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June 14, 2019

Raymond P. Martinez, Administrator
Federal Motor Carrier Safety Administration
1200 New Jersey Avenue, SE
Washington, DC 20590-0001
Via Federal Express
800-832-5660

Re: Motor Carrier Regulatory Reform Coalition's Petition for Rulemaking on Scope and Use of "Preventability" Determinations in Assessing Safety Fitness of Motor Carriers

Dear Mr. Martinez:

I represent the Motor Carrier Regulatory Reform Coalition ("MCRR"). Pursuant to 49 CFR 389.31, enclosed for filing please find 1 original and 2 copies of a Petition for Rulemaking in the above-referenced matter.

Please file stamp one copy and return in the envelope provided.

Thank you for your assistance.

Yours truly,

Henry E. Seaton

cc: Jim Mullen
Chief Counsel FMCSA
1200 New Jersey Avenue SE
Washington DC 20590

BEFORE THE FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION

Docket No. FMCSA-_____

THE MOTOR CARRIER REGULATORY REFORM ("MCRR") COALITION'S PETITION FOR RULEMAKING ON SCOPE AND USE OF "PREVENTABILITY" DETERMINATIONS IN ASSESSING SAFETY FITNESS OF MOTOR CARRIERS

COMES NOW, the Motor Carrier Regulatory Reform (MCRR) coalition and files this its Petition for Rulemaking under 49 C.F.R. § 389.31. MCRR submits that rulemaking under the Administrative Procedure Act (5 U.S.C. §§ 551, 553) is a necessary prerequisite to any permanent implementation of a process for determining "preventability" of commercial motor vehicle accidents as proposed in the Crash Preventability Demonstration Program ("CPDP") announced by the Federal Motor Carrier Safety Administration ("FMCSA" or "Agency") in July 2017.

I. Identity of the Parties

MCRR for the purpose of this Petition is composed of ten trade associations including:

Air and Expedited Motor Carriers Association
Alliance for Safe, Efficient and Competitive Truck Transportation
American Home Furnishings Alliance/Specialized Furniture Carriers
Apex Capital Corp.
Auto Haulers Association of America
National Association of Small Trucking Companies
Tennessee Motor Coach Association
The Expedite Alliance of North America
Transportation & Logistics Council
Transportation Loss Prevention & Security Association

Petitioners' membership includes shippers, brokers and carriers directly affected by the proposed preventability procedure and publication of preventability findings. MCRR's membership includes over 10,000 small, frequently unrated motor carriers. Their interests are entitled to statutory protection under the Administrative Procedure Act (APA), the Paperwork

Reduction Act and other requirements for administrative due process before they are assigned safety fitness ratings that can put them out of business under 49 CFR Part 385.

Petitioners' interests require particularized regulatory analysis prior to implementation of any guidance having the effect of a new rule. If CPDP were made permanent in August 2019 as recently announced by the Secretary of Transportation, the result would be a comprehensive re-definition of what constitutes accident "preventability" for purposes of calculating the "accident factor" used in assigning safety ratings to motor carriers under 49 C.F.R. Part 385, Appendix B, section II.B(e). Unquestionably, this re-definition of an essential term used in the safety fitness determination process under 49 U.S.C. § 31144 would set a new standard of "general … applicability and future effect," thus constituting a new "rule" within the meaning of APA (5 U.S.C. § 551(4)). If CPDP is baked into the safety fitness determination process without being vetted in the rulemaking docket for which MCRR petitions here, the result will be an open-and-shut violation of the APA.

II. Background

Over 98 percent of the 525,000 motor carriers the Agency regulates are small businesses under Small Business Administration (SBA) guidelines. The Agency is required to make safety fitness determinations and disclose those determinations to the public under 49 U.S.C. § 31144(a)(3). Yet during the past 9 years, the Agency has been able to provide actual safety ratings to only about 12,000 carriers per year even when using its methodology known as Compliance, Safety, Accountability (CSA) as a supposed improvement over Part 385 procedures. The resulting regulatory limbo has left over 95 percent of the regulated carriers in a position of not holding a current safety rating, thus operating as "unrated" yet approved by the Agency to perform service on the nation's roadways.

Neither collecting and publishing CSA roadside data and scores nor issuing crash preventability findings can be shown to advance the Agency's mandate to provide safety ratings to all carriers. The insufficient data quality and systemic flaws of CSA have not been addressed almost ten years after its implementation. No compelling argument for making preventability determinations has been made to show how the Agency's mandate of issuing safety ratings to all carriers would be enhanced.

MCRR's proposal for a biennial desktop audit (modeled on the Agency's current process for desktop audits of "new entrant" motor carriers under 49 U.S.C. § 31144(g))[1] is a more effective proposal which should be considered prior to institutionalization of preventability determinations, resumed publication of CSA scores, or further tinkering with the Agency's sketchy "Corrective Action Plan" for CSA under the FAST Act. In any event, the CPDP should not be made permanent until it is (i) reviewed as a proposed rule under APA, (ii) subjected to cost-benefit analyses based on likely caseloads, (iii) safeguarded with administrative appeal processes, (iv) expanded to include many additional categories of accidents which often involve no fault of the carrier, and (v) clarified to reflect that no determination of fault by the Agency is expressed or implied with regard to accident categories not within the expanded scope of CPDP.

III. Argument

The Agency has no statutory mandate to set up ad hoc tribunals for making so-called "preventability" determinations. As used in the CPDP test study, the preventability standard is an artificial construct with no proven correlation to causation, fault, or carrier liability, much less

[1] See Comments submitted by MCRR in "Regulatory Review" Docket No. DOT-OST-2017-0069 (November 16, 2017) at https://www.regulations.gov/document?D=DOT-OST-2017-0069-1680 and Comments submitted by MCRR to the Motor Carrier Safety Advisory Committee (MCSAC) (July 19, 2018) at https://www.regulations.gov/document?D=FMCSA-2006-26367-0154.

is it a proven indicator of safety compliance by carrier management or a proven predictor of future crashes.

1. Requirement for Rulemaking. In considering the Agency's CSA 2010 / SMS program, Congress expressly included the following relevant provisions in the FAST Act (Pub.L. 114-94), which mandate APA-compliant rulemaking, preclude the misuse of guidance and forbid the republication of CSA/SMS scores without subsequent Congressional approval. See, for example:

-- Section 5202, which expands public participation in formulation of major rules, and requires regulatory impact studies on representative segments of the motor carrier industry.

-- Section 5303, which mandates periodic review, public comment and weeding out in relation to FMCSA "guidance" documents.

-- Section 5304, which requires USDOT to publish, prioritize and take tangible action on all rulemaking petitions, rather than merely sitting on them.

-- Section 5221, which requires detailed scrutiny of the statistical validity of any proposed program to reform or replace CSA – a process which the Agency has barely begun.

The National Transportation Policy, 49 U.S.C. 13101, also requires the Agency to consider the effect of any new policy initiative on the needs of the traveling and shipping public, and on free market competition in which all carriers, regardless of size, compete on an equal footing if they are fit to operate.

2. Effect on Small Businesses. Petitioners submit that establishing a preventability standard, particularly for small unrated carriers, will have the unintended consequences of (1) establishing an inaccurate alternative vetting standard that will result in a higher insurance cost; (2) fomenting reluctance on the part of the shipping public to use carriers whose crashes have not

been determined to be preventable; and (3) resulting in misuse of "preventability" by the plaintiffs' personal injury bar to characterize small and unrated carriers as unfit for use under an alternative standard that is inconsistent with statute and existing regulations.

3. Due Process. While crash preventability is considered in the context of a compliance review, the broad exceptions to preventability review under the test program are very different from those used under Part 385. The CPDP offers no procedure for adjudication, and no appeals process. As proposed, it amounts to an ad hoc grand jury proceeding in which the crash is presumed preventable. By the proposed publication of 130,000 crashes annually as subject to the preventability standard, small carriers will be required to pre-litigate every reportable crash at significant cost.

Pursuant to 49 U.S.C. § 504, information and data collected by enforcement officers concerning crashes are not admissible in court. Moreover, MCRR can show that SMS methodology and the concept of "preventability" is frequently used by the plaintiffs' bar to prejudice a jury's attitude toward the defendant carriers and the motor carrier industry in particular. Even more troubling is the fact that many recorded crashes would never be screened as preventable or non-preventable under the current program, because their fact patterns would not fit the narrow strictures currently defined by the Agency. This scoping issue would have a particularly misleading effect with respect to small carriers, given the small sample sizes and the paucity of crash data available in their safety records.

The only tangible effect of case-by-case "preventability" determinations by the Agency would be to create yet another series of bogus "safety" evaluations which the plaintiffs' bar could portray – along with legally and statistically flawed CSA data – as seemingly plausible alternatives to Part 385 safety ratings and/or SAFER snapshots. "Preventability" determinations

would be even more insidious than CSA because they would misuse the findings made on individual crashes to undermine the carrier's over-all safety record – and to cast doubt on its legal status as fit to operate and fit to use pursuant to the determinations necessarily made by FMCSA under section 31144 in order to register it as a motor carrier in the first place.

4. Absence of Cost-Benefit Analysis. There has been no cost-benefit analysis for making the preventability study permanent. Based upon the Agency's own data, Petitioners can show the results are insignificant. During the test period the Agency made determinations on less than 5 percent of the crashes and found that almost half of the crashes submitted for review could not be considered under the narrow fact patterns eligible for review. Even when front facing cameras show crashes caused by motorists drifting left of center and hitting the commercial motor vehicle head on, the Agency has declined to determine the accident was preventable because the motor carrier could not demonstrate the motorist was either drunk or attempting to commit suicide.

5. Need for True Regulatory Reform. Executive Orders 13771 and 13777 require the Agency to remove two regulations for each new regulation it proposes. In this context, MCRR submits that the scope and magnitude of adopting a permanent preventability standard and publishing its results is premature to say the least, at a time when Congress and the Agency are still working through the procedures prescribed by the FAST Act with regard to the future of CSA/SMS and the validity and use of roadside truck safety data in general.

Clearly, the adoption of the test program as guidance would impose a new and significant financial burden on carriers, requiring them to contest preventability immediately upon the occurrence of any accident so as to avoid the adverse consequences of loss of business and increased insurance rates that would flow from a preventability determination. Moreover,

accident reconstruction and litigation is a long drawn-out process; its effects on the carrier would be compounded by having to submit a request for an FMCSA preventability determination and by gathering all of the facts in support thereof. The resulting burdensome costs of this additional layer of fact-finding have not been calculated and are not covered by insurance. Thus, adopting the preventability standard by guidance would have a significant financial impact and effect on the industry. It also would insert the Agency into the role of quasi-judicial finder of fact, imposing substantial new administrative burdens on FMCSA and the motor carrier industry alike.

IV. Conclusion and Request for Relief

For all the reasons stated in this Petition, imposition of a new fact-finding regime on the trucking industry and on the Agency's small staff – especially through the short cut of "guidance" – would be an ill-considered diversion from the safety compliance mission to which FMCSA always has given priority. The result would be to make it even more difficult for the Agency to fulfill its statutory mandate of assigning safety ratings to all carriers it regulates. If the Agency is to consider taking on additional fact-finding duties as a federal accident review board, it should do so only after full public notice and comment on such issues as (i) who would do the fact-finding; (ii) whether the fact-finders would be agency employees, contractors or both, (iii) how their work would be funded without further crippling the carrier safety rating process, and (iv) how to provide appropriate disclaimers for accidents as to which no findings would be made due to limitations on fact patterns eligible for review.

Respectfully submitted,

THE MOTOR CARRIER REGULATORY REFORM COALITION

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