government employees and their families are not permitted to drive from the U.S.-Mexico border to or from the interior of Mexico or Central America. Travel by vehicle is permitted between Hermosillo and Nogales.” The travel warning cites the increase in the number of U.S. citizens murdered in Mexico, up from 35 in 2007 to 111 in 2010. The 8-page document is rife with warnings to curtail non-essential travel to many of Mexico’s states. Some highlights include:

*“Nogales and Northern Sonora: You are advised to exercise caution in the city of Nogales. Northern Sonora is a key region in the international drug and human trafficking trades, and can be extremely dangerous for travelers....**You should defer non-essential travel to these areas.**”*

*“Ciudad Juarez and Chihuahua: The situation in the state of Chihuahua, specifically Ciudad Juarez, is of special concern. Ciudad Juarez has the highest murder rate in Mexico. Mexican authorities report that more than 3100 people were killed in Ciudad Juarez in 2010...**You should defer non-essential travel to Ciudad Juarez and to the Guadalupe Bravo area southeast of Ciudad Juarez. U.S. Citizens should also defer non-essential travel to the northwest quarter of the state of Chihuahua.**”*

*“Durango, Coahuila and Zacatecas: Between 2006 and 2010, the number of narcotics-related murders in the State of Durango increased*

dramatically...U.S. government employees are restricted from traveling to the cities of Durango and Gomez Palacio. **You should defer non-essential travel to these cities.** The State of Coahuila has also experienced an increase in violent crimes and narcotics-related murders...**You should defer non-essential travel to this area, as well as the cities of Piedras Negras and Ciudad Acuna due to frequent incidents of Transnational Crime Organizations (TCOs).** The northwestern portion of the state of Zacatecas has become notably dangerous and insecure...**You should defer non-essential travel to these areas."**

"Monterrey and Nuevo Leon: The level of violence and insecurity in Monterrey remains elevated...TCO's continue to use stolen cars and trucks to create roadblocks or 'blockades' on major thoroughfares, preventing the military or police from responding to criminal activity in Monterrey and the surrounding areas. Travelers on the highways between Monterrey and the United States (notably through Nuevo Laredo and Matamoros/Reynosa) have been targeted for robbery that has resulted in violence...The number of kidnappings and disappearances in Monterrey, and increasingly throughout Monterrey's consular district, is of particular concern."

Tamaulipas: **You should defer non-essential travel to the state of Tamaulipas...**TCOs have set up roadblocks in various parts of Nuevo Laredo in which armed gunmen carjack and rob unsuspecting drivers...U.S. Government employees are currently restricted from traveling on the highway between Nuevo Laredo and Monterrey, as well as Mexican Highway 2 towards Reynosa or Ciudad Acuna due to security concerns. Be aware of the risks posed by armed robbery and carjacking on state highways throughout Tamaulipas."

Security concerns are not limited to the northern border region, and the advisory lists several other situations that could affect one's safety in other parts of Mexico.

"Sinaloa and Southern Sonora: **You should defer non-essential travel to Culiacan and exercise extreme caution when visiting the rest of the state...**Highway robbery and carjacking are ongoing security concerns for travelers on the Mexican toll road Highway 15 in Sonora and on Maxipista Benito Juarez in Sinaloa. When traveling in Sinaloa, U.S. government employees are required to use armored vehicles and may only travel in daylight hours."

"San Luis Potosi...Cartel violence and highway lawlessness have increased throughout the state and are a continuing security concern. All

*official U.S. government employees and their families have been advised to defer travel on the entire stretch of highway 57D in San Luis Potosi as well as travel in the state east of highway 57D towards Tamaulipas. **You should defer non-essential travel in these areas.***

*“Nayarit and Jalisco: Official U.S. government employees are prohibited from traveling to Colotlan, Jalisco, and Yuhualica, Jalisco, both near the Zacatecas border, because of an increasingly volatile security situation. **You should defer non-essential travel to these cities.**”*

*“Michoacán: **You should defer non-essential travel to the State of Michoacán, which is home to another of Mexico’s most dangerous TCOs, ‘La Familia’.**”*

*“Guerrero and Morelos: You should exercise extreme caution when traveling in the northwestern part of the state of Guerrero, which has strong TCO presence.”*

It is very clear that the safety of U.S. drivers traveling into Mexico cannot be ensured, and therefore simultaneous and comparable authority is not made available to U.S. motor carriers under the pilot program.

### **Previous Program Participants**

The FMCSA proposes to give those Mexico-domiciled motor carriers that participated in the 2007-09 demonstration project and operated under provisional operating authority credit for the amount of time the carrier operated, in calculating the 18-month period of provisional operating authority. The IBT strongly disagrees with this proposal. The previous program, defunded by Congress over safety concerns, did not provide the same level of transparency or enforcement mechanisms that this current cross-border program provides. PASAs were not noticed in the Federal Register. Trucks were not equipped with electronic devices to provide data concerning hours-of-service and/or cabotage violations. English proficiency requirements for drivers were not the same. Also, the FMCSA insisted that the prior program was not a “pilot” program, and therefore, grandfathering those trucks with time spent in the prior program violates the requirement in section 6901 that “granting such authority is first tested as part of a pilot program.”

### **Pre-Authority Safety Audit (PASA) Requirements**

The FMCSA proposes to permit Mexico-domiciled motor carriers to designate the vehicles and drivers they wish to use in the pilot program, at which time the FMCSA will inspect and approve those vehicles and drivers. While the IBT recognizes that maintenance records and other safety data

of the carrier will be checked, we would suggest that the PASA should allow for a spot check of other vehicles in the motor carrier's fleet along with a review of driving records of drivers not designated to participate in the pilot program. This will give a more accurate picture of the overall safety and maintenance practices of the carrier.

The cross-border proposal does not specifically make clear that the PASAs for all carriers participating in the pilot program will be published in the Federal Register prior to the start of the pilot program and/or the carrier's participation in the program, should the carrier be granted operating authority after the commencement of the program. The FMCSA intends to grant temporary operating authority after completion of the PASA. Section 6901 requires providing "sufficient opportunity for public notice and comment" of the PASAs, making it necessary for the PASA information to be noticed prior to the carrier's participation. Otherwise, the comment period would not be relevant.

While the notice states that English language proficiency of the Mexican driver will be tested to assess whether the driver can read and speak the English language sufficiently to understand highway traffic signs and signals in the English language, there is no clarification or description of the details of the testing and how proficiency of the English language is measured. This should be further explained in the final proposal.

Finally, the notice fails to make clear that participants in the previous program are subject to the PASA requirement, and that PASAs previously conducted are not sufficient for participation in this new program. New PASAs must be conducted for all participants in this program both because of the time lapsed since the earlier PASAs were performed, and because the PASAs proposed in the notice by the FMCSA include additional requirements that were not part of those earlier PASAs.

### **Monitoring, Oversight and Enforcement**

The FMCSA proposes to equip all participating long-haul vehicles with an electronic monitoring device installed and activated at all times. The agency intends to monitor compliance with hours-of-service and prohibitions against point-to-point delivery of domestic cargo, but does not indicate specifically what type of equipment will be used. Electronic On-Board Recorders (EOBRs) measure time behind the wheel of a moving vehicle, but do not necessarily measure on-duty-not driving time. To

comply with hours-of-service regulations, on-duty time cannot exceed 14 hours, but the FMCSA may have to rely on Mexican drivers providing this information in writing rather than through electronic means.

While the notice states that monitoring includes electronic data collection and analysis, there is no indication that any monitoring will take place in real time. If there is no real-time monitoring, violations of hours-of-service will put fatigued drivers behind the wheel and potentially compromise the level of safety on our U.S. highways. No real-time monitoring would mean that Mexican drivers could violate out cabotage laws and deliver U.S. cargo point-to-point in the U.S., denying work for our Teamster members and other U.S. drivers. The economic damage will already have been done when the FMCSA analyzes the data. We strongly suggest real-time electronic monitoring of Mexico-domiciled trucks enrolled in the pilot program.

Any monitoring and enforcement of hours-of-service regulations must also ensure that Mexico-domiciled drivers who cross the U.S.-Mexico border comply with the limitations on on-duty and driving times. Obviously, Mexico-domiciled drivers may log hours in Mexico before arriving at the border, and then may drive more hours within the U.S. The pilot program must ensure that drivers crossing the border do not exceed the maximum number of operating and on-duty hours established by U.S. regulations, and must therefore account for operating and on-duty time that occurs on the Mexican side of the border.

In addition, regulatory guidance under 49 CFR Section 395.8(k)(1) requires motor carriers to retain supporting documents at their principal places of business for a period of 6 months from the date of receipt. “Supporting documents are the records of the motor carrier which are maintained in the ordinary course of business and used by the motor carrier to verify the information recorded on the driver’s record of duty status. Examples are: bills of lading, carrier pros, freight bills, dispatch records, electronic mobile communication/tracking records, gate record receipts, weight/scale tickets, fuel receipts, fuel billing statements, toll receipts, toll billing statements, port of entry receipts, cash advance receipts, delivery receipts, lumber receipts, interchange and inspection reports, lessor settlement sheets, over/short and damage reports, agricultural inspection reports, driver and vehicle examination reports, crash reports, telephone billing statements, credit card receipts, border crossing reports, custom declarations, traffic citations, and

overweight/oversize permits and traffic citations. Supporting documents may include other documents which the motor carrier maintains and can be used to verify information on the driver's records of duty status. If these records are maintained at locations other than the principal place of business but are not used by the motor carrier for verification purposes, they must be forwarded to the principal place of business upon a request by an authorized representative of the Federal Highway Administration (FHWA) or State official within 2 business days."

[75 FR 32984, June 10, 2010]

### **U.S.-Mexico Equivalency of Laws and Regulations**

The notice indicates that the Secretary of Transportation is accepting three areas of Mexican regulations as being equivalent to U.S. regulations. These include regulations governing Mexican Commercial Driver's Licenses, physical examinations conducted by Mexican doctors and drug testing specimens collected by Mexican medical collection facilities, and controlled substances testing in Mexico conducted by personnel from Mexico's Transport and Communications Ministry (SCT). Unfortunately, the rationale provided for justifying equivalency in these areas depends upon factors that, in many cases, are unproven and lack substantiation.

### **Commercial Driver's License**

The FMCSA indicates that it is in the process of updating its MOU with Mexico, specifying that the Mexican LF is equivalent to the U.S. CDL. At the same time, it implies that disqualification standards are not identical for safety infractions or testing positive for the use of drugs. The notice further states that because Mexico's disqualification standards are not identical to U.S. standards, the FMCSA has developed a system to monitor the performance of Mexico-licensed drivers while operating in the United States. It is not clear what that monitoring system is, or how the disqualification standards differ. Nor is it clear whether or how the system will take account of incidents in drivers' private vehicles in Mexico as opposed to incidents in their commercial vehicles. Those issues should be clarified.

The agency visited a Mexican driver license facility, a medical qualification facility and test and inspection facility on February 17, 2011. It observed



Mexico to have rigorous requirements for knowledge and skills testing, but no documentation is provided.

The IBT has serious concerns about the accuracy and completeness of information in the Mexico LF database. In addition, the DOT Inspector General has cited several instances where states have not timely recorded violations of Mexican drivers operating in the U.S. It is well known that many Mexican drivers also possess a Mexican state license in addition to the Mexican LF. While the FMCSA would require Mexican drivers participating in the pilot program to produce a copy of a driving record for a Mexican state license the driver may hold, it is dependent on the integrity of the driver to produce the record. There are also instances where a Mexican driver may have more than one Mexican state license. The fact that the FMCSA is relying on individual drivers to report their violations on Mexican state-issued licenses begs the question of whether there is sufficient electronic access to Mexico's drivers' records at all.

### **Drug and Alcohol Testing**

According to the FMCSA, drug testing specimens collected by Mexican medical collection facilities are equivalent to the process for test specimens collected in the United States. Further, an MOU has been executed which will require Mexico to collect drug testing specimens using U.S. specimen collection procedures, including chain of custody procedures and U.S. collection forms (translated into Spanish) to ensure sample integrity. However, there is still no laboratory in Mexico certified to test the specimen samples collected. Neither is there any information provided about the training regime for Mexican personnel to follow U.S. procedures. Chain of custody issues will continue to be a concern until these issues are resolved, as will whether the testing is random, about which little information has been provided. The U.S. driver workforce is subject to 10% random alcohol testing per year. There have been many anecdotal stories concerning the use of drugs by Mexican drivers to meet the demands of their employers and literally to keep awake. For that reason, the FMCSA should be forthcoming with any and all information and documentation about its MOU and the Mexican regulations and protocols for drug and alcohol testing.

## **Physical Examinations**

Mexico only requires red color vision. The U.S. requires red, green and yellow vision. There is an important safety reason for this; otherwise, the U.S. would not require it. It should be noted that the Vision Subcommittee of the FMCSA Medical Advisory Committee found that there is a paucity of research as to whether color-blindness contributes to increased crash risk. However, the committee also recommended that no changes be made to the current three color test requirement, because there is no medical research or evidence to justify doing so. The FMCSA should explain why it is proper to hold drivers from Mexico to a lower standard.

## **Federal Motor Vehicle Safety Standards (FMVSS)**

Under the cross-border proposal, vehicles of Mexico-domiciled motor carriers must comply with U.S. FMVSS and either have a manufacturer certification label or be built in model year 1996 or later and meet the FMVSS. The FMCSA is relying on a letter from the Truck Manufacturers Association (TMA) to verify “most trucks manufactured in Mexico since 1993 were built to FMVSSs, even if they were not certified as such.” Thus, the FMCSA proposes that, if a vehicle is of model year 1996 or newer, it need not possess an FMVSS or CMVSS label so long as it is “equipped with all the safety equipment and features required by the FMVSSs in effect on the date of manufacture . . . .” In other words, the FMCSA will determine when and whether to waive the requirement of certification for trucks build in 1996 or later. The agency, however, does not have authority to grant such waivers.

Pursuant to 49 U.S.C. §30122, “a person may not . . . introduce . . . in interstate commerce, or import into the United States, any motor vehicle. . . manufactured on or after the date an applicable motor vehicle safety standard . . . takes effect unless the vehicle complies with the standard and is covered by a certification issued under section 30115 of this title.” Section 30115(a), in turn, requires “[a] manufacturer or distributor” to certify that a vehicle complies with the applicable motor vehicle safety standards, which “must be shown by a label or tag permanently fixed to the vehicle.” These requirements are mandatory, and provide no basis for the FMCSA’s proposal that it be granted authority to waive the statutory requirements.

Even if the FMCSA were authorized to determine when this statutory certification requirement may be waived, it should not rely on the TMA’s assertion that most trucks manufactured since 1993 were built to FMVSSs.

Rather, the necessary inspections of these vehicles can be performed during the PASA vehicle inspection.

### **Need for Statistically Valid Findings**

Section 31315(c) of Title 49 mandates that any pilot program include “[a] reasonable number of participants necessary to yield statistically valid findings.” 49 U.S.C. §31315(c)(2)(C). The notice indicates that the previous program did not have a sufficient number of participating carriers or vehicles, and thus proposes instead to focus on the number of long-haul cross-border trips made by participating carriers. But the statute requires a reasonable number of participants, not a reasonable number of crossings, or hours driven, or miles driven. This is because where, as here, a pilot program is intended to assess the consequences of permitting some broader action – such as opening the border to all Mexico-domiciled carriers – the validity of the program is dependent on having a representative sample of participants.

### **Conclusion**

While the FMCSA’s proposal is a significant improvement over the prior program, there still remain significant gaps in transparency, enforcement mechanisms and safety measures to ensure that Mexican trucks and drivers participating in this cross-border trucking program meet all U.S. safety standards while operating in the United States. There are reasonable questions as to whether the Mexican government can ensure the safety of U.S. motor carriers and drivers in any reciprocal requirement of the program. Until the issues outlined in our comments are fully addressed, the DOT should not proceed with the implementation of this cross-border trucking program.

Respectfully submitted,

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