

ATTACHMENT #26(B)

**GREYHOUND LINES INC. AND ADVOCATES
FOR HIGHWAY SAFETY'S COMMENTS TO
FMCSA DOCKET 10886**

(21 Pages)

163217



Greyhound Lines, Inc.

Government Affairs Representative
Suite 400 East 1001 G. Street, N.W.
Washington, DC 20001
Phone 202-638-3490
Fax 202-638-3516

DEPT. OF TRANSPORTATION
DOCKETS

02 APR 17 AM 10:40

April 17, 2002

Docket Management Facility
United States Department of Transportation
Room PL-401
400 Seventh Street, SW
Washington, DC 20590-0001

Re: Dockets No FMCSA-98-3297
FMCSA-98-3298
FMCSA-98-3299
FMCSA-01-10886 -6
FMCSA-01-11060
NHTSA 02-11592
NHTSA 02-11593
NHTSA 02-11594

Dear Sir or Madam:

Attached for filing in the above-entitled proceedings are 8 copies of the comments of Greyhound Lines, Inc.. Please file one copy of these comments in each of the above 8 dockets. Please return the enclosed postcard as evidence of receipt of these comments. Thank you.

Sincerely yours,

Theodore Knappen

"An Equal Opportunity Employer"

DEPARTMENT OF TRANSPORTATION

DEPT. OF TRANSPORTATION
DOCKETS

**Federal Motor Carrier Safety Administration
National Highway Transportation Safety Administration**

02 APR 17 AM 10:40

Docket No. FMCSA-98-3297

Docket No. FMCSA-98-3298

Docket No. FMCSA-98-3299

Docket No. FMCSA-01-10886

Docket No. FMCSA-01-11060

Docket No. NHTSA 02-11592

Docket No. NHTSA 02-11593

Docket No. NHTSA 02-11594

**Comments of Greyhound Lines, Inc. on NAFTA Implementation Rules of FMCSA
and NHTSA**

April 18, 2001

Greyhound Lines, Inc. (Greyhound) commends the Federal Motor Carrier Safety Administration (FMCSA) and the National Highway Transportation Safety Administration (NHTSA) for its comprehensive program to implement the North American Free Trade Agreement (NAFTA) cross-border provisions for Mexican-domiciled operators of commercial motor carriers of passengers and freight. In general, Greyhound believes that FMCSA and NHTSA are establishing an appropriate structure to ensure the safety of Mexican cross-border commercial motor vehicle operations, but we have ~~some~~ serious concerns about several aspects of that structure, which we will address herein.

Greyhound's greatest concern remains the safety of Mexican-manufactured buses. We applaud FMCSA and NHTSA for establishing a process whereby all commercial buses travelling in the United States, whether they are manufactured in the U.S., Mexico, or

Canada, will be required to have a sticker or plate indicating that they were manufactured in compliance with the Federal Motor Carrier Vehicle Safety Standards (FMVSS) at the time of manufacture. We have concerns, however, about the enforcement of this provision.

First, the FMCSA and NHTSA notices state that the agencies have information indicating that most Mexican manufactured commercial motor vehicles complied with FMVSS when they were manufactured. Greyhound is not qualified to speak with regard to Mexican truck compliance with FMVSS, but we do have first hand knowledge as to Mexican bus compliance. **We state unequivocally that the vast majority of Mexican-manufactured buses did not comply with the FMVSS when they were manufactured and do not comply with the FMVSS and the Federal Motor Carrier Safety Regulations (FMCSR) now.** Many of these buses do not comply with the FMVSS/FMCSR standards for fundamental safety items such as brakes, fuel systems, windows, and emergency exits.

Second, although requiring the certification plate on the buses should ultimately ensure compliance with FMVSS, Greyhound believes that other enforcement action is needed in the short term. We note that FMCSA proposes to conduct on-site safety audits of Mexican carriers prior to granting provisional authority and that these safety audits will include vehicle inspection. **Those** vehicle inspections should focus on compliance with the FMCSR (which include ~~most~~ of the FMVSS), and if the inspectors find that the vehicles inspected do not comply with FMCSR standards, provisional authority should

automatically be denied. This will not only ensure compliance with FMCSR up front, it will prevent passengers from being inconvenienced by vehicles being placed out of service either at the border or at other inspection points.

Third, Greyhound strongly opposes the proposed two-year grace period for compliance with FMVSS for Mexican-manufactured buses that have previously operated in the United States both for policy and practical reasons. Of course, the basic point is that under no circumstances should DOT adopt a formal policy authorizing a large number of vehicles that are in substantial non-compliance with FMVSS/FMCSR to operate in the U.S. for a significant period of time. Such a policy is particularly inappropriate in this case since Mexican bus manufacturers have been on notice for more than 6 years that their buses must comply with FMVSS if they are to be operated in the United States. DOT provided such notice in its November 1995 Motor Carrier Operating Requirements Handbook.

The grace period policy is particularly inappropriate for buses because of the vast difference between the services that could be performed legally in the U.S. prior to 2002 and what can be performed in the future. Under charter and tour authority, a Mexican-manufactured bus may have made an occasional trip into the U.S., but with new fixed route authority, that bus likely will be operating in the U.S. on a daily basis. The safety threat presented by an unqualified bus will be much greater.

Finally, enforcement of the grace period, ~~at~~ least for bus companies, will be virtually impossible. How will DOT determine whether a bus has been previously operated in the U.S. or not? If DOT does choose to proceed with the inappropriate grace period proposal, FMCSA at least should require that during the pre-authorization audit, applicant companies provide clear written evidence that a bus ~~has~~ been in the U.S. pursuant to charter and tour authority. If such evidence is presented, a temporary waiver should be issued for that bus only and that waiver must be affixed to, or carried on, that bus at all times. All other buses should be required to have the FMVSS certificate before being allowed into the U.S..

Greyhound also remains concerned about enforcement of the Immigration and Naturalization Service (INS) requirement that domestic passenger transportation services in the U.S. be provided by drivers that are either U.S. citizens or resident aliens. We are pleased that FMCSA has removed the Form OP-1(MX) language that suggested that non-compliance with U.S. labor laws was not a ~~bar~~ to the grant of authority and ~~has~~ now made it clear that compliance with U.S. labor laws is mandatory. But we do not understand why the certification that the applicant is willing and able to comply with U.S. labor laws ~~also has~~ been removed. We strongly believe that such certification should be required and that violation of that certification should be grounds for refusal to grant permanent authority and/or revocation of existing authority.

The INS ~~has~~ been vigilant over the years in preventing domestic U.S. companies from ~~using~~ drivers that are neither citizens or resident aliens for domestic bus service, but ~~the~~

fact of the matter is that it is going to be a real challenge for **INS** to be equally effective in enforcing this prohibition on Mexican bus companies providing cross-border service. We urge **FMCSA** to take every possible action to assist **INS** in carrying out its statutory responsibility.

Another issue that needs to be addressed is the issuance of the final camioneta rules. **Greyhound** again urges **FMCSA** to immediately issue its final rules with regard to application of **FMCSR** to commercial passenger vans carrying 9 or more people, including the driver. Since commercial vans known as "camionetas" are likely to be a significant part of the influx of passenger-carrying commercial vehicles into the U.S., **FMCSA** should finalize its camioneta rules now so that the education and enforcement process can proceed efficiently with regard to all passenger-carrying commercial motor vehicles.

FMCSA issued its proposed camioneta rules 15 months ago. Since the subject of regulation of small passenger-carrying commercial vehicles had been discussed for many years, **FMCSA** was able to propose a well-balanced rule, which created very little controversy in terms of docket comments. **DOT** officials have made public statements since last summer indicating that the final rule was about to be released. We urge **FMCSA** to issue the final camioneta rule immediately so that it can be implemented effectively along with the other NAFTA-related rules.

We also note that the FMCSA notices contain no indication that enforcement of the rules with regard to passenger carriers will receive special focus. We hope that there will be such focus. Greyhound is concerned that with all of the controversy surrounding Mexican trucks, FMCSA will use its new resources exclusively for truck enforcement activities. We believe that those resources also need to be applied to passenger carrier enforcement. As we have previously described, there are unique bus issues involving both the vehicle and the driver. We urge FMCSA to devote the resources necessary to deal effectively with the unique passenger carrier issues.

Greyhound is disappointed that FMCSA has rejected our proposals that the cross-border audit and application procedures be applied to Mexican-owned bus companies applying for U.S. domestic authority and that the rules should make it clear that cross-border authority will be issued to Mexican bus companies only to the extent that Mexico has agreed to grant such authority to U.S. companies.

On the first point, we continue to believe that Mexican-owned companies providing domestic service in the U.S. should be subject to at least the same initial requirements and monitoring procedures as Mexican-owned companies providing cross-border service into the U.S.. FMCSA indicates that it will be publishing a final rule for all new domestic applicants in the "near future". Hopefully, that rule will be published and implemented before any domestic applications of Mexican-owned U.S. companies are processed.

On the issue of reciprocity, we acknowledge the point made by FMCSA that these rules do not "open the border" or lift the moratorium on the grant of cross-border operating authority. They merely set the procedures for ensuring safe operations. We appreciate the fact that DOT and FMCSA have worked diligently to ensure that U.S. carriers ~~are~~ given the same treatment in Mexico that Mexican carriers are given in the U.S. with regard to key issues such as terminal ownership and operation, multiple service points, and carriage of incidental package express. We urge that cross-border applications not be processed by DOT until the negotiations on the reciprocity issues are satisfactorily completed.

Finally, we urge FMCSA to coordinate with FTA and the Office of the Secretary to ensure that Mexican passenger carriers providing cross-border service comply with DOT's rules implementing the Americans with Disabilities Act. DOT now requires that all buses acquired for fixed-route service must be equipped with a wheelchair lift and that on an interim basis, companies ~~must~~ provide wheelchair lift service on 48 hours notice.

We are confident that DOT intends that Mexican carriers providing cross-border service in the U.S. will be required to adhere to those ~~same~~ standards. The first step toward ensuring ADA compliance should be to utilize all available methods of advising Mexican carriers of these requirements. This would include the application materials as well as the various seminars and conferences FMCSA is holding. Second, cross-border carriers should be required to ~~make~~ the ~~same~~ ADA reports to DOT that U.S. carriers ~~are~~ required to make. We understand that FMCSA ~~has~~ now been given the responsibility for collecting these reports so FMCSA should also be responsible for ensuring that the cross-

border carriers are complying with the reporting requirements. Third, an appropriate enforcement mechanism should be in place, including ensuring that cross-border carriers are covered by the existing Department of Justice enforcement regime and making failure to comply with ADA during the provisional authority period grounds for denying a carrier permanent authority.

Greyhound appreciates *the* opportunity to comment on the NAFTA rules, and we look forward to continuing to work with FMCSA and NHTSA on implementation issues.

Respectfully submitted,

Greyhound Lines, Inc. by

Theodore Knappen
Government Affairs Representative
Greyhound Lines, Inc.
Suite 400 East
1001 G Street, NW
Washington, DC 20001
Phone: (202) 638-3490



**ADVOCATES
FOR HIGHWAY
AND AUTO SAFETY**

DEPT. OF TRANSPORTATION
DOCKETS

02 MAY 20 PM 3: 36

May 20, 2002

Department of Transportation
Docket Management, Room PL-401
400 Seventh Street, S.W.
Washington, D.C. 20590

Re: Docket Nos.: FMCSA-01-10886 - 13
NHTSA-02-11592
NHTSA-02-11593
NHTSA-02-11594

**Certification of Compliance With Federal Motor Vehicle Safety Standards,
FMCSA Notice of Proposed Rulemaking;
Recordkeeping and Record Retention, NHTSA Notice of Proposed Rulemaking;
Importation of Commercial Vehicle, NHTSA Notice of Proposed Rulemaking;
Retroactive Certification of Commercial Vehicles By Motor Vehicle Manufacturers,
NHTSA Proposed Policy Statement, request for comments;**

Manufacturer Certification of FMVSS Compliance

Advocates for Highway and Auto Safety (Advocates) and the American Insurance Association¹ appreciate the opportunity to provide the National Highway Traffic Safety Administration (NHTSA) and the Federal Motor Carrier Safety Administration (FMCSA) with comments regarding the FMCSA proposal that all motor carriers in the U.S., including domestic and Canada- and Mexico-domiciled commercial motor vehicles (CMVs), display a label certifying compliance with all applicable Federal Motor Vehicle Safety Standards (FMVSS), the proposed NHTSA Policy Statement on the Retroactive Certification of Commercial Vehicles By Motor Vehicle Manufacturers, 67 FR 12790 (Mar. 19, 2002); and two related dockets on Importation of Commercial Motor Vehicles, 67 FR 12806 (Mar. 19, 2002), and attendant Recordkeeping and Record Retention, 67 FR 12800 (Mar. 19, 2002).

¹ American Insurance Association joins as a signatory in these comments.



Advocates realizes that the North American Free Trade Agreement (NAFTA) requires the elimination of trade barriers and unnecessary burdens on commerce between the United States and its trading partners, Canada and Mexico. The removal of barriers to trade, however, was not intended to require the evasion or suspension of established motor vehicle regulations and safety standards.² It is evident that neither the NHTSA nor the FMCSA knows how many Mexican and Canadian CMVs actually were compliant with applicable U.S. safety standards when they were built (*see note 10, infra*) and, therefore, could currently be certified and labeled in compliance with the certification requirements of the National Traffic and Motor Vehicle Safety Act of 1966 (Vehicle Safety Act). It is also apparent from the agency notices considered together that many thousands of Mexican CMVs have made hundreds of thousands of illegal trips into the U.S. for many years without conforming to the certification requirements.³

Advocates is pleased that FMCSA and NHTSA are proposing to rectify this situation and as a matter of policy require that all CMVs operating in the U.S. must be certified by the vehicle manufacturer and display a certification label indicating that the vehicle complies with the FMVSS applicable at the time of manufacture. Certification that vehicles are built to U.S. safety standards is required under the applicable sections of the Vehicle Safety Act, 49 U.S.C. §§ 30112 and 30115.⁴ This statutory requirement applies to all vehicles, including those seeking entry into the U.S. at border crossings, and as a matter of law must be enforced routinely as part of customs and motor vehicle inspections. Advocates supports that portion of the FMCSA proposed rule that would require all motor carriers, foreign and domestic, comply with the statutory certification and labeling mandates as of the effective date of the final rule.

The FMCSA proposes, however, that only foreign motor carriers that begin operations on or after that effective date of the final rule, or expand their operations from

² The NAFTA Agreement, as part of the basic rights and obligations of the contracting parties, preserves the right of each signatory nation to establish its own level of protection. "Notwithstanding any other provision of this Chapter, each Party may, in pursuing its legitimate objectives of safety or the protection of human, animal or plant life or health, the environment or consumers, establish the levels of protection that it considers appropriate in accordance with Article 907(2)." North American Free Trade Agreement Between The Government of the United States of America, The Government of Canada and the Government of the United Mexican States (NAFTA), Article 904(2) (1993).

³ NHTSA states that the agencies were well aware of the applicability of federal statutory requirements pertaining to manufacturer certification and labeling and that the issue was publicized in the Department of Transportation's NAFTA Operating Requirements Handbook (DOT 1995) and that participants including the government representatives attending the November 1995 NAFTA conference in San Antonio, Texas, were given notice of this provision of U.S. law. 67 FR 12807.

⁴ Originally enacted as part of Section 108 of the Vehicle Safety Act.

OP-2 to OP-1(MX) operations outside the border zones, must be properly certified by the manufacturer as meeting the relevant FMVSS on the date of manufacture and have the required FMVSS certification label. 67 FR 12784. FMCSA proposes that Canada- and Mexico-domiciled motor carriers operating in the U.S. prior to the effective date of a final rule for this rulemaking action be allowed 24 months to bring their vehicles into compliance with the FMVSS. *Id.* Advocates opposes this portion of the FMCSA proposal. This action has a number of deleterious consequences for public safety, the integrity of federal and state border inspection, and agency observance of the constraints of existing federal law.

On its face, the two-year "grace period" is a clear violation of the certification requirements of the Vehicle Safety Act.⁵ NHTSA has determined that the term "import" applies to CMVs entering the U.S.⁶ In fact, NHTSA has previously determined that vehicles that were not constructed to U.S. standards, and could not be certified as such by the manufacturer, cannot be permitted to enter and operate in the U.S.⁷

⁵ Obtaining the manufacturer certification and affixing a certification label to the vehicle are conditions precedent for operating in the U.S. The NHTSA notice on retroactive certification, docket number NHTSA-02-11594, points out that vehicles entering the U.S. for the purpose of engaging in interstate commerce, *i.e.*, operating in the U.S. to conduct trade and the carriage of passengers, are subject to the statutory certification requirement. 67 FR 12807. The Vehicle Safety Act provides

a person may not manufacture for sale, sell, offer for sale, introduce or deliver for introduction in interstate commerce, or import into the United States, any motor vehicle or motor vehicle equipment manufactured on or after the date an applicable motor vehicle safety standard prescribed under this chapter takes effect unless the vehicle or equipment complies with the standard and is covered by a certification issued under section 30115 of this title.

49 U.S.C. § 30112 (emphases supplied). NHTSA is very clear that this language applies to all vehicles entering the U.S. from Mexico and Canada. 67 FR 12791.

⁶ NHTSA discusses the rationale for its interpretation at length in the notice on importation of commercial vehicles, DOT docket NHTSA-02-11593, 67 FR 12806. The safety purpose of the statutory requirement is to ensure that only vehicles meeting the FMVSS can operate on U.S. roads and highways in order to protect public safety. "The fact that a commercial vehicle is domiciled in Canada or Mexico is of no consequence as to its safety when it is being operated on United States highways." 67 FR 12807. The agency goes on to explain that the Vehicle Safety Act prohibition on permitting noncomplying vehicles to enter the U.S. is similar to laws against contraband. *Id.* Moreover, the agency notice indicates that at a meeting held in 2001, officials from the U.S. Customs Service (Department of the Treasury) and from FMCSA agreed with NHTSA's interpretation that a person "imports" a commercial vehicle when they drive the vehicle across the U.S. border.

⁷ NHTSA's own longstanding interpretation of the term "import" underscores the statutory prohibition. In responding to a request for an exemption from the certification requirement for

Advocates is concerned that non-compliant CMVs present a special safety hazard on U.S. roads, and that non-compliant motor coaches, in particular, are especially dangerous for the bus passengers as well as for other highway users. The FMCSA's proposal, if adopted, clearly would create a two-tiered safety regime for motor carriers. In particular, the proposed "grace period" provides a strong incentive for foreign motor carriers to operate equipment in the U.S. prior to the effective date of a final rule for this docket for up to two years without conforming to the applicable FMVSS. This would subject the people of the U.S. to less safe operations by carriers using CMVs that fail to conform to major regulatory requirements of the FMVSS. The foreign motor carriers could use equipment that not only will not, but sometimes could not, be brought into compliance with the FMVSS. However, their use could reap financial rewards for the companies until they were forced to retire the equipment after two years of operation.

The FMCSA asserts in the preamble of this notice that, despite a grace period of two years for achieving conformity or to "rearrange or supplement" their existing fleets, foreign CMVs "would still be subject to all other FMCSA requirements, including those based on the FMVSSs cross-referenced in the FMCSRs." *Id.* This promise of enforcement of applicable FMVSS by the agency is highly problematic and largely illusory. Since several of the applicable FMVSSs have compliance dates for CMVs manufactured after the late 1980s,⁸ such as the requirements for ABS, automatic brake adjusters, and trailer underride guards, there is no certain way to determine which vehicles are non-compliant without certification labels or reliable documentation

Canadian built trucks that did not comply with the then-existing safety standard for air brakes, FMVSS No. 121, the NHTSA Administrator stated that "I conclude that any exclusion of Canadian vehicles from Standard No. 121 would be an evasion of the [Vehicle Safety] Act's prohibition on importation of noncomplying vehicles." Letter from James B. Gregory, Administrator, NHTSA, to Mr. J.C. Carruth, President, Canadian Trucking Association, dated May 9, 1975, p. 2, available in DOT docket NHTSA-02-11593-2. The letter pointed out that noncomplying motor vehicles shall be refused entry into the U.S. *Id.* at p. 1. Thus, any vehicle seeking entry into the U.S. must first be certified as complying with the applicable FMVSS as of the date of manufacture and must bear a permanently affixed label from the manufacturer that documents that fact.

⁸ The great majority of the remaining applicable FMVSS have compliance dates in the late 1960s or early 1970s that make it improbable that foreign carrier CMVs would still be in service without conforming to these safety requirements. However, "[a]ccording to the Mexican government, the average age of federally registered truck tractors in Mexico is 16 years." *North American Free Trade Agreement: Coordinated Operation Plan Needed to Ensure Mexican Trucks' Compliance With U.S. Standards*, U.S. General Accounting Office (GAO-02-238), December 2001, p. 26. Since U.S. domestic trailers often serve to transport cargo for as much as 20 years, including local service operation near the ends of their useful lives, it is possible that some truck tractors and many current trailers in Mexican service that cross the southern border into the U.S. could be at least 20 years old or more. There is no reliable way to determine their age.

available to inspection personnel confirming the dates of manufacture of buses, trucks, truck tractors, semitrailers/full trailers, and converter dollies with regard to these safety features.⁹ In fact, the FMCSA has no effective way of enforcing these adopted FMVSS

⁹ Title 49, CFR § 393.53(a) provides that each CMV manufactured on or after October 20, 1993, and equipped with a hydraulic brake system, shall meet the automatic brake adjustment system requirements of FMVSS No. 105. Title 49, CFR § 393.53(b) provides that each CMV manufactured on or after October 20, 1994, and equipped with an air brake system, shall meet the automatic brake adjustment system requirements of FMVSS No. 121. Title 49, CFR § 393.53(c) provides that each CMV manufactured on or after October 20, 1994, and equipped with an air brake system that contains an external automatic adjustment mechanism and an exposed pushrod shall have the condition of service brake underadjustment displayed by a brake adjustment indicator conforming to the requirements of FMVSS No. 121. Title 49, CFR § 393.55(a),(b) provides that each truck and bus manufactured on or after March 1, 1999, and equipped with a hydraulic brake system, shall be equipped with an antilock brake system (ABS) that meets the requirements of FMVSS No. 105 and shall be equipped with an ABS malfunction indicator system meeting the requirements of FMVSS No. 105. Title 49, CFR § 393.55(c)(1) provides that each air braked truck tractor manufactured on or after March 1, 1997, shall be equipped with an ABS that meets the requirements of FMVSS No. 121. Title 49, CFR § 393.55(c)(2) provides that each air braked CMV other than a truck tractor (trucks, buses, semitrailers, full trailers, dollies) manufactured on or after March 1, 1998, shall be equipped with an ABS that meets the requirements of FMVSS No. 121. Title 49, CFR § 393.55(d)(1) provides that each truck tractor manufactured on or after March 1, 1997, and each single-unit air braked vehicle manufactured on or after March 1, 1998, subject to the forgoing requirements for ABS, shall be equipped with an electrical circuit capable of signaling a malfunction affecting the generation or transmission of response or control signals to the vehicle's ABS, as required by FMVSS No. 121. Title 49, CFR § 393.55(d)(2) provides that each truck tractor manufactured on or after March 1, 2001, and each single-unit vehicle that is equipped to tow another air-braked vehicle subject to the requirement for ABS, shall be equipped with an electrical circuit capable of transmitting a malfunction signal from the ABS on the towed vehicle to the trailer ABS malfunction lamps in the cab of the towing vehicle, and shall have the means for connection of the electrical circuit to the towed vehicle, as required by FMVSS No. 121. Title 49, CFR § 393.55(d)(3) provides that each semitrailer, trailer converter dolly, and full trailer manufactured on or after March 1, 2001, and subject to the requirements for ABS, shall be equipped with an electrical circuit capable of signaling a malfunction in the trailer's ABS, and shall have the means for connection of the ABS malfunction circuit to the towing vehicle, as required by FMVSS No. 121. Also, each trailer manufactured on or after March 1, 2001, subject to the requirements for ABS, designed to tow another air-brake equipped trailer shall be capable of transmitting a malfunction signal from the ABS of the trailer being towed to the vehicle in front of the trailer, as required by FMVSS No. 121. Title 49, CFR § 393.55(e) provides that each trailer, including a trailer converter dolly, manufactured on or after March 1, 1998, and before March 1, 2009, and subject to ABS requirements, shall be equipped with an ABS malfunction indicator lamp, which meets the requirements of FMVSS No. 121. Forty-nine CFR § 393.86(a) provides that each trailer and semitrailer, except for pulpwood trailers, low chassis vehicles, special purpose vehicles, wheels-back vehicles, and trailers towed in driveway/towaway operations, with a gross vehicle weight rating of 10,000 pounds or more manufactured on or after January 26, 1998, must be equipped with a rear impact guard that meets the requirements of FMVSS No. 223 and No. 224. Title 49, CFR § 393.41 provides that every CMV manufactured on or after one year after March 7, 1989, that is, on or after March 7, 1990,

for motor carriers.¹⁰ It is abundantly clear that the agency has been unable for many years to determine exactly which foreign-domiciled motor carriers were subject to the applicable FMVSS for their trucks and buses.¹¹

Advocates also opposes FMCSA's proposal to amend 49 CFR Part 393. The agency plans limited enforcement of the certification requirement. According to the proposal, the failure to have a certification label permanently affixed to the vehicle would result only in a citation and fine at a roadside inspection and a civil penalty if a label is found lacking during a compliance review. 67 FR 12784 n. 4. Vehicles without a certification label would not be placed out of service. However, this assumes that all vehicles lacking certification labels have, in fact, been certified by the manufacturer and are only missing the permanent label that attests to the fact of the certification. While this might be a reliable assumption where vehicles are regularly certified and labeled by the manufacturer, the agency cannot operate under this assumption with regard to tens of thousands of foreign CMVs that were not originally certified by the manufacturer. Moreover, FMCSA itself states that "the FMVSS [certification] label would be prima facie evidence of compliance with the proposed rule." *Id.* at 12784. The lack of a certification label, however, cannot also be assumed to provide similar evidence of compliance with the proposed rule. When a certification label is not present on a CMV there can be no presumption of affirmative compliance with the certification requirement. In light of the circumstances that most foreign-built CMVs were not originally certified to the FMVSS, and that an overwhelming majority of foreign-built CMVs were not manufactured to comply with the prevailing U.S. standards when they were built, FMCSA must presume that the lack of a certification label is evidence that the vehicle was not properly certified and inspectors should place the vehicle out of service. Accordingly, Part 393 should be amended to include the failure to display a certification label as one of the criteria for immediately placing a CMV out-of-service.

These considerations, however, are not relevant to the essential illegality of the FMCSA proposal to exempt CMVs operated by foreign motor carriers from the current legal requirement for vehicle certification of compliance with applicable FMVSS. Well-settled law and regulation require that all vehicles, including CMVs, operate in the U.S.

except for an agricultural commodity trailer, converter dolly, heavy hauler or pulpwood trailer, shall be equipped with a parking brake systems as required by FMVSS No. 121.

¹⁰ No explanation is provided in the instant notice on how inspection personnel could determine which foreign-domiciled CMVs fail to comply with applicable safety requirements.

¹¹ In effect, the FMCSA proposes in this notice to perpetuate this flawed enforcement regime in order to provide time for foreign-domiciled motor carriers to attempt continue to operate in the U.S. regardless of whether they can actually be certified by the manufacturer. It is unconscionable for FMCSA to ask the public to support a proposition that will continue to place the public at increased safety risk while the agency protracts an ongoing violation of federal law.

only with appropriate certification provided by their original, end-stage, or modifying manufacturers or by their importers. The FMCSA has no legal basis for granting a two-year reprieve from this requirement. The agency has no authority to supplant unambiguous statutory requirements through a peremptory grant of authority to foreign CMVs to continue operations for up to two years after a final rule requiring conformance to the statute, despite their prior failure to have appropriate FMVSS certification.¹² CMVs operated by foreign carriers may seek retroactive certification, as provided for by NHTSA in its related rulemaking actions discussed below, but these carriers may not continue to operate their CMVs in the U.S. during the period provided for securing appropriate certification. If certain CMVs operated by these carriers cannot achieve certification, or if the carriers are unwilling or unable to secure certification, they must immediately cease using such CMVs in the U.S. A grant to foreign motor carriers to continue to use vehicles that fail to meet one or more of the applicable FMVSS adopted by the FMCSA not only subjects the people of the U.S. to documented inferior safety conditions, but is directly contrary to current law and regulation, and constitutes an abuse of agency authority where it has not been granted any discretion.

Retroactive Certification

To address the issue of foreign trucks that previously did not need to be certified to U.S. standards since they did not operate in this country, NHTSA proposes to allow vehicle manufacturers to retroactively certify commercial vehicles that were built to comply with the applicable FMVSS at the time of production. In principle, Advocates does not object to permitting retroactive certifications, although we raise some concerns about this approach and make recommendations for improving implementation later in these comments.

Assuming that vehicle manufacturers could determine which trucks are entitled to retroactive certification, and that the certifications, even though retroactive, are made and a certification label affixed to the vehicle before entry into the U.S., Advocates is concerned that there will be great potential for abuse, including the issuance of mistaken, unsupported, or fraudulent certifications. According to the notice, about one-third of the 400,000 trucks that now operate on Federal roads in Mexico, or 130,000 commercial vehicles, may have complied with all the applicable FMVSS at the time of manufacture.¹³

¹² The certification requirement is established law and its validity is independent of previous failures by FMCSA or other agencies to enforce it.

¹³ This claim is speculative and unverified by any documentation of record in any of the four dockets covered in these comments. In the FMCSA notice for Docket No. FMCSA-01-10886, the FMCSA repeatedly makes it manifest that the agency does not actually know the number of vehicles that comply with the FMVSS, e.g., "[I]t is uncertain how many vehicles produced for use in Mexico meet all applicable U.S. safety requirements." 67 FR 12782, 12783. "NHTSA and FMCSA staff were told by Mexican vehicle manufacturers that most Mexican commercial

67 FR 12792. That means that the majority of the truck fleet using Mexican Federal roads, some 270,000 or more commercial vehicles, would be ineligible for entry into the U.S. This large population of ineligible vehicles will inevitably encourage the issuance of false certifications and the production of fraudulent labels. For this reason, NHTSA must carefully supervise and review the issuance of retroactive certifications in order to ensure that only those foreign commercial vehicles that actually complied when manufactured are labeled as compliant. Unfortunately, the proposed Policy Statement does not provide sufficient safeguards to ensure that only those commercial vehicles that in fact complied with the FMVSS when originally manufactured (or were subsequently modified to achieve compliance) will actually be certified and permitted to operate in the U.S. Advocates strongly recommends that NHTSA amend the policy based on the following points.

The policy should be limited to only those manufacturers that can actually substantiate that they produced vehicles that complied with U.S. safety standards. NHTSA states that only manufacturers that actually produced commercial vehicles for sale in the U.S. are likely to be able to produce the data and analysis necessary to enable them to certify their vehicles as compliant. *Id.* As a pragmatic measure, these manufacturers at a minimum must submit their data to NHTSA in an electronic format to ensure that the retroactive certifications by a manufacturer are based on sound data and analysis. Without requiring a submission to the agency, manufacturers would be able to issue retroactive certifications and labels without having to produce any factual basis for the certification.¹⁴ Without the data to confirm the accuracy of the certification, enforcement personnel will not have a reliable basis for accepting any certification.

vehicles built since 1994 were built to meet the FMVSSs." *Id.* At 12783. However, this statement is uncorroborated and no documentation to support this assertion is provided in the public dockets. Moreover, there is no representation of the actual percentage of CMVs conforming to all of the applicable FMVSS. When the FMCSA offers a number, it openly qualifies its reliance on its representation: "Currently, there are approximately 400,000 trucks and buses that operate on the Federal roads in Mexico. About 130,000 of those vehicles were built since 1994 and *may* comply with the FMVSSs." *Id.* (emphasis supplied). Even this assertion, however, applies only to trucks operating on Mexican Federal roads – roads that constitute a small percentage of the country's surface mileage used by CMVs. Most trucks in Mexico avoid the use of the Federal roads because of the tolls imposed. (See "North American Free Trade Agreement . . ." *op. cit.*, p. 10). Along with the FMCSA's uncertainty expressed in the forgoing quotation, this makes it apparent that no one, including the Mexican government, Mexican motor vehicle manufacturers, NHTSA, or the FMCSA actually knows how many or which current Mexican CMVs conformed to all of the FMVSS extant at the time the vehicles were built.

¹⁴ Although normally vehicle manufacturers do not provide NHTSA with data to support their certification unless the agency subsequently questions the certification, retroactive certification is a deviation from the normal process of certifying vehicles contemporaneous with their manufacture. In these circumstances, it is appropriate to require foreign manufacturers to

Submission of certification data to NHTSA, however, will not be sufficient to determine which vehicles actually adhere to the applicable FMVSS, particularly those that were produced for Mexican operations and subsequently were operated in the U.S. Both Mexican motor carriers and Mexican commercial motor vehicle manufacturers may not be knowledgeable about the FMVSS and which of the new vehicle standards applied to which CMVs at the time of manufacture.¹⁵ Since there is no certification labeling requirement in Mexico for CMVs produced in that country,¹⁶ it will often be difficult to determine the date of manufacture in order to judge which standards apply to a particular vehicle. Accordingly, many of the certifications that may eventually be produced for evaluation may be based on erroneous or fraudulent documentation. Advocates firmly believes that the only way to verify that each Mexican-manufactured CMV alleging conformity with the FMVSS is to inspect each vehicle along with any documentation at the time of the pre-authorization safety audit to determine whether the vehicles pass muster under the FMVSS. Otherwise, the FMCSA will impose enormous burdens on border inspection personnel to inspect each vehicle on an *ad hoc* basis not only for conformity with the Federal Motor Carrier Safety Regulations (FMCSR), but also with the applicable FMVSS. Without this initial, threshold confirmation of applicable FMVSS conformity, Mexico-domiciled motor carriers may certify their vehicles as complying with the FMVSS at the time of initial application for OP-1(MX) or OP-2 operating authority or certification, but in fact do so without demonstrable proof that their CMVs conformed to applicable FMVSS at the time of manufacture.¹⁷

document their determination that the vehicle complied with U.S. standards at the time of manufacture.

¹⁵ "According to Mexican officials, prior to 1992, Mexico had few vehicle manufacturing and operation safety standards, and those that did exist were very general." "North American Free Trade Agreement," *op. cit.*, p. 20. Despite the addition of manufacturing standards since 1992, there still is no Mexican government requirement for certifying and labeling the date of manufacture of CMVs.

¹⁶ See 67 FR 12783, col. 1.

¹⁷ If the FMCSA cannot determine when a given foreign-domiciled motor carrier's foreign-manufactured CMVs were produced in order to determine whether they conform to the applicable FMVSS, the agency cannot approve the use of those specific vehicles for operation in the U.S. See Advocates' comments, *supra*. Moreover, if a Mexico-domiciled motor carrier affirms on either the OP-1(MX) or OP-2 application forms that its CMVs conform to the applicable FMVSS at the time of the vehicles' manufacture without any capability of providing certification or other dispositive evidence confirming compliance with the applicable FMVSS, the Mexico-domiciled motor carrier has made a *prima facie* fraudulent representation concerning FMVSS conformity. See FMCSA final rule adopting the application regime for OP-1(MX) Mexico-domiciled motor carriers seeking awards of operating authority to carry freight or passengers beyond the municipalities and commercial zones at the U.S.-Mexico border, 66 FR 22371, 22397-22403 (May 3, 2001) (where the request from applicants for certification of compliance with applicable

Also, the policy should not permit registered importers to retroactively certify a vehicle. Registered importers may only import a non-complying vehicle if NHTSA has made a determination that a vehicle, which was not originally manufactured to conform to all applicable FMVSS at the time of manufacture, "is substantially similar to a motor vehicle originally manufactured for import into and sale in the United States." 49 U.S.C. § 30141(a)(1)(A). Since NHTSA has not made a determination that any vehicle covered by the policy statement would be eligible to be imported (67 FR 12793), it appears to be a moot issue. However, even were the agency to make a determination that vehicles were eligible to be imported, it could only do so based on original production information generated by the original CMV manufacturer which would form the basis for a retroactive certification. Even if the original manufacturer chose not to certify the CMV, NHTSA would still need the same type of information in order to make a determination that the vehicle is "substantially similar" and, therefore, eligible to be imported.

According to the notice, many manufacturers will not be able to issue retroactive certifications because the manufacturer would need data generated at the time the vehicle was built. "As a practical matter, only those manufacturers that produced and certified substantially similar vehicles for sale in the United States at the same time that the non-certified vehicles was manufactured are likely to have generated this information." *Id.* Without such information a manufacturer cannot produce the required certification and NHTSA cannot make a determination that a nonconforming vehicle could be eligible to be imported. Lacking these actions, registered importers cannot certify that a vehicle was compliant with or "substantially similar" to the FMVSS when manufactured. Thus, there seems to be no purpose in allowing registered importers to certify foreign-built CMVs unless and until the original manufacturers begin to certify a significant portion of their CMV production to U.S. safety standards.

Additionally, the rationale for permitting retroactive certification is to allow motor carriers who operate compliant but not yet certified CMVs to cross the border and operate in the U.S., especially those carriers who are already doing so. Therefore, as a matter of policy, the importation of CMVs that require retroactive certifications should be limited to motor carriers and should not be available to registered importers.

Advocates supports NHTSA's judgment that the policy of allowing retroactive certification should terminate after a reasonable period of time. The agency has made a preliminary determination that a three-year period, until September 1, 2005, is reasonable to accommodate the needs of Mexico- and Canada-domiciled motor carriers who need to obtain retroactive certifications. While Advocates does not oppose this provision, the agency has not stated the basis for permitting a three-year period. Motor carriers who are barred from entry into the U.S. because they do not have the proper certification label

FMVSS allows only an affirmative response, as is the case with all queries of applicants in Section V on Safety Certifications save for the initial entry).

will quickly learn that they need to get the retroactive certification from the manufacturer. The manufacturers should be able to produce the necessary data analysis in less than three years. It may be that only a one- or two-year period is necessary to accommodate those who plan to regularly cross the border and would need a retroactive certification. The agency should provide a rational basis for the time period that is ultimately selected.

CONCLUSION

Advocates supports the proposal by FMCSA and NHTSA to require foreign trucks to adhere to vehicle certification provisions of U.S. law. Without valid manufacturer certification and labeling, border agents and CMV inspectors cannot determine whether vehicles, both foreign and domestic, comply with U.S. safety standards. Moreover, without such compliance the public can have no confidence regarding the safety of trucks and buses on U.S. highways. For these reasons, Advocates opposes any "grace period" that would allow trucks and passenger buses that were not built in conformance with U.S. federal vehicle safety standards to cross the U.S. border and operate on U.S. highways. The proposed two-year "grace period" is both unsafe and illegal, and violates the strictures of the 1966 Vehicle Safety Act. Foreign motor carriers should not be given free passage to operate illegally on the streets and highways of the U.S. Rather, foreign motor carriers should avail themselves of the retroactive certification process before entering the U.S. While Advocates accepts the necessity of allowing a reasonable period for foreign motor carriers to obtain retroactive certifications from the original vehicle manufacturer, that time period should be as short as possible.

ORIGINAL SIGNED

Henry M. Jasny
General Counsel
Advocates for Highway and Auto Safety

ORIGINAL SIGNED

David Snyder
Assistant General Counsel
American Insurance Association

ORIGINAL SIGNED

Gerald A. Donaldson, Ph.D.
Senior Research Director
Advocates for Highway and Auto Safety