

# **NAFTA AND THOSE UNSAFE MEXICAN TRUCKS: FACT OR FICTION?**

## **2012 ALFA Transportation Practice Group Seminar**

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### **Texas: Where the Rubber Meets the Road With Mexico**

As a trial lawyer in the West Texas city of El Paso, over the years the defense of truck drivers and trucking companies from the Republic of Mexico has become a significant part of my practice, and allowed fairly unique insight into their operations and related safety issues and concerns. El Paso, Texas sits at the border of Ciudad Juarez, Mexico and is the second largest port of entry by incoming truck volume in the State of Texas, second only to Laredo, Texas. Based on 2008 data from the Department of Transportation, El Paso had 758,856 trucks crossing the U.S./Mexico border, which constituted 15.6% of the total crossings for all U.S./Mexican ports of entry.<sup>1</sup> 2010 data shows that Laredo accounted for 33% of the truck crossing volume in 2010, with 1,550,177 trucks crossing at the two identified bridges.<sup>2</sup> El Paso accounted for 15% of the truck crossing volume with 705,340 trucks crossing at the two bridges identified.<sup>3</sup> As with any truck, invariably accidents occur, and sooner or later they end up in our offices, giving us the opportunity to interact with, and closely examine the record keeping policies, safety practices and attitudes of motor carriers and their drivers in the Republic of Mexico. There are many misconceptions. What we have learned over decades of representing these companies, is that by and large the (mis)statements about their safety are exaggerated, and in many cases just wrong. This paper will explore just a few safety related issues pertaining to motor carriers from the Republic of Mexico in light of our current political debate and implementation of the NAFTA/Border Trucking Pilot Program discussed by my colleagues on this panel.

### **The Politics of NAFTA and Where We Stand Now**

The political background of NAFTA, the implementation of the Pilot Program and allowing access by Mexican trucks to the U.S. is highly charged and furiously debated. Even a short search on the Internet will pull up more articles pro and con than you would care to read, and they won't be cited here. The arguments range from safety concerns, union pressure, protection of American workers, environmental issues, national security, international trade relations and just about anything else running the gamut across that spectrum. It is worth noting

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<sup>1</sup> <http://ai.fmcsa.dot.gov/international/border.aspt> (last visited 3/2/12)

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

that despite all of the hoopla, it was recently reported that only the fourth (4<sup>th</sup>) Mexican carrier has passed the mandatory Pre-Authority Safety Audit (PASA) required to seek operating authority in the United States.<sup>4</sup> Only two of those carriers have been granted operating authority, and there are only eighteen (18) other companies that have applied and are in various stages of the application and PASA processes.<sup>5</sup> That being said, Mexican trucks are coming, and are a part of your immediate future as transportation industry professionals and attorneys representing the industry. While it's certainly not yet the "flood" of Mexican truckers predicted by the doom and gloom naysayers, make no mistake: free trade is a reality and Mexican motor carriers are here to stay. Although this does not represent any big change for those of us in the border commercial zones such as Laredo and El Paso where Mexican motor carriers have been operating for years, it's a safe bet that their presence outside of those zones will present new challenges for just about everyone else in the industry.

### **The Reality of the Mexican Motor Carrier and Driver**

Fueled largely by hyperbolic claims by biased, talking heads (most of whom probably with little or no real experience or contact with Mexican motor carriers and their drivers), the media portrayal has resulted in a distorted and exaggerated picture, in our experience. It is claimed that these companies and individuals intentionally flaunt the law, are not qualified, are not required to live up to the same standards as U.S. drivers and whose solution to law enforcement is to bribe the enforcing officer. Frankly, this has not been our experience at all.

In our experience, Mexican motor carriers operating within the commercial border zone tend to fall into one of two categories – (1) large, well staffed and extremely experienced fleets, or (2) very small individual owner/operators operating one or two trucks, at most. There does not appear to be very much in between. Our experience with the larger motor carriers has been uniformly satisfactory, with appropriate documentation and support for their equipment and drivers. More problematic are the smaller carriers who simply do not have the resources, and sometimes the experience to achieve the same level of compliance. However, these smaller operators are not the ones who will be seeking authority to operate long haul within the United States. They usually are dedicated to just one or two customers. With their lack of resources, they will more than likely simply continue to operate drayage shipments across the border, and are not really the "issue" being debated. The larger fleets who have the resources, assets and staffing who might seek authority to operate outside the border zone appear more than capable to live up to the responsibility that entails.

In our experience, the Mexican truck driver is almost uniformly male. He has typically started driving at a very young age, with training from a father, uncle or other family member who was also a driver. Truck driving schools are non-existent, and they learn by doing. They are high school educated, if that. Most are limited English proficient, but generally can understand and speak enough to get by. They live in a world of corruption, poverty and violence that most of us in the U.S. cannot comprehend. The job of a truck driver is viewed of one of importance, responsibility and trust, and one of the better paying occupations, particularly for someone with limited education. They are hold Federal licenses, which is the Mexican equivalent of a U.S.

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<sup>4</sup> <http://www.thetrucker.com/News/Stories/2012/2/28> (last visited 3/2/12)

<sup>5</sup> *Id.*

CDL. They are not criminals. Almost all have submitted certificates from the government attesting to that fact. Many have been vetted by U.S. Customs/Border Patrol as part of the CT-PAT program. Their attitudes towards law enforcement are mixed, based largely upon the high level of distrust for law enforcement officials in Mexico. However, they all know they are being singled out for extra scrutiny, and realize that full cooperation and compliance with law enforcement while in the U.S. is necessary to maintain their livelihood. In short, our hands on experience has shown that the portrayal of the Mexican trucking companies and their drivers is, in almost all cases, wildly inconsistent with reality.

### **The Mexican Regulatory Scheme and Its Relevance to United States Compliance**

One of the more strident arguments voiced against Mexican motor carriers and their drivers, is the perceived inadequacy of the Mexican regulatory and enforcement scheme, and how that will somehow impact their safety in the United States. There are several points worth examining on that issue:

1. All Mexican motor carriers and their drivers who receive authority to operate in the United States are required to comply with all Federal Motor Carrier Safety Regulations.<sup>6</sup> As such, the extent of the Mexican regulatory scheme would appear to be irrelevant to their operating in the United States, because if they don't comply with U.S. laws, they will not be granted authority, period. Furthermore, to obtain an OP-2 authority to operate within the commercial border zone, Mexican motor carriers have to pass a safety audit, and are subjected to random audits, just like domestic carriers. To obtain an OP-1 authority to operate long haul within the United States, they have to go through a thorough application process, including the Pre-Authorization Safety Audit (PASA), and demonstrate that they comprehend and have the ability to comply with all U.S. laws and regulations. Any authority granted is only conditional until a comprehensive safety review as conducted within 18 months. Furthermore, this does not include compliance with federal programs such as CT-PAT, which provides comprehensive supply chain security, training and enforcement, which is being required by most, if not all of the major U.S. carriers and their customers doing business with Mexican motor carriers. With regard to the claims about failing to track hours of service, it is worth noting that the vast majority, if not all of the Mexican motor carriers currently operating drayage shipments within the commercial border zone are "100 mile radius" short haul drivers that are exempted from maintaining driver's logs pursuant to Federal regulations.<sup>7</sup> Essentially, all that is required is that records of the time the driver reports and is released from work, and the number of hours, be maintained for six months<sup>8</sup> The only real "exception" to enforcement of U.S. regulations appears to be in the area of English proficiency. While Mexican truck drivers are required to meet the English language capabilities required by U.S. regulation, noncompliance is not an out of service

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<sup>6</sup> 49 C.F.R. § 390.3(a)

<sup>7</sup> 49 C.F.R. § 395.1 (e)

<sup>8</sup> *Id.*

violation for Mexico-domiciled motor carriers and drivers authorized to operate exclusively within the commercial border zones.<sup>9</sup>

2. Mexican truck drivers operating in the United States hold Federal licenses from the Republic of Mexico, which is the Mexican equivalent of the U.S.CDL. The validity of this license has been recognized in a Memorandum of Understanding (MOU) between the United States and Mexican governments, which was upheld by The United States Supreme Court.<sup>10</sup> Similar to U.S. requirements, drivers must present appropriate proof of identification, residency and a current medical certification. Proof of training must be provided, both skills and knowledge, and in particular training for any special endorsements sought such as hazmat. The driver is required to submit to a practical exam (road test), and submit proof of English language skills, which is required for the initial application for an international endorsement. This does not include any background checks required to obtain a "Fast Pass" from the U.S. CBP for border crossing, or to be certified in the CT-PAT program. Mexican Federal licenses are required to be renewed every two (2) years. Furthermore, in our experience, the major Mexico-domiciled motor carriers only hire drivers with at least two (2) years experience, and those who they know will meet all background checks needed to operate internationally. Unlike U.S. motor carriers, in our experience major Mexican motor carriers conduct socio- economic studies on their drivers, and also criminal background checks. If their drivers cannot pass legal requirements and are being placed out of service, it hurts their business and distracts from their ability to serve their U.S. customers. Failure gives them a strong incentive to comply with the regulatory scheme and hire good drivers.
  
3. Contrary to the media's portrayal, there are similarities between the U.S. and Mexican regulatory schemes. An excellent resource for material on these issues is "Mexico Trucker On-Line," a website containing many supporting documentation and facts responding to the issues being discussed.<sup>11</sup> Just a short listing of some similarities on critical regulatory issues currently in the public eye follows:
  - a. Drug and Alcohol Testing – in Mexico, the law requires random drug testing by motor carriers at a 50% rate. Random testing can also be conducted at terminals, ports of entry and specific areas along corridors. Drug collection procedures are ISO certified, and a Memorandum of Understanding exists between the U. S.and Mexico that sample collection will satisfy U.S. drug testing regulations, and use U.S. collection procedures and forms that have been translated into Spanish.
  
  - b. Commercial Driver's License – As noted above, the driver must provide proof of medical qualification, address and training, with renewal every

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<sup>9</sup> Memorandum, MC-ECV-0005-07 United States Department of Transportation, 7/19/07

<sup>10</sup> See *Dept. of Transp. v. Public Citizen*, 541 U.S. 752 (2009)

<sup>11</sup> <http://mexicotrucker.com/mexican-truck-docs/mexican-laws-meeting-us-compatibility> (last visited 3/2/12)

two years. Drivers can be disqualified for major and serious traffic violations, and the license can be cancelled by a judge. Cancellations can occur for three speeding violations in a one year period, for leaving the scene of an accident without notifying the authorities, or abandoning your vehicle. Cancellation is also mandated when the license is altered, or failing a drug test. Similar to the U.S., a license cannot be obtained after failing a drug test without proof of successful completion of a rehabilitation program. Cancellation of a federal license is valid for ten (10) years, and cannot be renewed within that time.

- c. Medical Standards – the Republic of Mexico requires a comprehensive physical and psychological examination as a prerequisite to obtaining a Federal license. Furthermore, such examinations may be required while the driver is in operation to determine if he is still fit.

### **The U.S. Response, and Whether We Are Ready for Long Haul Operations in the U.S. by Mexican Trucks**

As part of the ongoing implementation process of NAFTA, for years the FMCSA and OIG have presented various reports and audits on compliance with NAFTA Cross-Border Trucking Provisions. Of significance, is the follow-up audit conducted by the FMCSA on August 6, 2007 that set forth some revealing data about the agency's capability and the safety of Mexican motor carriers and drivers. It was found that between 1998 and June 2006, the number of FMCSA border inspectors had increased from 13 to 254, and from 1997 to 2006, the percentage of Mexican trucks taken out of service had decreased from 44% to 21%.<sup>12</sup> Significantly, from 2004-2006, in every year except one, the out of service rates for Mexico-domiciled vehicles was less than United States vehicles. For 2004-2006, the out of service percentage for United States vehicles was 22.6%, 22.4% and 22.3%, respectively.<sup>13</sup> For Mexico-domiciled vehicles, it was 23.1%, 20.4% and 20.9%, respectively.<sup>14</sup> Of more significance, the percentage of drivers inspected and placed out of service due to a license violation was significantly less for Mexican drivers in every year. From 2004-2006, the out of service rate for United States drivers was 6.8%, 6.9% and 7.3%, respectively, while for Mexican drivers it was 1.9%, 1.1% and 1.2%, respectively.<sup>15</sup> The audit also found that FMCSA had continually improved its border safety program, had adequately addressed two of the four prior audit issues, but still needed to work on the establishment of data bases for enforcement purposes, needed to work on bus inspections, and still needed to implement policies regarding manufacturing safety standards and to ensure implementation of comparable drug and alcohol testing in Mexico.<sup>16</sup>

In a follow up audit report on August 19, 2011, OIG concluded that FMCSA was generally complying with all statutory requirements needed for the implementation of the Cross-

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<sup>12</sup> Follow-Up Audit on the Implementation of the North American Free Trade Agreement's Cross-Border Trucking Provisions, Federal Motor Carrier Safety Administration, Report No: MH-2007-062, August 6, 2007

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

Border Trucking Pilot Program, with only a few exceptions.<sup>17</sup> In particular, OIG identified that FMCSA still needed to finalize plans for conducting 50% of the Pre-Authorization Safety Audits (PASAs) in Mexico, which had not yet been done due to safety concerns. It was also recommended to have site-specific plans for coordinating with CBP to ensure that the Pilot Program drivers and trucks were identified and inspected, and also to establish systems to verify their eligibility for the program.<sup>18</sup> In addition, a recommendation was made for implementing the plan for on-board electronic monitoring devices, and to continue training for inspection and enforcement personnel.<sup>19</sup> The various concerns raised by the OIG were addressed by FMCSA in their report to Congress regarding the Cross-Border Trucking Pilot Program.<sup>20</sup> FMCSA noted that auditors would be sent in teams to Mexico to ensure that there is safety during the PASA and compliance reviews, and that all Mexico-domiciled motor carriers authorized to operate beyond the border commercial border zones would require a Commercial Vehicle Safety Alliance (CVSA) inspection decal to verify their status and the validity of 50% of the drivers participating in the program. Each driver and vehicle would be pre-approved, and approved vehicles would display a suffix at the end of their US DOT number for quick identification.<sup>21</sup> Furthermore, FMCSA had added a module to their existing law enforcement database that would allow ready identification of the participants in the Pilot Program, and were conducting additional training for enforcement personnel.<sup>22</sup> Lastly, on August 29, 2011, FMCSA awarded its first contract for the acquisition of electronic on-board monitoring devices for participating Mexican trucks, with training by the manufacturer having been completed in September, 2011.<sup>23</sup>

In short, years of ongoing audits and inspections have demonstrated massive improvement in the capability of the Federal government to enforce safety at our borders, and shown that as a result of this enforcement, Mexican motor carriers and drivers compare favorably to U.S. motor carriers and drivers, and that all essential requirements of the NAFTA provisions are being addressed in a satisfactory fashion. In fact, the latest 2011 data (current as of December 16, 2011), still shows that Mexican domiciled carriers with limited authority beyond the commercial zone had driver and vehicle out of service rates that were less than U.S. domiciled carriers.<sup>24</sup> These statistics show driver and vehicle out of service rate for U.S. domiciled carriers as being 5.3% and 21.1%, respectively, but Mexican domiciled carriers only had a driver and vehicle out of service rate at 1.8% and 17.4%, respectively.

## **Embrace the Reality**

Mexican motor carrier and their drivers operating in the U.S. under NAFTA will not be the end of world or the U.S. trucking industry as we know it. The volume simply isn't there, and

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<sup>17</sup> Office of Inspector General Audit Report, FMCSA Generally Complies with Statutory Requirements, but Actions are Needed Prior to Initiating its NAFTA Cross-Border Trucking Pilot Program, Report No: MH-2011-161, August 19, 2011

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> The Cross-Border Trucking Pilot Program Report to Congress, Federal Motor Carrier Safety Administration, October 20, 2011

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> <http://ai.fmcsa.dot.gov/international/border.asp> (last visited 3/2/12)

stringent enforcement will exclude all but the most capable. These companies and drivers have no incentive to violate the law, since compliance is essential to their continued existence. They are not all bad and that generalization by biased parties is largely inaccurate. The facts have shown that they are capable of operating just as safely as U.S. carriers and drivers. The FMCSA appears to have both the means and methods to fully implement all safety concerns, and are doing so today. The day of the Mexican truck driver operating beyond the commercial border zone has dawned, and they are coming here to stay. As the political furor dies down, the rest of the industry will soon realize what those of us on the border have known for years, and that is in reality, it's not all that bad.