EXHIBIT A

NASTC et al. v FMCSA

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DECLARATION OF DAVID OWEN, PRESIDENT OF NATIONAL ASSOCIATION OF SMALL TRUCKING COMPANIES

My name is David Owen. I am President of the National Association of Small Trucking Companies ("NASTC"). NASTC is **a** for-profit trade association incorporated in the State of Tennessee. The membership of NASTC consists primarily of individuals who operate small fleets of commercial motor vehicles. NASTC's mission is to serve as an advocate for, a consultant to, and a source of collective buying power for its member companies. NASTC has over 2600 members in the United States and Canada. Several of the parties submitting statements in **support** of the motion for stay of the Federal Motor Carrier Administrations (FMCSA) rule in Docket No. FMCSA-2004-18898; Withdrawal of Proposed improvements to the Motor Carrier Safety Status Measurement Svstem (Safestat) and Implementation of **a** New Carrier **Safety** Measurement System **(CSMS)** ("CSA-2010") are members of NASTC[1]

NASTC has been **a** leading party in representing the interests of its members and other small fleet operators before the FMCSA and Congress with respect to the agency's **CSA-2010** program. NASTC filed comments, on behalf of its members, with the agency in the 2004-18898 docket. **NASTC's** comments included **a** request that the agency postpone publishing the individual records and BASIC scores of motor carriers until the agency had provided adequate notice of all aspects of the program and had conducted and completed a full rulemaking pursuant to the Administrative Procedures Act.

While any one of **NASTC's** member carriers could have brought this action before the Court or filed comments before the agency below on its own, NASTC and its members elected to take such action collectively on behalf of themselves and other **small** fleet operators.

As stated in the statements submitted by the NASTC members, if the FMCSA is permitted to publish on the Agency's website the **BASIC** scores of individual carriers many carriers will be hurt economically because of the harm to their reputations. The harm which the carrier will suffer will be irreparable. Many shippers and freight brokers have already announced that they will not use the services **of** motor carriers whose BASIC scores fall below **a** certain level and the carrier receives an "Alert" classification from FMCSA. Both shippers and brokers are concerned that **they** may **be** found vicariously liable to third party plaintiffs in **cases** arising from accident claims against the motor carrier while it is transporting the shipper or broker's freight. The shippers and brokers and their counsel have expressed concern that plaintiffs counsel will introduce the FMCSA "Alert" classification of the carrier as evidence of the shipper or broker's negligence in using the services of the carrier. The FMCSA **has** issued statements to the transportation industry that it **is** the intent of the agency in publishing carrier's BASIC scores and classifications that shippers and carriers not use those carriers with "Alert" scores even though **such** carriers may lawfully operate on the nations roads and highways.

An "Alert" score will not only effect a carrier's competitive position but **is** likely to result in higher insurance premiums, **a** reluctance of drivers to work for such companies, and other economic and operational harm from which the carrier will be unable to recover if the publication is permitted to occur.

The agency has acknowledged that the statistics on which the carriers' BASIC scores and classifications are unreliable, that the algorithms that the agency is utilizing to calculate these scores are untested and unproven and that the public has neither been informed ***of*** nor provided

[1] Ennis Corp., H&V Leasing, Inc., Jim Loyd Transport Co.

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an opportunity to comment on, the agency **has** refused to **postpone** the publication of the **scores** and classifications.

This declarations under penalty of perjury.

Respectfully submitted,

David Owen
President

DECLARATION OF MARK McLOCHLIN, ELECTED PRESIDENT
OF THE EXPEDITE ALLIANCE OF NORTH AMERICA

My name is Mark McLochlin. I am elected President of The Expedite Alliance of North America (TEANA) and owner of Clearwater Logistics. TEANA is a not-for-profit trade association domiciled in the State of PA. The 85 members of TEANA consist primarily of small carriers which provide expedited or "hot shot" motor carrier transportation in interstate commerce, and affiliated brokers. TEANA's mission is to advocate best practices and ensure an efficient and competitive environment in which its members can provide economical services designed to meet the industry's needs. Two of the parties submitting statements in support of the motion for stay of the Federal Motor Carrier Administrations (FMCSA) rule in Docket No. FMCSA-2004-18898; Withdrawal of Proposed Improvements to the Motor Carrier Safety Status Measurement System (Safestat) and Implementation of a New Carrier Safety Measurement Svstem (CSMS) ("CSA-2010") are members of TEANA.[1]

TEANA has been a leading party in representing the interests of its members before the FMCSA and Congress with respect to the agency's CSA-2010 program. TEANA filed comments, on behalf of its members, with the agency in the 2004-18898 docket. TEANA's comments included a request that the agency postpone publishing the individual records and BASIC scores of motor carriers until the agency had provided adequate notice of all aspects of the program and had conducted and completed a full rulemaking pursuant to the Administrative Procedures Act.

While any one of TEANA's members could have brought this action before the Court or filed comments before the agency on its own, TEANA and its members elected to take such action collectively on behalf of themselves and other similarly affected motor carriers.

As stated in the statements submitted by the TEANA members, if the FMCSA **is** permitted to publish on the Agency's website the BASIC scores of individual carriers many carriers will be hurt economically because to the harm to their reputations. The harm which the carrier will suffer will be irreparable. Many shippers and freight brokers have already announced that they will not use the services of motor carriers whose BASIC scores fall below a certain level and the carrier receives an "Alert" classification from FMCSA. Both shippers and brokers are concerned that they may be found vicariously liable to third party plaintiffs in cases arising from accident claims against the motor carrier while it is transporting the shipper or broker's freight. The shippers and brokers and their counsel have expressed concern that plaintiffs counsel will introduce the FMCSA "Alert" classification of the carrier as evidence of the shipper or broker's negligence in using the services of the carrier. The FMCSA has issued statements to the transportation industry that it is the intent of the agency in publishing carrier's **BASIC** scores and classifications that shippers and carriers not use those carriers with "Alert" scores even though such carriers may lawfully operate on the nation's roads and highways.

An "Alert" score will not only effect a carrier's competitive position but is likely to result in higher insurance premiums, a reluctance of drivers to work for such companies, and other economic and operational harm from which the carrier will be unable to recover if the publication is permitted to occur.

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[1] Tyme-It Transportation, Inc. and Universal Traffic Service, Inc.

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The agency has acknowledged that the statistics on which the carriers' BASIC scores and classifications are unreliable, that the algorithms that the agency is utilizing to calculate these scores are untested and unproven and that the public has neither been informed of nor provided an opportunity to comment on, the agency has refused to postpone the publication of the scores and classifications.

This declaration **is** under penalty of perjury

Respectfully submitted,

Mark McLochlin
President

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DECLARATION OF MICHAEL KING, ELECTED PRESIDENT OF THE AIR & EXPEDITED MOTOR CARRIER ASSOCIATION

My name is Michael King. I am the elected President of the Air & Expedited Motor Carrier Association (AEMCA) and owner of King's Express of Buffalo, New York. AEMCA is a not-for-profit trade association domiciled in Manassas, Virginia. The AEMCA currently has 1l 0 members consisting primarily of licensed for hire interstate motor carriers serving the air freight industry. Among the services AEMCA provides to its members is information concerning regulatory compliance with not only the Federal Motor Carrier Safety Administration (FMCSA) requirements but also with TSA and FAA rules and regulations, compliance with which is essential to the rendition of surface transportation having a prior or subsequent movement by air. AEMCA is committed to ensuring that its members are apprised of regulations governing their operations and regularly participates in regulatory issues which affect the membership. One of the parties submitting a statement in support of the motion for stay of the FMCSA rule in Docket No. FMCSA-2004-18898; Withdrawal of Proposed Improvements to the Motor Carrier Safetv Status Measurement Svstem (Safestat) and Implementation of a New Carrier Safety Measurement Svstem (CSMS) ("CSA-2010") is a member of AEMCA.[1]

AEMCA has been a leading party in representing the interests of its members before the FMCSA and Congress with respect to the agency's CSA-2010 program. AEMCA filed comments, on behalf of its members, with the agency in the 2004-18898 docket. AEMCAs comments included a request that the agency postpone publishing the individual records and BASIC scores of motor carriers until the agency had provided adequate notice of all aspects of the program and had conducted and completed a full rulemaking pursuant to the Administrative Procedures Act.

While any one of AEMCAs member carriers could have brought this action before the Court or filed comments before the agency on its own, AEMCA and its members elected to take such action collectively on behalf its members, broker partners and other similarly affected small carriers.

As stated in the statements submitted by the AEMCA members, if the FMCSA is permitted to publish on the Agency's website the BASIC scores of individual carriers many carriers will be hurt economically because to the harm to their reputations. The harm which the carrier will suffer will be irreparable. Many shippers and freight brokers have already announced that they will not use the services of motor carriers whose BASIC scores fall below a certain level and the carrier receives an "Alert" classification from FMCSA. Both shippers and brokers are concerned that they may be found vicariously liable to third party plaintiffs in cases arising from accident claims against the motor carrier while it is transporting the shipper or broker's freight. The shippers and brokers and their counsel have expressed concern that plaintiffs counsel will introduce the FMCSA "Alert" classification of the carrier as evidence of the shipper or broker's negligence in using the services of the carrier. The FMCSA has issued statements to the transportation industry that it is the intent of the agency in publishing carrier's BASIC scores and classifications that shippers and carriers not use those carriers with "Alert" scores even though such carriers may lawfully operate on the nation's roads and highways.

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[1] **Forward Air, Inc.**

An "Alert" score will not only effect a carrier's competitive position but is likely to result in higher insurance premiums, a reluctance of drivers to work for such companies, and other economic and operational harm from which the carrier will be unable to recover if the publication is permitted to occur.

The agency has acknowledged that the statistics on which the carriers' BASIC scores and classifications are unreliable, that the algorithms that the agency is utilizing to calculate these scores are untested and unproven and that the public has neither been informed of nor provided an opportunity to comment on, the agency has refused to postpone the publication of the scores and classifications.

This declaration **is** under penalty of perjury.

Respectfully submitted,

Michael King
President

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DECLARATION OF KENNETH LUND,
ALLEN LUND COMPANY

My name is Kenneth Lund and I am Vice-President of the Allen Lund Company. I am submitting this declaration in support of the relief sought by Petitioners.

The Allen Lund Company is the nation's largest truck broker of fresh Fruits and vegetables. We arrange for the transportation of 238,000 shipments annually moving in interstate commerce and use 18,000 licensed, authorized and insured motor carriers to transport shipments. As a property broker and intermediary we are required by federal statute to retain carriers which are licensed and authorized and have no other delegated safety duties under the Federal Motor Safety Regulations.

Accordingly, we rely upon the ICC and now the FMCSA to certify motor carriers as safe for use and under Federal Regulations are not required to second guess the Agency's decision with respect to fitness.

Within the past few years, plaintiff's bar, in an effort to increase the amount of judgments, has named intermediaries in lawsuits contending that under state law intermediaries and shippers have an obligation to second guess *the* Federal Motor Carrier Safety Administration's ultimate safety fitness determination. As a result, state law judgments have been entered against shippers and brokers which have created chaos in the shipping community.

The FMCSA's intended release of CSA 2010 data to the public accompanied by its public statements that such data is intended for use by shippers and brokers in making safety related decisions, creates major problems for shippers and brokers by implying that the Federal Government has changed the statutes and regulations which govern responsibility for fitness determinations.

As a result of the prospective use of GSA 2010, our customers, competitors, and third party providers are suggesting that it can and will become the industry norm that brokers must rely upon this information for fear of vicarious liability and set new standards for use. Such new standards would be difficult and impractical to enforce and would affect the efficiency of our operations.

The data to be released under CSA 2010 has not been scrubbed or reviewed but figures released to the public by the FMCSA at various times have suggested that as many as two-thirds of the peer group motor carriers we currently use would be labeled as under safety "Alert" on December 6.

The Allen Lund Company has not been afforded an opportunity to comment about release of this data under the Administrative Procedure Act nor has the Agency considered the affect which release of this unscrubbed data would have upon the shipping and receiving public.

We have shared our concerns with the FMCSA in an open meeting and have received no formal response or opportunity to address this issue, Clearly, we share the concerns of the Petitioners that release of this data will have a dramatic effect upon competition, requiring the industry to bar from use motor carriers which the Agency has otherwise certified under the existing regulations as fit enjoying either a satisfactory or unrated status (unrated being the equivalent of satisfactory under existing regulations).

We currently pay over 10,000 carriers yearly in excess of $120 million to transport fresh fruits and vegetables from the field to market, Over 97% of the carriers we use are small operators with 15 trucks or less who rely upon Alien Lund to eliminate deadhead and return their expensive refrigerated equipment to the areas of their domicile under load. If, because of fear of vicarious liability and release of CSA 2010 methodology we must bar any carrier who is under a safety "Alert" the carrier can easily be placed out of business,

In this regard, 1 have participated in over 10 different webinars and meetings over the past several months sponsored by a variety of trade associations in which safety consultants and present and former employees of the FMCSA have told shippers and brokers that the industry cannot rely upon the FMCSA's ultimate fitness determination, After release of CSA 2010 data we have been told that each shipper and broker must establish its own new credentialing criteria for fear of vicarious liability and must effectively use the data in some manner tu second guess the Agency's ultimate fitness rating.

It is clear to us that the unintended consequences of premature release of CSA 2010 data far outweigh its benefits. In the absence of rulemaking, the Agency has not provided the shipping public with any clear guidance on why the material is being released or what we are supposed to do with it. The consequences on our business as shippers demand we accept indemnity obligations and use only peer group carriers who are not under alert could devastate Allen Lund's business, exacerbate our costs, and result in the blackballing of many small carriers who have not been afforded any due process or opportunity to be effectively heard,

Kenneth Lund
Allen Lund Company

AFFIDAVIT OF DAVID BAKER
APEX CAPITAL CORP.

My name is David Baker and I am President of Apex Capital Corp., 6000 Western Place, Suite 1000, Fort Worth, TX 76107. I offer this Affidavit on behalf of my company in support of Petitioners' relief in the above-described proceeding. Apex Capital is a commercial factor which finances approximately 1,000 small carriers through the purchase of receivables. The publication of CSA 2010 data to the public will, in our estimation, result in increased potential exposure of our assignors to large jury verdicts. Let me explain why.

Our clients are required by contract to indemnify and hold harmless the shipper and broker customers from vicarious liability arising out of their acts or omissions. Typically when vicarious liability is not an issue, lawsuits will settle within policy limits and small carriers can escape excess judgments which otherwise cripple their ability to stay in business. Publication of CSA 2010 data and its prospective use by plaintiffs bar to join shippers in lawsuits for alleged negligent selection or selection hiring will have a material adverse effect on the willingness of shippers to use small carriers.

Access to credit is particularly important in the trucking industry where new rigs are typically leased to own through equipment financing companies and small carriers are faced with financing their own float for up to 60 days on profit margins of 3% to 5%.

For these reasons, I ask that the Court consider the incalculable adverse effect which premature release of this data may have on the ability of carriers to remain in business and finance their operations.

By: [signature]
David Baker
Apex Capital Corp.

State of Texas

County of Tarrant

Subscribed and sworn to before me this 24th day of November, 2010.

Rachel D Bradford [SEAL]
Notary Public

RACHEL D. BRADFORD
Notary Public, State of Texas
My Commission Expires
August 19, 2014

My Commission Expires: 8-19-2014

AFFIDAVIT OF BILL HATFIELD,
BP EXPRESS, INC.

My name is Bill Hatfield and I am Vice President and CFO of BP Express, Inc., a Knoxville, Tennessee based motor carrier. We employ/contract 175 people at 6 different terminals throughout the United States. We enjoy a satisfactory safety rating issued by the Federal Motor Carrier Safety Administration.

We have previewed our CSA 2010 percentile ranking and are above the 65 percentile in at least one of the BASICs and will be apparently marked in orange and noted as under "Alert" if this data is released to the public.

We support the relief sought by Petitioners because we have been advised by several customers and steamship lines that CSA 2010 data will be used to determine whether we can enjoy freight. Out of fear of vicarious liability, our customers are being told that the Agency's "satisfactory" fitness determination is no longer sufficient. Apparently, without rulemaking the Agency is releasing comments which suggest that shippers and brokers have undefined safety duties which makes the publication of this data necessary. BP Express is committed to safety and is not opposed to ultimate implementation by the Agency of a new fitness determination procedure.

Yet, we believe an unintended and unfair consequence of the program would be loss of business and the possible bankruptcy of small carriers who, like BP Express, have been certified by the Agency as satisfactory yet are blackballed by customers based on data for which we have had no due process.

Bill Hatfield, Vice President CFO
BP Express, Inc.

State of TENN.

County of HAMBLEN

Subscribed and sworn to before me this 24 day of NOVEMBER 2010.

Richard W. Lee [SEAL]
Notary Public

My Commission Expires: 3-25-13

RICHARD W. LEE STATE OF TENNESSEE NOTARY PUBLIC HAMBLEN COUNTY

AFFIDAVIT OF JAMES R. DEMATTEIS
DES MOINES TRUCK BROKERS, INC.

My name is James DeMatteis and I am the owner of Des Moines Truck Brokers, Inc. a property broker subject to the regulations of the FMCSA in Docket No. MC180183. I am making this Affidavit on behalf of my company in support of Petitioners' request to postpone release of CSA 2010 methodology and data to the public for the following reasons.

Des Moines Truck Brokers is required by FMCSA regulation to arrange for transportation using carriers which are licensed and authorized by the FMCSA to operate. In the ordinary conduct of our business, we confirm that carriers hold FMCSA authority and are certified by a rating of satisfactory or equivalent. This complies with our regulatory duty and the duty of the shipping public in general.

In the roll-out of CSA 2010, the Agency has issued various press releases but has not fully disclosed CSA 2010 methodology or what is to be expected of property brokers after the release. In fact, the Agency through its Administrator has repeatedly said that the material is going to be released to the public before rulemaking so that shippers and brokers can "make safety based decisions." There has been no formal determination of what additional duties this places upon Des Moines Truck Brokers or other brokers in general.

As a result, the industry is in confusion and release of this data without thorough vetting will have a major disruptive effect upon our business and our ability to utilize small carriers which are otherwise determined by the Agency to be fit to operate.

Des Moines Truck Brokers each year books approximately 4000 truck loads of freight using approximately 1200 different motor carriers, many of whom are small and are permitted by the FMCSA to operate. Des Moines Truck Brokers has been advised by consultant experts some of whom are former **FMCSA** officials, that with release of this data we must establish our own new safety credentialing standards for determining

carrier fitness, second guessing the Agency's ultimate determination and using the material to be released. What those standards are has not been determined. If it means that we must use this data in its current form, we will lose access, industry estimates, to over 50% of the carriers we currently use who are placed in peer groups. There seems to be much confusion over how many carriers will even be placed in these peer groups and it may very well be that the data to be released will not offer any information on many of the carriers we use, leaving us with the implied duty to second guess the Agency without any material to perform that analysis.

It is clear that property brokers and shippers are targets for vicarious liability and have been named in lawsuits in the past when plaintiff's bar seeks to add additional defendants. The industry as a whole has been alarmed by release of CSA 2010 and the shipping community has been told that it can no longer retain carriers who are licensed, authorized and insured or hire a broker to perform this simple duty.

Large 3PLs and asset-based carriers are currently conducting seminars to woo customers away from brokers like us suggesting that after CSA 2010 is released, the shipping community must hire only large brokers or large carriers to conduct service because the increased vicarious liability exposure requires an intermediary with sufficient reserves to sustain multimillion dollar judgments which will clearly result, they say, from this new modality.

This concern over CSA 2010 and its implementation if released, threatens us with immediate loss of business and leaves us with an unclear decision over the state of our operations. Do we use CSA methodology which is untried and unproven to bar from use up to half of the peer grouped carriers we currently use? What are we to do with respect to carriers which are not rated under CSA 2010 if the Agency's press release correctly suggests we now have some undefined safety based decision to make other than to rely on the Agency's ultimate safety fitness determination?

In this context, it should be noted that as a property broker, the statutes provide that we can be sued by any party aggrieved by our failure to perform our duties as a property broker. See 49 U.S.C. 14704. When our regulatory duties are only to hire a licensed and insured carrier, yet the Agency suggests our duties go further than that and release unscrubbed data without providing clarity, it is clear that the brokerage industry quickly becomes a target for additional litigation.

We support this petition also because of the devastating effect it will have upon carriers which we have found to be fit, willing and safe to operate but who will be faced with imminent loss of business based upon the scoring modality.

It is our understanding that 35% of the carriers regardless of the safety program, will be under "alert" and marked in orange for violation of hours of service regulations alone. Yet, when one examines the modality for this, it appears that this percentile ranking is in large part based upon paperwork violations which may have absolutely no indication of the carrier's crash record or its compliance with the hours of service.

We see no reason for the release of this data before it is thoroughly vetted in rulemaking. It appears to us that the early release of this data before the studies are even in or the public has had an opportunity to review the recent 800 changes in the modality and consider the effect of the release under the Administrative Procedure Act is improper and begs the question, "Why not wait and get it right?"

As a small business which provides a needed service of eliminating dead head miles and working with blue collar entrepreneurs to save fuel and efficiently and competitively conduct interstate commerce, I believe Des Moines Truck Brokers and the small carriers it uses deserve full consideration of the impact of release of this data under the APA before some artificial deadline or in lieu of premature release.

By: [signature]
James R. DeMatteis, President
Des Moines Truck Brokers

State of IOWA

County of Warren

Subscribed and sworn to before me this 24 day of November, 2010.

[signature] [SEAL]
Notary Public

My Commission Expires: 7/28/12

NOTARIAL SEAL • IOWA
SARAH K. ROSENBERGER
Commission Number 191343
My Commission Expires
7/28/12

AFFIDAVIT OF PATRICK INNIS
ENNIS CORP.

My name is Patrick Ennis and I am the owner of Ennis Corp., a for-hire motor carrier based in Clarion, Iowa. We currently operate 23 over-the-road tractor trailer units. We are regulated by the Federal Motor Carrier Safety Administration and have a satisfactory safety rating.

For the past 5 or 6 months, we have been actively preparing for CSA 2010 and subscribed to Vigillo, a purveyor of information about CSA 2010, and 1.1. Keller, a leading publisher of safety information. Although we have a satisfactory safety rating, our current score in fatigued driving under the CSA modality is 74.8 or approximately 9 percentage points above the initial enforcement threshold. Apparently, if CSA 2010 data is released to the public, we will be marked under "Alert" and coded orange for shippers and brokers to see.

We do not believe that CSA 2010 is fair or appropriate for release to the public in its current state. Our company is clearly peer grouped in fatigued driving with companies that are not required to log and with companies who have the onboard recording device. CSA 2010's "fatigued driving" BASIC is based not only on drivers which exceed the 14 hour and 70 hour driving times but also on paperwork violations such as the failure of a driver to keep his log up to date when stopped for inspection. Over half of

the points we have accumulated in this BASIC result from paperwork violations which carriers in our peer group do not incur.

As a carrier ultimately certified by the FMCSA as "satisfactory" we value the Agency's ultimate determination and oppose the December 6 release of CSA 2010 data because of fear of the affect it will have on our ability to compete and obtain freight from shippers and brokers.

Much of our ability to operate efficiently and return trucks to our Iowa base is predicated on obtaining back haul freight in the spot market from property brokers. Several of the current brokers who tender us freight have indicated they are being counseled to use CSA 2010 data to credential carriers for use out of fear of vicarious liability or negligent selection.

With a satisfactory safety rating, we believe we have been ultimately credentialed for use by shippers and brokers. Clearly, we cannot afford to remain in business and lose our access to back haul freight. We do not understand why the Agency seems intent on releasing CSA 2010 data to the public next week when it has been made aware of the potential adverse consequences on carriers like Ennis who have been subject to an audit and found fit to operate. Accordingly, we urge the Court to grant the relief Petitioners seek.

Patrick Ennis, Owner
Ennis Corp.

State of Iowa

County of Wright

Subscribed and sworn to before me this 24th day of November, 2010.

Kaysie Williams [SEAL]
Notary Public

My Commission Expires: 9.25.2013

NOTARIAL SEAL IOWA
KAYSIE WILLIAMS
COMMISSION NUMBER 749062
My Comm. Exp. 9.25.2013

Affidavit of Barry E. Bernard,
Express America Trucking, Inc,

My name is Barry Bernard and I am President of Express America Trucking, Inc., an intermodal drayman based in Memphis, Tennessee. We employ 165 drivers and owner-operators at three terminals throughout the southeast and pull intermodal containers between rail heads and ports on the one hand and interim customers on the other. I am authorized by my company to submit this Affidavit in support of the relief sought by Petitioners in the above captioned lawsuit.

As an intermodal carrier, we are highly dependent upon contracts with large intermodal brokers and upon access to chasses and containers provided by steamship lines and/or other intermodal equipment providers. Over the past several months, we have received notice from at least three key equipment providers or brokers that upon release of CSA data to the public we will be scored based upon CSA 2010 criteria and will lose access to business and/or the trailers and chassis necessary to provide service if our scores exceed the enforcement thresholds established by the Agency.

Express America Trucking, like most of the similarly situated competitors of which I am aware, fare poorly in one or more of the five remaining BASIC areas which will still be published if the Agency is not deterred. This is true because of the nature of our business, the fact that we pull intermodal containers, use independent contractors and paper logs yet are peer grouped with dissimilar carriers, and has no proven correlation to our safety record. We have not been afforded an opportunity to examine the Agency's scoring mechanism, its peer grouping of carriers, or its rating system for violations. Unlike flatbed carriers who were granted redaction of the securement BASIC as the result of private meetings with the Agency, our carriers have not been formally or informally addressed.

Under the proposed CSA 2010 system of reporting violations, there is no due process in that warnings and citations are reported and fed through the system before we have an opportunity to contest and any "DataQ" we file is not subject to judicial review.

For all these reasons, release of this data is tainted and not ready for public release. I am advised that in August of 2010, after working on the pilot program in test states for several years, the Agency made 800 changes in its scoring methodology, none of which have been subject to peer review.

It is out of fear of vicarious liability that shippers and brokers feel compelled to use this unscrubbed system. No one has provided us with an answer as to why this system must go live on December 6 when affected shippers and brokers have not been afforded the opportunity to review its affect upon small carriers like Express America Trucking.

Clearly a stay is warranted because the adverse consequence of release upon Express America Trucking and similarly situated carriers. We will be faced with immediate loss of existing customers and access to equipment we have come to be dependent upon. Moreover, we perceive we will have difficulty in raising finances, obtaining loans for new equipment and continuing in business.

We currently enjoy a satisfactory or equivalent safety rating from the FMCSA and accordingly are certified for use by shippers, brokers and steamship lines. Any release of the proposed data will undermine the shipping public's ability to utilize us out of fear of vicarious liability. For these reasons, we ask that the Court direct postponement of release of this data until the matter can be properly considered and statutory due process provided.

By: Barry E. Bernard, President

Express America Trucking, Inc.

State of Tennessee

County of Shelby

Subscribed and sworn to before me this 24th day of November, 2010.

[SEAL]

Notary Public

My Commission Expires: October 7, 2014

My Commission Expires: ________________

SEAN M ABEL STATE OF TENNESSEE NOTARY PUBLIC SHELBY COUNTY

AFFIDAVIT OF MATTHEW J. JEWELL,
FORWARD AIR, INC.

My name is Matthew J. Jewell and I am Executive Vice President and Chief Legal Officer of Forward Air, Inc., a property broker subject to the regulations of the FMCSA in Docket No. MC249708.

At the request of Petitioners, I attended a meeting with the FMCSA (hereinafter sometimes referred to as "the Agency") held at its office on October 5, 2010. The meeting was arranged by the Small Business Administration after Petitioners received no response to their formal Motion to Postpone. At that time, the Agency requested from Petitioners language to be placed upon any release which would satisfy the vicarious liability concerns and permit release of the data as scheduled.

As a defense lawyer familiar with the misuse of SafeStat in tort litigation, I helped draft proposed language which would make clear that the Agency made the ultimate determination of fitness and that CSA 2010 methodology could not be used in a court of law. This suggested language was submitted to the Agency by letter dated October 8, 2010.

No response was received by Petitioners but Administrator Ferro apparently released certain comments to another trade association indicating that the SafeStat warning would be attached and that pejorative language would be removed. In response, a follow-up letter was sent to the Agency addressing these concerns. A copy of it is attached. Again, no response to Petitioners was forthcoming.

As of this writing, I have not been formally advised of any Agency decision on the Petition or our suggested language. The best information I have concerning the language has been obtained from presentations made by the Agency to other groups which indicate that the color of the warnings will be changed from red to orange, language indicating that a carrier is deficient or marginal will be changed to "alert" and that the following warning will be placed upon the website, "BASIC percentiles above the FMCSA threshold signify the carrier is prioritized for an FMCSA intervention and do not signify or otherwise imply a safety rating or safety fitness determination."

This information was gleaned only from presentations made by FMCSA or former FMCSA officials to others at private webinars. In my estimation, this language does not address the serious vicarious liability concerns we have. Placing the words "Alert" on the website, is an open invitation for vicarious liability and use of the data by shippers and brokers to grade carriers. Moreover, the language that indicates that it is not part of the safety rating will have no affect, in my estimation, to dispel the intended forced use of the data by the shipping and receiving public to establish a new standard for diligence in negligent selection suits.

It is clear to us from the participation by the current and former Agency officials in webinars, seminars and the dissemination of information to the shipping public that **CSA** 2010 is intended to shift in large part the responsibility for credentialing carriers from the Agency to the shipper and broker community.

Unless this matter is postponed and thoroughly and properly considered, as the party responsible to my company for risk assessment, I will have no alternative but to preclude use of any carrier who is under enforcement activity by the Agency for fear of vicarious liability. This will very likely result in loss of business for carriers who have provided excellent service to us without mishap and will otherwise affect our ability to effectively route our traffic via low cost providers and eliminate dead head and inefficiencies incurred by carriers seeking return shipments in the spot market.

For these reasons, on behalf of Forward Air, I request that publication of this data be postponed pending appropriate consideration of these matters in the impending rulemaking proceeding.

By: ______________________
Matthew J. Jewell, Executive Vice President
and Chief Legal Officer
Forward Air, Inc.

State of Georgia

County of Fulton

Subscribed and sworn to before me this 26th day of November ,2010.

______________________ [SEAL]
Notary Public

PAULA GUSTAFSON
MY Commission
NOTARY
PUBLIC
EXPIRES
06-01-2012
FULTON COUNTY, GEORGIA

My Commission Expires: June 1, 2012

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RICHARD GOBBELL
Non-Lawyer
Motor Carrier Safety Consultant
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October 27, 2010

Anne S. Ferro, Administrator
Federal Motor Carrier Safety Administration
United States Department of Transportation
1200 New Jersey Avenue SE, Suite W60-300
Washington, DC 20590
Via U.S. **Mail/Email**
anne.ferro@dot.gov

Dear Ms. Ferro,

As you know we filed a Motion to Postpone under Docket No. FMCSA-2004-18898. We submit that CSA 2010 data should be accumulated solely for the Agency's enforcement purposes. In view of the devastating unintended vicarious liability consequences, public release of this data is neither proper nor required under FOIA (see 5 U.S.C. §552(b)(7)).

We firmly believe there is no internet exception to the APA and the protections guaranteed small businesses through the related rulemaking statutes. Unless the interests of the small motor carriers which represent 95% of the for-hire motor carriers are fully and adequately protected as part of the proposed early release of the unperfected CSA 2010 methodology, we must reserve our objections.

In an effort to accommodate the Agency, we submitted proposed redaction and disclaimer language in our letter to you of October 8 which was intended to address the vicarious liability concerns which otherwise will result in loss of business, carrier bankruptcies, loss of jobs and disruption to the industry.

We have received no response to either the Motion or the letter but have received through the media the attached notice which indicates that the Agency has made a preliminary decision concerning a possible warning. This relief, if true as reported, is a step in the right direction but does not satisfy our concerns. A SafeStat type warning has proven ineffective before in state court actions to preclude use of the data to establish shipper liability and will not be sufficient to allay the fears of brokers, shippers and third party equipment providers who are continuing to place contract termination provisions in carrier contracts under the misguided impression that the Agency intends the public to use this flawed data upon publication. In fact, the number of brokers and shippers advising our clients that CSA 2010 methodology will be used to deprive them of existing business is increasing. See attachments.

Accordingly, the Agency's full adoption of the redaction and disclaimer notice in our October 8 letter accompanied by unequivocal affirmation of the public's ability to rely upon the Agency's ultimate fitness determination as a certification for use is the bare minimum necessary to frame release of this data as planned in December.

. We will be happy to meet again with you to discuss our issues but must reserve our objection to the public release of any data without APA compliance in the absence of the relief sought in our October 8 letter offering clear protection to the traveling and shipping public that failure to use all or part of the release data in its present form should not and cannot be used to establish vicarious liability.

Yours truly,

Henry E. Seaton, Esq.
Counsel for the National Association of Small Trucking Companies (NASTC); The Expedite Alliance of North America (TEANA); and the Air & Expedited Motor Carrier Association (AEMCA)

William D. Bierman, Esq.
Executive Director, Transportation Loss Prevention and Security Association

cc: Gary.Shoemaker@dot.gov
Alais.Griffin@dot.gov

Valued NYK Contract Carrier:

NYK Logistics (Americas) Inc. is writing to urge you to preview your CSA 2010 data at http://csa2010.fmcsa.dot.gov/. Click on the Data Preview link at the top of the page where you will find your 7 Behavior Analysis Safety Improvement Categories (BASICs) data. This information will be used to determine your Safety Fitness Determination (SFD) and will replace your Safety Rating. If you have already visited this site then you are a step ahead and aware of your data under the new Safety Management System (SMS).

NYK's Safety Policy under the current SafeStat measurements, provides that we qualify carriers with Satisfactory Ratings. However, we may qualify carriers based on SafeStat data (scores) if your Rating is Conditional or not rated in the SAFER database.

The public will not have access to CSA 2010 data until the end of the year, at which time NYK will refine our Safety Policy to qualify carriers using CSA 2010 guidelines. Our Safety Policy will be in line with SMS. In the future, if the Unsafe Driving or Fatigued Driving BASICs or any two of the other BASICs are above the Unfit Threshold, you may not be qualified to move freight for NYK.

NYK welcomes all questions and feedback on this program and anticipates that you are on top of all the changes CSA 2010 will bring to your company and our industry. NYK also requests that you send us a copy of your CSA 2010 Preview Data at your convenience to carrier.safety@na.nyklogistics.com or fax to 901-215-3214.

Best regards,

NYK Carrier Relations Compliance Team
Toll Free: 877-468-5557
Fax: 901-215-3214

Please disregard this notice if you have received in error,

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October 27, 2010

NYK Logistics & Mega Carrier
NYK Carrier Relations Compliance Team
Via **Fax:** 901-215-3214

Dear **NYK** Carrier Relations Compliance Tam:

This firm represents several small carriers which have received the attached notice from you concerning your intended use of CSA 2010. We respectfully suggest that CSA 2010 is **not** intended for use by the shipping and traveling public in qualifying carriers. Specifically, CSA 2010 modality is a work in progress predicated on peer rankings of carriers based upon warnings and citations which have had no scrutiny and little due process.

Attached hereto is a Motion to Postpone release of this data filed by 4 trade associations together with 2 additional letters to the FMCSA requesting redaction of all or part of this data from public view because of the unintended vicarious liability consequences of same.

We honestly believe based upon published data that shippers, brokers and IEPs have been seriously misled about the intended use or penalties for non-use of this flawed data when it is released. Your letter is one of many that has been sent to small carriers and it is for this reason that we oppose release of CSA 2010 data.

We urge you to join the coalition of the named associations to straighten out the confusion of CSA 2010. Many brokers like **NYK** have expressed support for our efforts, recognizing that as many as two-thirds of their available carriers may be barred from use if the course of action you indicate is followed. Please note that the "thresholds" to which you refer do not in any way replace the current rating system of satisfactory, unfit, conditional, or unrated (which is the equivalent of satisfactory). These thresholds are only intended by the Agency for its internal use in its monitoring and enforcement policy and do not establish "the Unfit Threshold" in any of the BASIC areas.

We are not unmindful of your vicarious liability concerns and it is for that reason that we are seeking relief from the FMCSA in advance of release of this data. Your comments and feedback to both the undersigned and ,Administrator Anne Ferro would be welcome.

Yours truly,

Henry E. Seaton

HES/nre

Transport Topics; week of October 25, 2010

HEADLINE: Ferro Says FMCSA to Alter CSA to Address Industry Concerns
Byline: Sean McNally, Senior Reporter

PHOENIX — The **Federal Motor Carrier Safety Administration** is making several changes in its soon-to-be-implemented overhaul of truck safety standards as a result of industry comments, Administrator Anne Ferro told Transport Topics.

Ferro said at the annual meeting of American Trucking Associations here last week that FMCSA will change some of the terminology used to label fleets, put disclaimers on the data and hold back crash data when the program is implemented in December.

However, despite the desire by some fleets to delay publication of the scores, they will be posted as scheduled, Ferro said.

"We've had a great deal of opportunity to talk to the industry ... about our publication of that data to a broader audience," Ferro told TT in an Oct. 19 interview during the ATA meeting. "Number one, it will be going public in December, and we will be initiating the warning letters and phasing-in the concept of a focused compliance review where appropriate."

But to avoid inflammatory terms, FMCSA will be "getting away from that 'trigger language,' so it won't say 'deficient' " on a carrier's score, but "probably something closer to 'threshold', or 'above the threshold' or something like that," Ferro said.

Fleets have been concerned that using the term "deficient" is too pejorative and could harm them in legal proceedings.

Also in response to industry concerns, Ferro said that while the agency considers whether it's feasible to assign fault to the crashes in its system, "we will continue to treat the crash data as we do under SafeStat" and keep it off FMCSA's public website.

As a result, carriers' scores in six of the seven CSA safety categories are now scheduled to be posted.

Under CSA, the agency is sorting carrier infractions — from crashes to cargo securement violations — into seven categories, or BASICs.

In August, FMCSA changed the way some of the BASICs are calculated. Those revisions, according to Scott Randall, safety director at Hogan Transports, benefited large carriers, who generally saw improvements in their scores.

"The larger the carrier, the greater the chance they would be deficient under the old methodology," but under the new methodology "larger carriers all saw a decrease," he said.

Keith Klein, chief operating officer of Transport Corp. of America, said that before the changes, his company was "deficient in three of the seven basics," but that is not the case now.

"There are still some concerns on CSA 2010, that there may be a lot of bumps in the road that we think could be avoided to some degree," said Charles "Shorty" Whittington, president of Grammer Industries and chairman of ATA's executive committee. "However, in a nutshell, this

thing is so far down the pike that if you're going to be a carrier, you're going to have to learn to be a good carrier."

Steve Williams, chairman and CEO of Maverick USA Inc., told TT he agreed with FMCSA's decision to post the scores, despite his concerns about CSA.

"I don't like the message that it is sending to the public, that we have something hidden behind this score," he said.

However, that didn't absolve the agency from continuing to look at the program, he said.
"I am confident that we will in time — and it needs to be sooner than later — get this right," Williams said. "It is a critical piece that needs to be implemented and to accomplish the goals that we want to accomplish on highway safety."

Some of the concern stems from carriers' fear that shippers or plaintiffs attorneys may use the data from CSA either to select carriers or in lawsuits.

Former FMCSA Administrator Annette Sandberg, now a consultant and attorney with Scopelitis, Garvin, Light, Hanson & Feary, said that failing to do due diligence and potentially using a carrier with a deficient or even marginal score "does not play very well" with juries, citing several multimillion-dollar suits where brokers or shippers have been found negligent for using poorly rated carriers.

As a result, Sandberg said she advises her clients to discuss the CSA issue with their carriers, and for carriers to explain that there are issues with the data.

John Hill, also a former FMCSA administrator and current consultant, said he believed the CSA scores should be publicized. But he added that if quality issues with the data persist, the scores might need to be withheld until the data problems were solved.

End.

AFFIDAVIT OF RICHARD GOBBELL,
GOBBELL TRANSPORTATION SAFETY, LLC

My name is Richa'rd Gobbell and I am President of Gobbell Transportation Safety, LLC. I am making this statement in support of the Petition for Stay filed by the Petitioners in the above-described proceeding.

From 1972 until 2007, more than 35 years, I was employed by state and federal highway safety enforcement agencies that were responsible for the enforcement of the Federal Motor Carrier Safety and Hazardous Materials Regulations. For 15 years, I taught enforcement and compliance review course at Federal Motor Carrier Safety Administration's National Training Center in Oklahoma City and Washington, DC to both federal and state enforcement officials. Prior to my retirement, for 30 years I was with the Federal Highway Administration (FHWA) and the Federal Motor Carrier Safety Administration (FMCSA) in which I was responsible for the enforcement of both the Federal Motor Carrier Safety and Hazardous Materials Regulations. Two and *V2* years prior to my FHWA and FMCSA service I was with the former Interstate Commerce Commission (ICC). At the ICC I was responsible to insure that each carrier that had or was granted operating authority was maintaining a safe operating condition within its company.

I completed my last 12 year of my career at the FMCSA as the Tennessee Division Administrator. As the Division Administrator it was my responsibilities to administrate a comprehensive motor carrier safety program in Tennessee, through my staff of nine employees and administered a FMCSA's Grant programs to the Tennessee Department of Safety. That program included, among other things, it

conducting a very large commercial motor vehicle roadside inspections program across the State. When I retired from FMCSA I was responsible for the oversight of more than 900 Tennessee Department of Safety roadside truck inspectors.

During my career at the State agency I worked for, the FHWA and the FMCSA, I inspected approximately **10,000** commercial motor vehicles in operation upon the highway. I conducted somewhere around **1,000** motor carrier compliance reviews at carrier's offices. I investigated **100s** of commercial motor vehicle crashes.

Following my retirement in 2007 I have been a safety consultant and have served as an expert witness in several civil cases directing attention particularly to the vicarious liability issue which has arisen since deregulation. Attached hereto as Appendix A is a copy of my vitae.

The FMCSA regulations governing highway safety have changed little since they were implemented and enforced by the Interstate Commerce Commission prior to deregulation. When entry control and the filed rate doctrine in the Interstate Commerce Commission Termination Act was promulgated by Congress over 15 years ago, motor carriers were freely allowed to waive rules of commerce and enter written bilateral contracts pursuant to 49 U.S.C. 14101(b). The one aspect of regulation which did not change was the FMCSA safety rules. Those safety rules cannot be waived by written contract and placed solely upon the authorized motor carrier the non-delegable safety duties to comply with FMCSA requirements. See 49 C.F.R. 390.3(a).

Similarly, both before and after deregulation, the Federal Government established a regulatory body which is solely responsible for determining safety fitness. When the Interstate Commerce Commission's regulation over highway safety was terminated, enforcement of the safety rules and the credentialing of carriers were transferred first to the Federal Highway Administration and then, when it was created, to the Federal Motor Carrier Safety Administration (a subsidiary agency of the U.S. DOT) without any material change in the regulations or statutes.

The traditional public utility basis for the ICC and now the U.S. DOT to certify carriers as safe to use was based upon the doctrine that the Agency is the ultimate determiner of highway safety and that it is upon its decision both the traveling and shipping public can rely. The federally promulgated insurance requirements and endorsements demonstrate that these minimum levels of financial requirements are intended to inure to the benefit of the shipping and traveling public.

With deregulation, though, has come a new conflict between federal and state authorities as plaintiffs bar has sought to join shippers and brokers into accident litigation in an effort to increase the amounts of judgments and available sources of recovery. I have been personally involved in several lawsuits in which plaintiffs bar has attempted to use FMCSA safety data to establish a duty on shippers, brokers and vehicle leasing companies for screening of carriers which exceeds verification that the government has determined the carrier to be fit to operate.

In this context, the shipper and broker community is frightened about the prospects of vicarious liability and approaches CSA 2010 with heightened awareness of the unintended consequences of release of additional data.

Although the broker regulations provide that a broker is required only to retain a licensed, authorized and insured carrier, the argument being made is that a brokers, shippers and vehicle leasing companies have an additional statutory duty to use data released by the Agency to second guess the Agency's ultimate fitness determination.

In this context, premature release to the public of CSA 2010 data will and has, in my estimation, already has and will expand when released a chilling *effect* on competition and the ability of carriers to obtain business where the Agency has merely indicated in a percentile ranking that such carriers are under progressive examination.

The Agency, in considering CSA 2010, has not released its methodology, its science, or its math for public review and criticism. The program is, by the Agency's own admission, a work in progress and the University of Michigan study has not even been released. In August of this year, for example, the Agency made approximately 800 statistical changes to its methodology which affected its scoring and the outcome of its peer group sampling making any analysis based on the previous methodology impossible. Even the number of carriers in each peer group has not been released.

As a consultant familiar with the roadside inspections and collection of data involved, **it** has been impossible for me to accurately review the data to be collected

and to verify its accuracy and applicability, or fitness for use.

I have read the Petition to Postpone filed by Petitioners with the Agency and note that no response to the points raised by it has been forthcoming. Ordinarily, the Agency is required to set forth any change which would have a major affect upon the industry in a rulemaking proceeding at which time each of these issues should be addressed to assure data quality accuracy as well as to protect the interests of small carriers and entities under the Reg Flex Act and the Paperwork Reduction Act. No such procedures have been afforded in this case. Moreover, there are serious due process concerns about the data being accumulated and weighed.

The data being accumulated includes roadside warnings and citations, not convictions, and the data is to be released to the public with any due process afforded the carrier provided only on the backside after the harm to its reputation is done. "DataQs" is a procedure in which a carrier may send a request to review a data issue to the Federal Government which in turn refers the request back to the enforcement officer for a non-judicial review. In my experience of filing numerous DataQ, it is an ineffective means of protest and violates all concepts of due process. Moreover, as Petitioners point out, there are serious flaws with the data to be accumulated and the accuracy of the data when used for a statistical ranking.

Obviously, there are geographical differences imposed based upon the area of carrier operations and carriers in "probable cause" states are up to 4 times as likely to have high scores in one of the BASIC areas as carriers who operate principally in non-"probable cause" states. Yet, because both carriers are compared

in the same peer group, the result is an inequitable bias against certain carriers based upon their geographical scope of operation.

This bias is also particularly apparent in the important stand- alone basis of carriers' hours of service compliance. Apparently, the Agency proposes to compare for percentile rankings in the same peer group carriers which have the on-board recording device, those which are not required by regulations to log, and those which currently maintain a paper log. A carrier which maintains a paper log is twice as likely to accumulate points in this important BASIC than a carrier which operates an EOBR or one which is not required to log. This bias easily manifests itself in making carriers with paper logs likely to populate the upper 35% of the percentile ranking in a peer group which is deemed to be under the FMCSA's proposed methodology as a stand-alone BASIC.

The additional areas raised by Petitioners in their Motion to Postpone are well taken and in my experience reflect actual problems with the data including but not limited to the failure of roadside inspectors to list satisfactory inspections, the profiling of certain carriers based upon the age and nature of equipment, and other enforcement anomalies. The Agency has acknowledged that uniformity of enforcement is a difficult task and one in which Commercial Vehicle Safety Alliance (a non-governmental agency) is currently working on. Simply stated, though, the inequities have not been adequately addressed at this point to permit the release of the data with any reliability.

As part of use of CSA 2010 in its ultimate enforcement activities, the Agency has apparently set artificial percentile rankings which are convenient for its ultimate

enforcement program to be unveiled and considered in rulemaking in the Spring, but I have seen no scientific evidence for public listing of the term "Alert" or coding in orange any carrier above the 65 or 80 percentiles in any of the five remaining BASIC areas.

No reason has been cited for releasing peer group rankings to the public suggesting that carriers are under enforcement based upon percentile rankings until this thorough review required by statute is performed. Unfortunately, the Agency in its public releases and the Administration's letter to the Minnesota Trucking Association, has suggested that the data is being made available to the public which allows "... the FMCSA to leverage the support of shippers, insurers, and other interested stakeholders to ensure that motor carriers remain accountable for sustaining safety operations over time" without appreciating the effect on the industry due to the vicarious liability consequences of this statement. (See June 8, 2010 letter from Anne Ferro to the Minnesota Trucking Association.)

It appears clear from the preparatory CSA 2010 seminars conducted by the industry and the Agency that the shippers and brokers fearful of vicarious liability will believe it is incumbent to use this un-scrubbed data to bar existing carriers from use if this material is released. To date, the Agency has given no apparent consideration to the affect of the release of this data on the efficiency of motor carriers or the competition between motor carriers which is set forth in the National Transportation Policy. See 49 U.S.C. 13101. Each year the Agency conducts a safety audit of approximately 17,000 motor carriers which it deems most at risk

under its current compliance review enforcement system and ultimately finds only about one percent of all carriers unfit to operate.

While no analysis of the use of CSA 2010 in the test states has been issued by the Agency, it does not appear that there is any correlation between the number of carriers identified for intervention and labeled as under "Alert" and the number of carriers ultimately found to be unsafe. Missouri, one of the test states in which CSA 2010 methodology was used, assigned an unsatisfactory rating to only 2 carriers for fiscal year 2010, yet approximately two-thirds of the carriers it tested under CSA methodology were labeled deficient and under "Alert."

If the Agency is able to use its comprehensive safety methodology to rate all 600,000 plus carriers as originally proposed in the five remaining BASIC areas, at least 250,000 would be under "Alert" and the for-hire segment which makes up 170,000 to 200,000 carriers will be severely compromised if shippers and brokers use the public data as the Agency suggests they should in making safety based decisions.

It is interesting to note that the Agency has selectively decided to publish for the public review percentile rankings in only 5 of the 7 BASIC areas of inquiry noting that in 2 of the 5, the determination has been made that the material is not yet ready for public release. This subjective decision by the Agency demonstrates that there is, in the Agency's schema, no requirement for public release and, I submit, that in all 7 of the BASICs, CSA 2010 is a work in progress and that the same adverse consequences of premature release requires delayed publication of any data.

By: [signature]
Richard Gobbell, President
Gobbell Transportation Safety, LLC

State of Tennessee

County of Williamson

Subscribed and sworn to before me this 26 day of November, 2010.

Laura German [SEAL]
Notary Public

My Commission Expires: 61/71/2013

LAURA GERMAN
STATE OF TENNESSEE NOTARY PUBLIC
WILLIAMSON COUNTY, TN

Appendix A

November 26,2010

A copy Richard C. Gobbell's Vitae.

3100 Braintree Rd.
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gobbell49@comcast.net

Richard (Rick) Gobbell

Summary of experience:

For 35 years I have been responsible for truck safety, motor coach safety and hazardous materials compliance and enforcement at both State and Federal agencies. I retired from the U.S. Department of Transportation, Federal Motor Carrier Safety Administration in January of 2007 after 32 ½ years service.

For 30 years I was a Special Agent, Program Specialist, State Director and Division Administrator at the Federal Motor Carrier Safety Administration. I was a FMCSAs State Director and Division Administrator in the Tennessee Division Office for the last 12 years of my career.

Prior to my service at FMCSA I was a District Supervisor with the Interstate Commerce Commission (ICC) for two and one half years.

And prior to that I was a Tennessee State Roadside truck enforcement officer conducting roadside truck safety enforcement activities for two and one-half years as well.

Education

I have a BS Degree in Business Administration from the University of Tennessee. I have a major in marketing and minor in accounting. I completed several transportation, business law and business management courses during my four year degree program.

Specific Experience

Over the years I completed more than 100 training classes relating to motor carrier safety and hazardous materials enforcement including investigation techniques, crash investigation, evidence, interviewing witnesses, hazardous materials investigations, safety regulations and management and supervising employees.

I served as an Associate Staff Instructor at the U.S. Department of Transportation's Transportation Safety Institute in Oklahoma City and at its National Training Center in Washington, D.C for 15 years. During this time I was an instructor in more than 50 classes for Federal and State Commercial Motor Vehicle inspectors and auditors. I estimate that somewhere between 500 and 700 current and former staff members of the Federal Motor Carrier Safety Administration and State officers and officials completed safety, investigation techniques, program and policy classes in which I was either the lead or an associate instructor.

For a year I was a lead instructor in the Federal Highway Administration Quality Management Improvement Initiative program. Another instructor and I conducted six one-week classes during this project in which this class was presented to about 100 Federal Highway and Federal Motor Carrier Safety

Administration staff personnel.

During my career I conducted more than a 1,000 safety and hazardous materials compliance reviews on trucking companies, motor coach companies and hazardous materials carriers and shippers.

I investigated 100s of truck and bus crashes and hazardous materials incidents.

I have been a witness in State and Federal courts on many occasions.

I have inspected somewhere in the neighborhood of 10,000 driver and vehicles at roadside inspection sites. I have personally placed 1,000s of drivers and vehicles "Out of Service' during these inspections for safety and hazardous materials violations.

I initiated more than 500 federal enforcement actions against motor carriers, motor coach operators, drivers and hazardous materials shippers for violation of the Federal Motor Carrier Safety and Hazardous Materials Regulations during my career.

I was certified by the US DOT to conduct truck and bus inspections and compliance reviews for more than 30 years.

In the last 20 years of my career, while continuing to conduct vehicle inspections and compliance reviews, I was a supervisor responsible for a division staff that was conducting these activities.

For more than 20 years I was either directly or in-directly responsible for the oversight of our State Partner's Motor Carrier Safety Assistance Program (MCSAP) which included more than a hundered roadside inspection officers and a budget of more than **14** million dollars a year.

I have a U.S. States Government "Secret" security clearance.

Currently:

Since my retirement I have been very active in assisting Commercial Motor Vehicle operators and Hazardous Materials shippers in establishing and/or improving their compliance programs in all areas of the regulations in which the Federal Motor Carrier Safety Administration has jurisdiction.

I have provided training to hundreds of carrier officials and staff in Hazardous Materials *General Awareness/Familiarization, Function Specific and Security Awareness and in-depth Security training.*

I have provided training to hundreds of carrier officials and drivers in the new hours of service regulations, FMCSA's SafeStat CSA2010 safety data analysis program and many other parts of the regulations. I have also provided training to 100s of drivers relating to conduct vehicle pre-trip inspections and how to pass roadside inspection':

I have assisted numerous motor carriers as a safety consultant, both large and small.

I have served as a Commercial Motor Carrier Safety Expert in civil cases that

have resulted from very serious injuries and deaths.

My company, Gobbell Transportation Safety, LLC, currently serve as a safety department for seven small motor carriers. In this service we provide a full service safety program in which we qualify their drivers, maintain their driver qualification files, monitor their drivers for hours of service compliance, vehicle maintenance/safety, hazardous materials compliance as well as all of the other parts of both the Federal Motor Carrier Safety and Hazardous Materials Regulations.

*I am currently **a** bi-weekly guest on the Dave Nemo, XM 770 Open Road Radio show. This is a one hour show where I discuss current issues, FMCSA programs, rules, rule changes, roadside Inspection and/or FMCSA Compliance and Enforcement Programs or any other subject relating to trucking that our listeners want to call in and discuss.*

These are lively shows and a wide range of spontaneous subjects are discussed.

Experience

1978 - 2007

I served as a Field Investigator, Program Specialist and Division Administrator at the U.S. Department of Transportation, Federal Motor Carrier Safety Administration in Nashville, TN. This includes the years at the Federal Highway Administration that had the same areas of responsibility prior to the establishment of the FMCSA in 2000.

From 1995 to 2007 I was the Division Administrator responsible for **all** *of* FMCSAs programs relating to truck and bus safety, hazardous materials, commercial driver's license, State grants, license, insurance, and registration in the State of Tennessee.

Even though I was a supervisor for the last several years I continued to conduct the above activities.

I was one of the very few Division Administrators at FMCSA that maintained my Vehicle Inspection and Compliance Review certification.

I was responsible for the administration of a $14 million per year Motor Carrier Safety Assistance Grant Program to the Tennessee Department of Safety. This agency used the funds to conduct truck and bus safety enforcement activities. We had more than 900 Tennessee State Troopers participating in our program.

I conducted and/or oversaw thousands of investigations that resulted in penalties for violations of the safety, hazardous materials and other regulations the agency was responsible for enforcing. I conducted and oversaw hundreds of investigations into major truck and bus crashes.

I worked with the National Transportation Safety Board on several crash investigations

1975 - 1978

Interstate Commerce Commission

I served as District Supervisor and was responsible for the administration of a compliance and enforcement program relatina to truckina companies authoritv. tariffs, claims, and insurance and a vast array of other regulations that applied to trucking, freiaht brokers, shippers, freiaht forwarders, water, rail, pipeline and passenger transportation operations.

I was responsible for granting emergency and temporary authority applications from motor carriers requesting permission to provide transportation service to the public.

1972 - 1975

I was an enforcement officer for the Tennessee Public Service Commission. I inspected commercial trucks, buses and drivers for compliance with the safety and hazardous materials regulations at inspection sites and during traffic stops. I placed hundreds of vehicles and drivers out of service and arrested many drivers for safety, drug and alcohol related violations.

January 2007 - Present

I am currently a Motor Carrier Safety Consultant. I have conducted several Mock DOT Audits of motor carrier's compliance with the Safety and Hazardous Materials Rules and Regulations. I have conducted a Safety Director Basic Motor Compliance Rules and Regulations Course (3 day class), provided Hazardous Materials Awareness, Recurring and Hazardous Materials Security Training Classes to several of my clients.

I have conducted several Driver Hours of Service and How to Pass a DOT Inspection Training classes.

I have conducted analytical work for a very large motor carrier property broker. I have conducted several SafeStat training classes for both motor carriers, brokers and freight forwarderds.

I have conducted several SafeStat Training classes at a National Trucking Association's annual meeting. I have been a guest speaker at Delta NU Alpha on the subject of SafeStat Scores, proposed and new rules on the horizon at DOT.

I have developed a New Entrant Motor Carrier Training Program covering all areas of the Federal Motor Carrier and Hazardous Materials Rules and Regulations that I provide to some of my clients.

Court Appearances:

As a State roadside inspector I regularly appeared in both General Sessions and Circuit court on matters relating to violations of the Federal Motor Carrier Safety and Hazardous Materials Regulations in which I had cited a motor carrier and/or driver.

While employed at the Federal Highway Administration, Office of Motor Carrier I appeared in U.S. District Courts on three or four occasions on matters relating to motor carrier's violations of the Federal Motor Carrier Safety Regulations.

I once appeared in U.S. District Court in a criminal matter as an expert witness on behalf of the Government (Federal Highway Administration) in a matter relating to fraud where an individual claimed that he had received design approval from the U.S. DOT for a vehicle he had obtain investments to manufacture.

I was deposed in U.S. Civil Court proceeding relating to serious truck crashes on two occasions in my career.

Recent participation

December 2007 I participated in the Federal Motor Carrier's CSA 2010 presentation in Dallas, TX.

April 2008 I participated in "Supply Chain Labaility" Webinar.

July 2008 I presented a Webinar on "SafeStat Vs CSA 2010" to more than 75 participants from the Expediters Annual Convention in Wilmington, OH.

October 2008 and January 2009 I have participated in the Federal Motor Carrier Safety Administration's Motor Carrier Safety Advisory Committee quarterly conference call meeting.

November 2008 – 2009 Presenter to the annual conference of the National Association of Small Trucking Companies SafeStat Vs CSA 2010.

November 2008 – Keynote Speaker at the annual conference of the National Association of Small Trucking Companies on the subject of Motor Carrier DOT Compliance Audits.

September 2008 to Present I am a bi-weekly DOT Expert on the Dave Nemo Open Road Radio Show that is broadcasted nationwide on XM Radio Channel 170 and Sirius 141. The name of my show is Safety Compliance and Common Sense.

November 2009 – Participated in the Federal Motor Carrier Webinars on CSA 2010.

January 2010 Participated in the Federal Motor Carrier Safety Administration Hours of Service Listening Sessions on January 19, 2010, and January 25, 2010.

August 26, 2010 Presented a CSA2010 Presentation for the National Association of Factors in Kansas City, KA.

September 26, 2010 Attended a Motor Carrier Safety Compliance Course at the U.S. Department of Transportation, Transportation Safety Institute at Oklahoma City, OK.

October 22, 2010 – Presented CSA2010 and DOT Audit Training at Xtra Lease, Inc. Le Vergne, TN with over 150 attendees.

November 10, 2010 – Presented CSA 2010 Training to Delta Nu Alpha Bowling Green, KY.

November 11, 2010 – Presented a CSA2010 panel discussion for the National Association of Small Trucking Companies with approximately 50 participants.

Awards and Recognitions

1983 to March 2007

In summary

11 Cash Awards
8 Outstand, exceptional or meritorious service performance appraisals
4 Within-Grade Salary Increases
12 letters of appreciation
8 Certificates of Appreciations
3 Promotions, GS 9 – GS- 11
1 Promotion GS 11 to 12
1 Promotion GS 12 to GS 13
1 Promotion GS 13 to GS-14

March 30, 2007 Press Release – FMCSA awarded the TN Department of Safety received an honor for reducing fatalities and fatal crashes involving commercial motor vehicles. TN was chosen for the honor from among the 13 states in the Southern Resource Center for 2006. This Motor Carrier Safety Assistance Program was a major program that I was responsible for during my last year of service to FMCSA.

February 15, 2006 Exceeded Expectations Performance Appraisal

October 19, 2005 Letter of Appreciation from my former supervisor, Jerry L. Cooper, expressing his pleasure of having worked with me.

August 29, 2005 Letter of Appreciation from Administrator Sandberg for assistance to the public

August 11, 2005 Cash Award of 1,500

June 22, 2005 Cash Award $750

June 7, 2005 Cash Award $750

May 30, 2004 Cash Award $600

April 6, 2004 Letter of Congratulations from Administrator Sandberg

February 5, 2004 Letter of Appreciation From Chief Safety Officer, John Hill

May 1, 2003 Performance award of $1,000

January 31, 2002 Cash Award of $2,000

August 12,2001 Cash Award $600

December 30, 2001 Promotion from State Director GS-13 to Division Administrator GS-14

November 19, 2001 Outstanding Performance Appraisal

December 3, 2000 With-in-Grade Increase

December 2000 Find the Good and Award it from Administrator Rodney Stater, Federal Highway Administration

December 5, 1999 Performance Award $500

January 17, 1999 Time Off Incentive Award 8 hrs

December 6, 1998 Within-Grade Increase

March 25, 1998 Special Act Award $2,500

March 29, 1998 Special Act/Service Award $500

May 1997 Plaque of Appreciation Region Four Customer Service Award (hand copied)

March 14, 1997 Letter of Appreciation from the Tennessee Trucking Association

November 1996 Promotion from Federal Program Specialist GS-12 to GS-13 State Director (copy not available)

September 3, 1996 Letter of Appreciation M.S. Carriers

July 15, 1996 Special Act Award $400

March 7, 1996 Letter of Appreciation from the TN Motor Coach Association

October 1995 Partners For Excellence Award from Administrator George Reagle

January 23, 1995 Meritorious Performance Appraisal

September 9, 1994 Letter of appreciation from Holly J. Kinley-Lick Federal Highway Administration

April 1994 Plaque of Appreciation for Continued Superior Performance As an Associate Staff at U.S. DOT Transportation Safety Institute (Only issued after 12 classes)(I server in more than 30 such classes)

May 1993 Certificate of a Peer Award from entire staff of Region **4**

May IO, 1993 Certificate of Appreciation from President Bill Clinton for my service to the Federal Highway Administration

January 20, 1993 Letter of Appreciation West Tennessee Traffic Club

May 1993 Outstanding Rating Certificate

January 19, 1993 Outstanding Performance Appraisal

May 13, 1991 Letter and Certificate of Appreciation for my exceptional efforts for achieve this highest success rate in its history of the academy for its graduating trainees.

February 8, 1991 Supervisor's Special Act Award $200

August 1988 Promotion from GS-11 (Safety Investigator) to GS-12 Federal Program Specialist

October 11, 1983 With-in-Grade Salary Increase

February 22, 1983 Letter of Appreciation from the Tennessee Public Service Commission

February 9, 1982 Letter of Appreciation Tennessee Public Service Commission

October 6, 1981 Letter of appreciation for my work and accomplishments from my supervisor N. Hugh Galbreath

Affidavit of J.D. Heatherly
H&V Leasing, Inc.

My name is J.D. Heatherly. I am Office Manager of H&V Leasing, Inc. of Newport, Arkansas. I am authorized to make this statement on H&V's behalf. My company operates 13 trucks and is regulated by the Federal Motor Carrier Safety Administration.

We have examined our CSA 2010 scores and if released to the public they will show that we have scores in two of the BASIC areas slightly above the 65 percentile. In those areas we are peer grouped with dissimilar carriers who have, we believe, scale house advantages which statistically skew a proper evaluation of our safety profile.

We have been advised by at least one major customer that it feels compelled to use CSA 2010 if released to the public as a screening mechanism to determine its subsequent use of carriers and accordingly we are threatened with immediate loss of business if the data is released on December the 6th.

H&V is committed to highway safety and we do not believe the CSA scoring methodology is fair, appropriate for use by shippers, or intended to interfere with our abiiity to compete.

In this regard, we received a satisfactory safety rating from the FMCSA on July 8, 2009 and have been determined by the Agency to be fit and safe for shippers and brokers to use. Any system which suggests that the public should be "alerted" about use of a carrier which the Agency has determined is satisfactory should not be implemented under these circumstances until the system is thoroughly reviewed under rulemaking.

Because of the possible immediate harm to H&V, we urge that the relief Petitioners seek be granted.

By: JD Heatherly
J. D. Heatherly
H&V Leasing, Inc.

State of Arkansas

County of Jackson

Subscribed and sworn to before me this 24th day of November, 2010.

Lola Powell
Notary Public

[SEAL] Lola Powell
County Of Jackson
Notary Public - Arkansas
My Commission Exp. 07/01/2015

My Commission Expires: 07/01/2015

Affidavit of Mark Kreider,
Innovative Worldwide Logistics, Inc.

I am Mark Kreider, President of Innovative Worldwide Logistics, Inc. We are a small family owned transportation brokerage located in Knoxville, Tennessee. We employ 3 people and have 1,600 small carriers under contract. I believe the CSA 2010 is unfair and has the very real possibility of forcing me out of business due to new customer requirements to protect themselves against frivolous lawsuits. Since the CSA 2010 does not render a trucking company fit or unfit, it is up to the broker to make an individual judgment on trucking company's safety. This creates a liability concern for the customer since they depend on the broker to hire fit trucking companies. Using fear tactics, large corporate brokers are already contacting my customers and telling them that they need to hire them exclusively to manage all their freight for protection against CSA 2010 related lawsuits. These large corporate brokers are promising to indemnify my customers against liability in exchange for all their business. This type of broad indemnification is not possible for small companies to provide.

If the CSA 2010 comes to be, and our customers require broad indemnification, we will be finished. We will be forced to close our doors or become an agent for a large brokerage.

I fully support efforts to increase safety but this is not the way. A better system would be for the Federal government to analyze the statistics privately and rate a carrier as fit or unfit as is done with the airline industry. Forcing brokers and traffic managers to become safety experts is ludicrous, unnecessary, and will create more lawsuits. Let the transportation experts in the Federal government make the call and inform the public on whether or not a trucking company is fit or unfit.

Mark Kreider, President
Innovative Worldwide Logistics

State of Tennessee

County of Knox

Subscribed and sworn to before me this 24 day of November, 2010.

Robbie Griffey [SEAL]
Notary Public

My Commission Expires: May 7, 2013

ROBBIE GRIFFEY
STATE OF TENNESSEE NOTARY PUBLIC
KNOX COUNTY

AFFIDAVIT OF JIM LOYD,
JIM LOYD TRANSPORT CO.

My name is Jim Loyd and I am President of Jim Loyd Transport Co., 2660 Cedartown Hwy., Rome, GA 30161. We are a small trucking company which currently has 30 power units. We provide truckload service to companies all over the United States. We enjoy a satisfactory safety rating from the FMCSA which is the highest rating awarded to a company. Our company has not had a chargeable accident in the past 5 years and has only one non-chargeable accident which was not our fault on our record in the past 5 years.

Because Georgia was a test state for the CSA 2010 methodology, I have some experience with how it works or does not work and of the possible adverse consequences release of CSA 2010 data can have on small trucking companies like Jim Loyd Transport.

As a small carrier with comparatively few power units, any statistical comparison of Jim Loyd with other carriers in a percentile ranking can be particularly sensitive to a small number of aberrant recordable events which do not accurately reflect the carrier's commitment to safety or its compliance with the Federal Safety Regulations.

Our company is based in Georgia which is a test state and accordingly, I am familiar with some of the CSA 2010 methodology and can testify to the problems I have encountered. Our company uses paper logs and has not converted to an EOBR. As a result, we have accumulated violation points with respect to form and manner violations or failure of drivers to keep logs up to date which are not incurred by our competitors who either are not required to log or who have an EOBR. Placed in peer groups, accordingly our percentile ranking in the hours of

service bracket exceeds the enforcement threshold and will indicate to the public that we are in the orange area and under an “Alert”. We have been advised by the 3PL for our largest customer that CSA 2010 is going public on December 6 and that we will be measured by that system. The threat to our continued business relationship is accordingly very real.

It is important to note in this regard, though, that in the past 2 months we have had a new audit by the FMCSA of our books and records in the BASIC area which shows a high percentile ranking and the Agency has concluded that no change in our satisfactory rating is warranted. Notwithstanding this satisfactory rating, though, unless the relief Petitioners seek is granted, we will still be shown as exceeding the enforcement threshold, or under an “Alert” to the shipping community if this material is released.

In conclusion, I am somewhat reluctant to offer testimony in this proceeding or to draw attention to my company for fear of further being blackballed or targeted for enforcement or loss of business because of the vicarious liability hysteria which surrounds the impending release of the CSA 2010 modality.

At the end of the day, though, I know that Jim Loyd Transport is a safe small carrier which is being set up to be tarred and feathered by the misapplication of wrong data. We are more than happy to help the FMCSA do its job and offer it the assurances that we are a compliant carrier if our actual safety rating, the results of their audit and our crash record alone is not enough to be persuasive.

But I feel compelled to make this statement on behalf of my company and the thousands of large and small carriers who will be threatened with loss of business if not bankruptcy.

Jim Loyd

Jim Loyd, President
Jim Loyd Transport Co.

State of Georgia

County of Floyd

Subscribed and sworn to before me this 24th day of November, 2010.

_________________ [SEAL]
Notary Public

NOTARY PUBLIC, FL[illegible] GEORGIA
MY COMMISSION EX[illegible] AUGUST 9, 2011

My Commission Expires: _______________

AFFIDAVIT OF KEVIN LHOTAK,
RELIABLE TRANSPORTATION SPECIALISTS, INC.

My name is Kevin Lhotak. I am President of Reliable Transportation Specialists, Inc. and we employ –112___ people. I am authorized to make this statement in support of the relief sought by Petitioners.

We currently enjoy a satisfactory safety rating from the FMCSA. We are most concerned about potential release of CSA 2010 methodology and data to the public because various customers and equipment providers have told us that they will feel compelled to use this information to bar use of any carrier over the enforcement threshold in the remaining 5 BASICs.

As an intermodal carrier based in Indiana, the system is particularly biased against our company in rating us on a percentile basis because of the high number of citations which are written by the surrounding states and the fact that intermodal carriers operate with equipment that is maintained by others. For these reasons, and these reasons alone, I believe we are above the enforcement threshold in certain areas. The agency, and only the agency, should ultimately determine carrier safety and we have been determined to enjoy the highest safety rating available. For these reasons we urge that release of this data be postponed because release will have an incalculable adverse impact on our ability to obtain existing freight. We urge that the Court stay release of this material until the Administrative Procedures Act is complied with.

Kevin Lhotak, President
Reliable Transportation Specialists, Inc.

State of Indiana

County of Porter

Subscribed and sworn to before me this 24 day of November, 2010.

[SEAL]

Notary Public

My Commission Expires: July 14, 2012

Affidavit of Larry Danko
Southern States Cooperative, Incorporated

Southern States Cooperative, Incorporated ("SSC"), an agricultural cooperative founded in 1923, now has more than 300,000 farmer stockholder/members. As one of the nation's largest cooperatives, the Richmond, VA firm provides a wide range of farm inputs including fertilizer, seed, livestock feed and pet food, animal health supplies, and petroleum products. We serve our member and non-member customers through over 1,200 retail outlets.

SSC is dedicated to serving farmers throughout a 26 state area and as part of providing goods, materials and supplies to the farming community, we currently hire annually as many as 500 independent transportation carriers to provide service. Particularly during the spring planting season, we may procure service in the spot market from available carriers enlisting as many as 50 new carriers per month. It is neither economical nor reasonable for SSC to extensively credential each carrier before use. Reliance on the FMCSA's ultimate determination of fitness is all a shipper such as SSC can reasonably be expected to do.

Traditionally we have verified carriers for use by confirming that they were appropriately licensed, authorized and insured in accordance with FMCSA requirements.

We have been advised that CSA 2010 will impact our selection process and require us to accept responsibility for negligently hiring carriers which the FMCSA otherwise certifies as fit for use under existing regulations.

We have been advised that after release of CSA 2010 data to the public, it will be too dangerous for us to hire our own carriers based upon their certification by the Agency as licensed, authorized and insured to operate. We would need to seek professional help in weighting out each carrier using CSA 2010 in order to avoid the possibility of suit. This deeply concerns us.

As part of the preparation for CSA 2010, we have been advised by a large broker that SSC may no longer afford to follow its existing selection criteria and should hire a third party provider who will examine CSA scoring methodology to select carriers in order to protect SSC from the possibility of large vicarious liability judgments. One such judgment has been entered in the State of Virginia, where we are domiciled, using in part FMCSA data under SafeStat. Information released by the FMCSA under CSA 2010 has heightened the vicarious liability concern because the Agency has suggested that shippers and brokers have a safety obligation and responsibility which extends beyond simply relying upon the Agency doing its job to ultimately determine highway fitness.

Clearly, the confusion surrounding this issue is a major impediment to continued efficient operations by SSC, particularly in view of the impending spring planting season.

We support the efforts of Petitioners to postpone release of any CSA 2010 data until the issue of the validity of such data and who, be it the FMCSA, or the shipping public, bears the responsibility under Federal Motor Carrier Safety Regulations for certifying safety fitness for use, is clarified.

Clearly, the public release of CSA 2010 and the confusing issue of its intended use and effect on the small carriers we currently use, is an issue involving a major regulatory change which needs to fully be reviewed in the context of the yet to be announced rulemaking proceeding to address more this entire issue.

If we were required to restrict our use of carriers based upon a December 6 release of this material to the public, our distribution of agricultural products would suffer major interruptions and under fear of additional vicarious liability we would be forced to consider terminating the use of many carriers upon whom we have come to depend. We understand that an undeterminable number of carriers will not even be rated under this system and in light of the Agency's pronouncement that shippers have some undetermined additional safety duty, we are at a loss to determine what carriers can be used and under what circumstances.

Finally, as an operator of a private fleet which is subject to the new FMCSA methodology we have reviewed our numbers and how they are calculated and can affirm that CSA 2010 methodology, peer groups and mathematical algorithms are a work in progress which should not be used by any shipper to blackball use of a carrier.

I am submitting this Affidavit as the Director of Transportation of Southern States Cooperative and I am authorized to make this statement on its behalf.

By: Larry Danko
Larry Danko
Director, Transportation
Southern States Cooperative, Incorporated

State of Virginia

County of Henrico

Subscribed and sworn to before me this 24 day of November, 2010.

Jeanna Paige Hardee [SEAL]
Notary Public

My Commission Expires: 6/30/2012

JEANNA PAIGE HARDEE
NOTARY PUBLIC
REG # 145569
MY COMMISSION EXPIRES 06/30/12
COMMONWEALTH OF VIRGINIA

AFFIDAVIT OF STEVEN B. SAMPLE,
RIME-IT TRANSPORTATION

My name is Stephen B. Sample and I am President of Tyme-It Transportation, an FMCSA regulated motor carrier and property broker domiciled in Louisville, Kentucky. I am also the Chair of the Legislative Committee of The Expedite Alliance of North America (TEANA) one of the Co-Petitioners in this lawsuit. I am authorized to make this statement on behalf of both Tyme-It and TEANA.

I have been involved in the trucking industry for 28 years and have substantial experience in truck brokerage having served as President of the Transportation Intermediaries Association in 2002-2003.

TEANA supports postponed release of CSA 2010 information to the public pending consideration of the affect of this data on efficiency, competition, and small businesses as required by the National Transportation Policy, the APA and the related statutes intended to protect small businesses.

TEANA is a trade association composed of approx. 65 small carriers who provide a niche service. We provide just in time shipments on a call on demand basis for large industrial shipments when inventory shortages require exclusive use to avoid plant shutdowns.

In order to efficient and responsive service, our members must be able to dispatch trucks from their local domicile to points throughout the United States on short notice and then arrange for back hauls or return moves from destination in the spot market to avoid empty miles and inefficiency. This "spot marketplace" has become a substantial portion of the truckload industry as a result of deregulation and functions by using property brokers and other intermediaries who arrange for shipments via the internet often using carriers that must be credentialed and certified on short notice.

Under existing regulations, brokers are intermediaries who act like real estate brokers or stock brokers bringing together willing shippers and carriers often times for one or two

moves. To credential a carrier, a broker must verify that it is licensed, authorized and insured and is otherwise able to meet the service requirement of its customer. This credentialing process has traditionally required only that the broker obtain certification from the ICC, now the FMCSA, that the Federal Government has certified the carrier as safe to operate. The trucking industry is no different than other regulated industries in which a credentialing organization, be it a bar association, the FAA, or local taxicab authority, certifies the regulated entity for use so that the shipping public is not required to do so.

In this context, the lead up to CSA 2010 and the Agency's informal announcements have created chaos in the industry and led major shippers to conclude that for fear of vicarious liability they must either use only large carriers with unlimited indemnification ability or impractically second guess the FMCSA's decisions by choosing only carriers which have no blemish on their safety record as shown by the data to be released.

TEANA members are currently seeing in prospective contracts provisions which say that brokers cannot use nor can carriers provide service if the information to be released suggests that in any of the BASIC areas of inquiry the carrier is over the enforcement threshold, or I presume marked as under "Alert" under the newly announced nomenclature.

As we understand it, in the BASIC areas to be published, 35% of the peer group carriers will be deficient in each of 3 BASICs and 80% will be deficient in the remaining BASIC to be released. Any way the FMCSA cuts the pie, well over 50% of the monitored carriers it otherwise certifies as fit, willing and able after investigation under its existing system will fail under this criteria.

This is of particular concern to TEANA members since it will drastically interrupt their ability to operate efficiently and to broker loads to one another without drilling down into data and procedures which have not been subject to public review, comment or scrutiny.

The industry commentators on CSA 2010 have repeatedly called it a "game changer" or "a brave new world". It appears to TEANA that this is truly the case in terms of the catastrophic effect that it will have upon the ability of TEANA members to continue viable operations, particularly in the spot market.

Finally, one particular issue which is troubling to TEANA members is the obvious geographical anomalies which result from inclusion of carriers in peer groups with percentile rankings which pay no attention to anomalies and exceptions which affect this peer group ranking. Many of the expediters in our association are involved in providing automotive and industrial shipments and are centered in the Michigan, Ohio and Indiana areas. Those three states are "probable cause" states and as a result historically stop far more trucks for minor speeding violations, issuing warnings than other states. Under the methodology, apparently developed by the CSA carriers operating in these states are nonetheless put in peer groups with carriers operating in states in which such warnings and speed violations are not written as frequently. Accordingly, it has been said it is a lucky day if you are based on Montana and if you are based in Indiana, Michigan or Ohio you are going to be statistically prejudiced with no effective due process or way to correct the inherent bias and prejudice in the system.

TEANA, like the other Co-Petitioners, is committed to safety and probably would have no ultimate objection to the use of imperfect data as a screening tool for the Agency doing its job in determining highway safety. Yet, whether intended or unintended, the consequences of premature public release of CSA 2010 data are substantial and incalculable because no good cause has been shown for not considering the public release of CSA 2010 methodology as part of rulemaking and we urge that the Motion to Postpone be granted.

By: ______________________________
Stephen B. Sample, President
Tyme-It Transportation, Inc.

State of Kentucky

County of Jefferson

Subscribed and sworn to before me this 24th day of Nov, 2010.

______________________________ [SEAL]
Notary Public

My Commission Expires: Oct 22, 2013

Affidavit of Steven W. Norman,
Universal Traffic Service, Inc.

My name is Steven Norman and I am the Director of Resource Development at Universal Traffic Service, Inc. (UTS), a licensed property broker. I'm also a member of the Board of Directors of TEANA, a named Plaintiff in this proceeding. This Affidavit is submitted on behalf of UTS.

UTS is a licensed property broker which employs 99 people and arranges for the transportation of shipments using authorized and insured motor carriers certified as authorized to operate by the FMCSA. We currently have approximately 12,000 carriers under contract and book 20,000 loads per month.

As a property broker we are required by regulation to use only licensed and authorized carriers and otherwise have no federally mandated obligations for the safe operation of the commercial motor vehicles used by the authorized carriers we retain.

We have been told by transportation attorneys, purveyors of CSA 2010 monitoring systems and others that release of CSA 2010 is a "game changer" and "a brave new world" for the motor carrier industry and the shipping and receiving public. Certain of our larger broker and 3PL competitors have been advising shippers that as a result of release of CSA data to the public, the shipping community may be required to second guess the FMCSA's ultimate safety fitness determination and use carriers which the

website reflects are over the arbitrary enforcement thresholds at their own peril. The peril being touted as the reason for using our competitors is that they will assume responsibility for the negligent selection of the carrier and can financially indemnify the shipper from runaway jury verdicts which are predicted to result from use by plaintiff's bar of the soon to be released data and percentile rankings coupled with the Agency's pronouncements that the data and rankings must be published before rulemaking so that shippers can make "safety based decisions." The ramp up to CSA 2010 indicates to us that UTS may be unequivocally harmed by premature release of this data as we are forced to either be "safe rather than sorry" and bar use of the valued carriers who are certified by the Agency as fit for use because of an unproven mathematical ranking or to accept unmeasured additional risk of liability through indemnity obligations to our customers in order to compete in the marketplace.

Clearly, this is an issue of major impact to UTS and the members of TEANA, many of which are our vendors. If all of them are placed in peer groups based on conveyed data as many as two-thirds can be expected to be above the threshold to be noted as an "Alert" under the CSA methodology. To have to cease using even 10% of our carrier base would undermine our ability to serve our customers in the critical marketplace we serve.

By: [signature]
Steven W. Norman

State of ______________

County of Kent

Subscribed and sworn to before me this 24th day of November, 2010.

[signature] [SEAL]
Notary Public RITA A. KLINE

My Commission Expires: 2-6-2013

RITA A. KLINE
NOTARY PUBLIC, STATE OF MI
COUNTY OF KENT
MY COMMISSION EXPIRES Feb 6, 2013
ACTING IN COUNTY OF Kent

Affidavit of James Frye,
CHEP USA

My name is James Frye and I am Director and Counsel of CHEP USA ("CHEP") and I am authorized to make this statement in support of the relief sought by Petitioners. CHEP is a nationwide distributor of proprietary pooled pallets used by commercial shippers in the transportation and storage of freight and cargo. We regularly retain over 100 different motor carriers to transport pallets to our manufacturing customers and from retail outlets back to our service depots.

In addition, we have an affiliate, Lean Logistics, which operates as a licensed property broker. As counsel for CHEP, I am involved in risk assessment and insurance issues for both companies and I am authorized to make this statement.

Of primary concern to shippers and brokers is the issue of vicarious liability which can arise under state law concepts of vicarious liability, negligent entrustment or negligent hiring. The industry as a whole is particularly aware of large judgments entered against or agreed to by property brokers as a result of lawsuits in which the carriers they retain have been involved in multiple fatalities.

The Federal Motor Carrier Safety Administration is charged by Congress with determining which carriers are safe to operate, and under FMCSA safety regulations, the authorized motor carrier has a non-delegable safety duty for the operation of the commercial motor vehicle.

Unfortunately in the ramp up to CSA 2010, the role of the Agency, the carrier and the carrier's customers (shippers and brokers) has become confused and many in the industry, including various trade groups, have concluded that release of CSA 2010 to the public is actually intended for use by shippers and brokers in establishing a new duty of due diligence which would result in CHEP and Lean Logistics bearing an obligation to second guess the Agency's ultimate fitness determination. Release of CSA 2010 data will confuse, we fear, the application of the Federal Safety Regulations on the shipper and broker community and result in new and greater potential exposure to lawsuits.

Unless Petitioners' relief is granted, our job in risk management will result in us facing an unanswered question of what safety standards should be applied. Is a carrier certified by the FMCSA as licensed and insured to operate fit for use, or is the Agency, by publishing this information with warnings, a color coated format like TSA security alerts, etc., actually telling the shipper and broker community that the shippers of cargo bear some new responsibility and liability? Until this issue is squarely addressed and resolved, there is no foreseeable reason for early publication of CSA 2010 methodology which the Agency acknowledges must go through rulemaking before the government can use the questionable data and scoring mechanism it proposes to give to the public with unmeasured unintended consequences.

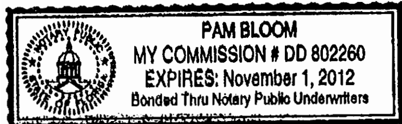
By: ______________________
James Frye, Director and Counsel
CHEP USA

State of Florida
County of Orange

Subscribed and sworn to before me this 29th day of November, 2010.

Pam B. Bloom [SEAL]
Notary Public

My Commission Expires: Nov. 1, 2012


PAM BLOOM
MY COMMISSION # DD 802260
EXPIRES: November 1, 2012
Bonded Thru Notary Public Underwriters

Re: FMCSA-2004-18898: Withdrawal of Proposed Improvements to the Motor Carrier Safety Status Measurement System (Safestat) and Implementation of a New Carrier Safety Measurement System (CSMS)

COMMENTS OF THE NATIONAL ASSOCIATION OF SMALL TRUCKING COMPANIES (NASTC), THE EXPEDITE ALLIANCE OF NORTH AMERICA (TEANA), AND AIR & EXPEDITED MOTOR CARRIERS ASSOCIATION (AEMCA)

MOTION TO POSTPONE

COME NOW, the National Association of Small Trucking Companies (NASTC), The Expedite Alliance of North America (TEANA) and the Air and Expedited Motor Carriers Association (AEMCA), through Counsel, and files this their motion to postpone further release to the public of CSA 2010 data with percentile ranking until such time as full compliance with the Administrative Procedure Act and the protection afforded under the Regulatory Flex Act and the Paperwork Reduction Act is complied with and state as follows:

I. Interest of the Parties

The three organizations supporting this Petition represent over 3,000 small privately owned motor carriers that are part of over 150,000 similarly situated small businesses which will be directly adversely effected by the FMCSA's announced public release of CSA 2010 data and scoring in its present format.

At the outset, Petitioners reaffirm their commitment to highway safety and their commitment to work with the FMCSA to develop a new, less costly methodology pursuant to which the Agency can meet its statutory obligations to ensure that all motor carriers (both private and for-hire) are fit, willing and able to comply with federal safety regulations.

Petitioners recognize that CSA 2010 is a work in progress and pledge to work with the FMCSA to ensure that its ultimate data collection and statistical analysis can be used as a reasonable and fair tool for use by the Agency in its intended progressive intervention program.

Yet, for the reasons stated herein, Petitioners must unequivocally oppose release of unscrubbed CSA 2010 data together with untested statistical analysis which announces to the shipping public that any carrier with percentile rankings above artificially established enforcement thresholds are "marginal" or "deficient" and thus somehow not fit for use.

As small businesses, Petitioners submit that any change in the FMCSA's safety methodology which has a major economic impact on small carriers should be subject to close analysis in accordance with the Reg Flex Act, the Paperwork Reduction Act and the Data Quality Act.

The data collection method, the data accuracy, and its relevance to safety has not been subject to review or rulemaking and there has been no analysis of the effect on small businesses which comprise over 95% of the motor carrier industry and virtually 100% of Petitioners' constituency. With respect to safety, Petitioners submit that small for-hire motor carriers are not merely statistics and their employee drivers and owner-operator partners are not mere numbers. They represent successful small businesses in the best of the American tradition.

In this Motion to Postpone, Petitioners will show the direct substantial and devastating effect release of this data in its present form will have on the continued operations of approximately two-thirds of the industry because of the unintended vicarious liability consequences of the Agency's action.

2. Araumenf

Petitioners submit that unfortunately the FMCSA has not fully comprehended the effect which release of CSA 2010 in its current format to the public will have on small carriers. The Agency currently proposes to release raw data concerning every local state and federal recordable safety incident including warnings, citations, and out of service orders to the public in the name of "transparency" and "analysis." Unscrubbed data will be statistically accumulated by carriers, sorted into 6 BASICs and then scores will be assessed by percentile ranking in peer groups consisting of tens of thousands of operationally dissimilar carriers.

Based upon the lowest of its progressive thresholds for enforcement, percentage pegs and various percentile levels will be established in each BASIC category, ranging in value for non-hazmat non-bus operations from 65 to 80 percentile. Based upon these percentile rankings of carriers, current estimates are that 68% or over two-thirds of the industry will be pejoratively described in the public release of this data as "marginal" or "deficient" in at least one of the BASIC areas.

The cursory announcement afforded in the Federal Register on April 9, 2010 sets forth only an outline of CSA 2010 and does not set forth with specificity the data to be used, the basis for the peer groups or the assignment, the relative weighing of CSA violation points, the basis for percentile ranking or any factual predicate for concluding that a carrier should be labeled as "marginal" or "deficient."

The data collection method, data accuracy, and relevance to safety has not been subject to review or rulemaking and there has been no analysis on the affect on small businesses which comprise over 95% of the motor carrier industry.

(a) Vicarious Liability/Efficiency and Competitive Concerns with Premature Release of CSA 2010 Data

The grist for this petition is the substantial anticompetitive effect which the proposed release to the public of **CSA** 2010 in December will have on the motor carrier industry, small carriers in particular.

Petitioners submit that the most disruptive and potentially devastating threat to the efficient and competitive privately owned motor carrier system is the fear of vicarious liability. Vicarious liability as it applies to interstate trucking is the concept that the shipper or broker as the customer of a safety regulated motor carrier (or vendor) can somehow be vicariously liable or responsible for negligent selection when it hires a carrier that the FMCSA regulates and confirms is licensed, insured and authorized to operate. The problem of vicarious liability is real and has resulted in aberrant decisions in which state law has been applied to suggest that a shipper or broker is required to second guess the Agency's ultimate fitness determination through use of publicly released data even when the FMCSA has certified the carrier is licensed and authorized for use. See *Schramm v. Foster*, 2004 US. Dist. Lexis 16875 (D.Md. August 23, 2004) and *Jones v. D'Souza*, 2007 U.S. Dist. LEXIS 66993 (W.D. Va. 2007).

Although SafeStat and current available data clearly contains warnings to the contrary, courts have misapprehended the role of the FMCSA and its current safety procedures. The Agency has been advised both formally and informally that release of the CSA 2010 scoring system with the current "marginal" and "deficient" limbo bars will be a train wreck involving trucks, clearly exacerbating the vicarious liability issue with drastic unintended economic consequences.

The Agency has been advised and comments in support of Petitioners' request will clearly demonstrate that major Fortune 500 customers (including shippers, logistics companies and intermodal equipment providers) are currently so confused about the Agency's use and intent of CSA 2010 that they are prospectively including in contracts provisions which would bar use of any carrier with a "deficient" or "marginal" rating in any BASICs category if and when CSA 2010 data is released to the public. See Appendix A. Attached as Appendix B is an example of the contractual language another Fortune 500 is now inserting in every contract for carriage which poignantly demonstrates this problem.

Unfortunately, the FMCSA has not disabused the shipping industry of its unreasoned fear of vicarious liability and has failed *to* affirm its sole preemptive duty to ultimately certify to the shipping and traveling public which carriers are fit for use. The comments of the Volpe Center and the Agency's response to inquiries from affected parties such as the Minnesota Trucking Association have only further heightened confusion over the permissible or intended use of CSA 2010 data by shippers and brokers.

Under the current system, the FMCSA audits approximately 17,000 carriers per year (including those deemed statistically the worst offenders under Safestat) and ultimately awards over half satisfactory ratings. Assuming the accuracy of this data, far less than 1% of the motor carriers were found unfit to operate by the FMCSA in 2009 and crashes involving commercial motor vehicles declined 20% to a 60 year low. The Agency cannot don judicial blinders and ignore this economic reality, the confusion in the industry, or the devastating effect on over 150,000 small for-hire carriers' if

[1] **This estimate is based on FMCSA data showing approximately 220,000 of the 700,000 registered carriers are for-hire and the estimate that CSA data will label two-thirds of the authorized drivers as marginal or deficient.**

they are barred from handling customers' freight because the proposed unscrubbed CSMS data is released on schedule.

The labeling of over two-thirds of the industry as "deficient" with the obvious unintended consequence of bankruptcies and loss of jobs due to unrebutted vicarious liability concerns is clearly a foreseeable consequence which requires the relief Petitioners seek. Moreover, if faced with the risk of losing major customers at any time that the FMCSA website shows their operations are marginal or deficient under any BASICs, small businesses will be unlikely to make major investments in new equipment and lenders will be less likely to support them. Brokers' ability to access the back haul market and match loads with available carrier capacity will be compromised. Dead miles will be increased, fuel will be wasted, and the cost of transportation will be increased as the efficiency of the spot market is compromised.

(d) Why the FMCSA Should Affirm Its Sole Ultimate Duty
to Determine Hiahwav Fitness for Use

In the context of vicarious liability, Petitioners submit that the federal statutes and regulations have a preemptive effect under the Commerce Clause and The Federal Aviation Administration Authorization Act of 1994 (F4A).

The FMCSA and not state authorities are solely responsible for determining which carriers are safe to operate. Federal statute places the sole non-delegable duty upon an authorized motor carrier to conduct its operations in compliance with the Federal Motor Carrier Safety Regulations, to designate agents and to provide evidence of insurance to assure the traveling and shipping public that the carrier meets minimum levels of financial responsibility for its negligent acts or omissions. (49 CFR 387)

Federal statutes and regulations impose no safety compliance duty on shippers and brokers. In fact, property brokers which are regulated by the Agency and hence directly affected by this ruling are required only by regulation to retain "authorized carriers". See 49 C.F.R. 371.1. The U.S. DOT through the FMCSA, is charged with the exclusive duty of determining the compliance of motor carriers and bus lines with the requirements of the Act including the safe operation of commercial motor vehicles. The FMCSA is solely charged with registering authority, issuing permits to regulated carriers and assigning safety ratings and placing carriers out of service.

In this regard, the FMCSA's regulation of the trucking and bus industry as public utilities is no different than the duties and obligations of other regulatory bodies vis-a-vis the credentialing of the regulated and their certification for public use, whether the regulated entity be subject to the regulations imposed by the FAA, the FCC or the FMC. The Agency in the name of uniformity and highway safety has the sole duty to decide who is authorized to operate commercial motor vehicles in interstate commerce. The Agency assumes the duty so the shipping public does not have to.

Unfortunately, the Agency in an effort to be transparent and inclusive, has issued certain comments which have obfuscated the purpose of the CSMS data system and which have suggested to some that determining safety fitness is a "stakeholder shared

responsibility" and that shippers and brokers are invited, if not required, to second guess the Agency's progressive threshold analysis.

In responding to an inquiry by the Minnesota Trucking Association, the Agency's Administrator said that shipper use of CSA information allows "... the FMCSA to leverage the support of shippers, insurers, and other interested stakeholders to ensure that motor carriers remain accountable for sustaining safety operations over time."

In issuing the most recent safety measurement system methodology in August, the Volpe Center confirmed in the preface that "Future SMS development will be part of the continuous improvement process based on results and feedback" yet on page 1-2, concluded that, "Thus, the SMS will empower carriers and other firms (e.g. shippers, insurers) involved in the motor carrier industry to make safety based business decisions."

The Agency has not defined the "safety based business decisions" for which its shippers are required to make under the new methodology.

On the contrary, unless the FMCSA affirms its sole duty to determine safety for use as part of the CSA methodology, this kind of "inclusive" language will simply, through fear of vicarious liability, introduce a "game changer" which affects small companies, jobs and competition long before the SFD portion of the methodology can even be submitted for approval.

Petitioners submit the Agency cannot transition from Safestat, with its warning that the data is not intended for use, to CSA 2010, with the suggestion that stakeholders should use the information to make safety decisions, without recognition that a major change in policy is inherently occurring which requires closer scrutiny and the protection assured by statute.

(e) CSA 2010 Methodology is a Work in Progress and Does Not Meet the Data Quality Act Requirements for Public Reliance in its Present Format

As late as last month, the Agency, in an effort to improve its analysis, made peer grouping changes and other system corrections which resulted in changes in as much as 50 percentage points for some carriers. Carriers one day ranked as deficient or marginal who were 15 percentage points above the 65% marginal threshold found their scores dropped to 30 with no change in their safety profile. (See Appendix C.)

Although the CSA 2010 methodology is hopefully a perfectible tool which has ultimate value for use by the Agency in performing its safety duties, it is the release of this data in December maligning over two-thirds of the industry as "marginal" or "deficient" which Petitioners submit is without statutory, scientific or statistical warrant and which will have a demonstrable and catastrophic effect on the industry and small carriers in particular.

Not only has the small business protection assured by statute not been complied with, the CSA 2010 methodology and data reliability has not been tested in accordance with

the Data Quality Act.

Petitioners have concerns that releasing of CSMS to the public in its current state and without the protections afforded by the Administrative Procedure Act, Reg Flex analysis and scrutiny under the Data Quality Act will have a serious adverse effect on small carriers, brokers and shippers who use them.

The ongoing "refinements" to CSMS with regard to issues such as methods of measuring exposure, peer groupings, and violation severity weighting are issues which seriously impact small carriers and which should timely and properly be considered in the context of rulemaking and regulatory approval of the entire safety fitness determination methodology.

Petitioners have specific concerns about the effect of the current CA methodology as it relates to small carriers in the following areas:

(1) The law of large numbers - Reporting anomalies statistically prejudice entities with small samplings.

(2) Geographical anomalies - Small carriers operating in "probable cause states" are up to four times more likely to accumulate unsafe driving points than carriers operating nationally.

(3) Profiling - Small carriers without Prepass are subject to greater and more severe roadside inspections than larger Prepass carriers.

(4) Reporting failures/scale house anomalies - The system contains no checks to preclude underreporting of clean inspections which Petitioners' members report are significant at some scales.

(5) Due Process/DataQ has no checks or balances - Small carriers are particularly unable to efficiently and uniformly correct false data. (See Appendix D, Express America Statement.)

(6) EOBRs - Over 50% of the points in the fatigued drivers BASICs are incurred because of paper log violations. Thus, small carriers are Statistically twice as likely to be rated "deficient" or "marginal" in the BASICs. (See Appendix E.)

(7) Carriers with units operating under the 100 mile logging exemption are not segregated from the OTR carriers which must log and comply with the 11 and 14 hour rule, thus contaminating any peer group sample.

The above flaws in the information gathered by the FMCSA represent an inherent problem in CSA 2010 whereby the information and its dissemination violate the Data Quality Act and the Office of Management and Budget ("OMB") and DOT Information Dissemination Quality Guidelines (referred to collectively herein as the "Guidelines"). The goal of the Guidelines is to "ensur[e] and maximiz[e] the quality, objectivity, utility, and integrity of information, including statistical information, disseminated by

Federal Agencies," and in order to meet that goal, CSA 2010 must not go into effect as it is currently structured. (See *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies; Republication* 67 Fed. Reg. 36,8451, 36,8458 (Feb. 22, 2002).)

The Guidelines define dissemination as "agency initiated or sponsored distribution of information to the public," and information as "any communication or representation of knowledge such as facts or data, in any medium or form..." CSA 2010 thus falls within the purview of the Guidelines as under CSA 2010, motor carrier "BASICs" (information) will be publicly displayed on an FMCSA website (dissemination). (See *Withdrawal of Proposed Improvements to the Motor Carrier Safety Status Measurement System (SafeStat) and Implementation of a New Carrier Safety Measurement System (CSMS)*, 75 Fed. Reg. 68,18256, 68,18258 (April 9, 2010).) Additionally, the analytical information disseminated through CSA 2010 is likely to be "influential" as defined by the Guidelines (i.e., information "that will most likely have an important effect on governmental or private-sector policies, or have important consequences for specific technologies, substances, products, or firms") and as such it is necessary that an "independent re-analysis of original and supporting data using the same methods would generate similar analytical results, within an acceptable range of error or imprecision." (See *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies; Republication* 67 Fed. Reg. 36,8451, 36,8460 (Feb. 22, 2002).)

CSA 2010 fails to meet the standards of the Guidelines because the information therein contained and disseminated is not objective. Under the Guidelines, objectivity has two distinct components: presentation and substance. *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies; Republication* 67 Fed. Reg. 36,8451, 36,8459 (Feb. 22, 2002). As to presentation, "objectivity includes whether disseminated information is being presented in an accurate, clear, complete, and unbiased manner. This involves whether the information is presented within a proper context. Sometimes, in disseminating certain types of information to the public, other information must also be disseminated in order to ensure an accurate, clear, complete, and unbiased presentation." *Id.* As to the substance, "objectivity involves a focus on ensuring accurate, reliable, and unbiased information. In a scientific, financial, or statistical context, the original and supporting data shall be generated, and the analytic results shall be developed, using sound statistical and research methods." *Id.*

The information disseminated by CSA 2010 is neither objective with respect to its presentation nor its substance. As detailed above, the substance of the information is plagued with anomalies, reporting failures and the consequences of profiling small motor carriers. The gathered data is therefore not developed using sound statistical and research methods. Additionally, the information is presented in a significantly biased manner, as the motor carrier "peer groups," in which the data on carriers are compared directly to one another, are created without taking into account the varied characteristics of the motor carriers.

Finally, the information is not presented with "a high degree of transparency about

data and methods to facilitate the reproducibility of such information by qualified third parties." (See *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies; Republication* 67 Fed. Reg. 36,8451, 36,8460 (Feb. 22, 2002).) Thus, motor carriers performing significantly different services and subject to the laws of significantly different jurisdictions are compared as if the differences did not exist. CSA 2010 is therefore currently designed to disseminate influential information regarding motor carriers that is not objective and as a result will have important and often devastating consequences on the transportation industry.

Obviously, the CSA 2010 modality can be further refined and reasonable thresholds can be imposed for the Agency's use in determining ultimate fitness but Petitioners submit there is an entirely different question whereas here the Agency intends to release the data for public use knowing that imminent **loss** of business is foreseeable.

(f) Araurnent in Support of Delavina Publication of CSMS Data

The Federal Register Notice to which this comment is addressed provides for a three step program for its implementation of CSA 2010. The first step is approval of the "more comprehensive carrier safety measurement system" and only the third step, the ultimate new safety fitness determination methodology is scheduled for Notice of Proposed Rulemaking. (See Fed. Reg. Vol. 75, No. 68, p. 18257.)

The Agency states that the subject Federal Register Notice addresses only implementation of the first component "a more comprehensive safety measurement system" to identify and prioritize motor carriers for investigation. The Agency has repeatedly acknowledged that the **CSMS** system is a work in progress and that the Agency has received "valuable feedback from its partners and stakeholders through listening sessions and written comments." Petitioners submit that the valuable feedback time has not yet expired and that the CSMS program is not ready for prime time. The industry has not had an opportunity to review the peer groupings, the assigned point valuations on violations, the due process concerns of reporting warnings and citations not convictions, the viability of DataQ or a scientific basis for labeling carriers as "marginal" or "deficient" based upon percentile rankings.

Conclusion

In conclusion, Petitioners share the FMCSA's safety concerns and pledge to work with the Agency to develop CSA 2010 methodology as a viable compliance and enforcement tool for the Agency's use. Yet Petitioners submit that release of CSA 2010 information to the public with percentile rankings by artificial peer groups labeling a majority of the industry as "marginal" or "deficient" is flawed, seriously misleading, and will have direct and severe adverse consequences on the motor carrier industry and small carriers in particular.

CSA 2010 procedures and the terms and conditions of release to the public can and must be considered in the context of rulemaking in order to assure that the real concerns of small carriers concerning misuse of CSA 2010 by the industry for purposes

of barring carriers from use can be considered.

The Agency must affirm its sole duty to certify carriers as licensed, authorized and insured for use by the shipping public and for operations on the public highways. The Agency must affirm its regulatory obligation and retract misleading statements to the contrary from which the industry has inferred that second guessing and other safety standards need to be applied for fear of vicarious liability. The issue of the Agency's preemptive safety duties is an important issue of Federal Constitution law which cannot be treated as a language change in a press release. At stake is an important principle of federal transportation law and the Agency's statutory duties and obligations which cannot and should not be left to state courts in accident suits to resolve in disparate and non-uniform fashions. Such a change in the schema of federal regulation of interstate commerce cannot be left to a confused industry to sort out with loss of business and jobs as collateral damage. Clearly, statutory and judicial issues are at stake which mandate the immediate relief Petitioners seek.

Finally, the Agency must acknowledge its regulatory duty to consider the effect of all regulations on small business enterprises and its obligation to provide a level playing field in which "mom and pop" small businesses can be certified for use and compete on a level playing field with large carriers backed by Wall Street hedge funds.

Relief Sought

The above premises considered, Petitioners request the Agency to (1) postpone public release of CSA 2010 data pending completion of rulemaking on the SDF aspects of CSA 2010; or in the alternative (2) release only accumulated safety data as FOIA may require, redacting any pejorative characterization of a carrier based upon such data as well as percentile ranking and establishing a duty on shippers, brokers or other carriers; and (3) issue a statement affirming that in the absence of an administrative final rulemaking, the Agency is monitoring the activity of all interstate carriers and that the shipping and traveling public may rely upon the Agency's ultimate fitness determination as a certification for use.

Respectfully submitted,

Henry E. Seaton, Esq.
Seaton & Husk, L.P.
General Counsel for NASTC, AEMCA and TEANA
September 30, 2010

AFFIDAVIT OF CHRIS MOORE
IN SUPPORT OF MOTION TO POSTPONE

My name is Chris Moore and I am President of National Drayage Services, LLC, 3150 Lenox Park Boulevard, Suite 312, Memphis, TN 38115. We support the Motion filed by NASTC, AEMCA, TEANA and other parties to postpone release of CSA 2010 data for public use until this matter can thoroughly be reviewed as part of rulemaking.

We are a small drayage company which current utilizes 0105 owner-operators and which provides intermodal transportation to and from the following ports: Charleston SC, Savannah GA, Jacksonville FL, Memphis TN & Atlanta. We are 1 of the over ________ motor carrier signatories to the UIIA which is intended to permit motor carriers to have free and open access to steamship owned containers and chassis.

Out of fear of vicarious liability, at least 2 steamship lines (one of which is the country's second largest) has determined that it must second guess the FMCSA's determination of fitness and has issued orders that motor carriers found deficient or marginal under CSA 2010 in any BASIC area are to be barred from use and cannot even transport the steamship's box on customer routed freight.

Because of this misconception about the FMCSA release of existing and proposed data, carriers who are fit, willing, able and authorized by the Agency for use are very simply deprived of access to freight. We oppose the release of CSA 2010 in its present form because it will only exacerbate the problem. Now is the time for the Agency to address the misconception concerning the label "deficient" or "marginal" which have no meaning in the current safety fitness methodology and which we submit should have no place in the new methodology which should be subjected to rulemaking.

If the current misconceptions about CSA 2010 are not corrected by the Agency and the proposed data is released, there are estimates that as many as _____ small draymen like my company may lose business and may not be able to financially survive long enough to successfully complete the progressive intervention program which CSA 2010 envisions.

Christopher Moore, President
National Drayage Services, LLC

State of Tennessee)
County of Shelby)

Subscribed and sworn to before me this 24th day of September, 2010.

Karen S. Stevens [Seal]
Notary Public

My Commission Expires: ______________

MY COMMISSION EXPIRES MARCH 25, 2012

KAREN S STEVENS STATE OF TENNESSEE NOTARY PUBLIC SHELBY COUNTY

APPENDIX B

(g) Carrier hereby acknowledges that it possesses full and complete understanding and knowledge of the DOT's CSA 2010 program (including, but not necessarily limited to, driver violations and ranking criteria). Carrier, and any drivers of Carrier, shall at all times meet CSA 2010 safety standards sufficient to enable Carrier to (a) operate without DOT intervention or restriction; (b) obtain and maintain the insurance coverage required by this Agreement; and (c) be and remain competitive with similarly situated carriers with regard to quality of driver safety as measured under CSA 2010. Carrier further agrees to (i) immediately notify Broker in writing of receiving notification that Carrier has been deemed "unfit" or "marginal" in any area of their safety and compliance performance measured by the CSA 2010 program; and (ii) to reject and not otherwise accept the transport of any freight offered by Broker during such time as Carrier is deemed "unfit" or "marginal" in any area of its safety and compliance performance measured by the CSA 2010 program.

(h) Carrier shall only provide services under this Agreement by using competent professional drivers who meet the minimum driver qualification standards of the DOT, including, but not limited to, familiarity and compliance with state and federal motor carrier safety regulations. Carrier shall not provide services under this Agreement when utilizing any driver found to be unsafe, unqualified, unfit, uninsurable, or marginal, pursuant to federal or state law or the criteria established by the DOT as part of the CSA 2010 program.

CSA Revisions Improve Most Scores but Worsen Others, Carrier Execs Say
Sean McNally, Senior Reporter

Changes that the **Federal Motor Carrier Safety Administration** has made to its CSA safety-monitoring program are causing the ratings of fleets across the country to change, and not always for the better, carrier executives told Transport Topics.

Carriers by and large saw their scores go down, sometimes dramatically, but in some of the BASICs most related to higher crash rates, some fleets saw their scores go up in other areas, as a result of FMCSA's changes to the program. In this program, lower scores mean better safety ratings. "We saw significant drops in some of our scores and saw increases in others, and it is strictly in tune with the methodology changes that were implemented," said Jack Curry, safety director for American Central Transport Inc., Liberty, Mo.

Curry said the truckload carrier "saw significant improvement in the BASIC area of unsafe driving and in our crash indicator . . . 55 basic points in one and 30 in another; it is a huge drop," which he attributed to FMCSA's use of miles driven and total vehicles for grouping fleets, rather than just the number of trucks.

On the flip side, he said that American Central Transport's percentile score in the cargo-related BASIC rose because of the changes FMCSA made to the types of violations it examines in that category. FMCSA started allowing nationwide fleets to see their percentile scores under CSA on Aug. 16, but fleets in nine states, such as Missouri, where the agency had been running a pilot test of the program, have been able to see their scores all along.

In addition to opening up the system to provide more information, FMCSA also made a number of changes to how it calculates fleet safety records — ranging from resetting the thresholds for when a company is targeted for intervention to the severity of hundreds of violations to how the system calculates a carrier's exposure to safety problems.

"Had these tweaks been done previously, we probably wouldn't have been on their radar," said Donna Underwood, safety director for Steelman Transportation Inc., Springfield, Mo. Underwood said Steelman, primarily a flatbed carrier with 100 trucks and a small hazardous materials division, was deficient in four of the BASICs before the changes were made. "I am right now deficient in just two: cargo and fatigued driving," she said. Steelman had been deficient in unsafe driving because of speeding violations, but FMCSA instituted a graduated point system, Underwood said, which reduced its score.

Sherwin Fast, president of Great Plains Trucking Inc., Salina, Kan., said the modifications caused dramatic drops in the score for his fleet of about 55 trucks. The company initially was in the 95th percentile for crashes, Fast said, but after an FMCSA investigation put the fault for many of those crashes elsewhere, "they lowered it down to 75." "Now, this last couple weeks when they switched to the mileage instead of the vehicle, we're at a 20.7," he said. "We run a lot of miles, so we went from a 95 to a 20. . . . We would never have been targeted for an intervention of any kind, had they been doing this all along."

Great Plains' unsafe driving score also fell dramatically, to 43.8 from 93.9, because of the change in methodology. "I love the new one; it just looks so much better," Fast said.

"They've improved across the board," said Richard Jenkins, safety director for Brown Trucking Co., Lithonia Ga., adding that the company's crash indicator score "dropped 30 basis points, which was huge."

APPENDIX D

A couple of key points I would like to discuss with CSA 2010 is the challenge process. The process for removing erroneous information through the DataQ web portal and the state time frame for having roadside inspection data reported.

The time frame to remove false or inaccurate date differs in each and every state as well as the process to remove false data listed in the FMSCR Web portal. The DataQ website allows you to challenge any incorrect data however getting the incorrect information removed is not easy at it sounds.

As an example, an owner operator leased his truck on with Express America in March 1,2010 only to quit unexpectedly on March 23, 2010 – His registration still shows Express America Trucking and he has received no less than 4 roadside inspections from his current carrier. Unfortunately his current carrier is not concerned with all the applicable requirements regarding vehicle registrations. All of this driver's roadside inspections were horrendous and this information is listed under our DOT number. I move to challenge the information and have this data removed.

The state of Georgia required me to send a notarized letter stating the circumstances in which this driver left our company and affirming that he no longer worked for Express America. The state informed me that it could be 6 weeks or longer before the information was removed once they received my notarized letter. This driver had 2 inspections in the state of Georgia and 2 of his inspections in Texas. Texas did respond that the data would be removed but it could take up to 6 weeks.
I had 2 inspections to show up on our DOT number in July 2010 of this year from the state of Texas but the driver had not been employed with Express America since November of 2009. Almost 8 months had passed prior to this information being uploaded to the FMCSR web portal.

The time constraints associated with reported data and the method of removing inaccurate data are both significant issues that should be addressed as well.

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Statistical Anomalies in SafeStat

Fatigued driving (HOS) is highlighted by the FMCSA as a stand alone BASIC and the threshold for being labeled as deficient is the 65 percentile. In other words, if a carrier is in the bottom 35% of its peer group based upon a weighted points scheme, the carrier will be labeled as deficient in this area and if CSA 2010 data is prematurely released to the public, that carrier will be barred from use by steamship lines, shippers and brokers who feel compelled to use CSA 2010 data for fear of vicarious liability.

In an excellent article entitled, "Trust but Verify" Aaron Huff in the September issue of CCJ opined that the on-board recording device represents a technological gain for the industry. Included was the conclusion that carriers who convert to electronic logs before CSA 2010 goes live have the rare opportunity to reduce their total violations in the fatigued category BASIC by 50%.

An examination of the attached chart demonstrates how this is possible and how little a 50 percentile drop may actually have to do with fatigued driving. Clearly, the biggest source of violations classified as "fatigue related" are actually paperwork violations pertaining to general form and manner of logs and failure of a driver to record current duty status. When coupled with failure to maintain a log, these 3 paperwork violations account for 71% of the total violations in the fatigue BASIC area.

This means that drivers who fill out paper logs based on the numbers are susceptible to receive over three times more fatigued driving violations than those who log electronically.

This obvious discrepancy does not disappear when the CSA 2010 point valuation criteria is applied. For rating purposes, each violation in a category is weighted, points are assigned and total points accumulated are compared based upon the number of inspections conducted with all peer grouped carriers including both those who log manually and electronically. Based upon the number of violations times the severity rating, paperwork violations account for 122.98 points, far more than are assigned to carriers found guilty of exceeding the hours of service under the 11 and 14 hour rules combined (76.65).

The 50 point differential in percentile ranking enjoyed by carriers with electronic logs may have some correlation to safety but the frequency and severity attached to paperwork violations severely skews the percentile ranking as to make any peer group including both paper and electronic loggers statistically invalid as a measure of fatigue.

In sum, the electronic logging system is certainly to be encouraged for a whole lot of reasons but any system which assigns more total points to paperwork violations (which only paper loggers incur) than it does to actual violations of the hours of service regulations cannot compare apples to oranges and conclude that one is deficient, marginal or not safe to eat.

Top rankings of 2010 inspection violations

(through May 21)

Rank	Violation Code	Description	% of total violations	CSA 2010 point value
1	395.8	Log violation (general/form and manner)	19.84	2
2	395.8F1	Driver's record of duty status not current	13.64	5
5	395.3A2	Requiring or permitting driver to drive after 14 hours on duty	7.04	7
6	395.8E	False report of driver's record of duty status	4.02	7
8	395.3A1	Requiring or permitting driver to drive more than 11 hours	3.9	7
11	395.8A	No driver's record of duty status	3.02	5
			51.46	

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL ASSOCIATION)
OF SMALL TRUCKING COMPANIES,)
THE EXPEDITE ALLIANCE OF)
NORTH AMERICA and AIR &)
EXPEDITED MOTOR CARRIERS)
ASSOCIATION,)
)
Petitioners,)
v.) F.R.A.P. 28(a)(1) Certificate as to Parties, Rulings, and Related Cases
)
FEDERAL MOTOR CARRIER SAFETY)
ADMINISTRATION,)
)
Respondent)

Under Rule 28(a)(1) for the U.S. Court of Appeals of the District of Columbia Circuit and the Federal Rules of Appellate Procedure, counsel of Petitioner certifies the following:

A. Parties

1. **Petitioners:**

The National Association of Small Trucking Companies ("NASTC") is a trade association incorporated in the State of Tennessee. Its membership consists primarily of individuals who operate commercial motor vehicles. The purpose of NASTC is to serve as an advocate for, a consultant to, and a source of collective

buying power for its member companies. NASTC has over 2600 members in the United States and Canada. See attached Declaration of David Owens.

The Expedite Alliance of North America ("TEANA"), is a trade association incorporated in the Commonwealth of Pennsylvania. Its membership consists primarily of individuals who operate commercial motor vehicles in the expedited freight market. The purpose of TEANA is to serve as an advocate for and a consultant to its members on matters of federal and state legislation and regulation. See attached Declaration of Mark McLochlin.

The Air & Expedited Motor Camers Association ("AEMCA"), is a trade association incorporated in the State of Virginia. Its membership consists primarily of individuals who operate commercial motor vehicles in the air and expedited freight markets. The purpose of AEMCA is to provide its members with timely, value added information, education, benefits and opportunities to promote business development through networking with members and industry groups and to serve as an advocate for and a consultant to its member companies. See attached Declaration of Mike King.

2. Respondents:

The respondents are the Federal Motor Carrier Safety Administration ("FMCSA") and the United States.

B. Rulings Under Review.

Petitioners seek review of the final rules issued by respondents in Docket No. FMCSA-2004-18898; ***Withdrawal of Proposed Improvements to the Motor Carrier Safety Status Measurement System (Safestat) and Implementation of a New Carrier Safety Measurement System (CSMS).*** **A** copy of the request for comments and final rules, which rules have not been published in the Federal Register, are attached.

C. Related Cases.

The case on review has not previously been before this Court or any other court. Petitioners are not aware of any related cases currently pending before this Court or any other court.

Respectfully submitted,

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Email Kenneth.Siegel@strasburger.com

Henry E. Seaton, **Esq.**
Seaton & Husk, L.P.

Counsel for Petitioners

DECLARATION OF DAVID OWEN, PRESIDENT OF NATIONAL ASSOCIATION OF SMALL TRUCKING COMPANIES

My name is David Owen. I am President of the National Association of Small Trucking Companies ("NASTC"). NASTC is a for-profit trade association incorporated in the State of Tennessee. The membership of NASTC consists primarily of individuals who operate small fleets of commercial motor vehicles. NASTC's mission is to serve as an advocate for, a consultant to, and a source of collective buying power for its member companies. NASTC has over 2600 members in the United States and Canada. Several of the parties submitting statements in support of the motion for stay of the Federal Motor Carrier Administrations (FMCSA) rule in Docket No. FMCSA-2004-18898; Withdrawal of Proposed Improvements to the Motor Carrier Safetv Status Measurement Svstem (SafeStat) and Implementation of a New Carrier Safety Measurement Svstem (CSMS) ("CSA-2010") are members of NASTC[1]

NASTC has been a leading party in representing the interests of its members and other small fleet operators before the FMCSA and Congress with respect to the agency's CSA-2010 program. NASTC filed comments, on behalf of its members, with the agency in the 2004-18898 docket. NASTC's comments included a request that the agency postpone publishing the individual records and BASIC scores of motor carriers until the agency had provided adequate notice of all aspects of the program and had conducted and completed a full rulemaking pursuant to the Administrative Procedures Act.

While any one of NASTC's member carriers could have brought this action before the Court or filed comments before the agency below on its own, NASTC and its members elected to take such action collectively on behalf of themselves and other small fleet operators.

As stated in the statements submitted by the NASTC members, if the FMCSA is permitted to publish on the Agency's website the BASIC scores of individual carriers many carriers will be hurt economically because of the harm to their reputations. The harm which the carrier will suffer will be irreparable. Many shippers and freight brokers have already announced that they will not use the services of motor carriers whose BASIC scores fall below a certain level and the carrier receives an "Alert" classification from FMCSA. Both shippers and brokers are concerned that they may be found vicariously liable to third party plaintiffs in cases arising from accident claims against the motor carrier while it is transporting the shipper or broker's freight. The shippers and brokers and their counsel have expressed concern that plaintiffs counsel will introduce the FMCSA "Alert" classification of the carrier as evidence of the shipper or broker's negligence in using the services of the carrier. The FMCSA has issued statements to the transportation industry that it is the intent of the agency in publishing carrier's BASIC scores and classifications that shippers and carriers not use those carriers with "Alert"scores even though such carriers may lawfully operate on the nations roads and highways.

An "Alert" score will not only effect a carrier's competitive position but is likely to result in higher insurance premiums,,a reluctance of drivers to work for such companies, and other economic and operational harm from which the carrier will be unable to recover if the publication is permitted to occur.

The agency has acknowledged that the statistics on which the carriers' BASIC scores and classifications are unreliable, that the algorithms that the agency is utilizing to calculate these scores are untested and unproven and that the public has neither been informed of nor provided

[1] Ennis Corp., H&V Leasing, Inc., Jim Loyd Transport Co.

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an opportunity to comment on, the agency has refused to postpone the publication of the scores and classifications.

This declarations under penalty of perjury.

Respectfully submitted,

David Owen
President

DECLARATION OF MARK McLOCHLIN, ELECTED PRESIDENT
OF THE **EXPEDITE ALLIANCE OF NORTH AMERICA**

My name is Mark McLochlin. I am elected President of The Expedite Alliance of North America (TEANA) and owner of Clearwater Logistics. TEANA is a not-for-profit trade association domiciled in the State of _PA_____. The 85 members of TEANA consist primarily of small carriers which provide expedited or "hot shot" motor carrier transportation in interstate commerce, and affiliated brokers. TEANA's mission is to advocate best practices and ensure an efficient and competitive environment in which its members can provide economical services designed to meet the industry's needs. Two of the parties submitting statements in support of the motion for stay of the federal Motor Carrier Administrations (FMCSA) rule in Docket No. FMCSA-2004-18898; Withdrawal of Proposed Improvements to the Motor Carrier Safetv Status Measurement Svstem (SafeStat) and Implementation of a New Carrier Safety Measurement Svstem (CSMS) ("CSA-2010") are members of TEANA.[1]

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While any one of TEANA's members could have brought this action before the Court or filed comments before the agency on its own, TEANA and its members elected to take such action collectively on behalf of themselves and other similarly affected motor carriers.

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This declaration is under penalty of perjury.

Respectfully submitted,

[signature]

Mark McLochlin
President

DECLARATION OF MICHAEL KING, ELECTED PRESIDENT OF THE
AIR & EXPEDITED MOTOR CARRIER ASSOCIATION

My name is Michael King. I am the elected President of the Air & Expedited Motor Carrier Association (AEMCA) and owner of King's Express of Buffalo, New York. AEMCA is a not-for-profit trade association domiciled in Manassas, Virginia, The AEMCA currently has 110 members consisting primarily of licensed for hire interstate motor carriers serving the air freight industry, Among the services AEMCA provides to its members is information concerning regulatory compliance with not only the Federal Motor Carrier Safety Administration (FMCSA) requirements but also with TSA and FAA rules and regulations, compliance with which is essential to the rendition of surface transportation having a prior or subsequent movement by air. AEMCA is committed to ensuring that its members are apprised of regulations governing their operations and regularly participates in regulatory issues which affect the membership. One of the parties submitting a statement in support of the motion for stay of the FMCSA rule in Docket No. FMCSA-2004-18898; Withdrawaf of Proposed Improvements to the Motor Carrier Safetv Status Measurement System (SafeStat) and Implementation of a New Carrier Safetv Measurement Svstem (CSMS) ("CSA-2010") is a member of AEMCA.[1]

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While any one of AEMCA's member carriers could have brought this action before the Court or filed comments before the agency on its own, AEMCA and its members elected to take such action collectively on behalf its members, broker partners and other similarly affected small carriers.

As stated in the statements submitted by the AEMCA members, if the FMCSA is permitted to publish on the Agency's website the BASIC scores of individual carriers many carriers will be hurt economically because to the harm to their reputations. The harm which the carrier will suffer will be irreparable. Many shippers and freight brokers have already announced that they will not use the services of motor carriers whose BASIC scores fall below a certain level and the carrier receives an "Alert" classification from FMCSA Both shippers and brokers are concerned that they may be found vicariously liable to third party plaintiffs in cases arising from accident claims against the motor carrier while it is transporting the shipper or broker's freight. The shippers and brokers and their counsel have expressed concern that plaintiffs counsel will introduce the FMCSA "Alert" classification of the carrier as evidence of the shipper or broker's negligence in using the services of the carrier. The FMCSA has issued statements to the transportation industry that it is the intent of the agency in publishing carrier's BASIC scores and classifications that shippers and carriers not use those carriers with "Alert" scores even though such carriers may lawfully operate on the nation's roads and highways.

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This declaration is under penalty of perjury.

Respectfully submitted,

Michael King
President

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Respectfully submitted,

Mark McLochlin
President

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Respectfully submitted,

Michael King
President

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DECLARATION OF KENNETH LUND, ALLEN LUND COMPANY

My name is Kenneth Lund and I am Vice-President of the Allen Lund Company. I am submitting this declaration in support of the relief sought by Petitioners.

The Allen Lund Company is the nation's largest truck broker of fresh Fruits and vegetables. We arrange for the transportation of 238,000 shipments annually moving in interstate commerce and use 18,000 licensed, authorized and insured motor carriers to transport shipments. As a property broker and intermediary we are required by federal statute to retain carriers which are licensed and authorized and have no other delegated safety duties under the Federal Motor Safety Regulations.

Accordingly, we rely upon the ICC and now the FMCSA to certify motor carriers as safe for use and under Federal Regulations are not required to second guess the Agency's decision with respect to fitness.

Within the past few years, plaintiff's bar, in an effort to increase the amount of judgments, has named intermediaries in lawsuits contending that under state law intermediaries and shippers have an obligation to second guess *the* Federal Motor Carrier Safety Administration's ultimate safety fitness determination. As a result, state law judgments have been entered against shippers and brokers which have created chaos in the shipping community.

The FMCSA's intended release of CSA 2010 data to the public accompanied by its public statements that such data is intended for use by shippers and brokers in making safety related decisions, creates major problems for shippers and brokers by implying that the Federal Government has changed the statutes and regulations which govern responsibility for fitness determinations.

As a result of the prospective use of GSA 2010, our customers, competitors, and third party providers are suggesting that it can and will become the industry norm that brokers must rely upon this information for fear of vicarious liability and set new standards for use. Such new standards would be difficult and impractical to enforce and would affect the efficiency of our operations.

The data to be released under CSA 2010 has not been scrubbed or reviewed but figures released to the public by the FMCSA at various times have suggested that as many as two-thirds of the peer group motor carriers we currently use would be labeled as under safety "Alert" on December 6.

The Allen Lund Company has not been afforded an opportunity to comment about release of this data under the Administrative Procedure Act nor has the Agency considered the affect which release of this unscrubbed data would have upon the shipping and receiving public.

We have shared our concerns with the FMCSA in an open meeting and have received no formal response or opportunity to address this issue, Clearly, we share the concerns of the Petitioners that release of this data will have a dramatic effect upon competition, requiring the industry to bar from use motor carriers which the Agency has otherwise certified under the existing regulations as fit enjoying either a satisfactory or unrated status (unrated being the equivalent of satisfactory under existing regulations).

We currently pay over 10,000 carriers yearly in excess of $120 million to transport fresh fruits and vegetables from the field to market, Over 97% of the carriers we use are small operators with 15 trucks or less who rely upon Alien Lund to eliminate deadhead and return their expensive refrigerated equipment to the areas of their domicile under load. If, because of fear of vicarious liability and release of CSA 2010 methodology we must bar any carrier who is under a safety "Alert" the carrier can easily be placed out of business,

In this regard, 1 have participated in over 10 different webinars and meetings over the past several months sponsored by a variety of trade associations in which safety consultants and present and former employees of the FMCSA have told shippers and brokers that the industry cannot rely upon the FMCSA's ultimate fitness determination, After release of CSA 2010 data we have been told that each shipper and broker must establish its own new credentialing criteria for fear of vicarious liability and must effectively use the data in some manner tu second guess the Agency's ultimate fitness rating.

It is clear to us that the unintended consequences of premature release of CSA 2010 data far outweigh its benefits. In the absence of rulemaking, the Agency has not provided the shipping public with any clear guidance on why the material is being released or what we are supposed to do with it. The consequences on our business as shippers demand we accept indemnity obligations and use only peer group carriers who are not under alert could devastate Allen Lund's business, exacerbate our costs, and result in the blackballing of many small carriers who have not been afforded any due process or opportunity to be effectively heard,

Kenneth Lund
Allen Lund Company

AFFIDAVIT OF DAVID BAKER
APEX CAPITAL CORP.

My name is David Baker and I am President of Apex Capital Corp., 6000 Western Place, Suite 1000, Fort Worth, TX 76107. I offer this Affidavit on behalf of my company in support of Petitioners' relief in the above-described proceeding. Apex Capital is a commercial factor which finances approximately 1,000 small carriers through the purchase of receivables. The publication of CSA 2010 data to the public will, in our estimation, result in increased potential exposure of our assignors to large jury verdicts. Let me explain why.

Our clients are required by contract to indemnify and hold harmless the shipper and broker customers from vicarious liability arising out of their acts or omissions. Typically when vicarious liability is not an issue, lawsuits will settle within policy limits and small carriers can escape excess judgments which otherwise cripple their ability to stay in business. Publication of CSA 2010 data and its prospective use by plaintiffs bar to join shippers in lawsuits for alleged negligent selection or selection hiring will have a material adverse effect on the willingness of shippers to use small carriers.

Access to credit is particularly important in the trucking industry where new rigs are typically leased to own through equipment financing companies and small carriers are faced with financing their own float for up to 60 days on profit margins of 3% to 5%.

For these reasons, I ask that the Court consider the incalculable adverse effect which premature release of this data may have on the ability of carriers to remain in business and finance their operations.

By: [signature]
David Baker
Apex Capital Corp.

State of Texas

County of Tarrant

Subscribed and sworn to before me this 24th day of November, 2010.

Rachel D Bradford [SEAL]
Notary Public

RACHEL D. BRADFORD
Notary Public, State of Texas
My Commission Expires
August 19, 2014

My Commission Expires: 8-19-2014

AFFIDAVIT OF BILL HATFIELD,
BP EXPRESS, INC.

My name is Bill Hatfield and I am Vice President and CFO of BP Express, Inc., a Knoxville, Tennessee based motor carrier. We employ/contract 175 people at 6 different terminals throughout the United States. We enjoy a satisfactory safety rating issued by the Federal Motor Carrier Safety Administration.

We have previewed our CSA 2010 percentile ranking and are above the 65 percentile in at least one of the BASICs and will be apparently marked in orange and noted as under "Alert" if this data is released to the public.

We support the relief sought by Petitioners because we have been advised by several customers and steamship lines that CSA 2010 data will be used to determine whether we can enjoy freight. Out of fear of vicarious liability, our customers are being told that the Agency's "satisfactory" fitness determination is no longer sufficient. Apparently, without rulemaking the Agency is releasing comments which suggest that shippers and brokers have undefined safety duties which makes the publication of this data necessary. BP Express is committed to safety and is not opposed to ultimate implementation by the Agency of a new fitness determination procedure.

Yet, we believe an unintended and unfair consequence of the program would be loss of business and the possible bankruptcy of small carriers who, like BP Express, have been certified by the Agency as satisfactory yet are blackballed by customers based on data for which we have had no due process.

Bill Hatfield, Vice President CFO
BP Express, Inc.

State of TENN.

County of HAMBLEN

Subscribed and sworn to before me this 24 day of NOVEMBER 2010.

Richard W. Lee [SEAL]
Notary Public

My Commission Expires: 3-25-13

RICHARD W. LEE
STATE OF TENNESSEE NOTARY PUBLIC
HAMBLEN COUNTY

AFFIDAVIT OF JAMES R. DEMATTEIS
DES MOINES TRUCK BROKERS, INC.

My name is James DeMatteis and I am the owner of Des Moines Truck Brokers, Inc. a property broker subject to the regulations of the FMCSA in Docket No. MC180183. I am making this Affidavit on behalf of my company in support of Petitioners' request to postpone release of CSA 2010 methodology and data to the public for the following reasons.

Des Moines Truck Brokers is required by FMCSA regulation to arrange for transportation using carriers which are licensed and authorized by the FMCSA to operate. In the ordinary conduct of our business, we confirm that carriers hold FMCSA authority and are certified by a rating of satisfactory or equivalent. This complies with our regulatory duty and the duty of the shipping public in general.

In the roll-out of CSA 2010, the Agency has issued various press releases but has not fully disclosed CSA 2010 methodology or what is to be expected of property brokers after the release. In fact, the Agency through its Administrator has repeatedly said that the material is going to be released to the public before rulemaking so that shippers and brokers can "make safety based decisions." There has been no formal determination of what additional duties this places upon Des Moines Truck Brokers or other brokers in general.

As a result, the industry is in confusion and release of this data without thorough vetting will have a major disruptive effect upon our business and our ability to utilize small carriers which are otherwise determined by the Agency to be fit to operate.

Des Moines Truck Brokers each year books approximately 4000 truck loads of freight using approximately 1200 different motor carriers, many of whom are small and are permitted by the FMCSA to operate. Des Moines Truck Brokers has been advised by consultant experts some of whom are former **FMCSA** officials, that with release of this data we must establish our own new safety credentialing standards for determining

carrier fitness, second guessing the Agency's ultimate determination and using the material to be released. What those standards are has not been determined. If it means that we must use this data in its current form, we will lose access, industry estimates, to over 50% of the carriers we currently use who are placed in peer groups. There seems to be much confusion over how many carriers will even be placed in these peer groups and it may very well be that the data to be released will not offer any information on many of the carriers we use, leaving us with the implied duty to second guess the Agency without any material to perform that analysis.

It is clear that property brokers and shippers are targets for vicarious liability and have been named in lawsuits in the past when plaintiff's bar seeks to add additional defendants. The industry as a whole has been alarmed by release of CSA 2010 and the shipping community has been told that it can no longer retain carriers who are licensed, authorized and insured or hire a broker to perform this simple duty.

Large 3PLs and asset-based carriers are currently conducting seminars to woo customers away from brokers like us suggesting that after CSA 2010 is released, the shipping community must hire only large brokers or large carriers to conduct service because the increased vicarious liability exposure requires an intermediary with sufficient reserves to sustain multimillion dollar judgments which will clearly result, they say, from this new modality.

This concern over CSA 2010 and its implementation if released, threatens us with immediate loss of business and leaves us with an unclear decision over the state of our operations. Do we use CSA methodology which is untried and unproven to bar from use up to half of the peer grouped carriers we currently use? What are we to do with respect to carriers which are not rated under CSA 2010 if the Agency's press release correctly suggests we now have some undefined safety based decision to make other than to rely on the Agency's ultimate safety fitness determination?

In this context, it should be noted that as a property broker, the statutes provide that we can be sued by any party aggrieved by our failure to perform our duties as a property broker. See 49 U.S.C. 14704. When our regulatory duties are only to hire a licensed and insured carrier, yet the Agency suggests our duties go further than that and release unscrubbed data without providing clarity, it is clear that the brokerage industry quickly becomes a target for additional litigation.

We support this petition also because of the devastating effect it will have upon carriers which we have found to be fit, willing and safe to operate but who will be faced with imminent loss of business based upon the scoring modality.

It is our understanding that 35% of the carriers regardless of the safety program, will be under "alert" and marked in orange for violation of hours of service regulations alone. Yet, when one examines the modality for this, it appears that this percentile ranking is in large part based upon paperwork violations which may have absolutely no indication of the carrier's crash record or its compliance with the hours of service.

We see no reason for the release of this data before it is thoroughly vetted in rulemaking. It appears to us that the early release of this data before the studies are even in or the public has had an opportunity to review the recent 800 changes in the modality and consider the effect of the release under the Administrative Procedure Act is improper and begs the question, "Why not wait and get it right?"

As a small business which provides a needed service of eliminating dead head miles and working with blue collar entrepreneurs to save fuel and efficiently and competitively conduct interstate commerce, I believe Des Moines Truck Brokers and the small carriers it uses deserve full consideration of the impact of release of this data under the APA before some artificial deadline or in lieu of premature release.

By: ______________________
James R. DeMatteis, President
Des Moines Truck Brokers

State of IOWA

County of Warren

Subscribed and sworn to before me this 24 day of November, 2010.

______________________ [SEAL]
Notary Public

My Commission Expires: 7/28/12

NOTARIAL SEAL IOWA
SARAH K. ROSENBERGER
Commission Number 191343
My Commission Expires
7/28/12

AFFIDAVIT OF PATRICK INNIS
ENNIS CORP.

My name is Patrick Ennis and I am the owner of Ennis Corp., a for-hire motor carrier based in Clarion, Iowa. We currently operate 23 over-the-road tractor trailer units. We are regulated by the Federal Motor Carrier Safety Administration and have a satisfactory safety rating.

For the past 5 or 6 months, we have been actively preparing for CSA 2010 and subscribed to Vigillo, a purveyor of information about CSA 2010, and 1.1. Keller, a leading publisher of safety information. Although we have a satisfactory safety rating, our current score in fatigued driving under the CSA modality is 74.8 or approximately 9 percentage points above the initial enforcement threshold. Apparently, if CSA 2010 data is released to the public, we will be marked under "Alert" and coded orange for shippers and brokers to see.

We do not believe that CSA 2010 is fair or appropriate for release to the public in its current state. Our company is clearly peer grouped in fatigued driving with companies that are not required to log and with companies who have the onboard recording device. CSA 2010's "fatigued driving" BASIC is based not only on drivers which exceed the 14 hour and 70 hour driving times but also on paperwork violations such as the failure of a driver to keep his log up to date when stopped for inspection. Over half of

the points we have accumulated in this BASIC result from paperwork violations which carriers in our peer group do not incur.

As a carrier ultimately certified by the FMCSA as "satisfactory" we value the Agency's ultimate determination and oppose the December 6 release of CSA 2010 data because of fear of the affect it will have on our ability to compete and obtain freight from shippers and brokers.

Much of our ability to operate efficiently and return trucks to our Iowa base is predicated on obtaining back haul freight in the spot market from property brokers. Several of the current brokers who tender us freight have indicated they are being counseled to use CSA 2010 data to credential carriers for use out of fear of vicarious liability or negligent selection.

With a satisfactory safety rating, we believe we have been ultimately credentialed for use by shippers and brokers. Clearly, we cannot afford to remain in business and lose our access to back haul freight. We do not understand why the Agency seems intent on releasing CSA 2010 data to the public next week when it has been made aware of the potential adverse consequences on carriers like Ennis who have been subject to an audit and found fit to operate. Accordingly, we urge the Court to grant the relief Petitioners seek.

Patrick Ennis

Patrick Ennis, Owner
Ennis Corp.

State of Iowa

County of Wright

Subscribed and sworn to before me this 24th day of November, 2010.

Kaysie Williams [SEAL]
Notary Public

My Commission Expires: 9.25.2013

NOTARIAL SEAL IOWA
KAYSIE WILLIAMS
COMMISSION NUMBER 749062
My Comm. Exp. 9.25.2013

Affidavit of Barry E. Bernard,
Express America Trucking, Inc,

My name is Barry Bernard and I am President of Express America Trucking, Inc., an intermodal drayman based in Memphis, Tennessee. We employ 165 drivers and owner-operators at three terminals throughout the southeast and pull intermodal containers between rail heads and ports on the one hand and interim customers on the other. I am authorized by my company to submit this Affidavit in support of the relief sought by Petitioners in the above captioned lawsuit.

As an intermodal carrier, we are highly dependent upon contracts with large intermodal brokers and upon access to chasses and containers provided by steamship lines and/or other intermodal equipment providers. Over the past several months, we have received notice from at least three key equipment providers or brokers that upon release of CSA data to the public we will be scored based upon CSA 2010 criteria and will lose access to business and/or the trailers and chassis necessary to provide service if our scores exceed the enforcement thresholds established by the Agency.

Express America Trucking, like most of the similarly situated competitors of which I am aware, fare poorly in one or more of the five remaining BASIC areas which will still be published if the Agency is not deterred. This is true because of the nature of our business, the fact that we pull intermodal containers, use independent contractors and paper logs yet are peer grouped with dissimilar carriers, and has no proven correlation to our safety record. We have not been afforded an opportunity to examine the Agency's scoring mechanism, its peer grouping of carriers, or its rating system for violations. Unlike flatbed carriers who were granted redaction of the securement BASIC as the result of private meetings with the Agency, our carriers have not been formally or informally addressed.

Under the proposed CSA 2010 system of reporting violations, there is no due process in that warnings and citations are reported and fed through the system before we have an opportunity to contest and any "DataQ" we file is not subject to judicial review.

For all these reasons, release of this data is tainted and not ready for public release. I am advised that in August of 2010, after working on the pilot program in test states for several years, the Agency made 800 changes in its scoring methodology, none of which have been subject to peer review.

It is out of fear of vicarious liability that shippers and brokers feel compelled to use this unscrubbed system. No one has provided us with an answer as to why this system must go live on December 6 when affected shippers and brokers have not been afforded the opportunity to review its affect upon small carriers like Express America Trucking.

Clearly a stay is warranted because the adverse consequence of release upon Express America Trucking and similarly situated carriers. We will be faced with immediate loss of existing customers and access to equipment we have come to be dependent upon. Moreover, we perceive we will have difficulty in raising finances, obtaining loans for new equipment and continuing in business.

We currently enjoy a satisfactory or equivalent safety rating from the FMCSA and accordingly are certified for use by shippers, brokers and steamship lines. Any release of the proposed data will undermine the shipping public's ability to utilize us out of fear of vicarious liability. For these reasons, we ask that the Court direct postponement of release of this data until the matter can be properly considered and statutory due process provided.

By: Barry E. Bernard, President

Express America Trucking, Inc.

State of Tennessee

County of Shelby

Subscribed and sworn to before me this 24th day of November, 2010.

Sean M. Abel [SEAL]

Notary Public

My Commission Expires:
October 7, 2014

My Commission Expires: ________________

SEAN M ABEL
STATE OF TENNESSEE NOTARY PUBLIC
SHELBY COUNTY

AFFIDAVIT OF MATTHEW J. JEWELL,
FORWARD AIR, INC.

My name is Matthew J. Jewell and I am Executive Vice President and Chief Legal Officer of Forward Air, Inc., a property broker subject to the regulations of the FMCSA in Docket No. MC249708.

At the request of Petitioners, I attended a meeting with the FMCSA (hereinafter sometimes referred to as "the Agency") held at its office on October 5, 2010. The meeting was arranged by the Small Business Administration after Petitioners received no response to their formal Motion to Postpone. At that time, the Agency requested from Petitioners language to be placed upon any release which would satisfy the vicarious liability concerns and permit release of the data as scheduled.

As a defense lawyer familiar with the misuse of SafeStat in tort litigation, I helped draft proposed language which would make clear that the Agency made the ultimate determination of fitness and that CSA 2010 methodology could not be used in a court of law. This suggested language was submitted to the Agency by letter dated October 8, 2010.

No response was received by Petitioners but Administrator Ferro apparently released certain comments to another trade association indicating that the SafeStat warning would be attached and that pejorative language would be removed. In response, a follow-up letter was sent to the Agency addressing these concerns. A copy of it is attached. Again, no response to Petitioners was forthcoming.

As of this writing, I have not been formally advised of any Agency decision on the Petition or our suggested language. The best information I have concerning the language has been obtained from presentations made by the Agency to other groups which indicate that the color of the warnings will be changed from red to orange, language indicating that a carrier is deficient or marginal will be changed to "alert" and that the following warning will be placed upon the website, "BASIC percentiles above the FMCSA threshold signify the carrier is prioritized for an FMCSA intervention and do not signify or otherwise imply a safety rating or safety fitness determination."

This information was gleaned only from presentations made by FMCSA or former FMCSA officials to others at private webinars. In my estimation, this language does not address the serious vicarious liability concerns we have. Placing the words "Alert" on the website, is an open invitation for vicarious liability and use of the data by shippers and brokers to grade carriers. Moreover, the language that indicates that it is not part of the safety rating will have no affect, in my estimation, to dispel the intended forced use of the data by the shipping and receiving public to establish a new standard for diligence in negligent selection suits.

It is clear to us from the participation by the current and former Agency officials in webinars, seminars and the dissemination of information to the shipping public that **CSA** 2010 is intended to shift in large part the responsibility for credentialing carriers from the Agency to the shipper and broker community.

Unless this matter is postponed and thoroughly and properly considered, as the party responsible to my company for risk assessment, I will have no alternative but to preclude use of any carrier who is under enforcement activity by the Agency for fear of vicarious liability. This will very likely result in loss of business for carriers who have provided excellent service to us without mishap and will otherwise affect our ability to effectively route our traffic via low cost providers and eliminate dead head and inefficiencies incurred by carriers seeking return shipments in the spot market.

For these reasons, on behalf of Forward Air, I request that publication of this data be postponed pending appropriate consideration of these matters in the impending rulemaking proceeding.

By: ______________________________
Matthew J. Jewell, Executive Vice President
and Chief Legal Officer
Forward Air, Inc.

State of Georgia

County of Fulton

Subscribed and sworn to before me this 26th day of November ,2010.

______________________________ [SEAL]
Notary Public

PAULA GUSTAFSON
My Commission
NOTARY
PUBLIC
EXPIRES
06-01-2012
FULTON COUNTY, GEORGIA

My Commission Expires: June 1, 2012

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Non-Lawyer
Motor Carrier Safety Consultant
gobbell490comcast.net

October 27, 2010

Anne S. Ferro, Administrator
Federal Motor Carrier Safety Administration
United States Department of Transportation
1200 New Jersey Avenue SE, Suite W60-300
Washington, DC 20590
Via U.S. Mail/Email
anne.ferro@dot.gov

Dear Ms. Ferro,

As you know we filed a Motion to Postpone under Docket No. FMCSA-2004-18898. We submit that CSA 2010 data should be accumulated solely for the Agency's enforcement purposes. In view of the devastating unintended vicarious liability consequences, public release of this data is neither proper nor required under FOIA (see 5 U.S.C. §552(b)(7)).

We firmly believe there is no internet exception to the APA and the protections guaranteed small businesses through the related rulemaking statutes. Unless the interests of the small motor carriers which represent 95% of the for-hire motor carriers are fully and adequately protected as part of the proposed early release of the unperfected CSA 2010 methodology, we must reserve our objections.

In an effort to accommodate the Agency, we submitted proposed redaction and disclaimer language in our letter to you of October 8 which was intended to address the vicarious liability concerns which otherwise will result in loss of business, carrier bankruptcies, loss of jobs and disruption to the industry.

We have received no response to either the Motion or the letter but have received through the media the attached notice which indicates that the Agency has made a preliminary decision concerning a possible warning. This relief, if true as reported, is a step in the right direction but does not satisfy our concerns. A SafeStat type warning has proven ineffective before in state court actions to preclude use of the data to establish shipper liability and will not be sufficient to allay the fears of brokers, shippers and third party equipment providers who are continuing to place contract termination provisions in carrier contracts under the misguided impression that the Agency intends the public to use this flawed data upon publication. In fact, the number of brokers and shippers advising our clients that CSA 2010 methodology will be used to deprive them of existing business is increasing. See attachments.

Accordingly, the Agency's full adoption of the redaction and disclaimer notice in our October 8 letter accompanied by unequivocal affirmation of the public's ability to rely upon the Agency's ultimate fitness determination as a certification for use is the bare minimum necessary to frame release of this data as planned in December.

. We will be happy to meet again with you to discuss our issues but must reserve our objection to the public release of any data without APA compliance in the absence of the relief sought in our October 8 letter offering clear protection to the traveling and shipping public that failure to use all or part of the release data in its present form should not and cannot be used to establish vicarious liability.

Yours truly,

Henry E. Seaton, Esq.
Counsel for the National Association of Small Trucking Companies (NASTC); The Expedite Alliance of North America (TEANA); and the Air & Expedited Motor Carrier Association (AEMCA)

William D. Bierman, Esq.
Executive Director, Transportation Loss Prevention and Security Association

cc: Gary.Shoemaker@dot.gov
Alais.Griffin@dot.gov

Valued NYK Contract Carrier:

NYK Logistics (Americas) Inc. is writing to urge you to preview your CSA 2010 data at http://csa2010.fmcsa.dot.gov/. Click on the Data Preview link at the top of the page where you will find your 7 Behavior Analysis Safety Improvement Categories (BASICs) data. This information will be used to determine your Safety Fitness Determination (SFD) and will replace your Safety Rating. If you have already visited this site then you are a step ahead and aware of your data under the new Safety Management System (SMS).

NYK's Safety Policy under the current SafeStat measurements, provides that we qualify carriers with Satisfactory Ratings. However, we may qualify carriers based on SafeStat data (scores) if your Rating is Conditional or not rated in the SAFER database.

The public will not have access to CSA 2010 data until the end of the year, at which time NYK will refine our Safety Policy to qualify carriers using CSA 2010 guidelines. Our Safety Policy will be in line with SMS. In the future, if the Unsafe Driving or Fatigued Driving BASICs or any two of the other BASICs are above the Unfit Threshold, you may not be qualified to move freight for NYK.

NYK welcomes all questions and feedback on this program and anticipates that you are on top of all the changes CSA 2010 will bring to your company and our industry. NYK also requests that you send us a copy of your CSA 2010 Preview Data at your convenience to carrier.safety@na.nyklogistics.com or fax to 901-215-3214.

Best regards,

NYK Carrier Relations Compliance Team
Toll Free: 877-468-5557
Fax: 901-215-3214

Please disregard this notice if you have received in error,

LAW OFFICE OF SEATON & HUSK, L.P.

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October 27, 2010

NYK Logistics & Mega Carrier
NYK Carrier Relations Compliance Team
Via Fax: 901-215-3214

Dear NYK Carrier Relations Compliance Tam:

This firm represents several small carriers which have received the attached notice from you concerning your intended use of CSA 2010. We respectfully suggest that CSA 2010 is **not** intended for use by the shipping and traveling public in qualifying carriers. Specifically, CSA 2010 modality is a work in progress predicated on peer rankings of carriers based upon warnings and citations which have had no scrutiny and little due process.

Attached hereto is a Motion to Postpone release of this data filed by 4 trade associations together with 2 additional letters to the FMCSA requesting redaction of all or part of this data from public view because of the unintended vicarious liability consequences of same.

We honestly believe based upon published data that shippers, brokers and IEPs have been seriously misled about the intended use or penalties for non-use of this flawed data when it is released. Your letter is one of many that has been sent to small carriers and it is for this reason that we oppose release of CSA 2010 data.

We urge you to join the coalition of the named associations to straighten out the confusion of CSA 2010. Many brokers like NYK have expressed support for our efforts, recognizing that as many as two-thirds of their available carriers may be barred from use if the course of action you indicate is followed. Please note that the "thresholds" to which you refer do not in any way replace the current rating system of satisfactory, unfit, conditional, or unrated (which is the equivalent of satisfactory). These thresholds are only intended by the Agency for its internal use in its monitoring and enforcement policy and do not establish "the Unfit Threshold" in any of the BASIC areas.

We are not unmindful of your vicarious liability concerns and it is for that reason that we are seeking relief from the FMCSA in advance of release of this data. Your comments and feedback to both the undersigned and ,Administrator Anne Ferro would be welcome.

Yours truly,

Henry E. Seaton

HES/nre

Transport Topics; week of October 25, 2010

HEADLINE: Ferro Says FMCSA to Alter CSA to Address Industry Concerns
Byline: Sean McNally, Senior Reporter

PHOENIX — The **Federal Motor Carrier Safety Administration** is making several changes in its soon-to-be-implemented overhaul of truck safety standards as a result of industry comments, Administrator Anne Ferro told Transport Topics.

Ferro said at the annual meeting of American Trucking Associations here last week that FMCSA will change some of the terminology used to label fleets, put disclaimers on the data and hold back crash data when the program is implemented in December.

However, despite the desire by some fleets to delay publication of the scores, they will be posted as scheduled, Ferro said.

"We've had a great deal of opportunity to talk to the industry ... about our publication of that data to a broader audience," Ferro told TT in an Oct. 19 interview during the ATA meeting. "Number one, it will be going public in December, and we will be initiating the warning letters and phasing-in the concept of a focused compliance review where appropriate."

But to avoid inflammatory terms, FMCSA will be "getting away from that 'trigger language,' so it won't say 'deficient' " on a carrier's score, but "probably something closer to 'threshold', or 'above the threshold' or something like that," Ferro said.

Fleets have been concerned that using the term "deficient" is too pejorative and could harm them in legal proceedings.

Also in response to industry concerns, Ferro said that while the agency considers whether it's feasible to assign fault to the crashes in its system, "we will continue to treat the crash data as we do under SafeStat" and keep it off FMCSA's public website.

As a result, carriers' scores in six of the seven CSA safety categories are now scheduled to be posted.

Under CSA, the agency is sorting carrier infractions — from crashes to cargo securement violations — into seven categories, or BASICs.

In August, FMCSA changed the way some of the BASICs are calculated. Those revisions, according to Scott Randall, safety director at Hogan Transports, benefited large carriers, who generally saw improvements in their scores.

"The larger the carrier, the greater the chance they would be deficient under the old methodology," but under the new methodology "larger carriers all saw a decrease," he said.

Keith Klein, chief operating officer of Transport Corp. of America, said that before the changes, his company was "deficient in three of the seven basics," but that is not the case now.

"There are still some concerns on CSA 2010, that there may be a lot of bumps in the road that we think could be avoided to some degree," said Charles "Shorty" Whittington, president of Grammer Industries and chairman of ATA's executive committee. "However, in a nutshell, this

thing is so far down the pike that if you're going to be a carrier, you're going to have to learn to be a good carrier."

Steve Williams, chairman and CEO of Maverick USA Inc., told TT he agreed with FMCSA's decision to post the scores, despite his concerns about CSA.

"I don't like the message that it is sending to the public, that we have something hidden behind this score," he said.

However, that didn't absolve the agency from continuing to look at the program, he said.
"I am confident that we will in time — and it needs to be sooner than later — get this right," Williams said. "It is a critical piece that needs to be implemented and to accomplish the goals that we want to accomplish on highway safety."

Some of the concern stems from carriers' fear that shippers or plaintiffs attorneys may use the data from CSA either to select carriers or in lawsuits.

Former FMCSA Administrator Annette Sandberg, now a consultant and attorney with Scopelitis, Garvin, Light, Hanson & Feary, said that failing to do due diligence and potentially using a carrier with a deficient or even marginal score "does not play very well" with juries, citing several multimillion-dollar suits where brokers or shippers have been found negligent for using poorly rated carriers.

As a result, Sandberg said she advises her clients to discuss the CSA issue with their carriers, and for carriers to explain that there are issues with the data.

John Hill, also a former FMCSA administrator and current consultant, said he believed the CSA scores should be publicized. But he added that if quality issues with the data persist, the scores might need to be withheld until the data problems were solved.

End.

**AFFIDAVIT OF RICHARD GOBBELL,
GOBBELL TRANSPORTATION SAFETY, LLC**

My name is Richa'rd Gobbell and I am President of Gobbell Transportation Safety, LLC. I am making this statement in support of the Petition for Stay filed by the Petitioners in the above-described proceeding.

From 1972 until 2007, more than 35 years, I was employed by state and federal highway safety enforcement agencies that were responsible for the enforcement of the Federal Motor Carrier Safety and Hazardous Materials Regulations. For 15 years, I taught enforcement and compliance review course at Federal Motor Carrier Safety Administration's National Training Center in Oklahoma City and Washington, DC to both federal and state enforcement officials. Prior to my retirement, for 30 years I was with the Federal Highway Administration (FHWA) and the Federal Motor Carrier Safety Administration (FMCSA) in which I was responsible for the enforcement of both the Federal Motor Carrier Safety and Hazardous Materials Regulations. Two and *V2* years prior to my FHWA and FMCSA service I was with the former Interstate Commerce Commission (ICC). At the ICC I was responsible to insure that each carrier that had or was granted operating authority was maintaining a safe operating condition within its company.

I completed my last 12 year of my career at the FMCSA as the Tennessee Division Administrator. As the Division Administrator it was my responsibilities to administrate a comprehensive motor carrier safety program in Tennessee, through my staff of nine employees and administered a FMCSA's Grant programs to the Tennessee Department of Safety. That program included, among other things, it

conducting a very large commercial motor vehicle roadside inspections program across the State. When I retired from FMCSA I was responsible for the oversight of more than 900 Tennessee Department of Safety roadside truck inspectors.

During my career at the State agency I worked for, the FHWA and the FMCSA, I inspected approximately **10,000** commercial motor vehicles in operation upon the highway. I conducted somewhere around **1,000** motor carrier compliance reviews at carrier's offices. I investigated **100s** of commercial motor vehicle crashes.

Following my retirement in 2007 I have been a safety consultant and have served as an expert witness in several civil cases directing attention particularly to the vicarious liability issue which has arisen since deregulation. Attached hereto as Appendix A is a copy of my vitae.

The FMCSA regulations governing highway safety have changed little since they were implemented and enforced by the Interstate Commerce Commission prior to deregulation. When entry control and the filed rate doctrine in the Interstate Commerce Commission Termination Act was promulgated by Congress over 15 years ago, motor carriers were freely allowed to waive rules of commerce and enter written bilateral contracts pursuant to 49 U.S.C. 14101(b). The one aspect of regulation which did not change was the FMCSA safety rules. Those safety rules cannot be waived by written contract and placed solely upon the authorized motor carrier the non-delegable safety duties to comply with FMCSA requirements. See 49 C.F.R. 390.3(a).

Similarly, both before and after deregulation, the Federal Government established a regulatory body which is solely responsible for determining safety fitness. When the Interstate Commerce Commission's regulation over highway safety was terminated, enforcement of the safety rules and the credentialing of carriers were transferred first to the Federal Highway Administration and then, when it was created, to the Federal Motor Carrier Safety Administration (a subsidiary agency of the U.S. DOT) without any material change in the regulations or statutes.

The traditional public utility basis for the ICC and now the U.S. DOT to certify carriers as safe to use was based upon the doctrine that the Agency is the ultimate determiner of highway safety and that it is upon its decision both the traveling and shipping public can rely. The federally promulgated insurance requirements and endorsements demonstrate that these minimum levels of financial requirements are intended to inure to the benefit of the shipping and traveling public.

With deregulation, though, has come a new conflict between federal and state authorities as plaintiffs bar has sought to join shippers and brokers into accident litigation in an effort to increase the amounts of judgments and available sources of recovery. I have been personally involved in several lawsuits in which plaintiffs bar has attempted to use FMCSA safety data to establish a duty on shippers, brokers and vehicle leasing companies for screening of carriers which exceeds verification that the government has determined the carrier to be fit to operate.

In this context, the shipper and broker community is frightened about the prospects of vicarious liability and approaches CSA 2010 with heightened awareness of the unintended consequences of release of additional data.

Although the broker regulations provide that a broker is required only to retain a licensed, authorized and insured carrier, the argument being made is that a brokers, shippers and vehicle leasing companies have an additional statutory duty to use data released by the Agency to second guess the Agency's ultimate fitness determination.

In this context, premature release to the public of CSA 2010 data will and has, in my estimation, already has and will expand when released a chilling *effect* on competition and the ability of carriers to obtain business where the Agency has merely indicated in a percentile ranking that such carriers are under progressive examination.

The Agency, in considering CSA 2010, has not released its methodology, its science, or its math for public review and criticism. The program is, by the Agency's own admission, a work in progress and the University of Michigan study has not even been released. In August of this year, for example, the Agency made approximately 800 statistical changes to its methodology which affected its scoring and the outcome of its peer group sampling making any analysis based on the previous methodology impossible. Even the number of carriers in each peer group has not been released.

As a consultant familiar with the roadside inspections and collection of data involved, it has been impossible for me to accurately review the data to be collected

and to verify its accuracy and applicability, or fitness for use.

I have read the Petition to Postpone filed by Petitioners with the Agency and note that no response to the points raised by it has been forthcoming. Ordinarily, the Agency is required to set forth any change which would have a major affect upon the industry in a rulemaking proceeding at which time each of these issues should be addressed to assure data quality accuracy as well as to protect the interests of small carriers and entities under the Reg Flex Act and the Paperwork Reduction Act. No such procedures have been afforded in this case. Moreover, there are serious due process concerns about the data being accumulated and weighed.

The data being accumulated includes roadside warnings and citations, not convictions, and the data is to be released to the public with any due process afforded the carrier provided only on the backside after the harm to its reputation is done. "DataQs" is a procedure in which a carrier may send a request to review a data issue to the Federal Government which in turn refers the request back to the enforcement officer for a non-judicial review. In my experience of filing numerous DataQ, it is an ineffective means of protest and violates all concepts of due process. Moreover, as Petitioners point out, there are serious flaws with the data to be accumulated and the accuracy of the data when used for a statistical ranking.

Obviously, there are geographical differences imposed based upon the area of carrier operations and carriers in "probable cause" states are up to 4 times as likely to have high scores in one of the BASIC areas as carriers who operate principally in non-"probable cause" states. Yet, because both carriers are compared

in the same peer group, the result is an inequitable bias against certain carriers based upon their geographical scope of operation.

This bias is also particularly apparent in the important stand- alone basis of carriers' hours of service compliance. Apparently, the Agency proposes to compare for percentile rankings in the same peer group carriers which have the on-board recording device, those which are not required by regulations to log, and those which currently maintain a paper log. A carrier which maintains a paper log is twice as likely to accumulate points in this important BASIC than a carrier which operates an EOBR or one which is not required to log. This bias easily manifests itself in making carriers with paper logs likely to populate the upper 35% of the percentile ranking in a peer group which is deemed to be under the FMCSA's proposed methodology as a stand-alone BASIC.

The additional areas raised by Petitioners in their Motion to Postpone are well taken and in my experience reflect actual problems with the data including but not limited to the failure of roadside inspectors to list satisfactory inspections, the profiling of certain carriers based upon the age and nature of equipment, and other enforcement anomalies. The Agency has acknowledged that uniformity of enforcement is a difficult task and one in which Commercial Vehicle Safety Alliance (a non-governmental agency) is currently working on. Simply stated, though, the inequities have not been adequately addressed at this point to permit the release of the data with any reliability.

As part of use of CSA 2010 in its ultimate enforcement activities, the Agency has apparently set artificial percentile rankings which are convenient for its ultimate

enforcement program to be unveiled and considered in rulemaking in the Spring, but I have seen no scientific evidence for public listing of the term "Alert" or coding in orange any carrier above the 65 or 80 percentiles in any of the five remaining BASIC areas.

No reason has been cited for releasing peer group rankings to the public suggesting that carriers are under enforcement based upon percentile rankings until this thorough review required by statute is performed. Unfortunately, the Agency in its public releases and the Administration's letter to the Minnesota Trucking Association, has suggested that the data is being made available to the public which allows "... the FMCSA to leverage the support of shippers, insurers, and other interested stakeholders to ensure that motor carriers remain accountable for sustaining safety operations over time'' without appreciating the effect on the industry due to the vicarious liability consequences of this statement. (See June 8, 2010 letter from Anne Ferro to the Minnesota Trucking Association.)

It appears clear from the preparatory CSA 2010 seminars conducted by the industry and the Agency that the shippers and brokers fearful of vicarious liability will believe it is incumbent to use this un-scrubbed data to bar existing carriers from use if this material is released. To date, the Agency has given no apparent consideration to the affect of the release of this data on the efficiency of motor carriers or the competition between motor carriers which is set forth in the National Transportation Policy. See 49 U.S.C. 13101. Each year the Agency conducts a safety audit of approximately 17,000 motor carriers which it deems most at risk

under its current compliance review enforcement system and ultimately finds only about one percent of all carriers unfit to operate.

While no analysis of the use of CSA 2010 in the test states has been issued by the Agency, it does not appear that there is any correlation between the number of carriers identified for intervention and labeled as under "Alert" and the number of carriers ultimately found to be unsafe. Missouri, one of the test states in which CSA 2010 methodology was used, assigned an unsatisfactory rating to only 2 carriers for fiscal year 2010, yet approximately two-thirds of the carriers it tested under CSA methodology were labeled deficient and under "Alert."

If the Agency is able to use its comprehensive safety methodology to rate all 600,000 plus carriers as originally proposed in the five remaining BASIC areas, at least 250,000 would be under "Alert" and the for-hire segment which makes up 170,000 to 200,000 carriers will be severely compromised if shippers and brokers use the public data as the Agency suggests they should in making safety based decisions.

It is interesting to note that the Agency has selectively decided to publish for the public review percentile rankings in only 5 of the 7 BASIC areas of inquiry noting that in 2 of the 5, the determination has been made that the material is not yet ready for public release. This subjective decision by the Agency demonstrates that there is, in the Agency's schema, no requirement for public release and, I submit, that in all 7 of the BASICs, CSA 2010 is a work in progress and that the same adverse consequences of premature release requires delayed publication of any data.

By: [signature]
Richard Gobbell, President
Gobbell Transportation Safety, LLC

State of Tennessee

County of Williamson

Subscribed and sworn to before me this 26 day of November, 2010.

Laura German [SEAL]
Notary Public

My Commission Expires: 61/71/2013

LAURA GERMAN STATE OF TENNESSEE NOTARY PUBLIC WILLIAMSON COUNTY, TN

Appendix A

November 26,2010

A copy Richard C. Gobbell's Vitae.

3100 Braintree Rd.
Franklin, TN 37069
(615)513-2672 Phone
(615)866-0139 Fax
gobbell49@comcast.net

Richard (Rick) Gobbell

Summary *of* experience:

For 35 years I have been responsible for truck safety, motor coach safety and hazardous materials compliance and enforcement at both State and Federal agencies. I retired from the U.S. Department of Transportation, Federal Motor Carrier Safety Administration in January of 2007 after 32 ½ years service.

For 30 years I was a Special Agent, Program Specialist, State Director and Division Administrator at the Federal Motor Carrier Safety Administration. I was a FMCSAs State Director and Division Administrator in the Tennessee Division Office for the last 12 years of my career.

Prior to my service at FMCSA I was a District Supervisor with the Interstate Commerce Commission (ICC) for two and one half years.

And prior to that I was a Tennessee State Roadside truck enforcement officer conducting roadside truck safety enforcement activities for two and one-half years as well.

Education

I have a BS Degree in Business Administration from the University of Tennessee. I have a major in marketing and minor in accounting. I completed several transportation, business law and business management courses during my four year degree program.

Specific Experience

Over the years I completed more than 100 training classes relating to motor carrier safety and hazardous materials enforcement including investigation techniques, crash investigation, evidence, interviewing witnesses, hazardous materials investigations, safety regulations and management and supervising employees.

I served as an Associate Staff Instructor at the U.S. Department of Transportation's Transportation Safety Institute in Oklahoma City and at its National Training Center in Washington, D.C for 15 years. During this time I was an instructor in more than 50 classes for Federal and State Commercial Motor Vehicle inspectors and auditors. I estimate that somewhere between 500 and 700 current and former staff members of the Federal Motor Carrier Safety Administration and State officers and officials completed safety, investigation techniques, program and policy classes in which I was either the lead or an associate instructor.

For a year I was a lead instructor in the Federal Highway Administration Quality Management Improvement Initiative program. Another instructor and I conducted six one-week classes during this project in which this class was presented to about 100 Federal Highway and Federal Motor Carrier Safety

Administration staff personnel.

During my career I conducted more than a 1,000 safety and hazardous materials compliance reviews on trucking companies, motor coach companies and hazardous materials carriers and shippers.

I investigated 100s of truck and bus crashes and hazardous materials incidents.

I have been a witness in State and Federal courts on many occasions.

I have inspected somewhere in the neighborhood of 10,000 driver and vehicles at roadside inspection sites. I have personally placed 1,000s of drivers and vehicles "Out of Service' during these inspections for safety and hazardous materials violations.

I initiated more than 500 federal enforcement actions against motor carriers, motor coach operators, drivers and hazardous materials shippers for violation of the Federal Motor Carrier Safety and Hazardous Materials Regulations during my career.

I was certified by the US DOT to conduct truck and bus inspections and compliance reviews for more than 30 years.

In the last 20 years of my career, while continuing to conduct vehicle inspections and compliance reviews, I was a supervisor responsible for a division staff that was conducting these activities.

For more than 20 years I was either directly or in-directly responsible for the oversight of our State Partner's Motor Carrier Safety Assistance Program (MCSAP) which included more than a hundered roadside inspection officers and a budget of more than **14** million dollars a year.

I have a U.S. States Government "Secret" security clearance.

Currently:

Since my retirement I have been very active in assisting Commercial Motor Vehicle operators and Hazardous Materials shippers in establishing and/or improving their compliance programs in all areas of the regulations in which the Federal Motor Carrier Safety Administration has jurisdiction.

I have provided training to hundreds of carrier officials and staff in Hazardous Materials *General Awareness/Familiarization, Function Specific and Security Awareness and in-depth Security training.*

I have provided training to hundreds of carrier officials and drivers in the new hours of service regulations, FMCSA's SafeStat CSA2010 safety data analysis program and many other parts of the regulations. I have also provided training to 100s of drivers relating to conduct vehicle pre-trip inspections and how to pass roadside inspection':

I have assisted numerous motor carriers as a safety consultant, both large and small.

I have served as a Commercial Motor Carrier Safety Expert in civil cases that

have resulted from very serious injuries and deaths.

My company, Gobbell Transportation Safety, LLC, currently serve as a safety department for seven small motor carriers. In this service we provide a full service safety program in which we qualify their drivers, maintain their driver qualification files, monitor their drivers for hours of service compliance, vehicle maintenance/safety, hazardous materials compliance as well as all of the other parts of both the Federal Motor Carrier Safety and Hazardous Materials Regulations.

*I am currently **a** bi-weekly guest on the Dave Nemo, XM 770 Open Road Radio show. This is a one hour show where I discuss current issues, FMCSA programs, rules, rule changes, roadside Inspection and/or FMCSA Compliance and Enforcement Programs or any other subject relating to trucking that our listeners want to call in and discuss.*

These are lively shows and a wide range of spontaneous subjects are discussed.

Experience

1978 – 2007

I served as a Field Investigator, Program Specialist and Division Administrator at the U.S. Department of Transportation, Federal Motor Carrier Safety Administration in Nashville, TN. This includes the years at the Federal Highway Administration that had the same areas of responsibility prior to the establishment of the FMCSA in 2000.

From 1995 to 2007 I was the Division Administrator responsible for **all** *of* FMCSAs programs relating to truck and bus safety, hazardous materials, commercial driver's license, State grants, license, insurance, and registration in the State of Tennessee.

Even though I was a supervisor for the last several years I continued to conduct the above activities.

I was one of the very few Division Administrators at FMCSA that maintained my Vehicle Inspection and Compliance Review certification.

I was responsible for the administration of a $14 million per year Motor Carrier Safety Assistance Grant Program to the Tennessee Department of Safety. This agency used the funds to conduct truck and bus safety enforcement activities. We had more than 900 Tennessee State Troopers participating in our program.

I conducted and/or oversaw thousands of investigations that resulted in penalties for violations of the safety, hazardous materials and other regulations the agency was responsible for enforcing. I conducted and oversaw hundreds of investigations into major truck and bus crashes.

I worked with the National Transportation Safety Board on several crash investigations

1975 – 1978

Interstate Commerce Commission

I served as District Supervisor and was responsible for the administration of a compliance and enforcement program relatina to truckina companies authoritv. tariffs. claims. and insurance and a vast array of other regulations that applied to trucking, freiaht brokers, shippers, freiaht forwarders, water, rail, pipeline and passenger transportation operations.

I was responsible for granting emergency and temporary authority applications from motor carriers requesting permission to provide transportation service to the public.

1972 - 1975

I was an enforcement officer for the Tennessee Public Service Commission. I inspected commercial trucks, buses and drivers for compliance with the safety and hazardous materials regulations at inspection sites and during traffic stops. I placed hundreds of vehicles and drivers out of service and arrested many drivers for safety, drug and alcohol related violations.

January 2007 - Present

I am currently a Motor Carrier Safety Consultant. I have conducted several Mock DOT Audits of motor carrier's compliance with the Safety and Hazardous Materials Rules and Regulations. I have conducted a Safety Director Basic Motor Compliance Rules and Regulations Course (3 day class), provided Hazardous Materials Awareness, Recurring and Hazardous Materials Security Training Classes to several of my clients.

I have conducted several Driver Hours of Service and How to Pass a DOT Inspection Training classes.

I have conducted analytical work for a very large motor carrier property broker. I have conducted several SafeStat training classes for both motor carriers, brokers and freight forwarderds.

I have conducted several SafeStat Training classes at a National Trucking Association's annual meeting. I have been a guest speaker at Delta NU Alpha on the subject of SafeStat Scores, proposed and new rules on the horizon at DOT.

I have developed a New Entrant Motor Carrier Training Program covering all areas of the Federal Motor Carrier and Hazardous Materials Rules and Regulations that I provide to some of my clients.

Court Appearances:

As a State roadside inspector I regularly appeared in both General Sessions and Circuit court on matters relating to violations of the Federal Motor Carrier Safety and Hazardous Materials Regulations in which I had cited a motor carrier and/or driver.

While employed at the Federal Highway Administration, Office of Motor Carrier I appeared in U.S. District Courts on three or four occasions on matters relating to motor carrier's violations of the Federal Motor Carrier Safety Regulations.

I once appeared in U.S. District Court in a criminal matter as an expert witness on behalf of the Government (Federal Highway Administration) in a matter relating to fraud where an individual claimed that he had received design approval from the U.S. DOT for a vehicle he had obtain investments to manufacture.

I was deposed in U.S. Civil Court proceeding relating to serious truck crashes on two occasions in my career.

Recent participation

December 2007 I participated in the Federal Motor Carrier's CSA 2010 presentation in Dallas, TX.

April 2008 I participated in "Supply Chain Labiality" Webinar.

July 2008 I presented a Webinar on "SafeStat Vs CSA 2010" to more than 75 participants from the Expediters Annual Convention in Wilmington, OH.

October 2008 and January 2009 I have participated in the Federal Motor Carrier Safety Administration's Motor Carrier Safety Advisory Committee quarterly conference call meeting.

November 2008 – 2009 Presenter to the annual conference of the National Association of Small Trucking Companies SafeStat Vs CSA 2010.

November 2008 – Keynote Speaker at the annual conference of the National Association of Small Trucking Companies on the subject of Motor Carrier DOT Compliance Audits.

September 2008 to Present I am a bi-weekly DOT Expert on the Dave Nemo Open Road Radio Show that is broadcasted nationwide on XM Radio Channel 170 and Sirius 141. The name of my show is Safety Compliance and Common Sense.

November 2009 – Participated in the Federal Motor Carrier Webinars on CSA 2010.

January 2010 Participated in the Federal Motor Carrier Safety Administration Hours of Service Listening Sessions on January 19, 2010, and January 25, 2010.

August 26, 2010 Presented a CSA2010 Presentation for the National Association of Factors in Kansas City, KA.

September 26, 2010 Attended a Motor Carrier Safety Compliance Course at the U.S. Department of Transportation, Transportation Safety Institute at Oklahoma City, OK.

October 22, 2010 – Presented CSA2010 and DOT Audit Training at Xtra Lease, Inc. Le Vergne, TN with over 150 attendees.

November 10, 2010 – Presented CSA 2010 Training to Delta Nu Alpha Bowling Green, KY.

November 11,2010 – Presented a CSA2010 panel discussion for the National Association of Small Trucking Companies with approximately 50 participants.

Awards and Recognitions

1983 to March 2007

In summary

11 Cash Awards
8 Outstand, exceptional or meritorious service performance appraisals
4 Within-Grade Salary Increases
12 letters of appreciation
8 Certificates of Appreciations
3 Promotions, GS 9 – GS- 11
1 Promotion GS 11 to 12
1 Promotion GS 12 to GS 13
1 Promotion GS 13 to GS-14

March 30,2007 Press Release – FMCSA awarded the TN Department of Safety received an honor for reducing fatalities and fatal crashes involving commercial motor vehicles. TN was chosen for the honor from among the 13 states in the Southern Resource Center for 2006. This Motor Carrier Safety Assistance Program was a major program that I was responsible for during my last year of service to FMCSA.

February 15, 2006 Exceeded Expectations Performance Appraisal

October 19, 2005 Letter of Appreciation from my former supervisor, Jerry L. Cooper, expressing his pleasure of having worked with me.

August 29, 2005 Letter of Appreciation from Administrator Sandberg for assistance to the public

August 11, 2005 Cash Award of 1,500

June 22,2005 Cash Award $750

June 7, 2005 Cash Award $750

May 30, 2004 Cash Award $600

April 6, 2004 Letter of Congratulations from Administrator Sandberg

February 5, 2004 Letter of Appreciation From Chief Safety Officer, John Hill

May 1, 2003 Performance award of $1,000

January 31, 2002 Cash Award of $2,000

August 12,2001 Cash Award $600

December 30, 2001 Promotion from State Director GS-13 to Division Administrator GS-14

November 19, 2001 Outstanding Performance Appraisal

December 3, 2000 With-in-Grade Increase

December 2000 Find the Good and Award it from Administrator Rodney Stater, Federal Highway Administration

December 5, 1999 Performance Award $500

January 17, 1999 Time Off Incentive Award 8 hrs

December 6, 1998 Within-Grade Increase

March 25, 1998 Special Act Award $2,500

March 29, 1998 Special Act/Service Award $500

May 1997 Plaque of Appreciation Region Four Customer Service Award (hand copied)

March 14, 1997 Letter of Appreciation from the Tennessee Trucking Association

November 1996 Promotion from Federal Program Specialist GS-12 to GS-13 State Director (copy not available)

September 3, 1996 Letter of Appreciation M.S. Carriers

July 15, 1996 Special Act Award $400

March 7, 1996 Letter of Appreciation from the TN Motor Coach Association

October 1995 Partners For Excellence Award from Administrator George Reagle

January 23, 1995 Meritorious Performance Appraisal

September 9, 1994 Letter of appreciation from Holly J. Kinley-Lick Federal Highway Administration

April 1994 Plaque of Appreciation for Continued Superior Performance As an Associate Staff at U.S. DOT Transportation Safety Institute (Only issued after 12 classes)(I server in more than 30 such classes)

May 1993 Certificate of a Peer Award from entire staff of Region **4**

May IO, 1993 Certificate of Appreciation from President Bill Clinton for my service to the Federal Highway Administration

January 20, 1993 Letter of Appreciation West Tennessee Traffic Club

May 1993 Outstanding Rating Certificate

January 19, 1993 Outstanding Performance Appraisal

May 13, 1991 Letter and Certificate of Appreciation for my exceptional efforts for achieve this highest success rate in its history of the academy for its graduating trainees.

February 8, 1991 Supervisor's Special Act Award $200

August 1988 Promotion from GS-11 (Safety Investigator) to GS-12 Federal Program Specialist

October 11, 1983 With-in-Grade Salary Increase

February 22, 1983 Letter of Appreciation from the Tennessee Public Service Commission

February 9, 1982 Letter of Appreciation Tennessee Public Service Commission

October 6, 1981 Letter of appreciation for my work and accomplishments from my supervisor N. Hugh Galbreath

Affidavit of J.D. Heatherly
H&V Leasing, Inc.

My name is J.D. Heatherly. I am Office Manager of H&V Leasing, Inc. of Newport, Arkansas. I am authorized to make this statement on H&V's behalf. My company operates 13 trucks and is regulated by the Federal Motor Carrier Safety Administration.

We have examined our CSA 2010 scores and if released to the public they will show that we have scores in two of the BASIC areas slightly above the 65 percentile. In those areas we are peer grouped with dissimilar carriers who have, we believe, scale house advantages which statistically skew a proper evaluation of our safety profile.

We have been advised by at least one major customer that it feels compelled to use CSA 2010 if released to the public as a screening mechanism to determine its subsequent use of carriers and accordingly we are threatened with immediate loss of business if the data is released on December the 6th.

H&V is committed to highway safety and we do not believe the CSA scoring methodology is fair, appropriate for use by shippers, or intended to interfere with our abiiity to compete.

In this regard, we received a satisfactory safety rating from the FMCSA on July 8, 2009 and have been determined by the Agency to be fit and safe for shippers and brokers to use. Any system which suggests that the public should be "alerted" about use of a carrier which the Agency has determined is satisfactory should not be implemented under these circumstances until the system is thoroughly reviewed under rulemaking.

Because of the possible immediate harm to H&V, we urge that the relief Petitioners seek be granted.

By: JD Heatherly
J. D. Heatherly
H&V Leasing, Inc.

State of Arkansas

County *of* Jackson

Subscribed and sworn to before me **this** 24th **day of** November **, 2010.**

Lola Powell
Notary Public

[SEAL]
Lola Powell
County Of Jackson
Notary Public - Arkansas
My Commission Exp. 07/01/2015

My Commission Expires: 07/01/2015

Affidavit of Mark Kreider,
Innovative Worldwide Logistics, Inc.

I am Mark Kreider, President of Innovative Worldwide Logistics, Inc. We are a small family owned transportation brokerage located in Knoxville, Tennessee. We employ 3 people and have 1,600 small carriers under contract. I believe the CSA 2010 is unfair and has the very real possibility of forcing me out of business due to new customer requirements to protect themselves against frivolous lawsuits. Since the CSA 2010 does not render a trucking company fit or unfit, it is up to the broker to make an individual judgment on trucking company's safety. This creates a liability concern for the customer since they depend on the broker to hire fit trucking companies. Using fear tactics, large corporate brokers are already contacting my customers and telling them that they need to hire them exclusively to manage all their freight for protection against CSA 2010 related lawsuits. These large corporate brokers are promising to indemnify my customers against liability in exchange for all their business. This type of broad indemnification is not possible for small companies to provide.

If the CSA 2010 comes to be, and our customers require broad indemnification, we will be finished. We will be forced to close our doors or become an agent for a large brokerage.

I fully support efforts to increase safety but this is not the way. A better system would be for the Federal government to analyze the statistics privately and rate a carrier as fit or unfit as is done with the airline industry. Forcing brokers and traffic managers to become safety experts is ludicrous, unnecessary, and will create more lawsuits. Let the transportation experts in the Federal government make the call and inform the public on whether or not a trucking company is fit or unfit.

Mark Kreider, President
Innovative Worldwide Logistics

State of Tennessee

County of Knox

Subscribed and sworn to before me this 24 day of November, 2010.

Notary Public [SEAL]

My Commission Expires: May 7, 2013

ROBBIE GRIFFEY
STATE OF TENNESSEE NOTARY PUBLIC
KNOX COUNTY

AFFIDAVIT OF JIM LOYD,
JIM LOYD TRANSPORT CO.

My name is Jim Loyd and I am President of Jim Loyd Transport Co., 2660 Cedartown Hwy., Rome, GA 30161. We are a small trucking company which currently has 30 power units. We provide truckload service to companies all over the United States. We enjoy a satisfactory safety rating from the FMCSA which is the highest rating awarded to a company. Our company has not had a chargeable accident in the past 5 years and has only one non-chargeable accident which was not our fault on our record in the past 5 years.

Because Georgia was a test state for the CSA 2010 methodology, I have some experience with how it works or does not work and of the possible adverse consequences release of CSA 2010 data can have on small trucking companies like Jim Loyd Transport.

As a small carrier with comparatively few power units, any statistical comparison of Jim Loyd with other carriers in a percentile ranking can be particularly sensitive to a small number of aberrant recordable events which do not accurately reflect the carrier's commitment to safety or its compliance with the Federal Safety Regulations.

Our company is based in Georgia which is a test state and accordingly, I am familiar with some of the CSA 2010 methodology and can testify to the problems I have encountered. Our company uses paper logs and has not converted to an EOBR. As a result, we have accumulated violation points with respect to form and manner violations or failure of drivers to keep logs up to date which are not incurred by our competitors who either are not required to log or who have an EOBR. Placed in peer groups, accordingly our percentile ranking in the hours of

service bracket exceeds the enforcement threshold and will indicate to the public that we are in the orange area and under an "Alert". We have been advised by the 3PL for our largest customer that CSA 2010 is going public on December 6 and that we will be measured by that system. The threat to our continued business relationship is accordingly very real.

It is important to note in this regard, though, that in the past 2 months we have had a new audit by the FMCSA of our books and records in the BASIC area which shows a high percentile ranking and the Agency has concluded that no change in our satisfactory rating is warranted. Notwithstanding this satisfactory rating, though, unless the relief Petitioners seek is granted, we will still be shown as exceeding the enforcement threshold, or under an "Alert" to the shipping community if this material is released.

In conclusion, I am somewhat reluctant to offer testimony in this proceeding or to draw attention to my company for fear of further being blackballed or targeted for enforcement or loss of business because of the vicarious liability hysteria which surrounds the impending release of the CSA 2010 modality.

At the end of the day, though, I know that Jim Loyd Transport is a safe small carrier which is being set up to be tarred and feathered by the misapplication of wrong data. We are more than happy to help the FMCSA do its job and offer it the assurances that we are a compliant carrier if our actual safety rating, the results of their audit and our crash record alone is not enough to be persuasive.

But I feel compelled to make this statement on behalf of my company and the thousands of large and small carriers who will be threatened with loss of business if not bankruptcy.

Jim Loyd, President
Jim Loyd Transport Co.

State of Georgia

County of Floyd

Subscribed and sworn to before me this 24th day of November, 2010.

______________ [SEAL]
Notary Public

NOTARY PUBLIC, FL[illegible] GEORGIA
MY COMMISSION EX[illegible] AUGUST 9, 2011

My Commission Expires: ________________

AFFIDAVIT OF KEVIN LHOTAK,
RELIABLE TRANSPORTATION SPECIALISTS, INC.

My name is Kevin Lhotak. I am President of Reliable Transportation Specialists, Inc. and we employ –112___ people. I am authorized to make this statement in support of the relief sought by Petitioners.

We currently enjoy a satisfactory safety rating from the FMCSA. We are most concerned about potential release of CSA 2010 methodology and data to the public because various customers and equipment providers have told us that they will feel compelled to use this information to bar use of any carrier over the enforcement threshold in the remaining 5 BASICs.

As an intermodal carrier based in Indiana, the system is particularly biased against our company in rating us on a percentile basis because of the high number of citations which are written by the surrounding states and the fact that intermodal carriers operate with equipment that is maintained by others. For these reasons, and these reasons alone, I believe we are above the enforcement threshold in certain areas. The agency, and only the agency, should ultimately determine carrier safety and we have been determined to enjoy the highest safety rating available. For these reasons we urge that release of this data be postponed because release will have an incalculable adverse impact on our ability to obtain existing freight. We urge that the Court stay release of this material until the Administrative Procedures Act is complied with.

Kevin Lhotak, President
Reliable Transportation Specialists, Inc.

State of Indiana

County of Porter

Subscribed and sworn to before me this 24 day of November, 2010.

[SEAL]

Notary Public

My Commission Expires: July 14, 2012

Affidavit of Larry Danko
Southern States Cooperative, Incorporated

Southern States Cooperative, Incorporated ("SSC"), an agricultural cooperative founded in 1923, now has more than 300,000 farmer stockholder/members. As one of the nation's largest cooperatives, the Richmond, VA firm provides a wide range of farm inputs including fertilizer, seed, livestock feed and pet food, animal health supplies, and petroleum products. We serve our member and non-member customers through over 1,200 retail outlets.

SSC is dedicated to serving farmers throughout a 26 state area and as part of providing goods, materials and supplies to the farming community, we currently hire annually as many as 500 independent transportation carriers to provide service. Particularly during the spring planting season, we may procure service in the spot market from available carriers enlisting as many as 50 new carriers per month. It is neither economical nor reasonable for SSC to extensively credential each carrier before use. Reliance on the FMCSA's ultimate determination of fitness is all a shipper such as SSC can reasonably be expected to do.

Traditionally we have verified carriers for use by confirming that they were appropriately licensed, authorized and insured in accordance with FMCSA requirements.

We have been advised that CSA 2010 will impact our selection process and require us to accept responsibility for negligently hiring carriers which the FMCSA otherwise certifies as fit for use under existing regulations.

We have been advised that after release of CSA 2010 data to the public, it will be too dangerous for us to hire our own carriers based upon their certification by the Agency as licensed, authorized and insured to operate. We would need to seek professional help in weighting out each carrier using CSA 2010 in order to avoid the possibility of suit. This deeply concerns us.

As part of the preparation for CSA 2010, we have been advised by a large broker that SSC may no longer afford to follow its existing selection criteria and should hire a third party provider who will examine CSA scoring methodology to select carriers in order to protect SSC from the possibility of large vicarious liability judgments. One such judgment has been entered in the State of Virginia, where we are domiciled, using in part FMCSA data under SafeStat. Information released by the FMCSA under CSA 2010 has heightened the vicarious liability concern because the Agency has suggested that shippers and brokers have a safety obligation and responsibility which extends beyond simply relying upon the Agency doing its job to ultimately determine highway fitness.

Clearly, the confusion surrounding this issue is a major impediment to continued efficient operations by SSC, particularly in view of the impending spring planting season.

We support the efforts of Petitioners to postpone release of any CSA 2010 data until the issue of the validity of such data and who, be it the FMCSA, or the shipping public, bears the responsibility under Federal Motor Carrier Safety Regulations for certifying safety fitness for use, is clarified.

Clearly, the public release of CSA 2010 and the confusing issue of its intended use and effect on the small carriers we currently use, is an issue involving a major regulatory change which needs to fully be reviewed in the context of the yet to be announced rulemaking proceeding to address more this entire issue.

If we were required to restrict our use of carriers based upon a December 6 release of this material to the public, our distribution of agricultural products would suffer major interruptions and under fear of additional vicarious liability we would be forced to consider terminating the use of many carriers upon whom we have come to depend. We understand that an undeterminable number of carriers will not even be rated under this system and in light of the Agency's pronouncement that shippers have some undetermined additional safety duty, we are at a loss to determine what carriers can be used and under what circumstances.

Finally, as an operator of a private fleet which is subject to the new FMCSA methodology we have reviewed our numbers and how they are calculated and can affirm that CSA 2010 methodology, peer groups and mathematical algorithms are a work in progress which should not be used by any shipper to blackball use of a carrier.

I am submitting this Affidavit as the Director of Transportation of Southern States Cooperative and I am authorized to make this statement on its behalf.

By: Larry Danko ______
Larry Danko
Director, Transportation
Southern States Cooperative, Incorporated

State of Virginia ______

County of Henrico ______

Subscribed and sworn to before me this 24 day of November, 2010.

Jeanna Paige Hardee ______ [SEAL]
Notary Public

My Commission Expires: 6/30/2012 ______

JEANNA PAIGE HARDEE
NOTARY PUBLIC
REG # 145569
MY COMMISSION EXPIRES
06/30/12
COMMONWEALTH OF VIRGINIA

AFFIDAVIT OF STEVEN B. SAMPLE,
RIME-IT TRANSPORTATION

My name is Stephen B. Sample and I am President of Tyme-It Transportation, an FMCSA regulated motor carrier and property broker domiciled in Louisville, Kentucky. I am also the Chair of the Legislative Committee of The Expedite Alliance of North America (TEANA) one of the Co-Petitioners in this lawsuit. I am authorized to make this statement on behalf of both Tyme-It and TEANA.

I have been involved in the trucking industry for 28 years and have substantial experience in truck brokerage having served as President of the Transportation Intermediaries Association in 2002-2003.

TEANA supports postponed release of CSA 2010 information to the public pending consideration of the affect of this data on efficiency, competition, and small businesses as required by the National Transportation Policy, the APA and the related statutes intended to protect small businesses.

TEANA is a trade association composed of approx. 65 small carriers who provide a niche service. We provide just in time shipments on a call on demand basis for large industrial shipments when inventory shortages require exclusive use to avoid plant shutdowns.

In order to efficient and responsive service, our members must be able to dispatch trucks from their local domicile to points throughout the United States on short notice and then arrange for back hauls or return moves from destination in the spot market to avoid empty miles and inefficiency. This "spot marketplace" has become a substantial portion of the truckload industry as a result of deregulation and functions by using property brokers and other intermediaries who arrange for shipments via the internet often using carriers that must be credentialed and certified on short notice.

Under existing regulations, brokers are intermediaries who act like real estate brokers or stock brokers bringing together willing shippers and carriers often times for one or two

moves. To credential a carrier, a broker must verify that it is licensed, authorized and insured and is otherwise able to meet the service requirement of its customer. This credentialing process has traditionally required only that the broker obtain certification from the ICC, now the FMCSA, that the Federal Government has certified the carrier as safe to operate. The trucking industry is no different than other regulated industries in which a credentialing organization, be it a bar association, the FAA, or local taxicab authority, certifies the regulated entity for use so that the shipping public is not required to do so.

In this context, the lead up to CSA 2010 and the Agency's informal announcements have created chaos in the industry and led major shippers to conclude that for fear of vicarious liability they must either use only large carriers with unlimited indemnification ability or impractically second guess the FMCSA's decisions by choosing only carriers which have no blemish on their safety record as shown by the data to be released.

TEANA members are currently seeing in prospective contracts provisions which say that brokers cannot use nor can carriers provide service if the information to be released suggests that in any of the BASIC areas of inquiry the carrier is over the enforcement threshold, or I presume marked as under "Alert" under the newly announced nomenclature.

As we understand it, in the BASIC areas to be published, 35% of the peer group carriers will be deficient in each of 3 BASICs and 80% will be deficient in the remaining BASIC to be released. Any way the FMCSA cuts the pie, well over 50% of the monitored carriers it otherwise certifies as fit, willing and able after investigation under its existing system will fail under this criteria.

This is of particular concern to TEANA members since it will drastically interrupt their ability to operate efficiently and to broker loads to one another without drilling down into data and procedures which have not been subject to public review, comment or scrutiny.

The industry commentators on CSA 2010 have repeatedly called it a "game changer" or "a brave new world". It appears to TEANA that this is truly the case in terms of the catastrophic effect that it will have upon the ability of TEANA members to continue viable operations, particularly in the spot market.

Finally, one particular issue which is troubling to TEANA members is the obvious geographical anomalies which result from inclusion of carriers in peer groups with percentile rankings which pay no attention to anomalies and exceptions which affect this peer group ranking. Many of the expediters in our association are involved in providing automotive and industrial shipments and are centered in the Michigan, Ohio and Indiana areas. Those three states are "probable cause" states and as a result historically stop far more trucks for minor speeding violations, issuing warnings than other states. Under the methodology, apparently developed by the CSA carriers operating in these states are nonetheless put in peer groups with carriers operating in states in which such warnings and speed violations are not written as frequently. Accordingly, it has been said it is a lucky day if you are based on Montana and if you are based in Indiana, Michigan or Ohio you are going to be statistically prejudiced with no effective due process or way to correct the inherent bias and prejudice in the system.

TEANA, like the other Co-Petitioners, is committed to safety and probably would have no ultimate objection to the use of imperfect data as a screening tool for the Agency doing its job in determining highway safety. Yet, whether intended or unintended, the consequences of premature public release of CSA 2010 data are substantial and incalculable because no good cause has been shown for not considering the public release of CSA 2010 methodology as part of rulemaking and we urge that the Motion to Postpone be granted.

By: ______________________________
Stephen B. Sample, President
Tyme-It Transportation, Inc.

State of Kentucky

County of Jefferson

Subscribed and sworn to before me this 24th day of Nov, 2010.

______________________________ [SEAL]
Notary Public

My Commission Expires: Oct 22, 2013

Affidavit of Steven W. Norman,
Universal Traffic Service, Inc.

My name is Steven Norman and I am the Director of Resource Development at Universal Traffic Service, Inc. (UTS), a licensed property broker. I'm also a member of the Board of Directors of TEANA, a named Plaintiff in this proceeding. This Affidavit is submitted on behalf of UTS.

UTS is a licensed property broker which employs 99 people and arranges for the transportation of shipments using authorized and insured motor carriers certified as authorized to operate by the FMCSA. We currently have approximately 12,000 carriers under contract and book 20,000 loads per month.

As a property broker we are required by regulation to use only licensed and authorized carriers and otherwise have no federally mandated obligations for the safe operation of the commercial motor vehicles used by the authorized carriers we retain.

We have been told by transportation attorneys, purveyors of CSA 2010 monitoring systems and others that release of CSA 2010 is a "game changer" and "a brave new world" for the motor carrier industry and the shipping and receiving public. Certain of our larger broker and 3PL competitors have been advising shippers that as a result of release of CSA data to the public, the shipping community may be required to second guess the FMCSA's ultimate safety fitness determination and use carriers which the

website reflects are over the arbitrary enforcement thresholds at their own peril. The peril being touted as the reason for using our competitors is that they will assume responsibility for the negligent selection of the carrier and can financially indemnify the shipper from runaway jury verdicts which are predicted to result from use by plaintiff's bar of the soon to be released data and percentile rankings coupled with the Agency's pronouncements that the data and rankings must be published before rulemaking so that shippers can make "safety based decisions." The ramp up to CSA 2010 indicates to us that UTS may be unequivocally harmed by premature release of this data as we are forced to either be "safe rather than sorry" and bar use of the valued carriers who are certified by the Agency as fit for use because of an unproven mathematical ranking or to accept unmeasured additional risk of liability through indemnity obligations to our customers in order to compete in the marketplace.

Clearly, this is an issue of major impact to UTS and the members of TEANA, many of which are our vendors. If all of them are placed in peer groups based on conveyed data as many as two-thirds can be expected to be above the threshold to be noted as an "Alert" under the CSA methodology. To have to cease using even 10% of our carrier base would undermine our ability to serve our customers in the critical marketplace we serve.

By: [signature]
Steven W. Norman

State of ________________

County of Kent

Subscribed and sworn to before me this 24th day of November, 2010.

[signature] [SEAL]
Notary Public RITA A. KLINE

My Commission Expires: 2-6-2013

RITA A. KLINE
NOTARY PUBLIC, STATE OF MI
COUNTY OF KENT
MY COMMISSION EXPIRES Feb 6, 2013
ACTING IN COUNTY OF Kent

Affidavit of James Frye,
CHEP USA

My name is James Frye and I am Director and Counsel of CHEP USA ("CHEP") and I am authorized to make this statement in support of the relief sought by Petitioners. CHEP is a nationwide distributor of proprietary pooled pallets used by commercial shippers in the transportation and storage of freight and cargo. We regularly retain over 100 different motor carriers to transport pallets to our manufacturing customers and from retail outlets back to our service depots.

In addition, we have an affiliate, Lean Logistics, which operates as a licensed property broker. As counsel for CHEP, I am involved in risk assessment and insurance issues for both companies and I am authorized to make this statement.

Of primary concern to shippers and brokers is the issue of vicarious liability which can arise under state law concepts of vicarious liability, negligent entrustment or negligent hiring. The industry as a whole is particularly aware of large judgments entered against or agreed to by property brokers as a result of lawsuits in which the carriers they retain have been involved in multiple fatalities.

The Federal Motor Carrier Safety Administration is charged by Congress with determining which carriers are safe to operate, and under FMCSA safety regulations, the authorized motor carrier has a non-delegable safety duty for the operation of the commercial motor vehicle.

Unfortunately in the ramp up to CSA 2010, the role of the Agency, the carrier and the carrier's customers (shippers and brokers) has become confused and many in the industry, including various trade groups, have concluded that release of CSA 2010 to the public is actually intended for use by shippers and brokers in establishing a new duty of due diligence which would result in CHEP and Lean Logistics bearing an obligation to second guess the Agency's ultimate fitness determination. Release of CSA 2010 data will confuse, we fear, the application of the Federal Safety Regulations on the shipper and broker community and result in new and greater potential exposure to lawsuits.

Unless Petitioners' relief is granted, our job in risk management will result in us facing an unanswered question of what safety standards should be applied. Is a carrier certified by the FMCSA as licensed and insured to operate fit for use, or is the Agency, by publishing this information with warnings, a color coated format like TSA security alerts, etc., actually telling the shipper and broker community that the shippers of cargo bear some new responsibility and liability? Until this issue is squarely addressed and resolved, there is no foreseeable reason for early publication of CSA 2010 methodology which the Agency acknowledges must go through rulemaking before the government can use the questionable data and scoring mechanism it proposes to give to the public with unmeasured unintended consequences.

By: ______________________
James Frye, Director and Counsel
CHEP USA

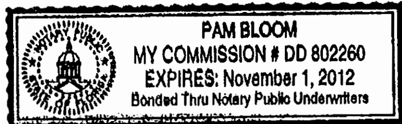
State of Florida

County of Orange

Subscribed and sworn to before me this 29th day of November, 2010.

Pam B. Bloom [SEAL]
Notary Public

My Commission Expires: Nov. 1, 2012


PAM BLOOM
MY COMMISSION # DD 802260
EXPIRES: November 1, 2012
Bonded Thru Notary Public Underwriters

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

ALLIANCE FOR SAFE, EFFICIENT AND COMPETITIVE TRUCK TRANSPORTATION; AIR & EXPEDITED MOTOR CARRIERS ASSOCIATION; THE EXPEDITE ASSOCIATION OF NORTH AMERICA; NATIONAL ASSOCIATION OF SMALL TRUCKING COMPANIES; TRANSPORTATION LOSS PREVENTION AND SECURITY ASSOCIATION; ALLEN LUND COMPANY, INC.; BOLT EXPRESS, LLC; BP EXPRESS, INC.; CARRIER SERVICES OF TENNESSEE, INC.; CONARD TRANSPORTATION, INC.; DES MOINES TRUCK BROKERS, INC.; FORWARD AIR, INC.; MEDALLION TRANSPORT & LOGISTICS, LLC; REFRIGERATED FOOD EXPRESS, INC.; SNOWMAN RELIABLE EXPRESS, INC.; TRANSPLACE, LLC; and TRIPLE G EXPRESS, INC.,

Petitioners,

- vs. -

FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION and THE HONORABLE RAYMOND LAHOOD, in his official capacity as SECRETARY OF TRANSPORTATION,

Respondents.

CASE NO. 12-1305

DECLARATION OF DAVID KREIGH
TOWNE AIR FREIGHT (AEMCA)

1. My name is David Kreigh and I am Director of Capacity Management for Towne Air Freight. I also serve as President of the Air & Expedited Motor Carrier Association ("AEMCA") on whose behalf I am filing this Declaration.

2. AEMCA, a petitioner in this case, is a trade organization composed primarily of 75 motor carriers which use commercial motor vehicles to transport shipments having a prior or subsequent movement by air or which require expeditious service from origin to destination. Our members operate a fleets consisting of different types of trucks, including straight trucks and tandem axle tractor trailers or "combos." Based on a particular carrier's ratio of straight trucks to combo units, that carrier may find itself in either of two different peer groups arbitrarily designated by the FMCSA under its SMS methodology.

3. In addition to being subject to FMCSA regulations, our members are part of a small subset of carriers which are subject to compliance with FAA and TSA regulations as well.

4. We have opposed the publication of unvetted SMS percentile rankings and methodology to the public from the outset, and in 2010 we were petitioners in *NASTC et al. v. FMCSA*.

5. Our members have relied upon the *NASTC* settlement and existing law to explain to our shippers that they may rely upon the FMCSA's certification of a carrier as safe to operate on the nation's roadways, and therefore that they may continue to do business with such a carrier free from concerns about encroaching state law imposing vicarious liability for "negligent selection" of carriers.

6. Unfortunately, the Agency's actions subsequent to *NASTC*, aided and abetted by merchants of carrier monitoring services, have met with some success in convincing shippers and brokers that they must use SMS methodology in making some additional risk assessment to the detriment of our members and the stability of the air freight industry.

7. One of our associations' largest industry partners is the Air Forwarders Association. It is comprised of forwarders which arrange for the through movement of shipments by air and truck in both domestic and foreign trade. Attached as *Appendix A* is a recent article which appeared in the Air

Forwarder Magazine after the issuance of the Agency's complained of May 16th Internet publication of "New Resources Available for Shippers, Brokers, and Insurers." Therein, the Association's general counsel advises all members that in order to avoid the admission into evidence of SMS methodology "subject to the whim of every judge," they must make their own independent safety evaluation of carriers subject to non-uniform standards which are set based upon the individual forwarder's risk appetite.

8. Use of SMS methodology in this way will have a devastating effect upon our members in the industry we serve because many of them have SMS scores above arbitrary enforcement thresholds set by FMCSA, even though they have SATISFACTORY safety ratings under the Agency's "official" published regulations.

9. Much of the service our small members provide is pickup and delivery in straight trucks to and from airport locations. In order to get sufficient density to provide economical, energy-efficient and timely service to meet airport schedules, it is important that carriers be able to consolidate shipments into combined truckloads for movement to airport hub cities.

10. If shippers are left to apply non-uniform SMS-based standards which limit a carrier's ability to pick up certain freight, that density will be lost and the carrier's service to its principal customers cannot be provided.

11. Because air freight is a niche market that is already subject to heavy regulation by other agencies, we believe additional marketplace restrictions as a consequence of the Agency's May 16th action will have a pronounced effect upon our members and the industry.

12. As providers of service in interstate commerce, we traditionally have relied and must rely upon federal regulators, be it the FAA, the FMCSA, TSA, the FDA and others, to certify us as safe for use by the shipping public.

13. Prior to FMCSA's efforts to promote its CSA/SMS methodology, our members relied upon their FMCSA operating authorities, and on those issued by the ICC before it, as the sole credentialing standards for its use by customers in all 50 states.

14. We urge this Court find that the statutes and regulations which mandate uniform federal safety credentialing of interstate motor carriers have not been changed by Congress, nor altered by the Agency in accordance with required statutory and regulatory procedures.

I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct.

Executed this 13TH day of NOVEMBER, 2012 at SOUTH BEND, INDIANA.

[signature]
David Kreigh

APPENDIX A

Forwarders Face Lawsuits

For Highway Accidents Caused by Truckers They Select

By: Daniel R. Barney & Nathaniel G. Snyder,
Scopelitis, Garvin, Light, Hanson & Feary, P.C.

As an air freight forwarder, motor carrier safety may be the last thing on your mind. However, when you select motor carriers to handle pick-ups, deliveries, and long-haul ground moves, you're increasingly taking a risk that you'll be sued for the unsafe conduct of those carriers and possibly face millions of dollars in uninsured liabilities.

Plaintiffs Suing Forwarders for Conduct of Motor Carriers

In the past few years, we have seen a number of cases in which highway-accident injuries or deaths allegedly caused by a negligent motor carrier led to a lawsuit being filed against not only the motor carrier, but also the third-party logistics provider ("3PL") that selected the motor carrier. In such cases, the 3PL may be ruled directly liable to the plaintiff for the injuries caused by the motor carrier, based on the theory that the 3PL was itself negligent in selecting an unsafe motor carrier. Not surprisingly, damage awards in such a case can be extremely high and most 3PLs do not have insurance against such liabilities.

These suits are likely to multiply with the ongoing implementation of the Comprehensive Safety Accountability ("CSA") program by the Federal Motor Carrier Safety Administration ("FMCSA"). Under CSA, FMCSA issues publicly-available safety scores for motor carriers that operate vehicles with gross vehicle weight ratings of 10,000 lbs or higher in five different Behavioral Analysis and Safety Improvement Categories ("BASICs"), and also ranks motor carriers in two additional areas that are not publicly available.

A motor carrier is assigned a score in each of these areas from 1-100; as in golf, the higher the score, the worse the performance. FMCSA also publishes Intervention Thresholds. If a carrier exceeds any of these thresholds in any of the BASICS, the carrier is a candidate for intervention and possible enforcement action by the agency. Any shipper, competitor, or other member of the public can go to FMCSA's Safety Management System ("SMS") website, pull up a motor carrier's BASICs, and compare them to the Intervention Thresholds.

Prior to CSA, FMCSA used a different system of measuring motor carrier safety called SafeStat. Under SafeStat, carrier scores in three different Safety Evaluation Areas ("SEAs") were made publicly available and any score of 75 or higher was deemed to be "deficient." Under the prior system, motor carrier SEA scores were used against 3PLs to argue that 3PLs acted negligently in selecting motor carriers. In perhaps the most notorious case, Schramm v. Foster, a Maryland U.S. District Court held in 2004 that the 3PL had a duty to check safety statistics published by FMCSA, and a "duty of further inquiry" because the motor carrier's SEA scores in that case were "marginal." Importantly, the motor carrier's SEA scores were actually below (better than) the deficient threshold set by FMCSA, but that did not stop the court from deciding that there was sufficient evidence of negligence to allow the case to proceed to trial.

CSA Will Only Increase the Risks to Forwarders

There is even more information available to plaintiffs under CSA than under the old system. Mathematically, because there are so many BASICs and because a carrier can exceed the Intervention Threshold in any BASIC, CSA will result in more carriers with scores that exceed an FMCSA-published threshold (by some estimates, over 50% of registered carriers exceed at least one basic). Plaintiffs' attorneys are well aware of CSA and are already contemplating how SMS data can be used to their advantage. In fact, in February 2011, an association of trial attorneys published a detailed article in its monthly newsletter detailing how CSA information could be used to prove motor carrier negligence.

To promote expert, uniform safety enforcement throughout the country, the courts should be asked to recognize that solely FMCSA, not juries in personal injury cases, is empowered to determine which motor carriers are safe to operate on the nation's highways. Negligent selection should not be a valid claim if the freight forwarder or other 3PL selects a carrier that FMCSA has found not to exceed any of the BASICs thresholds or to be otherwise in compliance with federal safety regulations. These are arguments that should be aggressively pursued in defense of a 3PL sued for negligent selection. Unfortunately, however, the argument is not guaranteed to carry the day if past court decisions are any indication. There is no reason to think that this will change under the CSA regime.

Recently, three motor carrier trade associations sued FMCSA over CSA. In a settlement, FMCSA agreed to temper some of the inflammatory language on its website and to refrain from using the word "ALERT" to refer to carriers with BASICs in excess of Intervention Thresholds. Just how much protection the settlement truly offers freight forwarders and other 3PLs that hire motor carriers, however, is questionable because FMCSA simply does not have the authority to prohibit use of SMS (CSA) information against a 3PL in a negligent selection lawsuit for damages. That decision rests with the individual judge, who will determine whether or not to allow such evidence. Thus, while FMCSA has published a disclaimer that states that readers of SMS data "should not draw conclusions about a carrier's overall safety condition simply based on the data displayed in [SMS]" (emphasis added), the plain fact is that FMCSA has no power to prohibit a judge from allowing SMS data into evidence in support of a negligent selection case. Indeed, FMCSA's quotation above basically admits as much; FMCSA does not say SMS data shall not be used at all to draw safety conclusions, only that it should not be used as the sole basis for such a conclusion. In fact, in Schramm v. Foster, the court specifically cited a disclaimer on the SafeStat page that cautioned against using SafeStat information for purposes not intended by FMCSA (for example, prioritizing carriers for safety improvement and enforcement), because doing so might lead to unintended results. The court effectively ignored the disclaimer by allowing the SafeStat information into evidence.

How Can You Protect Yourself?

Based on the foregoing, any air freight forwarder that is selecting a motor carrier to perform pick-ups, deliveries, or long-haul ground moves should strongly consider adopting motor carrier selection-criteria. Given the large number of carriers that exceed at least one Intervention Threshold, and the fact that carrier selection under CSA has yet to be challenged in court, establishing a carrier selection protocol that both protects the 3PL's legal interests without crippling the 3PL's ability to operate may be more art than science. However, even if a perfect balance is not struck, adoption and enforcement of even an imperfect selection protocol could go a long way towards protecting a 3PL from liability for negligently selecting an unsafe motor carrier.

When assisting air freight forwarder-clients in drafting a carrier-selection protocol, our focus is on implementing practical selection-criteria that balance administrative burden with the individual client's appetite for risk. If the selection protocol is too restrictive, for example, the forwarder may end up making numerous exceptions to it so as to prevent cargo from sitting idle. This practice, however, may inadvertently arm an injured plaintiff to argue in a negligent-selection lawsuit that the defendant-forwarder first acknowledged the importance of selecting safe carriers as evidenced by the selection protocol, only to actively choose to ignore the protocol in order to increase its profits. Thus, it is important to adopt selection-criteria that the forwarder can live with, minimizing the need for exceptions, and to include a procedure for considering and adopting defensible exceptions in the rare instances in which they are unavoidable.

[1]Daniel Barney is Managing Partner, DC Office (dbarney@scopelitis.com), and Nathaniel Saylor, Associate, Indianapolis Office (nsaylor@scopelitis.com), of the national transportation law firm of Scopelitis, Garvin, Light, Hanson & Feary, P.C. Both represent individual air freight forwarders and other transportation companies, and Mr. Barney also serves as outside Regulatory Counsel to the Airforwarders Association.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

ALLIANCE FOR SAFE, EFFICIENT AND COMPETITIVE TRUCK TRANSPORTATION; AIR & EXPEDITED MOTOR CARRIERS ASSOCIATION; THE EXPEDITE ASSOCIATION OF NORTH AMERICA; NATIONAL ASSOCIATION OF SMALL TRUCKING COMPANIES; TRANSPORTATION LOSS PREVENTION AND SECURITY ASSOCIATION; ALLEN LUND COMPANY, INC.; BOLT EXPRESS, LLC; BP EXPRESS, INC.; CARRIER SERVICES OF TENNESSEE, INC.; CONARD TRANSPORTATION, INC.; DES MOINES TRUCK BROKERS, INC.; FORWARD AIR, INC.; MEDALLION TRANSPORT & LOGISTICS, LLC; REFRIGERATED FOOD EXPRESS, INC.; SNOWMAN RELIABLE EXPRESS, INC.; TRANSPLACE, LLC; and TRIPLE G EXPRESS, INC., Petitioners,	CASE NO. 12-1305
- vs. -	
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION and THE HONORABLE RAY LAHOOD, in his official capacity as SECRETARY OF TRANSPORTATION, Respondents.	

DECLARATION OF SCOTT MICHAELIS
THE ALLIANCE FOR SAFE, EFFICIENT
AND COMPETITIVE TRUCK TRANSPORTATION

1. My name is Scott Michaelis and I am Secretary/Treasurer of the Alliance for Safe, Efficient and Competitive Truck Transportation ("ASECTT"), the lead petitioner in this case. I am also Manager of Supply Chain at Southern States Cooperative, Inc. ("Southern States"), a shipper member of ASECTT. I am authorized by both entities to make this statement.

2. ASECTT is a Section 501(c)(4) association composed of over 600 shippers, brokers and carriers. ASECTT is committed to ensuring balanced enforcement of federal safety regulations based upon objective criteria which encourage efficiency and competition in the marketplace. ASECTT encourages the FMCSA to fulfill its sole statutory obligation to certify carriers as safe to operate on the nation's highways and safe for the shipping public to use based upon objective criteria set forth in current regulations. ASECTT opposes the Agency's effort to repudiate the effectiveness of its own safety fitness determinations by advocating, through Internet guidance, that the shipper or broker community should use SMS methodology among other unspecified criteria to self-credential each carrier before use.

3. ASECTT maintains that the Agency's May 16th website publication of "New Resources Available for Shippers, Brokers, and Insurers" amounts to a rule without process which sets an unvetted new competitive standard for certifying carrier safety fitness and makes the shipping public the judge and enforcer of that standard under peril of being sued.

4. As Manager of Supply Chain for Southern States, a $2.3 billion dollar agricultural cooperative operating retail and wholesale locations in 26 states, I support ASECTT's goals and its Petition in this case based upon firsthand experience. Southern States provides agricultural commodities and farm supplies to growers, planters, livestock raisers and landscapers. Its distribution system is based upon a substantial private fleet and use of thousands of for-hire motor carriers regulated by the FMCSA. The commodities we ship and the origins and destinations of our commodities are subject to change based upon the planting, growing and harvesting needs of our customers.

5. The motor carriers who serve us are independently owned small businesses regulated by the FMCSA. I estimate that over 95% of the carriers we use are small businesses whose annual revenues are less than $5 million.

6. In credentialing carriers for use, we have traditionally relied upon the Federal Motor Carrier Safety Administration doing its job to determine

carrier fitness by contractually requiring each motor carrier to be licensed, authorized and insured and have an FMCSA safety rating of not less than satisfactory. Competition among carriers has been based upon their respective routes, rates and services as long as the Agency determines that the carriers are licensed to operate on the nation's highways under the objective criteria of the current rules.

7. In the 17 years I have been involved in interstate truck transportation as a traffic manager for shippers, I have always relied upon the FMCSA to certify carrier safety and it would be impractical, if not impossible, for me to make an independent safety evaluation of every motor carrier we use before tendering traffic.

8. With the rollout of SMS methodology in the Fall of 2010, several issues became clear:
   (1) The FMCSA intended to replace its previous SafeStat system for determining which carriers to audit with a more robust percentile ranking of carriers by peer group in seven performance areas of compliance.
   (2) The Agency intended to release this percentile ranking in calendar year 2010 even though the methodology had not been vetted under the Administrative Procedure Act.
   (3) Although the methodology was a work in progress and had not been vetted under the Administrative Procedure Act, the shipping and brokering community was led to believe that SMS methodology, then called Comprehensive Safety Analysis 2010, would be effective when publicly released and that the methodology would immediately change the way carriers were ultimately rated.

9. An already alarmed shipper and broker community, fearful of being the target of negligent selection lawsuits under state law concepts, sought affirmation from the Agency that publication of SMS methodology did not signal a change in the governing statutes and rules and that rulemaking would be forthcoming. From the outset, Southern States supported the lawsuit filed in *NASTC et al. v. FMCSA* and was gratified by the settlement which was reached which reaffirmed that the existing statutes and objective safety fitness determination under existing rules remained in effect. Notwithstanding the settlement, though, over the past 18 months we have seen SMS methodology touted by the Agency as fit for use by shippers and brokers. On several occasions, large carriers and brokers have solicited our business, advising us that "SMS methodology is here to stay" and shippers

can no longer use small carriers above the arbitrary enforcement thresholds in the publicly reported BASICs without running a substantial risk of being sued.

10. In analyzing the small carriers we have come to depend upon, we quickly realized that many are not measured in any of the BASICs, but of those who are captured under SMS methodology, well over 50% exceed one of the arbitrary percentile rankings. The more we have studied the methodology, the more we have become convinced that it has little, if any, nexus to safety. To use the methodology to brand carriers we have come to depend upon would significantly reduce capacity and increase costs.

11. In this context, the May 16th Internet publication, which is the source of this lawsuit, clearly seems to create a double standard (its "official" safety ratings determined under published regulations). As the Agency charged with determining carrier safety fitness, the Agency identifies over 100,000 carriers ranked in public SMS percentiles as fit to operate on the nation's roadways under one standard yet it advises Southern States and other shippers and brokers we cannot rely on that safety fitness determination in making business decisions or as protection against "negligent selection lawsuits" but must enforce some presumably higher and different standard using unvetted SMS methodology.

12. The result of the May 16th guidance creates an untenable dilemma for Southern States. Do we follow the supposedly "better safe than sorry" approach the Agency seems to recommend and lose access to thousands of carriers upon whom we have come to depend and likewise deprive those carriers of a major source of revenue? Or do we risk being named in an accident lawsuit simply because our mulch was on the truck and plaintiff's bar armed with the Agency's guidance argues we were not duly diligent in second guessing its ultimate safety fitness determination?

13. We have already seen that the publication of SMS percentile rankings has an anticompetitive effect on small carriers, particularly the small agricultural businesses which are our customers, members and haulers. At least one large motor carrier with a logistics affiliate has tried to convince Southern States it is too risky for us to rely on the Agency to certify our carriers as safe to operate. It says that unless we want to be sued we had better have them run our traffic department because they have the money to indemnify us from runaway jury verdicts which are otherwise soon to follow.

I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct.

Executed this 7th day of November, 2012 at Richmond, VA.

[signature]
Scott Michaelis

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

ALLIANCE FOR SAFE, EFFICIENT AND COMPETITIVE TRUCK TRANSPORTATION; AIR & EXPEDITED MOTOR CARRIERS ASSOCIATION; THE EXPEDITE ASSOCIATION OF NORTH AMERICA; NATIONAL ASSOCIATION OF SMALL TRUCKING COMPANIES; TRANSPORTATION LOSS PREVENTION AND SECURITY ASSOCIATION; ALLEN LUND COMPANY, INC.; BOLT EXPRESS, LLC; BP EXPRESS, INC.; CARRIER SERVICES OF TENNESSEE, INC.; CONARD TRANSPORTATION, INC.; DES MOINES TRUCK BROKERS, INC.; FORWARD AIR, INC.; MEDALLION TRANSPORT & LOGISTICS, LLC; REFRIGERATED FOOD EXPRESS, INC.; SNOWMAN RELIABLE EXPRESS, INC.; TRANSPLACE, LLC; and TRIPLE G EXPRESS, INC.,

Petitioners,

- vs. -

FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION and THE HONORABLE RAY LAHOOD, in his official capacity as SECRETARY OF TRANSPORTATION,

Respondents.

CASE NO. 12-1305

DECLARATION OF DAVID OWEN, PRESIDENT
NATIONAL ASSOCIATION OF SMALL TRUCKING COMPANIES

1. My name is David Owen and I am President of the National Association of Small Trucking Companies (NASTC) a for profit corporation which provides member services to approximately 3,500 small carriers. All members, with very few exceptions, constitute small businesses under SBA guidelines. NASTC is a named petitioner in this case.

2. NASTC, along with two other trade associations, were party litigants in *NASTC et al. v. FMCSA*, Case No. 10-1402 ("*NASTC*") which challenged the Agency's decision to publish CSA 2010/SMS methodology for public use without compliance with the Administrative Procedure Act. All filings in *NASTC* of course are part of this Court's records. I ask that the Court take judicial notice of the representations of the Agency in sworn pleadings in that case, as well as of the settlement agreement entered by the parties under the auspices of the Court's Office of Mediation.

3. In its responsive pleadings the Agency said that SMS methodology was for its own use in determining which carriers to audit and that publication was merely a continuation of prior practices with respect to similar SafeStat data. Our opposition to publication of SMS methodology was based on our fear that publication would amount to creating a new safety credentialing standard for enforcement by shippers and brokers to the detriment of motor carriers unfairly branded as high safety risks, many of whom are our members. In the settlement, the Agency affirmed its obligation to make an ultimate safety fitness determination under existing statutes and regulations, and expressly provided that, "Unless a motor carrier in the SMS has received an UNSATISFACTORY safety rating pursuant to 49 C.F.R. Part 385, or has otherwise been ordered to discontinue operations by the FMCSA, it is authorized to operate on the nation's roadways."

4. This settlement was entered in good faith by NASTC and the other co-petitioners in the belief that the settlement language was an affirmation of existing laws and statutes and would dispel the then widely perceived

misperception by shippers and brokers that SMS methodology constituted a new rule and new standards for determining carrier safety which they must enforce at their own peril.

5. Soon after the settlement was entered, and notwithstanding the agreed language, the Agency again began informally touting SMS methodology and its percentile rankings of peer groups as a viable and statistically accurate measure of carrier safety which shippers and brokers should use. Although the Transportation Intermediaries Association relied upon the settlement language in establishing its carrier qualifications program, it became clear that the Agency was encouraging shippers and brokers to second guess its own ultimate safety fitness determinations. Attached hereto as *Appendix A and B* are two letters by our Counsel to the Agency complaining of the Agency's actions. After much delay, we received the response from the Administrator which **is** attached as *Appendix C*.

6. As it became obvious that systemic problems existed with the unvetted SMS methodology and that shippers, brokers and forwarders, as well as carriers, were adversely affected by the Agency's informal proclamations, NASTC and the petitioners in the original lawsuit joined with other interested parties for collective action through ASECTT (the Alliance for Safe, Efficient and Competitive Truck Transportation), the 501(c)(4) corporation which is the lead petitioner in this lawsuit.

7. Our position with respect to the informal post-settlement actions of the Agency was made clear to the Agency, not only through the attached correspondence, but also through formal comments filed with its Motor Carrier Safety Advisory Committee ("MCSAC") in August of 2011, and in person to the Agency's Chief Safety Officer who was invited to attend our annual convention in November of 2011.

8. While we were heartened to see that MCSAC apparently recognized the continuing penal effect of publication of SMS scores in its December 8, 2011 report (see Amended Certified Administrative Record in this case), at no time did the Agency directly consult us or ask us to provide input on the adverse effect of publication of SMS methodology on small carriers. Nor, to our knowledge, was any independent analysis of such small business impacts undertaken by the Agency.

9. Yet, the Agency has candidly admitted that SMS methodology is a work in progress and has continued to postpone rulemaking in light of continuing and persistent criticism from ASECTT, NASTC and others.

10. Although it is nowhere reflected in the Agency's certified record, the Small Business Administration at our request invited the Agency to appear and discuss SMS at a Transportation Roundtable held on February 14, 2012. The Agency's Administrator did appear at that meeting, where NASTC was represented by Counsel. Attached as *Appendix **D*** is an outline of some of the problems with SMS methodology which were presented to the Agency at that time. In addition to ASECTT and the Owner-Operator Independent Drivers Association, 12 members of ASECTT appeared and offered complaints about SMS methodology and the Agency's use of the unvetted system to transfer additional use of the unvetted system to change the rules without process. Clearly, notwithstanding these efforts, our complaints did not register with the Agency which has certified that no record of the meeting, any of our filings, or comments were kept by the Agency or will be formally submitted as part of the certified record in this case. In fact, although the certified record shows the Agency in private discussions with trade groups representing large businesses, there is no record of our discussions with the Agency or the small business concerns we raised.

11. I find it significant that in certifying the record, the Agency fails to include our written objections to its violation of the settlement (see paragraph 5 above) nor our presentation at the February 14, 2011 SBA hearing (see paragraph 10 above), both of which are directly relevant to the basis of this case. Yet, it inserts in the record, and apparently relies upon, anonymously authored notes of secret meetings with trade associations representing large business interests who label small business dissenters as "noisy groups on the fringe". See administrative record document entitled "Addendum: Shippers and Insurers – Preliminary Stakeholder Analysis" at p.9. The "noisy fringe" represents 3,500 small businesses which cannot be ignored.

12. Without opening a genuine rulemaking, the Agency published a Federal Register Notice on March 29 requesting comments concerning changes *it had already made* to remedy some of the obvious errors of SMS methodology. Before this comment deadline even expired, we were surprised to see the Agency publish the May 16 documents entitled, "New Resources Available for Shippers, Brokers, and Insurers" which are the subject of this case.

13. In undercutting the value of its own safety fitness determination and suggesting that SMS methodology is a valuable tool for use by shippers and brokers, the Agency's May 16 documents have effectively disavowed any preemptive effect of its official safety fitness determinations under current regulations, exposing shippers and brokers to vicarious liability and negligent selection under state law concepts. The small carriers which compose most of our membership are particularly prejudiced by this action. On the average, SMS methodology and the arbitrary enforcement thresholds it incorporates stigmatize over 50% of the motor carriers measured as in some sense "high safety risks." Thus it should come as no surprise that 1044 of our members are branded under SMS methodology, which makes them subject to losing business from shippers who are afraid they will be sued under state tort law if our members are involved in highway accidents.

14. 662 of our members are too small to be measured in any of the existing BASICs. In House Committee testimony on September 14th, it was pointed out that if shippers cannot rely upon the FMCSA's ultimate safety fitness determination to use unrated carriers due to "lack of exposure or inspections" or simply having only perfect inspections, they will be overlooked by brokers and shippers for potential business – even if a particular carrier is actually a safe operator with a perfect safety record. Thus, it is clear that over 39% of our members are prejudiced in obtaining freight by the May 16th statement either because of their SMS percentile ranking or because they have no ranking at all. Current surveys by Morgan Stanley and others indicate that 55% to 71% of the shippers and brokers upon whom our carriers rely believe that SMS methodology must be used.

15. Under existing statute and regulations, all of our members are required to have a minimum level of financial responsibility in the form of insurance in the amount of at least $750,000 per occurrence. Yet, increased vicarious liability concerns by shippers have a particularly adverse effect on small carriers because shippers and brokers are much less likely to use small carriers with limited excess indemnity capacity than they are to use larger carriers with similar or worse SMS percentile rankings.

16. Moreover, small carriers without well developed nationwide sales forces are particularly dependent upon brokered freight to balance their operations and return under load from point of ultimate destination. This means that our small carriers must participate in a transactional market and to get a load

must be qualified by a broker or shipper in a matter of hours. Traditionally, our carriers could be qualified simply by confirming their trade references and visiting the FMCSA's Licensing and Insurance website to confirm that they are licensed, authorized and insured. In fact, under the existing broker regulations, that is all that is required. (See 49 C.F.R. 371.2.) The complaint of May 16th action by the Agency changes all of this by imposing more ambiguous, costly and time consuming obligations on brokers to second guess the Agency's ultimate safety determination.

17. Because SMS methodology is a comparative ranking of carriers within peer groups according to miles run or number of inspections, small carriers' scores are particularly volatile and subject to wild swings on a monthly basis because a single aberrant violation can drastically effect a carrier's percentile score.

18. This statistical flaw of SMS methodology flaw has been well documented in the report of Dr. James Gimpel, a copy of which is attached hereto as *Appendix **E**.* The problem of the law of large numbers which he discusses, to my knowledge, has not been addressed by the Agency to date. This is true even though Dr. Gimpel's report was filed with the Agency by ASECTT during July, as part of its comments on the March 29 Federal Register publication discussed in paragraph 12 above. Since well over 95% of the 525,000 motor carriers regulated by the FMCSA are small carriers with less than 50 power units (less than $10 million in gross revenue), it is clear that the May 16th publication and premature adoption of SMS methodology has serious direct and indirect costs on small businesses which should have been considered by the Agency prior to publication and implementation of its new May 16th guidance.

19. As the only major trade association whose members are small privately owned and regulated motor carriers, we have reminded the Agency that publication of SMS percentile rankings has adverse economic consequences on competition, efficiency and small business. The National Transportation Policy requires the FMCSA to administer the statute considering these factors. The Agency has yet to address our concerns.

20. We joined with ASECTT and other petitioners in this lawsuit because the May 16th guidance clearly told the shipping and broker community they must independently make safety fitness determinations and could not rely upon the Agency to do its job, and would be faced with possible lawsuits

under state law causes of action if they failed to do so. We believe this is a material change of existing statutes and regulations without due process or approval under the Administrative Procedure Act.

21. If there was any doubt that the Agency is using the Internet and the press to make fundamental new rules, it has been removed by Agency's establishment of a CSA SMS Facebook page and the reported comments of William Quade, FMCSA's Associate Administrator for Enforcement. (See item in Transport Topics, October 22, 2012, attached as *Appendix F.*)

22. Mr. Quade, who represented the Agency at the settlement discussions in *NASTC et al. v. FMCSA* is now reported to have said that "the agency's mission is not to assure the public that the trucking industry is safe. Under the best of circumstances, we are not going to tell you who's safe. The system is designed to identify the people that are so unsafe we need them out of business."

23. We believe this most recent statement by Mr. Quade confirms that the May 16th release to a frightened shipping public is a radical change in policy and a departure from the language of the statute. If the shipping public cannot rely upon the Agency's ultimate safety fitness determination in determining which carriers are safe to use, this abdication of the Agency's safety fitness determination responsibilities will clearly result in loss of business to many of the 1,044 small carrier members of NASTC which have one or more reported scores above the Agency's artificial thresholds. As is further shown in the Declarations of Thomas Hyde and Alex Morrison on behalf of NASTC member carriers, the failure of the Agency to adhere to its settlement in the *NASTC* case has had a material adverse effect upon small carriers which we ask this Court to address.

24. Imposition of SMS methodology has additional compliance costs which have not been analyzed by the FMCSA or subjected to Reg Flex Act review. SMS methodology is based on traffic citations and roadside inspection violations which are subject to court review and challenge. Minor violations, which in the absence of SMS methodology do not justify a court appeal returning a driver to a distance location for an appearance in court now can, in the case of a small carrier, result in a single incident increasing its SMS scores by as much as 30 percent because of the law of large numbers (see Gimpel Study, *Appendix E*). This means small carriers

will have direct additional compliance costs in judicially appealing minor traffic violations and non-out of service orders.

25. The FMCSA offers a system called "DataQ" which allows carriers to otherwise challenge the conclusions of roadside inspectors, but that procedure has no due process component since the roadside official who wrote the citation, in the case of most states, is the one who decides the appeal.

26. The Agency understands and has heard the major criticism of SMS methodology, that the crash BASIC, which is not made public at this time, is an inaccurate reflection of carrier performance because 60% or more of the crashes it captures are non-preventable accidents. For a small carrier, this can mean that it exceeds the 1.5 accidents per million miles based upon 1 or 2 reported crashes which were not its fault. To remedy this deficiency, the Agency proposes to study how to administratively call balls and strikes on each accident so that it can publish crash data for shipper and broker use as well.

27. Any administrative system which results in a bureaucrat determining crash preventability of every accident is clearly going to have a major cost component, not only to the Agency but particularly to the carrier involved. The supposition that the Agency can determine preventability of every crash, as long as the scrubbed number of crashes is to be used to establish a published percentile ranking for public use, requires a conclusion that the total number of crashes will be compressed and that every carrier will have to fight every crash in the administrative process in order to preserve a low crash score, while at the same time facing the prospects of a judicial proceeding to determine fault and liability. The establishment of a parallel administrative judicial system and its cost on our members is not calculable.

28. In the Fatigued Driving and Hours of Service BASICs, small carriers who do not employ electronic on-board recorders and speed limiters have over a 50% greater chance of accumulating points due to paperwork violations (in HOS BASIC) and exceeding the speed limit (in Unsafe Driving). To take away this advantage to fleet operators which typically have this equipment installed on new trucks, small carriers will have to retrofit older equipment with these devices to compete for low safety scores on equal footing. The cost of this additional technology is estimated at $500 to $1,000 per unit.

29. Since SMS methodology has been used by the FMCSA, rather than work with carriers to improve their scores, we have noticed a major increase in the number of unannounced, on-site audits which require small carriers to take time away from their ongoing job to locate material and act as a clerical assistant for the auditor. In many cases, although the Agency or the state official finds no violations, the audit is pronounced to be "non-ratable," the carrier's SMS scores are not reduced or modified, and the Agency sends in another auditor within the next year or year and a half to start the process anew. Provision for these non-ratable audits is not included in current regulations and the carrier's cost of assisting the auditor in examining the carrier's records have not been calculated or factored in.

I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct.

Executed this 9th day of November, 2012 at Gallatin, Tennessee.

David Owen, President, NASTC
David.Owen@NASTC.com

APPENDIX A

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December 13, 2011

Anne S. Ferro, Administrator
Federal Motor Carrier Safety Administration
United States Department of Transportation
1200 New Jersey Avenue SE, Suite W60-300
Washington, DC 20590
Via Email: anne.ferro@dot.gov

Re: Settlement in *NASTC et al. v. FMCSA*

Dear Ms. Ferro,

You may recall that your agency signed a settlement agreement with the carriers, freight intermediaries and trade associations I represented in the above-referenced case before the United States Court of Appeals for the District of Columbia Circuit. Under that agreement, FMCSA added a disclaimer to all on-line displays of individual carriers' data in the new Safety Measurement System ("SMS"). As pertinent here, the disclaimer stated that SMS scores "are not intended to imply any federal safety rating" of a carrier, and that the public should not "draw conclusions about a carrier's overall safety condition simply based on the data displayed in this system." In reliance on the settlement agreement committing the agency to publishing this disclaimer, my clients dismissed the petition in which they has sought judicial review of the agency's decision to publish SMS data—a petition premised on the de facto functioning of published SMS data as a new carrier safety rating system, never tested under the rulemaking procedures required by the Administrative Procedure Act.

With due respect, my clients and I find it impossible to reconcile your agency's above-quoted disclaimer and undertaking before the D.C. Circuit with the following portion of your written comments to the National Industrial Transportation League, the nation's largest trade association for shippers, as published on the Agency's website:

How to Use CSA to Select A Carrier

As shippers you should use SMS BASIC information as a risk indicator of a carrier as compared to other carriers in the safety event grouping. You can find carrier SMS information online at http://ai.fmcsa.dot.gov/sms/

3732539.1/SP/00005/0034/120811

This language inevitably undermines, and foments public confusion about, the significance and meaning of your agency's on-line disclaimer regarding SMS data. My clients view your NITL speech as evidence of the agency's continued and repeated violation of the above-described settlement, which had affirmed that the Agency is solely responsible under existing law to credential carriers as safe to operate on the nation's highways. Your statements to shippers and freight brokers that they have some unspecified "risk" in using carriers which are certified as safe to operate by the Agency amounts to an abdication of the Agency's role under the existing statute. As noted above, SMS methodology has not been vetted under the rigors of the rulemaking process, nor has it been shown to meet the requirements of the Data Quality Act. Accordingly, the methodology has not been certified as proper for use by the agency, which therefore has no statutory predicate for advising shippers that SMS scores "should be used" in making carrier selection.

The agency's continued violation of the settlement, and its assertions that shippers and brokers must independently examine carriers' safety fitness before using them, benefits only the vendors of safety monitoring services premised on unvetted SMS methodology, and those in the industry who seek competitive advantage based on this dubious data.

On behalf of the litigants in the above case, many of whose members are being prejudiced by your comments, we respectfully request your early response.

Yours truly,

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APPENDIX B

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January 16, 2012

Anne S. Ferro, Administrator
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United States Department of Transportation
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Via Email: anne.ferro@dot.gov

Re: Settlement in *NASTC et al. v. FMCSA*

Dear Ms. Ferro,

On December 13, 2011, we transmitted to you the attached letter referencing your repeated public statements that contravene the express language and intent of the settlement agreement in *NASTC et al. v. FMCSA*. You acknowledged receipt of this letter but have offered no response nor even suggested a meeting to consider our concerns.

Since our prior letter was written, your own hand-picked Motor Carrier Safety Advisory Committee has issued a report questioning the nexus between safety and SMS methodology, and requesting that you disabuse shippers and brokers of the need to use SMS methodology because of the danger that it penalizes carriers unfairly.

In addition, you have heightened our concern by publishing on the FMCSA website your comments to the NITL suggesting that SMS methodology should be used as credentialing criteria by the shipping public when in fact the Agency, and not the consumer, is solely responsible for certifying carrier safety under existing regulations. Most recently, in a media release to the traveling public, you have equated the ⚠ with an unsatisfactory safety rating, advising bus passengers that:

> *Companies with ⚠ BASIC status or an unsatisfactory safety rating are considered to be a higher safety risk.*

This statement is unsupported by the facts and evidence, is contradicted by the recent Wells Fargo study and is predicated on methodology which is inconsistent with the Data Quality Act and has never been vetted through a rulemaking in accordance with applicable law.

Your continued statements are having a chilling effect upon the free enterprise system as the Agency cavalierly brands as "a higher safety risk" more than 50% of the for-hire carriers large enough to be measured. Small businesses are losing customers and are being placed in jeopardy as a result of your statements, which suggest that SMS scores are the equivalent of safety ratings despite the disclaimers in the Agency's website.

These continuing abuses leave the petitioners in *NASTC et al. v. FMCSA*, and other parties similarly affected, with no alternative but to consider immediate court action to enjoin your *ultra vires* elevation of SMS methodology into a rule without rulemaking.

Yours truly,

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3782353.1/SP/00005/0034/011012

APPENDIX C

U.S. Department
of Transportation

**Federal Motor Carrier
Safety Administration**

Administrator

1200 New Jersey Avenue, SE
Washington, DC 20590

April 4, 2012

Refer to: MC-CC

Henry E. Seaton, Esq.
Seaton & Husk, L.P.
2240 Gallows Road
Vienna, VA 22182

Dear Mr. Seaton:

Thank you for your letters of December 13, 2011 and January 16, 2012, and for participating in the Small Business Roundtable with the Federal Motor Carrier Safety Administration (FMCSA) at the Small Business Administration on February 14. In your December letter, you expressed concern about remarks I made to the National Industrial Transportation League (NITL). During that meeting, I discussed the Compliance, Safety, Accountability (CSA) program and how shippers could use the Safety Measurement System (SMS) data as a risk indicator of one carrier as compared to other carriers in a particular safety event grouping. In your January letter, you expressed concern about the following statement posted on the CSA website:

> "Companies with ⚠ BASIC status or an unsatisfactory safety rating are considered to be a higher safety risk."

First, while I do not agree that the language quoted above is inconsistent with the terms of the settlement agreement reached in *NASTC et al. v FMCSA,* or with statute, I do appreciate your concern. Accordingly, I have directed my staff to remove the language and replace it with the following information:

> "The BASICs Status column displays the ⚠ symbol if, on the Carrier Details page, either the On-road column's percentile is over the intervention threshold or if the Investigation column displays the 'Serious Violation Found' icon. This indicates that, based on the data, the motor carrier may be prioritized for further monitoring. A company that is out of service has been shut down by FMCSA and is not permitted to operate."

Second, my remarks to NITL are not inconsistent with the cautionary statement FMCSA posted on the CSA website pursuant to the settlement agreement. The Agency has not stated or implied that SMS data are a Safety Fitness Determination (SFD), that the data alter a carrier's safety rating, or that they impact a carrier's operating authority. Moreover, although CSA is a new operational model, the data collected and analyzed in SMS are very similar to the data that were publicly available online for 10 years through SafeStat.

Federal law requires FMCSA to prohibit those motor carriers that it has determined are not "fit" from operating in interstate commerce. A motor carrier whose operations have been rated by FMCSA as satisfactory or conditional can operate in interstate commerce. Such a rating does not mean, however, that the public should ignore all other reasonably available information about a motor carrier's operations. Shippers, brokers, freight forwarders, and consumers are encouraged to exercise independent judgment about the companies they choose to do business with, and the public may utilize FMCSA safety ratings, CSA data, and any other information available to them that would aid in making business or consumer decisions. CSA data are only one of many possible pointers that the public can use to assess a motor carrier's safety performance record, which is what my remarks to the NITL were intended to convey.

As I mentioned at the February 14 Roundtable, FMCSA will continue its outreach efforts to educate the public about motor carrier safety and CSA. In particular, the Agency will continue to inform the public—as it does on the CSA website—that CSA data are not a safety rating and therefore do not represent a motor carrier's authority to operate. However, the CSA data are valuable, for public users to make independent judgments about a motor carrier's current safety performance and potential business risk.

I hope this information is helpful. Should you or members of your staff need additional information or assistance, please contact Charles Fromm, Deputy Chief Counsel, at (202) 493-0349 or by e-mail at charles.fromm@dot.gov.

Sincerely,

Anne S. Ferro

APPENDIX D

SBA Roundtable 2/14/2012
NASTC

Unaddressed Issues

The nexus between compliance and safety is unproven in any BASIC.

Systemic Issues:

- Grades on curve
- Competitive not objective standards
- Arbitrary thresholds established for monitoring purposes
- Used to identify or brand carriers as "higher safety risk"
- Peer grouping anomalies prejudice carriers by type (expediters, van lines, draymen)
- Missing factors – driver turnover and experience

Data Issues:

- Insufficient data
- Can measure only 12% of regulated entities
- Under-reporting
  - "We don't write no good reports"
  - System only captures traffic violations which result in vehicle inspection by qualified officer
- Profiling
  - SMS data and lack of data results in targeting carriers for inspection, system loses randomness
- Geographical Anomalies
  - Five states write 42% of the speeding tickets
  - Probable cause states/unsafe driving measures where you operate more than how you operate
- Due Process Issues
  - DataQ offers no due process
  - Guilty when proven innocent

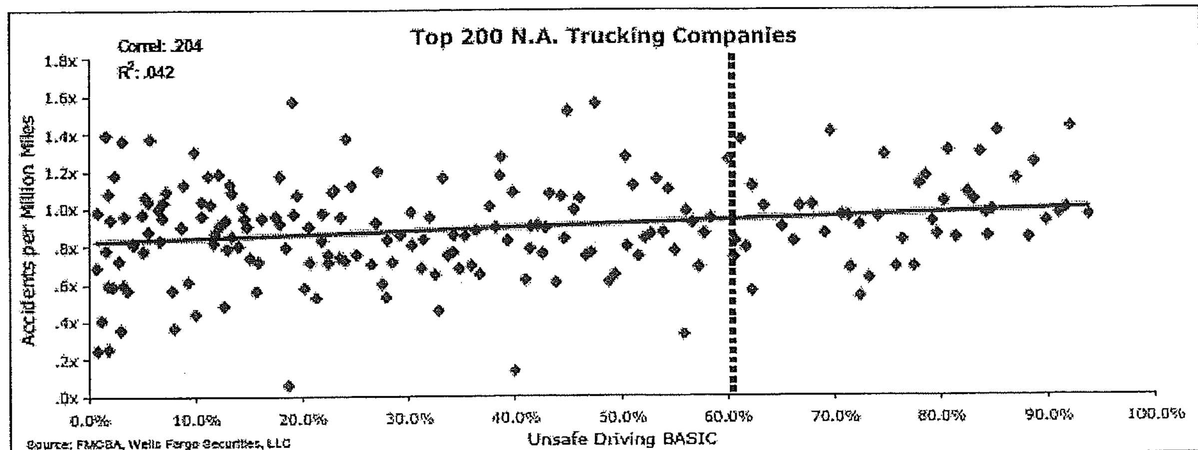
Statistical Issues:

- The law of large numbers
  - Predictability is function of number of data ports/missing sufficient numbers for small carriers
- Wild swings in percentile rankings based on single incident
- Peer group skips result in wild swings to percentile

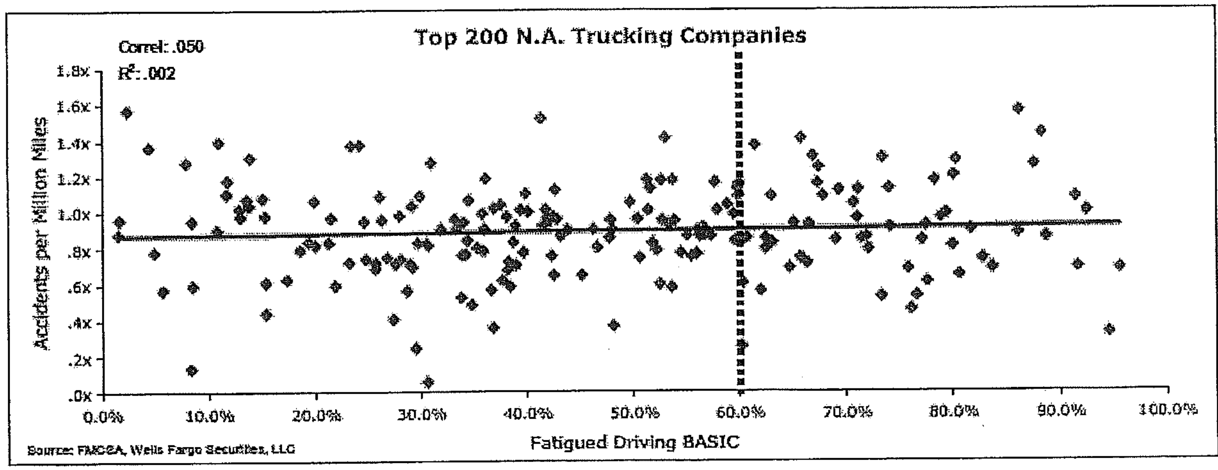
UMTRI:

- Based on out of date data
- No peer group review
- Conclusion on compliance/safety nexus challenged

The more contemporaneous and statistically valid Wells Fargo study contradicts UMTRI:



Similarly, Fatigued Driver scores did not show significance to accident rates.



Wells Fargo concluded:

> "Quite simply, we found very little relationship (i.e., not statistically significant) between Unsafe Driver or Fatigued Driver scores and actual Accidents per Power Unit."

The BASICs

(1) Unsafe Driving 7% measured (34,000 carriers). Because of "probable cause state statutes" – percentile ranking is function of where one operates/46% of points from 5 states.

(2) Fatigued Driving – over 50% of points are "form and manner" or other paperwork violation with no proven safety nexus. Carriers with EOBRs and which are not required to log are peer grouped with those who are.

(3) Vehicle Maintenance – Majority of points from non out of service violations with no proven nexus to safety/intermodal carriers prejudiced.

(4) Drug and Alcohol - .57% ranked. Acute violations/one missed random results in year long branding.

(5) Driver Qualification – 3.5% rated. Largely inadvertent issues like suspended license for unpaid ticket or child support. A focused audit with one violation equals ⚠.

(6) Crash – 2% ranked (16,000 carriers). Includes preventable and non-preventable accidents. Agency cannot call balls and strikes on 200,000 crashes with due process.

(7) Securement – UMTRI acknowledges lack of correlation.

Cost Benefit Analysis

- Direct compliance cost – unmeasured
- Indirect cost to small carriers – loss of business, jobs, higher insurance cost/uncalculated
- Additional cost to measure and rate missing 88% of carriers – uncalculated
- Safety benefit and t/b/d – basis for alleged benefit

APPENDIX E

Statistical Issues in the Safety Measurement and Inspection of Motor Carriers

James Gimpel
University of Maryland

The U.S. Department of Transportation's Federal Motor Carrier Safety Administration (FMCSA) has developed a Safety Measurement System (SMS) for gauging the safety of individual motor carriers traveling U.S. highways. The methodology of the SMS is detailed in a January 2012 report prepared by the John A. Volpe National Transportation Systems Center in Cambridge, MA (Volpe Center 2012). The key aspect of this new measurement system is the inspection of motor carriers by federal and state officials using established criteria for determining the safety of vehicles and the fitness of drivers.

Specifically, seven safety areas are identified by FMCSA as of critical: Unsafe Driving, Fatigued Driving, Driver Fitness, Controlled Substances and Alcohol, Vehicle Maintenance, Cargo-Related security, and Crash Indication assessment. The stated purpose of ranking carriers by percentile with this system is to target firms for progressive interventions to promote safety improvement and prevent accidents, injuries and fatalities on the national roadway network.

The goal of the FMCSA inspection and scoring system is surely a worthy one and there is no constituency for more accidents. Truck operators themselves are commonly the victims of traffic accidents, some of them fatal. This report documents some concerns and problems with the methodology of the SMS, and the data on which it is founded.

Data Generation Process

The data on which the SMS is based originate from inspection records from on-road safety inspections of Level III or higher and crash records reported by state government agencies. The inspections data are made available for study in the Motor Carrier Management Information System (MCMIS) database and are accompanied with motor carrier census data containing information about firm location, fleet size, and number of drivers.

From a statistical standpoint, is important to note how these inspections are carried out, and therefore how the data are generated. The data collection process is predisposed by design toward recordkeeping only on problems or violations, but not on the problem-free carriers and drivers. In this respect, one very significant feature of the data collection process is the decision to include carriers among the observations only following a violation. A firm or driver could have a series of clean inspections and never have these data points included, basically meaning that the data are badly censored, biasing any subsequent data analysis. The censoring of the data injects selection bias quite aside from the additional bias that results from the common complaint in the industry that clean inspections frequently go uncounted even after a firm has had a violation and is included in the MCMIS data. The data collection process by design is tantamount to the naïve research error of "selecting on the dependent variable" -- constraining variation toward high values of inspection violations and leaving out low (clean inspection) values. As pointed out below, this fundamental flaw has serious implications for the entire system.

The bias only begins at the design stage. Other sources of bias occur as the measurement system is implemented. While an inspection can occur almost anywhere, historically inspections have most frequently occurred at roadside inspection stations throughout the 50 states. This has changed as states now carry out more mobile inspections at rest stops, truck stops and other roadside sites. The recorded data originate from where these inspections take place. The locations of inspection stations, their times and hours of operation, are neither random nor uniform across the highway system. Inspection records are not likely to be reflective of the traffic volume of the nationwide carrier fleet, or the geographic location of firms, but instead the idiosyncratic practices of state regulators. For instance, recent data are highly sensitive to the high number of inspections carried out in California, Arizona and Texas, and the relative dearth of inspections in much of the Northeast.

What local regulators choose to focus on in terms of enforcement emphasis is also highly variable. Current data (Spring 2012) on BASIC percentile scores show that firms operating out of Montana and North Dakota exhibit far lower scores on the Unsafe Driving BASIC than firms physically located in Kentucky, West Virginia, New Hampshire and Massachusetts. This is an enforcement pattern that cannot be explained away by traffic density or road conditions. The Fatigued Driver BASIC scores are highest for carriers operating out of Florida, Georgia and Idaho, and just across the border from Idaho, considerably lower in Washington state – reflecting the vagaries of local enforcement -- not safety attributes of carriers operating in these regions. Vehicle maintenance BASIC violations are highest in Florida, Texas, South Carolina and Connecticut, but lower on carriers based in Hawaii, Pennsylvania, Delaware and Maryland – variation that cannot be explained by traffic or population density measures. From a statistical standpoint, the problem is the extraordinary level of heterogeneity in measurements resulting not from the characteristics of firms, drivers, and road conditions, but due to the application of the measuring instruments by data gatherers. The biases injected at the implementation stage prevent the BASIC indicators from assessing what they are intended to evaluate.

Because the data generation process is a highly imperfect reflection of the nature and quality of operator activity, the data are not a reflection of a representative cross-section of the carrier operators who are directly responsible for fleet safety – the responsible parties. Based on straightforward comparisons with trucking censuses, the data vastly over-represent the firms with very large fleets, while vastly under-representing the impressive number of small carriers operating two, three, or perhaps only a single vehicle. Larger carriers are not even responsible for hauling the vast majority of cargo, so the data collection cannot be justified on the basis of representing freight quantity or miles travelled. Moreover, because it is operators who are subject to inspection and penalty, they should be represented in any competent study.
Since the data are an inferior representation of the nationwide population of motor carriers and their safety habits, it is fundamentally unsound to generalize from any of the information contained in the data on inspected vehicles to the broader population of all carriers. Any data analysis carried out by any entity based on the inspections data, including data contained in the remainder of this report, should be accompanied with the caveat that it represents only the particular cases contained in the data. Nothing can be extrapolated from it, and its external validity is in doubt. In summary, using data generated only by happenstance of where inspections occur, based on idiosyncratic local enforcement practices, introduces selection bias, providing a misleading picture of important statistical relationships that inform essentials of the

regulatory regime. Findings based on the data are dubious due to the atypical or unusual nature of the sample.

The problem of sample selection bias cannot be dismissed by FMCSA on the grounds that it is only interested in the carriers who are sampled in the inspection process. After all, it is not merely external validity, or the generalization to non-sampled carriers, that is called into question by the bias in data. Key statistical relationships thought to be causal are misconstrued as well (Heckman 1976; 1979; Goldberger 1981). For instance, regression analysis based on the partial data will exhibit bias in the coefficients in much the same way as excluding important explanatory variables produces bias. Relationships between independent and dependent variables are not properly represented even for those carriers that have been subject to inspection and are included in the MCMIS system.

Unsafe Driving Scores and Crashes

One example of where the present data can mislead regulators is in relationships found between specific inspection violations and crash risk. What is true of that relationship among the highly overrepresented large and frequently inspected carriers in the data may not be true of the poorly represented midsized and small carriers, or of the population of carriers writ large. This variation in safety practices across the population of firms could result from a number of causes, including the important fact that the small carriers are frequently self-employed owner-operators, and confront different incentives for safety as well as costs associated with regulatory penalties than drivers who are employed by someone else.

Even using the data provided by FMCSA the variability in the relationship between the BASIC score for unsafe driving and the score for crash rates can be made evident if we apportion it by the number of inspections as determined by the agency's Combo Segmentation Safety Event Grouping (Volpe 2012, 3-4). Such a division creates 5 groups of trucking firms by inspection frequency: Combo Segment 1 with between 3-8 inspections; Combo 2 with 9-21 inspections; Combo 3 with 22-57 inspections; Combo 4 with between 58-149 inspections; and Combo 5 with 150 or more. The less frequently inspected carriers in the first two segments are usually smaller firms, and their BASIC scores for unsafe driving are largely unrelated to crash risk.

On the following pages appear three scatterplots (Figures 1, 2 and 3) showing the nature of the relationship between the BASIC percentile scores for unsafe driving and the crash rate drawing upon data from Spring 2012. The first plot exhibits the bivariate relationship for carriers in the second safety event group (inspections=9-21), the second plot is for the third safety event group (inspections=22-57), and the third plot captures the relationship for the largest and most frequently inspected carriers (>150 inspections). Note that these cut points in the number of inspections follow the agency's specifications and are not equal sized groups. Also, the number of carriers with particular BASIC scores varies considerably by the type of score, and is usually lower for some event group segments than for others.

Crashes per 100 PU

N of Inspections: 9-21

Crashes per 100 Units

Unsafe Driving BASIC %

R^2 Linear = 0.021

Figure 1. Bivariate Relationship between Unsafe Driving Score and Crashes per Power Unit, Combo Group 2, N=5,564

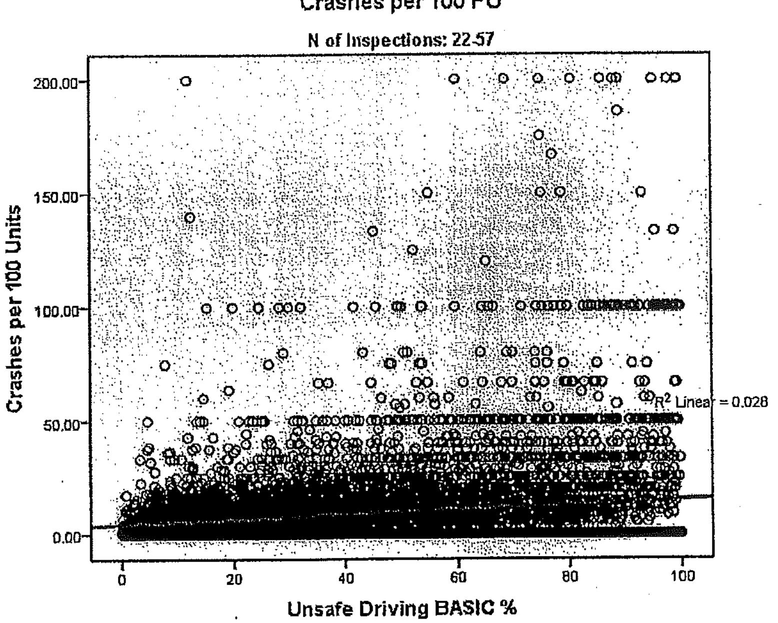


Figure 2. Bivariate Relationship between Unsafe Driving Scores and Crashes per Power Unit, Combo Group 3, N=8,998

Due to implausibly extreme values in the crash ratings from some outlying observations in the right tail of the distribution of those values, 84 cases were deleted as inaccurate. The resulting regression coefficients reveal that for the second combo group, the bivariate linear relationship is weakly positive but explains little of the variation in the scatter of points. Specifically the unsafe driving BASIC score explains a mere 2 percent of the variation in crash risk for carriers in the second event safety group (r=.14). Using the unsafe driving scores as a predictor of crash risk for these small carriers is little better than guessing, which is surprising given what these scores are supposed to indicate and how the data are generated with a bias toward violations.
For trucking operations with larger numbers of inspections (see Figures 2 and 3), the linear relationship is positive but only slightly stronger. Specifically, for firms in combo segment 3 with between 22 and 57 *recorded* inspections (N=8,998), the wide variation displayed in the plotted values suggests that many other factors are at play in determining accident risk. The extent of explained variation in accident risk rises to about 3 percent (R^2=.028).

Figure 3. Bivariate Relationship between Unsafe Driving Scores and Crashes per Power Unit, Combo Group 5, N=3,351

Among the largest firms, experiencing high numbers of inspections (N=3,351), the relationship is also positive, showing an increase in the accident rate of 1.2 (p≤.001) for every 10 point increase in the unsafe driving BASIC score (R^2=.07). Here, the positive association approximates that found in the Wells-Fargo Equities research study on the largest 200 firms in the industry (Wells-Fargo 2011, 6-7). But like the Wells-Fargo research, the errors around the regression line indicate that the amount of variation in accident risk explained by the unsafe driving score for large firms is modest at best (see Figure 3). As Wells-Fargo indicated, because it is intuitive that this relationship should be positive and clear-cut, there is either something wrong with the SMS measurement of unsafe driving, or something wrong with the sample of carriers in the MCMIS data.

In summary, then, based on the information provided in the MCMIS system, crash data supplied on individual firms reported by FMCSA, and stratifying the data by agency specified safety event groups, the estimated statistical relationships are quite varied across this limited sample of inspected vehicles. The relationship between unsafe driving scores and crash rate is almost non-existent for the carriers with fewest inspections, and is weakly positive for carriers in the higher inspection categories (Figures 2 and 3) but with a great deal of remaining error.

Driver Fatigue Scores and Crashes

Similar data analysis for other BASIC indicators shows that their relationships with crash ratings are highly variable across FMCSA's inspection frequency categories (see Figures 4, 5 and 6). For instance, for the smallest category with 6,598 carriers, the relationship between driver fatigue indicators and crash risk is flat, and slightly negative, but with an unstandardized regression coefficient not statistically discernible from zero (see Figure 4).

For group 2, with between 11 and 20 inspections, the relationship is positive, but unimpressive (see Figure 5). The regression coefficient suggests that for every ten point increase in the score for fatigued driving, the crash rating increases by 0.74 (β=.074). This is a statistically significant but weak association, with a wide scatter of points around the regression line (Figure 5). For this group, the fatigued driver BASIC score explains less than 1 percent of the variation in crashes per 100 power units (R2=.003).

For inspection group 5 for the driver fatigue BASIC, a category containing 763 larger carriers with high numbers of inspections (>500), the relationship between fatigued driving and crash risk is more robust than for carriers with fewer inspections (see Figure 6 below). In this event group, fatigued driving explains about 21 percent of the variation in crash risk (R^2=.21) and a ten point increase in the fatigued driving BASIC increases crash risk by slightly over 1 per 100 power units (β=.102). This is about as close to a substantively noteworthy relationship as any of these measures attain. But this relationship is reflective of only a very small share of firms, and while based on a sizable number of inspections, it is still not very precise as predictor of crash risk for individual carriers. Additional examination suggests that the relationship between crash risk and the driver fatigue BASIC for this group of firms seems to exhibit non-linearity, rising more steeply at scores above 80. But there is insufficient information at hand to discern whether this is an artifact of the scoring methodology, or a characteristic of specific carriers with high scores.

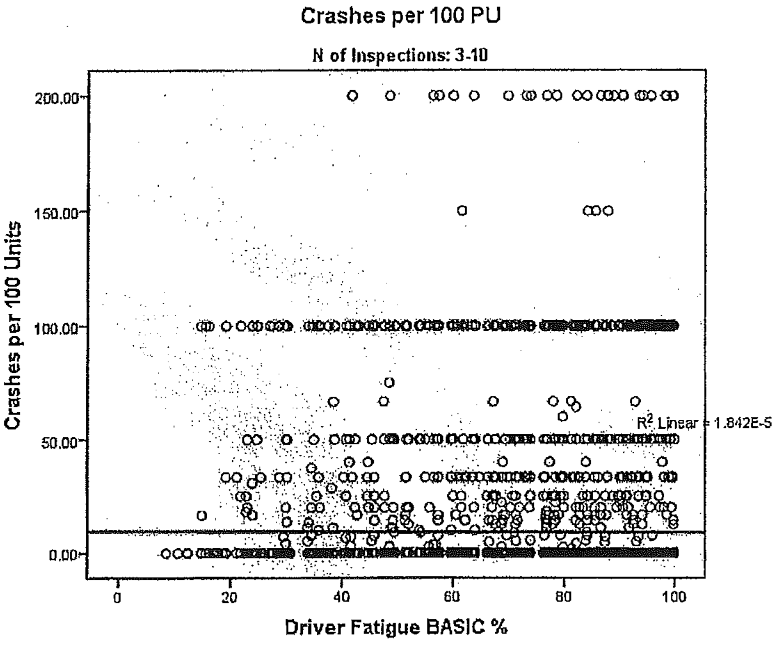


Figure 4. Bivariate Relationship between Driver Fatigue Scores and Crashes per Power Unit, Group 1, N=6,598

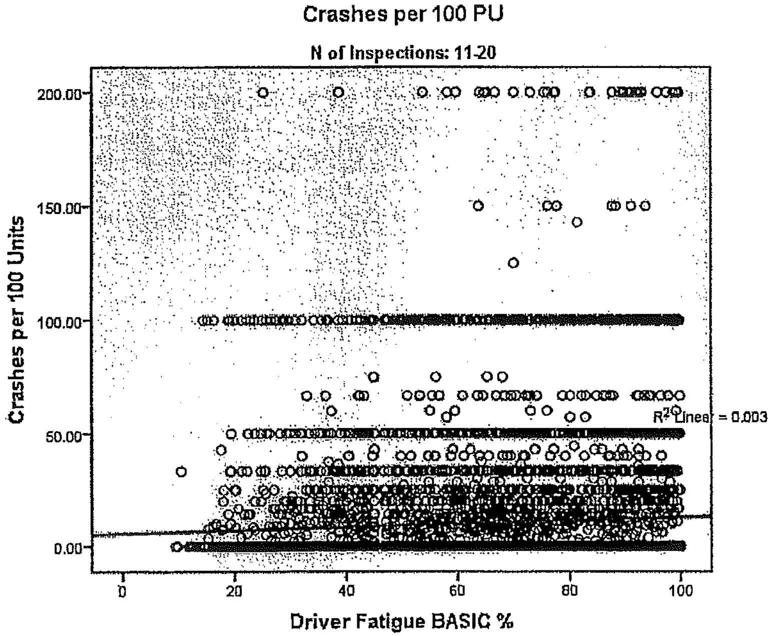


Figure 5. Bivariate Relationship between Driver Fatigue Scores and Crashes per Power Unit, Group 2, N=9,578

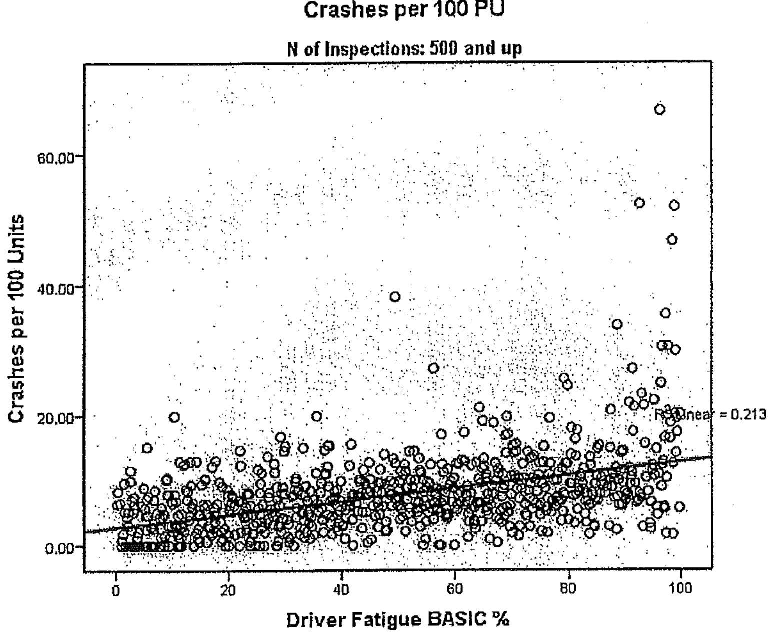


Figure 6. Bivariate Relationship between Driver Fatigue Scores and Crashes per Power Unit, Group 5, N=763

Vehicle Maintenance and Crashes

Finally, the vehicle maintenance BASIC specifies safety event groups similar to those of driver fatigue, except for the first one which includes carriers with 5-10 inspections rather than 3-10 (Volpe 2012, 3-13). The relationship of these scores in the MCMIS data to crash risk is also very low for the 5-10 inspections category, showing virtually no linear association between the explanatory and dependent variables at all (Figure 7) (R^2=.0004).

What's more, for the highest inspections category (501+), the relationship between vehicle maintenance scores and crash risk is actually *negative*! Here the regression coefficient indicates that a ten point rise in the vehicle maintenance BASIC % is associated with a 0.18 *drop* in crashes per 100 power units (Figure 8), although once again the variation in crashes per 100 power units explained by vehicle maintenance BASIC scoring hovers only about 1 percent (R^2=.013) (see Figure 8 below).

In any measurement system, there will be random error. The fact that the BASIC scores do not perfectly predict crashes by trucking firms is not itself a flaw with the SMS methodology. Even highly refined measuring instruments contain at least a limited amount of random error. But the SMS scoring system contains far more than simply random error – there is systematic error introduced. There are serious problems with the design of these instruments themselves that

render them unreliable. For many carriers in the MSMIS data, the association between crash risk and the BASIC scores is so low as to

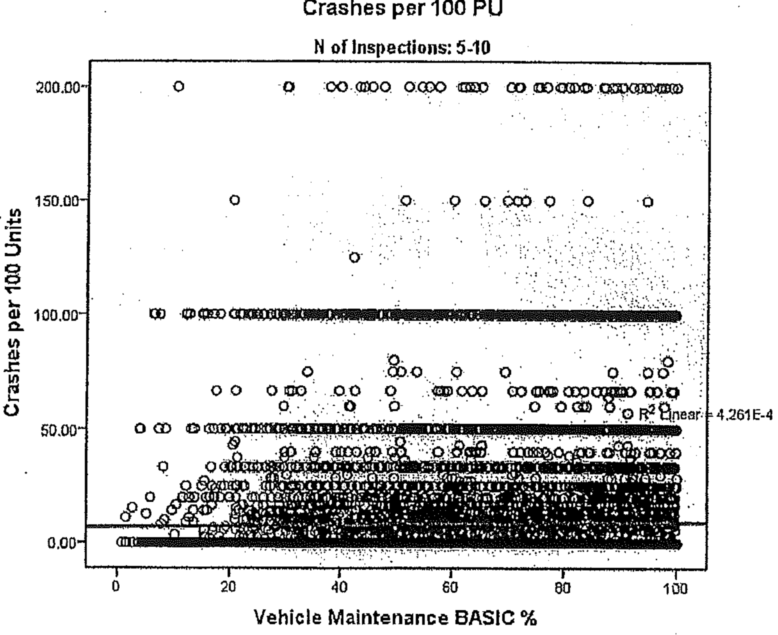


Figure 7. Bivariate Relationship between Maintenance Scores and Crashes per Power Unit, Group 1 N=17,014

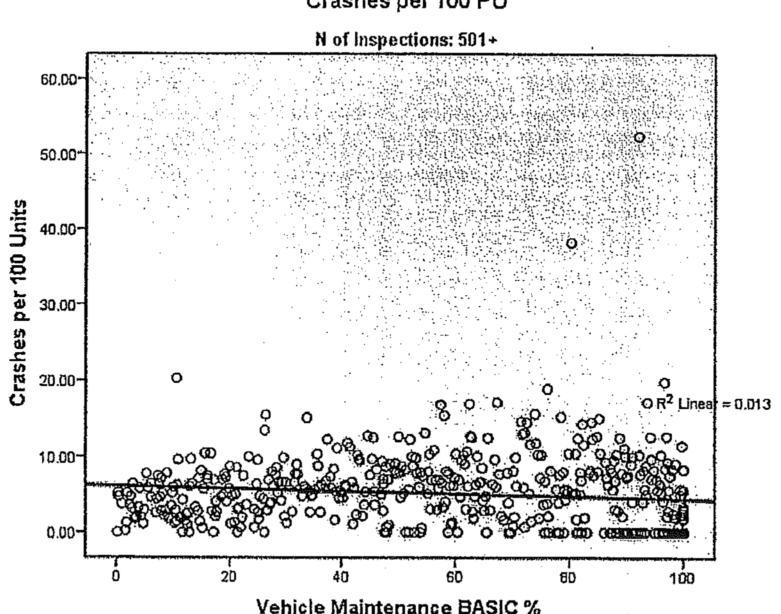


Figure 8. Bivariate Relationship between Maintenance Scores and Crashes per Power Unit, Group 5, N=503

be irrelevant, which is peculiar given what is commonly understood about the notions of unsafe driving, and the other constructs that BASIC scores are supposed to indicate. Nor do the relationships with crash risk improve appreciably when the data are not segmented by safety event group but analyzed as a whole to encompass greater heterogeneity.

The reliability of the SMS indicators is certainly questionable based on the weak and insignificant relationships between crash risk and BASIC scores. For the most frequently inspected safety event groups, the relationships are stronger for fatigued driving, but weaker for vehicle maintenance. Even in the case of fatigued driving, however, the association with crash risk is still insufficiently robust to justify generalizing to individual firm behavior and compliance. The straightforward evaluations presented here suggest these measures are erratic across the limited sample of carriers contained in the MCMIS data. Apparently, the SMS BASIC scores are not measuring what the FMCSA claims they are measuring. Measures that are unreliable cannot be depended upon to gauge true characteristics, changes and quantities.

Small Carriers and the Law of Large Numbers

Nowhere do we see the limitations of the BASIC scoring methodology more clearly than in that segment or group of carriers that have the fewest operators and are subject to fewer inspections. Under standard enforcement practices, the vast majority of smaller trucking firms go uninspected and therefore unmeasured. We have already noted that this is a major source of selection bias in the data, as the small number of very large carriers winds up being highly influential in regression specifications using the MCMIS data. The omission of small carriers is the quite natural result of basing data inclusion only on inspections and violations – on average smaller carriers have less exposure due to fewer travelled miles, and may also have fewer violations for reasons highlighted earlier. Consequently, the records that are included for the small carriers wind up having very few inspections counted in the denominator of BASIC formulae at any given point in time.

Table 1, below, shows the number of FMCSA SMS inspections over the previous two years as of March 2012. As the table indicates, a total of 326,000 firms have at least one inspection *that has been recorded.* Fully 200,000 carriers, or 61 percent of the total, have 5 or fewer inspections, and the SMS scoring system is not triggered until there are at least 5. Another 61,177 (18.7%) are recorded as having between 6 and 19 inspections. According to the March SMS data, 43,555 firms (13.3%) have had 20 or more inspections.

The problems of ratio and rate measures when denominators are small are well-known to statisticians. When ratio measures are based on fewer than 20 observations in the denominator, they are often considered unreliable, and frequently they are not even published. Twenty is a common cut-off point since beyond that changes in total variation contributed by successive measurements diminishes. Data with fewer than 20 observations in the denominator are not considered to meet a sufficient level of accuracy based on calculated standard errors. A denominator with 5 inspections is far less reliable than one with 40 when both have the same

numerator. In a single 24 month period, however, many firms may have only five, six or eight inspections. As Table 1 shows, many more have even fewer than that.

Table 1. Number of Carriers with Inspections and BASIC Scores for Nationwide Carrier Fleet, March 2012

Inspections	Carriers	N with Scores	% with Scores	No Scores
1	79,713	96	0.1	79,617
2	46,254	84	0.2	46,170
3	32,190	815	2.5	31,375
4	23,651	1,392	5.9	22,259
5	18,254	2,734	15.0	15,520
6	14,488	3,560	24.6	10,928
7	11,761	3,963	33.7	7,798
8	9,680	4,191	43.3	5,489
9	8,010	4,108	51.3	3,902
10	6,608	3,865	58.5	2,743
11	5,714	3,638	63.7	2,076
12	4,916	3,413	69.4	1,503
13	4,416	3,249	73.6	1,167
14	3,686	2,832	76.8	854
15	3,396	2,695	79.4	701
16	2,939	2,435	82.9	504
17	2,570	2,143	83.4	427
18	2,426	2,102	86.6	324
19	2,113	1,868	88.4	245
20+	43,555	41,991	96.4	1,564
Totals	326,340	91,174	27.9	235,166

Source: FMCSA, http://ai.fmcsa.dot.gov/SMS/Data/Downloads.aspx, accessed May 16, 2012

Small changes in the number of violations per inspection have a substantially larger effect when the number of total inspections is small than they do when the number of total inspections is larger. Suppose XYZ Freight Company moves from 200 points in violations to 260 points between inspection 5 and inspection 6. That moves the raw score on which the BASIC percentile is constructed from 40 to 43. But an identical change in violation points from 600 to 660 for OP Corporation between inspection 39 and 40 moves the raw score from 15 to 16.5, having *half* the impact.

Rates based on a small number of inspections are highly variable and for that reason unreliable as measures. When rates are unstable it is virtually impossible to distinguish random fluctuation from true changes in the underlying risk of crashes or accidents. Comparisons of firms based on unstable rates can lead to spurious conclusions about safety risks.

By way of statistical background, the notion that high variability is associated with small numerators can be understood through reference to *the law of large numbers*. In statistical terms, as the number of samples increases, the average of these samples is likely to reach the mean of

the whole population. Or, as the number of trials increase, the difference between the expected and actual value moves toward 0.

This explains why typically values obtained based on large numbers of observations provide stable estimates of the true, underlying quantity. Conversely, values based on small numbers of observations may fluctuate dramatically from year to year, or differ considerably from one case to another, even when there is no meaningful difference between them. Binning the data by inspection frequency does not mitigate the high variation in successive scores for less frequently inspected carriers.

In summary, then, smaller trucking firms are subject to few inspections, meaning that whatever BASIC scores they generate, high or low, are not reliable indicators of these firms' propensity to operate safely and in compliance with regulatory standards. For firms with more trucks and greater exposure, the higher number of inspections yields an average that will be more reflective of their actual rate of safety and compliance.

The upshot of the paucity of scores for small carriers means that even slight increases in these scores for small carriers leads to inaccurate inferences about their safety risk. Even after binning the firms into peer groups or "safety event groups," certain classes of carriers labor with unaccounted for business routines and practices which unfairly influence the percentile grading system in an adverse direction.

For example, straightforward tabulations based on the MCMIS data indicates that carriers with regular operations in particular states are targets for a disproportionate number of inspections directed at recording unsafe driving violations. Just five states: Michigan, Indiana, Tennessee, Texas and Pennsylvania, are responsible for 45 percent of the violations which inform the statistical analysis for unsafe driving. With no adjustment made for this partiality, the resulting comparison of carriers operating in these states with the carriers which operate in lower enforcement states produces completely untrustworthy conclusions from statistical analysis. Similarly, for the fatigued driving analysis, carriers that maintain proper logs (RODS) are peer grouped with carriers which are not required to log at all, and those which have electronic devices for logging. Over 50 percent of the violations in the Fatigued Driving BASIC are "form and manner" or "change of duty" violations which are incurred only by carriers required to maintain RODS. These carriers face an arbitrarily imposed burden and discriminatory treatment as a result.

Conclusions

A small share of the nationwide fleet of motor carriers is selected for inspection each year. Due to local peculiarities and pronounced biases in the selection process, the resulting data collection is an imperfect representation of the population of carriers, and especially small carriers. In addition, the measurements specified by federal regulators as part of the SMS inspections regimen are subject to wide variation in emphasis and application by geographic location. This is a serious problem in the SMS methodology because violations are not reflective of the actual performance and safety of firms, but are an artifact of the application of the measuring

instrument. Consequently, statistical relationships detected in the MSMIS data are not only a cloudy reflection of the true population, but may well be flat wrong.

The relationship between the Unsafe Driving BASIC measure and crash rates the low inspection safety event groups is particularly weak. This could point to a substantively significant attribute of small as compared to large carriers, it could also be an artifact of the small number of inspections among this group of carriers, and finally it could be the result of the censoring of the data by design of the data collection. Whatever the case, the absence of relationship calls the reliability of the BASIC scores into serious question.

Accidents are very poorly predicted by the BASIC scores in the MCMIS data and this is especially astounding given that the data generation process selects specifically on carriers supposedly at risk for accidents, not even including carriers until they have a violation. It is important to ask why the relationships are so weak. Certainly it is intuitively plausible that unsafe driving, poor vehicle maintenance and driver fatigue would be positively related to crash risk. There are a litany of systematic biases that are contaminating the SMS methodology, from the irregular data collection practices across geographic areas and agencies, to inappropriate definitions of the measures themselves.

Nearly every credible study of traffic accidents involving large trucks finds them to be difficult to predict because multiple forces are involved, with the behavior of a single vehicle operator explaining only a small share of accident occurrences or severity (Zhu and Srinivasan 2011; Khorashadia et al. 2005; Chang and Mannering 1999; Polus and Mahalel 1985). Circumstances including traffic dynamics, weather conditions, and the geometry of roads have found to be relevant, and many accidents are the fault of drivers other than the truck operator. In this connection, economists have long known that the addition of every driver on the road increases the total of other people's insurance costs. The upshot is that even truck drivers with clean inspection records will have accidents, but the systematic exclusion of clean inspection data by the SMS system eliminates these important cases from consideration in statistical modeling. Because accidents are usually the product of a complex interaction of human factors and environmental conditions, measures intended to predict and explain them have to be as free of noise as possible. But the SMS methodology designs noise into the BASIC scores rather than taking pains to eliminate it.

Vehicle inspections may prevent accidents, but only if the appropriate aspects of driver behavior and vehicle maintenance are being monitored and inspected. Why the BASIC scores for unsafe driving are so weakly associated with crash risk across the entire MCMIS sample is most likely the consequence of including safety-irrelevant aspects of operator behavior in the measure. The measures require thorough reconsideration after their reliability is assessed. For example, trucking industry sources suggest that the vast majority of violations falling within the fatigued driver BASIC category involve minor infractions associated with recordkeeping, and therefore do not precisely capture aspects of driver disposition or vehicle roadworthiness that serve the interest of accident prevention, such as driving longer hours than safety standards allow. If the scoring for fatigued and unsafe driving were focused on those violations actually germane to common understandings of those concepts, the statistical relationships between measures and outcomes would surely be stronger.

Increasing the number of biased observations only amplifies the magnitude of the bias. Simply increasing the total number of inspections carried out will not help if current tendencies in inspection and measurement remain in place. Large operators will continue to rack up numerous inspections that do little to alter their overall measure of compliance and safety while smaller operators will be subject to wild fluctuations in their BASIC scores, yielding relationships such as that found in Figure 1. Binning the data by frequency of inspection does nothing to protect smaller carriers from the threat of being placed out of service for violations that larger carriers can largely ignore.

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APPENDIX F

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Transport Topics

The Weekly Newspaper of Trucking and Freight Transportation

Week of October 22, 2012

DOT IG Agrees to Audit CSA After Request From Congress

By Eric Miller
Staff Reporter

The Department of Transportation's Inspector General has agreed to conduct an in-depth audit of the government's Compliance, Safety, Accountability program and to include a look at the relationship between carrier safety scores and crash risks.

The Oct. 12 audit request was made by Rep. John Duncan Jr. (R-Tenn.), chairman of the House Transportation Subcommittee on Highways and Transit, and the ranking Democratic member, Rep. Peter DeFazio (D-Ore.).

"Witnesses at the Sept. 13 [subcommittee] hearing raised concerns that a lack of adequate safety data, inappropriate weighting of violations and other scoring problems are causing CSA to erroneously label carrier safety performance," said the audit request letter from the congressmen.

Peter Barber, an analyst with the DOT inspector general, confirmed last week that one focus of the audit probably will be on the relationship of CSA carrier safety data to crash risk. He spoke during a meeting of a specially appointed CSA subcommittee of the Federal Motor Carrier Safety Administration's Motor Carrier Safety Advisory Committee.

Barber said the congressional subcommittee wants the audit completed by August, although an IG spokesman told TRANSPORT TOPICS that no specific timeline has been set.

The congressional audit request specifically called on the IG to "characterize the relationship between

(See CSA, p. 27)

Agency IG to Audit CSA

(Continued from p. 1)

scores and future crash risk," examine whether the weight given to each violation is tied to crash risk or crash severity, and if it is possible for carriers to "have high scores that erroneously reflect the fleet's safety performance."

Also, the subcommittee wants to know if it is possible for some carriers with potential safety problems to not be identified and targeted by CSA.

"FMCSA makes carriers' scores public so that third parties involved in the transportation industry can make safety-based business decisions," one of the audit questions in the letter said. "Given your findings, is a carrier's CSA score an accurate portrayal of the safety of the carrier? If so, is this accurate for all" the components of the safety program, known as BASICs?

Sean McNally, a spokesman for American Trucking Associations, said ATA backed the call for an audit.

"The congressmen's concerns are legitimate and appropriate and should be explored to the extent that they line up with the concerns that we have expressed," he said.

Members of the FMCSA's subcommittee on CSA last week began outlining their future discussions about program improvements during a lively debate, a process expected to "take months and years," said the subcommittee's chairman, David Parker.

Subcommittee member Jeffrey Tucker, CEO of logistics provider Tucker Co. Worldwide, said shippers are confused about how to use the data in determining which carriers are safe, creating an "impediment to buy-in" of the system.

But Bill Quade, FMCSA's associate administrator for enforcement, said the agency's mission is not to assure the public that the trucking industry is safe.

"Under the best of circumstances, we are not going to tell you who's safe," he said. "The system is designed to identify the people that are so unsafe we need them out of business."

But Quade also acknowledged that CSA remains a "work in progress."

Robert Petrancosta, vice president of safety for Con-way Freight, urged more FMCSA action, saying that CSA is in the midst of an "identity crisis" because it has evolved from a program aimed at identifying crash risk to one that adds regulatory compliance to the mix.

ATA, which supports the CSA study, has nonetheless been a vocal critic of some facets of the program.

The same day of the CSA subcommittee hearing, ATA released a white paper outlining several examples of how FMCSA highlights the benefits of CSA but could provide a clearer picture of the program's weaknesses.

"ATA's members are supportive of CSA's objectives, but they are also eager to see FMCSA make much-needed improvements," said Rob Abbott, ATA's vice president for safety policy. "However, the first step in that process is a candid acknowledgment of the program's limitations."

Some of those limitations, ATA said, include:

- Carriers' scores in three of CSA's seven measurement categories do not effectively identify future crash risk.
- FMCSA has only sufficient violation data to assign a percentile rank to 12% of all active carriers.
- Carriers with insufficient data should not be perceived as safer than those that have reported data.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

ALLIANCE FOR SAFE, EFFICIENT AND COMPETITIVE TRUCK TRANSPORTATION; AIR & EXPEDITED MOTOR CARRIERS ASSOCIATION; THE EXPEDITE ASSOCIATION OF NORTH AMERICA; NATIONAL ASSOCIATION OF SMALL TRUCKING COMPANIES; TRANSPORTATION LOSS PREVENTION AND SECURITY ASSOCIATION; ALLEN LUND COMPANY, INC.; BOLT EXPRESS, LLC; BP EXPRESS, INC.; CARRIER SERVICES OF TENNESSEE, INC.; CONARD TRANSPORTATION, INC.; DES MOINES TRUCK BROKERS, INC.; FORWARD AIR, INC.; MEDALLION TRANSPORT & LOGISTICS, LLC; REFRIGERATED FOOD EXPRESS, INC.; SNOWMAN RELIABLE EXPRESS, INC.; TRANSPLACE, LLC; and TRIPLE G EXPRESS, INC.,

Petitioners,

- vs. -

FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION and THE HONORABLE RAY LAHOOD, in his official capacity as SECRETARY OF TRANSPORTATION,

Respondents.

CASE NO. 12-1305

DECLARATION OF JOHN K. ELLIOTT
THE EXPEDITE ASSOCIATION OF NORTH AMERICA

1. My name is John K. Elliott and I am current President of The Expedite Association of North America (TEANA), a named Petitioner in the above captioned case. TEANA is a trade association comprised of motor carriers subject to FMCSA regulation which provide specialized, expedited, or "hot shot" services moving time sensitive shipments requiring exclusive use of a vehicle. Our members use a variety of over-the-road vehicles including cargo vans, sprinters, and tractor trailers. TEANA currently has 96 members of which 90 are small, privately owned businesses with less than $25 million in annual revenue.

2. Although TEANA members provide nationwide services and are domiciled in 18 different states and Canada, all are subject to the uniform federal safety rules enforced by the Federal Motor Carrier Safety Administration. The vast majority operate extensively in the northern central states where the need for just in time deliveries and lean inventory management programs of the traditional original equipment manufacturers in the automotive industry dictates a need for our services.

3. TEANA was one of the three trade associations which opposed publication of SMS methodology in *NASTC et al. v. FMCSA* because our members foresaw the adverse consequences of the possible use of the unvetted methodology by the shipping public to deny branded carriers access to freight. We agreed to the settlement in that case because we believed the negotiated language made clear that notwithstanding the publication of SMS scores, the shipper and broker community could and should continue to rely upon the Agency to do its job in certifying carriers as safe for use.

4. In light of the Agency's publication of its "New Resources Available for Shippers, Brokers, and Insurers" on May 16, 2012, we again find ourselves seeking court action, as will be more thoroughly shown in the specific examples of two of our members, Panther Expedite and Bolt Logistics. The effect of the Agency's touting of SMS methodology, notwithstanding the settlement, has had a chilling effect on the ability of TEANA members to obtain shipments from customers and has misled the shipping and brokering public into believing it cannot rely upon the Agency's ultimate safety fitness determination in selecting carriers for use.

5. Moreover, although rulemaking to evaluate the viability of SMS methodology and determine whether the system accurately measured carrier safety performance was promised by the Agency over a year ago, it has not been forthcoming. Although the Agency is still changing its algorithms, its

weighting of violations, and its safety event categories, the Agency's notice to our customers, shippers and brokers proclaims that SMS methodology is fit for their use in making previously unrequired, independent safety fitness determinations. The result is that based upon the Agency's arbitrary enforcement thresholds, SMS methodology identifies 50% of the carriers it can measure as potentially "higher safety risks" with a concomitant loss of competitiveness.

6. As will be shown in the supporting Affidavits of Ben Bauman and Allen Motter, TEANA members are suffering loss of business as a direct consequence of use of SMS methodology frightened shippers, who have now been told by the Agency that they should use SMS methodology and cannot rely on the Agency's determination of a carrier's safety fitness under current statutes and regulations.

7. Of particular concern to TEANA members is how SMS methodology unfairly treats our segment of the industry, assigning to expeditors high percentile rankings in crucial BASICs in an arbitrary and capricious manner and without due process. SMS methodology is not based upon objective valuation of an individual carrier safety program. Instead, it grades on a curve, assigning a percentile ranking to every carrier it can measure based upon a minimum number of traffic violations and inspections. Carriers are placed into arbitrarily assigned peer groups, their alleged violations are tagged with arbitrarily determined severity weightings, and their alleged safety performance is measured in seven BASICs, five of which are reported. Carriers exceeding various percentile thresholds are branded as high safety risks.

8. In this context, as the Bauman and Motter Declarations will show, TEANA has repeatedly pointed out to the Agency that SMS methodology has no proven nexus to safety and improperly places TEANA members in an arbitrarily constructed peer group for weighting purposes with dissimilar carriers.

9. In sum, and based upon the direct harm to its members from premature publication of SMS percentile rankings and the Agency's published advice that shippers and brokers cannot rely upon the Agency's safety fitness determination, TEANA requests that the Court require the Agency to delete all publication of SMS scores pending compliance with the Administrative Procedure Act.

I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct.

Executed this 1st day of November, 2012 at Taylor, Michigan.

John K. Elliott II
President, TEANA

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

ALLIANCE FOR SAFE, EFFICIENT AND COMPETITIVE TRUCK TRANSPORTATION; AIR & EXPEDITED MOTOR CARRIERS ASSOCIATION; THE EXPEDITE ASSOCIATION OF NORTH AMERICA; NATIONAL ASSOCIATION OF SMALL TRUCKING COMPANIES; TRANSPORTATION LOSS PREVENTION AND SECURITY ASSOCIATION; ALLEN LUND COMPANY, INC.; BOLT EXPRESS, LLC; BP EXPRESS, INC.; CARRIER SERVICES OF TENNESSEE, INC.; CONARD TRANSPORTATION, INC.; DES MOINES TRUCK BROKERS, INC.; FORWARD AIR, INC.; MEDALLION TRANSPORT & LOGISTICS, LLC; REFRIGERATED FOOD EXPRESS, INC.; SNOWMAN RELIABLE EXPRESS, INC.; TRANSPLACE, LLC; and TRIPLE G EXPRESS, INC.,

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Respondents.

CASE NO. 12-1305

DECLARATION OF WILLIAM D. BIERMAN, EXECUTIVE DIRECTOR OF TRANSPORTATION LOSS PREVENTION & SECURITY ASSOCIATION

1. My name is William D. Bierman and I am an attorney at law in the state of New Jersey. I have been practicing transportation law for 45 years. I am also the Executive Director of the Transportation Loss Prevention & Security Association (TLP&SA), an industry trade

group that has been in existence in one form or another for more than 50 years. TLP&SA is a Petitioner in the above entitled action. As our name reflects, TLP&SA concerns itself with all forms of loss prevention and security issues facing the transportation industry. Loss prevention includes promotion of safe practices in the operation of commercial trucks over the Nation's highways by TLP&SA members.

2. Our association is broadly based and consists of both large and small motor carriers. In fact, 25 of the top 100 carriers are members of our Association as well as numerous smaller carriers, transportation intermediaries and transportation attorneys.

3. Our members are adversely affected by the current Compliance, Safety, and Accountability (CSA) program improvidently sponsored by the Federal Motor Carrier Safety Administration (FMCSA). CSA has never been subjected to full public scrutiny in a rulemaking docket, and exists in a parallel universe next to FMCSA's official system of safety ratings which was duly adopted after rulemaking. While CSA purports to promote highway safety, this declaration will show that its flawed methodology for measuring truck safety forces TLP&SA members to divert safety management resources into activities designed to "improve" CSA scores and protect market share, rather than focusing directly on improving safe practices by drivers and equipment maintenance personnel. The relief sought in this case would redress these harms, by vacating FMCSA actions designed to publicize CSA scores and promote reliance on them by customers of motor carriers.

4. CSA is a misguided initiative taken by the FMCSA wherein the Agency has abdicated its responsibility to determine carrier safety on the nation's highways. CSA places the responsibility for determining carrier safety on freight shippers, transportation brokers and other intermediaries who do not have the expertise to make such a determination. FMCSA does this by issuing Internet advisories that shippers should make such determinations based on a flawed CSA system which has been constantly criticized. Furthermore, FMCSA keeps changing the system when it cannot justify obvious flaws. Moreover, the safety determination foisted upon the public comes with substantial potential liability. Instead of relying on the expertise of the FMCSA, the public is left to its own interpretation of CSA and is exposed to substantial jury verdicts into the millions of dollars based on vicarious liability and negligent selection theories.

5. Our members are now confronted with demands from customers to achieve certain CSA scores or risk losing business. These scores are being written into contracts and also subject our carriers to breach of contract claims on a monthly basis since the CSA numbers change periodically. Individual members of TLP&SA would qualify as petitioners before this Court in their own right because of the actual loss of business they have experienced due to their CSA scores, even though their official safety ratings under FMCSA's duly published regulations are "Satisfactory."

6. These business life and death consequences are faced by our members despite a prior challenge to this same CSA program before this same Court, wherein the FMCSA confirmed they were solely responsible for determining which carriers are fit to operate on the nation's highways.

7. The CSA initiative which substantially changed the way carriers operate was instituted without formal rule making and without consideration to the significant adverse impact it has on a substantial number of small carriers. FMCSA has indicated CSA scores are merely a tool for the Agency to determine how to allocate its enforcement resources. Nevertheless, the real fact is FMCSA has improperly "outsourced" its responsibility for credentialing motor carriers as safe operators. The reality is a carrier may have derogatory CSA scores but be classified as "satisfactory' by the FMCSA. Such an anomaly does not assure safety; it creates public chaos and confusion.

8. As various recent studies have revealed, there is little or no correlation between CSA scores and safety. Moreover, at best FMCSA can rate no more than 40 per cent of the existing carriers. Since CSA claims to be based on peer ranking, it is not credible on its face as there are insufficient peers for comparison. In addition, since CSA numbers come from the various states, the system does not take into consideration the fact there is no uniform inspection procedure among states. Therefore, there cannot be a true peer comparison.

9. As recent congressional hearings have determined, any accident, whether the fault of the carrier or not, is held against the carrier. Even the FMCSA has admitted this is a problem, but the Agency still has not remedied the situation.

10. SMS methodology is admittedly a work in progress, and its unfitness for use is shown by the agency's frequent changes to the methodology. Attached as *Appendix A* is an article from Truckers News which indicates drastic changes to be made to the methodology next week.

11. In this context, the agency's use of website publications to reinterpret its statutory duty and establish new safety fitness standards and credentialing obligations for use by the shipping public makes hash out of the Administrative Procedure Act and the protections guaranteed by rulemaking. Since the complained of May 16th release, the agency has modified its advice to the public on two occasions, once immediately before a small business hearing on the effect of SMS methodology on small carriers, and again shortly before the filing of petitioners' brief.

12. Without recanting any of the language of the May 16th release, the agency has now made subtle changes in its pronouncements which, for a frightened and confused public, creates a "rule du jour" which stands in stark contrast to the objective safety fitness standard established by existing law.

13. Finally, the Agency has established a "Complaint Department" of sorts known as "Data Q" where carriers can question their CSA scores. For example, if a carrier is issued a traffic summons and the court determines the carrier is "Not Guilty," one would assume that would be corrected by FMCSA and the bad score reversed. Inconceivable as it may sound, this does not automatically happen. The request goes back to the state of occurrence where they may or may not allow the correction. Meanwhile our members report such action takes months at best, while the carrier bears the black mark for all that time and may never have it erased even with a "Not Guilty" verdict.

14. In conclusion, the members of TLP&SA are laboring under a flawed system which has not been properly vetted and which system is destroying business opportunities for good carriers. The motor carrier industry is the life blood of our economy. This court should not allow a flawed imitative such as CSA to destroy small or large motor carriers. This court should immediately order the FMCSA to stop publicizing improperly constructed CSA scores unless or until such a system has been approved under proper rulemaking procedures. If the court does not act, safe carriers will go out of business before the situation can be corrected.

15. Since the agency has shown no willingness to abide by its statutory obligations or affirm the settlement and has continued to advocate that the shipping public be held to different confusing and ever changing standards under peril of state law, any decision by this Court of limited application would be of limited prospective value to TLP&SA members. Accordingly, TLP&SA submits the agency should be required by the Court to follow the settlement, affirm that its final safety fitness determination as required by 49 U.S.C. 31144 and 49 C.F.R. 385 is the sole agency publication intended for use by the public and admonish the agency for attempting to create new obligations upon the shipping public through publication of unvetted SMS methodology.

I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct.

Executed this 28th day of November, 2012 at ____________________.

William D. Bierman

APPENDIX A

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DAILY NEWS Nov 27, 2012 11:02 PM - 0 comments

Substantial changes to CSA coming as early as next week

By: James Menzies
2012-11-27

WASHINGTON, D.C. -- Carriers operating in the US will see changes to how their safety performance is scored under CSA, when changes to the safety measurement system go into effect as early as next week.

No official date has been announced for the launch of SMS 3.0 - the latest rendition of CSA's scoring system - but data mining company Vigillo predicted during a Webinar Monday that the changes are likely to take effect next week. The changes are significant and in some cases retroactive, and could immediately change a carrier's CSA scores, Vigillo officials warned.

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CSA (Compliance Safety Accountability) was launched in December 2010 as a way of measuring and monitoring the safety and compliance of carriers operating in the US. Since its launch, subtle changes have been made in response to feedback from the trucking industry and other stakeholders. The upcoming changes included in SMS 3.0 are among the most drastic. The three principle changes include: expanding the Vehicle Maintenance BASIC to include cargo violations; replacing the former Cargo-Related BASIC with a new HazMat BASIC; and the reweighting, renaming and elimination of certain violations.

As part of the overhaul, more than 100 violations will be transferred from the Cargo-Related BASIC into Vehicle Maintenance, which was already the category containing the greatest number of possible infractions. In the Cargo-Related BASIC's place is the new HazMat BASIC, which is heavily focused on compliance-related issues, such as proper documentation and placarding.

Drew Anderson, director of sales with Vigillo, said the changes stemmed from the concerns of flatdeck and open deck carriers that felt they faced increased scrutiny when compared to van operators, solely due to the visibility of the freight they haul.

"This change has been two years in the making," Anderson said. "There was a huge bias against flatbed and open deck carriers under the old methodology. They were subjected to more maintenance inspections as opposed to dry van and tanker trucks. Industry stakeholders went to the FMSCA and lobbied for this change."

While the changes were made in response to industry demands, Anderson pointed out they present a new conundrum.

"Be careful what you ask for, it just may happen," he quipped. "Indeed what we see is the bias shown against flatbed and open deck carriers is eliminated. As the Cargo BASIC fades into the sunset, all open deck and flatbed carriers with a Cargo BASIC alert, that alert goes away because the BASIC goes away."
What's left of the former Cargo BASIC now falls under the newly-created HazMat BASIC. Because of this category's emphasis on placarding and paperwork, Anderson said it can be argued that the focus of CSA is shifting more from safety towards compliance.

"What we see here is that the remaining HazMat BASIC really doesn't have a direct impact on safety, it's much more compliance related," Anderson said.

Adding to this phenomenon, the Cargo BASICs that were moved over to the Vehicle Maintenance category have in many cases been reweighted and made less punitive. As a result, the cargo-related violations have been effectively buried within the Vehicle Maintenance BASIC.

Vigillo ran an analysis of 2,000 customers to see how their current CSA scores would be affected by the changes contained within SMS 3.0. The top cargo-related violation doesn't appear until number 41 on the list of violations within the revamped category.

"This illustrates that the old non-HazMat cargo violations do sort of get lost within the new Vehicle Maintenance BASIC," Anderson said. The 41st most prevalent infraction, incidentally, is "leaking, blowing or loose cargo," which has been downgraded from a 10-point violation to a seven-point violation.

The result of all this is that seemingly serious violations have been diluted, in a sense, and buried within their new category.

The second major change, according to Sloan Morris, director of client services with Vigillo, is that the former Cargo-Related BASIC will be identified as the HazMat BASIC. These scores will be kept from the public's view for the next year. You don't necessarily have to be a hazardous materials hauler to be measured under the HazMat BASIC. Even hauling a few placarded loads will subject carriers to scrutiny under this BASIC, so carrier will want to ensure they are complying with all requirements as they pertain to placarding and paperwork. Because of the thinning of the former Cargo BASIC, the new HazMat BASIC now becomes the thinnest of BASICs in terms of violations, and as such, the most sensitive to violations.

One large carrier evaluated by Vigillo, running 1,900 power units and travelling 183 million vehicle miles, will immediately receive an alert in the HazMat category when the changes are made, Anderson pointed out. This despite the fact that carrier incurred only 10 violations under the new HazMat BASIC over the past two years, and for infractions that don't directly affect safety.

"The moral of this story is, watch your HazMat, even if you're not a HazMat carrier," Anderson warned. "It's not going to take much at all for you to go over the threshold."

In fact, of the top 10 violations found under the HazMat BASIC, only one is directly related to safety.

The third major change coming into effect when SMS 3.0 goes live is that violations will be reweighted retroactively, meaning carriers may see changes to their CSA scores. Those changes will continue to be adjusted even after SMS 3.0 is rolled out, Morris warned. Anderson noted the same changes will affect carriers within your own peer group, so don't feel you're being picked on.

Examples of impending changes include: eliminating the violation for speeding 1-5 mph over the limit; specifying whether or not driving with a suspended licence occurred while the licence was suspended for safety-related reasons; and changing the wording of the fatigued driving violation to hours-of-service compliance, to reflect the reality that not all HoS violators are fatigued.

If all this seems too much to digest, you can still sign up for two additional Webinars on the subject, to be held Nov. 28 at 11:30 EST and Nov. 29 at 1 p.m. EST, by visiting **www.vigillo.com**.

Related Topics

UNITED STATES COURT OF APPEALS
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ALLIANCE FOR SAFE, EFFICIENT AND COMPETITIVE TRUCK TRANSPORTATION; AIR & EXPEDITED MOTOR CARRIERS ASSOCIATION; THE EXPEDITE ASSOCIATION OF NORTH AMERICA; NATIONAL ASSOCIATION OF SMALL TRUCKING COMPANIES; TRANSPORTATION LOSS PREVENTION AND SECURITY ASSOCIATION; ALLEN LUND COMPANY, INC.; BOLT EXPRESS, LLC; BP EXPRESS, INC.; CARRIER SERVICES OF TENNESSEE, INC.; CONARD TRANSPORTATION, INC.; DES MOINES TRUCK BROKERS, INC.; FORWARD AIR, INC.; MEDALLION TRANSPORT & LOGISTICS, LLC; REFRIGERATED FOOD EXPRESS, INC.; SNOWMAN RELIABLE EXPRESS, INC.; TRANSPLACE, LLC; and TRIPLE G EXPRESS, INC.,

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Respondents.

CASE NO. 12-1305

DECLARATION OF KENNETH LUND
ALLEN LUND COMPANY

1. My name is Kenneth Lund and I am Vice President of the Allen Lund Company located at 4529 Angeles Crest Highway Suite 300, La Canada, CA 91011. I am submitting this Declaration in support of the relief sought by Petitioners. I have provided a similar Declaration in *NASTC et al. v. FMCSA,* Case No. Case No. 10-1402. Allen Lund Company is a named petitioner in the present case

2. Allen Lund Company is the nation's largest truck brokers of fresh fruits and vegetables. We arrange for the transportation of over 238,000 shipments annually, moving in interstate commerce and using 18,000 licensed, authorized and insured motor carriers to transport these shipments. As a property broker and intermediary, we are required by federal statutes to retain carriers which are licensed and authorized. We have no other delegated safety duties under the Federal Motor Carrier Safety Regulations.

3. The carriers we hire are solely responsible for complying with current Federal Motor Carrier Safety Regulations and must maintain evidence of financial ability to pay judgments resulting from auto accidents in the minimum amount of $750,000. Accordingly, we rely upon the federal regulators (formerly the ICC and now the FMCSA) to certify carriers as safe for use and under federal regulations. We are not required nor are we able to second guess the Agency's decision with respect to fitness.

4. Within the past few years, plaintiff's bar, in an effort to increase the amount of judgments, has named intermediaries in lawsuits contending that under state law intermediaries and shippers have an obligation to second guess the Federal Motor Carrier Safety Administration's ultimate safety fitness determination. As a result, state law judgments have been entered against shippers and brokers which have created uncertainty in the shipping community.

5. The FMCSA's release of CSA 2010 data to the public in the Fall of 2010, accompanied by its public statements that such data was intended for use by shippers and brokers, created major problems for shippers and brokers implying that the Federal Government had changed the statutes and regulations which governed responsibility for fitness determinations.

6. The Lund Company and others supported the three trade associations which filed suit against the Agency in *NASTC et al. v. FMCSA,* arguing that prospective use of CSA 2010 by our customers, competitors and third party providers would become an industry norm that brokers must rely upon SMS

data and percentile rankings for fear of vicarious liability. We contended that use of such new standards would be difficult and impractical to enforce and would affect the efficiency of our operations.

7. The result of this earlier suit was an agreed settlement in which the Agency stipulated and put on its website the following:

> The SMS results displayed on the SMS website are not intended to imply any federal safety rating of the carrier pursuant to 49 USC 31144. Readers should not draw conclusions about a carrier's overall safety condition simply based on the data displayed in this system. Unless a motor carrier in the SMS has received an UNSATISFACTORY safety rating pursuant to 49 CFR Part 385, or has otherwise been ordered to discontinue operations by the FMCSA, it is authorized to operate on the nation's roadways.

8. The Transportation Intermediaries Association, the nation's largest trade association representing truck brokers and other intermediaries readily seized upon this settlement as confirmation that the Agency's ultimate safety fitness determination could be relied upon in good faith. The carrier credentialing guidelines of the TIA provide that reliance on the Agency's safety fitness determination is the appropriate standard.

9. Notwithstanding the settlement, Agency officials including the Administrator, the Chief Safety Officer, and Bryan Price have continued to speak with shipper and broker groups advising that SMS methodology is fit and intended for their use, although there is great dispute within the industry over the accuracy of the data, whether it measures safety and whether a percentile ranking of carriers is useful. The rulemaking to determine whether the methodology is fit for the Agency's own use has been repeatedly postponed.

10. Surveys by Morgan Stanley and others suggest that more than 50% of the shipping public is concerned about what use should be made of SMS methodology in credentialing carriers, and problems with publication of SMS data which we foresaw in our initial support of *NASTC et al. v. FMCSA* have been realized as the Agency has continued to suggest that brokers are "stakeholders" with unspecified risk when not using SMS methodology.

11. Although we have continued to share our concerns with the FMCSA in open meetings, we received no formal response or opportunity to address our concerns about the continuing effect of publication of SMS scores on the shipping public and the small carriers upon which we depend. Over 95% of the carriers we use are small operators with 20 trucks or less who rely on Allen Lund to eliminate dead head and return their expensive refrigerated equipment to areas of their domicile under load.

12. Of the 43,000 carriers we have under contract, 31% have one or more percentile ranking above the arbitrary enforcement level set by the Agency in one of the five reported BASICs. 53% are not measured or scored in any of the BASICs and only 16% are under the enforcement thresholds in any of the reported BASICs. None of them have an UNSATISFACTORY safety rating, because we wouldn't use them if they did.

13. Clearly, SMS methodology and its percentile ranking of carriers is a confusing, woefully deficient, and inaccurate measuring tool for adjudging a carrier's safety fitness profile, particularly when every carrier we use is certified as safe to operate on the nation's roadways by the Agency in the first place.

14. I listened in by telephone to the SBA Roundtable held on February 14, 2012 when the Agency reaffirmed its support for SMS methodology and the publication of percentile rankings of carriers. At that time, various motor carriers questioned the data quantity and accuracy of SMS methodology, its correlation to safety, and the penal effect of branding which resulted from publishing SMS percentile rankings.

15. The Agency was advised by Jim Morse of RFX that brokers could not individually credential carriers or make use of SMS methodology in the real world of the spot market and must continue to rely upon the Agency's ultimate safety fitness determination as the sole standard for determining carrier safety fitness.

16. When the Agency stated that the complaints about the methodology, its accuracy and use would be addressed in a forthcoming rulemaking, and that the Agency's ultimate safety fitness determination would not be on a floating basis, I asked the Administrator why then the publication of the SMS methodology was not simply taken down until such time as it had been approved under the APA. I received no response from the Administrator and my vicarious liability concerns were not addressed. Publication

notwithstanding the consequences was defended solely in the name of "transparency and accountability." Publishing bad data is not transparency.

17. On May 16th the Agency, in the middle of a request for more information about intended modifications in the methodology, issued "New Resources Available for Shippers, Brokers, and Insurers." On a practical level, the May 16th statement repudiates the settlement of *NASTC et al. v. FMCSA* and destroys any ability of the shipping public and Allen Lund Company in particular to rely on the Agency's expertise and judgment to certify carriers as safe for use.

18. Where before, shippers and brokers have been able to turn to the Agency's website and determine that a carrier is licensed, authorized and insured as the regulations require, the Agency has now seemingly disavowed the effectiveness of its own safety fitness rating and told shippers and brokers they must use SMS methodology and "other available tools" to make an independent safety evaluation before hiring a carrier. In disavowing the preemptive effect of one uniform objective standard enforced by the Federal Agency, the Agency expressly states we are on our own to figure out what standards for negligent selection might apply in each of the 48 states in which we arrange for services.

19. Since 53% of our carriers, although certified as safe under existing regulations, have no SMS scores, what credentialing standards are we to use? Are we supposed to do an independent audit of a carrier domiciled 2,000 miles away before we tender them a load? If, as the Agency now seems to say, state law supersedes federal law and we cannot rely on the Agency's application of uniform safety standards in certification, must we simply bar using any carrier who cannot afford sufficient insurance to adequately indemnify us against runaway jury verdicts? It is clear to us that the consequences of premature release of SMS percentile rankings far outweighs any benefit and that the Agency's May 16th guidance implicitly changes the existing safety fitness rules and who is responsible for enforcing those rules.

20. The Agency has not provided the shipping public with any clear guidance on what we are supposed to do with percentile rankings of carriers and has not begun to answer the criticism of the methodology or its effect on carriers large and small. We are seeing increasingly frequent demands from shippers

that we accept indemnity obligations and use only carriers who are not under Alert under SMS methodology. Acceding to these requests exacerbates our costs, and will result in the blackballing of many small carriers who have not been afforded due process and who meet all objective standards under existing statutes and regulations for operating commercial motor vehicles in interstate commerce and competing on a level playing field as licensed, authorized and insured small carriers.

I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct.

Executed this 27 day of November, 2012 at La Cañada, CA.

Kenneth Lund

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

ALLIANCE FOR SAFE, EFFICIENT AND COMPETITIVE TRUCK TRANSPORTATION; AIR & EXPEDITED MOTOR CARRIERS ASSOCIATION; THE EXPEDITE ASSOCIATION OF NORTH AMERICA; NATIONAL ASSOCIATION OF SMALL TRUCKING COMPANIES; TRANSPORTATION LOSS PREVENTION AND SECURITY ASSOCIATION; ALLEN LUND COMPANY, INC.; BOLT EXPRESS, LLC; BP EXPRESS, INC.; CARRIER SERVICES OF TENNESSEE, INC.; CONARD TRANSPORTATION, INC.; DES MOINES TRUCK BROKERS, INC.; FORWARD AIR, INC.; MEDALLION TRANSPORT & LOGISTICS, LLC; REFRIGERATED FOOD EXPRESS, INC.; SNOWMAN RELIABLE EXPRESS, INC.; TRANSPLACE, LLC; and TRIPLE G EXPRESS, INC.,

Petitioners,

- vs. -

FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION and THE HONORABLE RAY LAHOOD, in his official capacity as SECRETARY OF TRANSPORTATION,

Respondents.

CASE NO. 12-1305

DECLARATION OF BEN BAUMAN
<u>BOLT EXPRESS</u>

1. My name is Ben Bauman and I am President of Bolt Express domiciled in Toledo, Ohio. Bolt Express is a licensed, authorized and insured carrier in compliance with FMCSA regulations and enjoys a satisfactory safety rating. Our gross revenue is approximately $60 million. We are one of the larger members of The Expedite Alliance of North America (TEANA) and specialize in providing exclusive use or expedited services using a combination of cargo vans, straight trucks, and tandem axle tractors.

2. In addition to transporting customer freight on trucks that we own and/or operate and for which we are responsible for safety compliance, we arrange for customer transportation using independent, licensed, authorized and insured motor carriers under contract with us.

3. As expediters which operate both tractor trailers and straight trucks, both Bolt's and the small carriers we use are placed in the so-called "straight truck" peer groupings under CSA 2010/SMS methodology and are graded on a curve with dissimilar private carriers many of whom do not conduct long haul operations, are not required to keep hours of service records, and are not subject to extensive inspections at the state maintained inspection stations on interstates which feed compliance data into the SMS algorithms.

4. As a result, Bolt and its subcontracted carriers score high in percentile rankings because of the group with which we are peered and this systemic flaw, our experience has found, results in Bolt and other expediters being branded as "exceeding the percentile thresholds for further monitoring" as set by the Agency.

5. Because SMS percentile rankings are based upon inaccurate compliance data with artificial compliance thresholds and carriers are scored on extraneous violations like paperwork errors on manual logs and drivers forgetting to carry medical cards, we believe percentile rankings are not a measure of a carrier's actual safety performance, particularly in our market segment.

6. For example, notwithstanding our current safety record and low crash score of .36 per million miles, Bolt's current percentile ranking in so-called "unsafe driving" is 72.8%, approximately 8 points above the monitoring threshold which results in the assignment of a ⚠ on the FMCSA website, which is published for our customers to see and use.

7. Clearly, this score and a ⚠ is an inaccurate sign of our safety procedures as our satisfactory safety rating and crash rate indicate. It is more an indication

of the fact that we operate heavily in the so-called probable cause states of Michigan and Indiana where proportionally more traffic violations (including speed warnings and tickets) are written than in other states where our peer group competitors operate.

8. Although we have an extremely low crash score, because of our SMS rankings we have been subject to onsite audits on 3 occasions. We received a satisfactory safety rating on June 14, 2010 and non-rated audits by the Public Utilities Commission of Ohio using FMCSA standards on January 11, 2011 and most recently on June 5, 2012. In all cases we were complimented on our safety program, and received no fines or citations. Each of these audits has been time consuming and has required substantial time, effort and expense to respond to the auditor's request.

9. Our crash ratio last year was .5 before considering preventability. This gross accident number is one-third of the number of crashes necessary to rate us as an unsatisfactory carrier under existing regulations and 49 C.F.R. 385.

10. Thus, it is highly prejudicial and inaccurate for the FMCSA to suggest to the shipping public that SMS methodology is an accurate reflection of Bolt Express. We believe that customers can and should rely upon the fact that we enjoy a satisfactory safety rating, have been monitored by the FMCSA, and that its ultimate safety fitness determination of Bolt provides assurance that we can be used without fear of suit. Clearly, the Agency's effort to encourage shippers and brokers to use SMS methodology has its adverse effect on Bolt.

11. After participating through TEANA in the initial court suit in *NASTC et al. v. FMCSA* which confirmed that "Unless a motor carrier in the SMS has received an UNSATISFACTORY safety rating pursuant to 49 CFR Part 385, or has otherwise been ordered to discontinue operations by the FMCSA, it is authorized to operate on the nation's roadways."

12. It was disappointing to see the Agency publicly proclaimed that its own safety fitness rating is not the official safety standard upon which our customers can rely, and that having earned a satisfactory safety rating, its value somehow diminishes over time, transferring to shippers and brokers some obligation to look at current percentile rankings and other factors in determining whether Bolt and its subcontractors are fit to use.

13. Even though we have an excellent safety footprint and feel as though we can justify our percentile rankings to any shipper, broker or plaintiff's attorneys if required to do so, forced use of SMS methodology by shippers and brokers will have a substantial adverse economic impact upon Bolt.

14. In order to provide immediate service to our customers, we must frequently retain other smaller expediters who have equipment available to make immediate pickup. $20 million of our annual revenue is derived from subcontracting to such carriers.

15. We have relied upon existing regulations and the settlement in *NASTC et al. v. FMCSA* to credential carriers as safe to operate based upon the FMCSA's safety fitness determination. Based upon the challenge of the May 16th release, our ability to rely upon the Agency's statutory determination has been removed and if not reversed, we will be subject to vicarious liability by selecting expediters whose scores may be higher than our own, even when the carrier is the only qualified service provider within 100 miles of our customer's pickup point and has been certified as fit to operate on the nation's roadways by the Agency responsible for making that decision.

16. As a result, the May 16th publication has a chilling effect on our business model and is prejudicial to our ability to use smaller carriers without deep pockets to transport shipment because of the possibility of excess verdicts under state law negligent selection theories.

I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct.

Executed this 23 day of November, 2012 at Toledo, OH.

[signature]

Ben Bauman

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ALLIANCE FOR SAFE, EFFICIENT AND COMPETITIVE TRUCK TRANSPORTATION; AIR & EXPEDITED MOTOR CARRIERS ASSOCIATION; THE EXPEDITE ASSOCIATION OF NORTH AMERICA; NATIONAL ASSOCIATION OF SMALL TRUCKING COMPANIES; TRANSPORTATION LOSS PREVENTION AND SECURITY ASSOCIATION; ALLEN LUND COMPANY, INC.; BOLT EXPRESS, LLC; BP EXPRESS, INC.; CARRIER SERVICES OF TENNESSEE, INC.; CONARD TRANSPORTATION, INC.; DES MOINES TRUCK BROKERS, INC.; FORWARD AIR, INC.; MEDALLION TRANSPORT & LOGISTICS, LLC; REFRIGERATED FOOD EXPRESS, INC.; SNOWMAN RELIABLE EXPRESS, INC.; TRANSPLACE, LLC; and TRIPLE G EXPRESS, INC., Petitioners, - vs. - FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION and THE HONORABLE RAY LAHOOD, in his official capacity as SECRETARY OF TRANSPORTATION, Respondents.	CASE NO. 12-1305

DECLARATION OF SCOTT BATEY
BP EXPRESS, INC.

1. My name is Scott Batey and I am CEO of BP Express, Inc., an FMCSA regulated intermodal carrier domiciled in Rockford, Tennessee, and a named petitioner in this case. We currently operate 240 trucks and have annual revenues of $25 million.

2. BP Express currently has 1 reported BASIC which exceeds the intervention threshold. That percentile ranking is 89% in the area of hours of service violations and results largely from form and manner violations incurred because our drivers maintain paper logs. Attached as *Appendix A* is a chart showing our percentile ranking in this BASIC over the past six months. Although our compliance scores, with few exceptions, have improved month to month, they are not reflected in the percentile rankings. Because we exceed the enforcement threshold we are subject to inordinate inspections and additional inspections have resulted in us jumping from one peer group into another at which time our scores increase although our relative performance improves. This statistical flaw distorts the improvement we have made in compliance and gives, we believe, an inaccurate picture of our safety performance.

3. From the outset, we have opposed publication of SMS percentile rankings as an inaccurate reflection of carrier safety performance and unfit for use by the shipping public. Notwithstanding the settlement in *NASTC et al. v. FMCSA,* shippers, brokers and steamship lines which use our services have closely scrutinized publication of SMS scores and have questioned our scores in the past, threatening to not award us business out of fear of perceived vicarious liability or negligent entrustment exposure under state law.

4. On March 27th the FMCSA issued a Federal Register Notice, a copy of which is attached hereto as *Appendix B* which, although not part of the rulemaking, requested that each carrier examine the proposed changes in SMS methodology and make comments. Without any other notice and while we were analyzing our new proposed scores, the Agency issued its May 16th guidance entitled, "New Resources Available for Shippers, Brokers, and Insurers" which is the subject of this lawsuit. Although the March 27th Notice clearly indicated SMS methodology and its percentile rankings were a work in progress and contained BASICs and scores which the Agency had reason to believe were flawed, the Agency's May 16th publication formally advised our customers that SMS methodology was somehow fit for their use in credentialing carriers and that BP's continuing certification by the Agency as fit to operate on the nation's roadways was

not sufficient to protect them against claims of negligent selection under state law concepts.

5. This formal Agency publication has had, I believe, a direct adverse effect on BP Express. Last month, although we won a $250,000 bid for new business on rates and services, the carrier advised us that because of our 88% score in the Hours of Service BASIC we could not receive the bid. This result is disturbing in view of the fact that we were subject to an 8 day focused compliance audit conducted by the FMCSA of our operations on June 18-26, 2012. At that time, the Agency examined primarily three BASIC areas of compliance, including hours of service, and found no acute violations in any area. We received no fines and under existing rules and regulations, including crash scores, we were found to be satisfactory. Although under existing regulations we expected we would receive a satisfactory safety rating which the public can and should rely upon to trump any percentile rankings under SMS scores, the Agency concluded that although it spent 6 days looking at all aspects of our operations, the audit was "non-ratable."

6. Of major concern to BP going forward is not just our 89% ranking in hours of service violations. We responded to the Agency's Federal Register Notice for additional information set forth in *Appendix B* which was pending before the May 16th guidance. Our responses were incorporated into ASECTT's filing, portions of which are attached as *Appendix C*. Therein, we pointed out that if the cargo BASIC, which the Agency proposes to eliminate, had no correlation to safety, inclusion of those violations in Vehicle Maintenance would only distort any nexus to safety in that BASIC and would prejudice draymen and other subsets of the industry which are more likely to have visible securement problems than van operators.

7. We also pointed out that the Agency's creation of a new seventh BASIC for hazardous materials was ill conceived. Dray carriers like BP which handle only sporadic light hazardous shipments would be profiled, faced with reduced percentile thresholds for intervention and branding, and assigned higher scores than the true target for the hazmat BASIC - carriers which regularly transport flammables, explosives and other truly dangerous articles.

8. In August, less than one month after the request for comments were due, the Agency released its response to the requested submissions and nowhere addressed the issues which were raised by ASECTT on our behalf. Although it delayed modifying public release of the new hazmat BASIC and the other objected to changes until December, based upon the current

undisclosed profile, in December BP will receive two additional Alerts. Our score in the hazmat BASIC will be 97% even though our current carrier profile shows we only have 19 inspections involving hazmat out of a total of 771 total inspections.

9. Because cargo securement violations, which the Agency admits have no correlation to safety, are now to be included in Vehicle Maintenance, our Vehicle Maintenance score will exceed the threshold for intervention as well. Since these changes, although announced in the Federal Register, are not part of a rulemaking, we have no judicial remedy and when our shippers and brokers are told in December we now have 3 out of 5 Alerts, I am confident the Agency's May 16th guidance will make us too toxic to continue to handle traffic for many existing customers, much less acquire new business unless the Court intervenes.

10. Ironically, when the Agency conducted its focused audit in June, it looked at the underlying hazmat and Vehicle Maintenance/Cargo Securement violations which in the revised SMS scores to be published in December will show us as a "high risk carrier" even though we have been audited and found to be in compliance based upon the same evidence.

I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct.

Executed this 31st day of October 2012 at Rockford, TN.

Scott Batey