



U.S. Department
of Transportation

**Federal Motor Carrier
Safety Administration**

Administrator

1200 New Jersey Avenue, SE
Washington, DC 20590

February 4, 2011

Refer to: MC-PRS

The Honorable Deborah A.P. Hersman
Chairman
National Transportation Safety Board
490 L'Enfant Plaza East, SW
Washington, DC 20594

Dear Chairman Hersman:

I am pleased to provide the Federal Motor Carrier Safety Administration's (FMCSA) response to the National Transportation Safety Board's (NTSB) safety recommendations H-09-32 through H-09-41. The Agency acknowledges the NTSB's thorough investigation and analyses of the January 2, 2008, motorcoach crash in Victoria, Texas, that prompted these recommendations. The FMCSA shares your commitment to transportation safety, and continues to develop and enforce regulations in order to reduce the incidence of crashes, injuries, and fatalities involving large trucks and buses. Our responses to the recommendations are provided below.

H-09-32: Update and redistribute your "Driver Fatigue Video" to include current information on fatigue and fatigue countermeasures and make the video available electronically. Implement a plan to regularly update and redistribute the video.

The FMCSA shares the NTSB's concerns regarding the importance of preventing fatigued driving and appreciates the impact training and education can have on drivers in recognizing the risks of inverted duty-sleep periods. The Agency completed its review of relevant studies and will update the "Driver Fatigue Video" to reflect the latest research on fatigue and countermeasures by the end of fiscal year (FY) 2011. The video will be posted for viewing on FMCSA's Web site and distributed to all for-hire passenger carriers and motorcoach associations.

Based on the above, FMCSA recommends that NTSB classify Safety Recommendation H-09-32 as "Open-Acceptable Response."

H-09-33: Revise 49 Code of Federal Regulations Part 376 to require that passenger motor carriers are subject to the same limitations on the leasing of equipment as interstate for-hire motor carriers of cargo.

The FMCSA acknowledges NTSB's concerns about Federal regulations regarding the leasing and interchange of commercial motor vehicles (CMVs). The Agency will initiate a rulemaking in FY 2011 to seek public comment on the need for amendments to its leasing regulations under 49 CFR Part 376 to require written agreements for passenger carrier vehicle leases.

Based on the above, FMCSA recommends that NTSB classify Safety Recommendation H-09-33 as "Open-Acceptable Response."

H-09-34: Seek statutory authority to deny or revoke operating authority for commercial interstate motor carriers found to have applications for operating authority in which the applicant failed to disclose any prior operating relationship with another motor carrier, operating as another motor carrier, or being previously assigned a U.S. Department of Transportation number.

The FMCSA acknowledges the NTSB's concern regarding interstate motor carriers that fail to disclose a prior business relationship with another motor carrier, or operating as another interstate motor carrier obtaining operating authority. The Agency will explore seeking authority to withhold or revoke operating authority per your recommendation.

Currently, applicants for passenger carrier operating authority are required to disclose affiliations with any other motor carrier regulated by FMCSA. As a part of the Agency's vetting program, applications for passenger carrier operating authority (OP-1(P)) are scrutinized using the New Applicant Screening (NAS) tool and manual processes to determine whether new applicant motor carriers are affiliated with any other motor carrier subject to an outstanding enforcement order to cease operations. The NAS tool assists the Agency in identifying new applicant carriers who may be attempting to evade outstanding enforcement orders, by matching the data from the carrier's OP-1(P) against enforcement data available in FMCSA's databases. In some instances, FMCSA is able to reject applications for new operating authority under 49 CFR 365.107 and 365.109 if the Agency determines that the new applicant is not fit, and willing, and able to comply with all applicable statutory and regulatory requirements. In addition, under 49 CFR 365.109(a)(2) the Agency may reject materially incomplete applications.

Based on the above, the FMCSA recommends that NTSB classify Safety Recommendation H-09-34 as "Open-Acceptable Response."

H-09-35: Apply the evasion detection algorithm process against all interstate passenger carriers that obtained Federal Motor Carrier Safety Administration operating authority, after the New Entrant Safety Assurance Program began in 2003 but before the program began vetting those carriers, to verify that those new entrant carriers do not have a concealed history of poor safety management controls because they were able to reenter interstate commerce undetected as reincarnated carriers.

All new entrant motor carriers subject to the Department's safety jurisdiction are required to undergo a safety audit and submit to an 18-month monitoring period as a part of the New Entrant Safety Assurance Program. But the only motor carriers subjected to the operating authority vetting program, including application of the NAS (formerly the evasion detection algorithm), are for-hire non-exempt motor carriers of passengers or household goods.

The FMCSA applied the NAS to all passenger carriers that were granted authority since 2003. As a result, FMCSA retroactively identified four possible reincarnated passenger carriers for subsequent investigation. The investigations of the four carriers have been completed and one carrier was issued a reincarnated carrier Notice of Violation (NOV) on October 25, 2010.

The NAS searched data in the Motor Carrier Management Information System (MCMIS), Licensing & Insurance System (L&I), and Enforcement Management Information System (EMIS) databases to identify companies that could be potential reincarnated carriers. The NAS tool enabled the Agency to match the new carrier applicants to carriers that have a history of poor performance. Once matching was completed, the NAS process assigned scores to each of the applicant-to-carrier matches. These scores were based on the number of pieces of information shared between the new applicant and the previous carrier out of all of the pieces of information known for an applicant. This score was weighted based on the types of information submitted, the similarity of the matched terms for certain values, and the uniqueness of the matched values in the NAS carrier dataset. Finally, these scores were curved so that they match user expectations for a 100-point scale.

The Agency screened a total of 2,690 passenger carriers applying for operating authority during the time period examined; however, these were narrowed down to passenger carriers that the NAS tool showed as having high probabilities of links to previous carriers. Each result showing a score of 90 or above in NAS, which resulted in 238 carriers, was then reviewed individually by FMCSA staff, establishing the characteristics that demonstrated linkages between the new (possible successor) carrier and the previous carrier. Of the 238 carriers identified, four carriers showed characteristics of reincarnation.

The Agency then directed the appropriate Division Administrators (DA) to schedule onsite compliance reviews (CRs) for the four carriers in question. The reviews were conducted during the National Passenger Carrier Strike Force, held August 23-September 5, 2010. The DAs utilized successor liability investigation worksheets and consulted with the trial attorneys in the FMCSA Service Centers to determine whether the Agency has the necessary legal basis to deem the respective carriers successors of the original motor carriers.

Out of the four passenger carriers that showed characteristics of reincarnation, the compliance reviews determined three of the four carriers were not reincarnated carriers. The Agency elected to pursue enforcement action against the fourth carrier. The documents submitted by the DA provide evidence that the subject carrier had reincarnated and that it had done so after receiving a Notice of Claim (NOC) and failing to pay the assessed civil penalty. The 2010 CR resulted in a "Satisfactory" safety rating and did not identify the same violations specified in the NOC that generated the out-of-service order against the original carrier. The NOV was completed and issued the week of October 25, 2010.

Based on the above, the FMCSA recommends that NTSB classify Safety Recommendation H-09-36 as "Closed-Acceptable Response."

H-09-36: Establish a requirement to review all passenger carrier lease agreements during new entrant safety audits and compliance reviews to identify and take action against carriers that have lease agreements that result in a loss of operational control by the certificate holder.

As NTSB recognizes in its recommendation H-09-33, FMCSA does not currently have rules concerning passenger carrier lease agreements; therefore, the Agency cannot take action against motor carriers of passengers concerning lease agreements. As stated above, FMCSA will initiate a rulemaking in FY 2011 to seek public comment on this issue. If FMCSA adopts new regulations concerning lease agreements for certain passenger carriers, the Agency would modify its new entrant and intervention policies to require Federal and State personnel to review these agreements.

Based on the above, FMCSA recommends that NTSB classify Safety Recommendation H-09-36 as “Closed-Acceptable Alternate Response.”

H-09-37: Assist the National Highway Traffic Safety Administration in developing a Web-based database of FMVSS-compliant passenger carrying commercial motor vehicles that can be utilized by federal, state, and local enforcement inspection personnel to identify non-FMVSS-compliant passenger-carrying commercial motor vehicles so that these vehicles (other than exempted vehicles) are placed out of service and cease operating in the United States. Implement a process to periodically update this database.

The FMCSA and NHTSA conducted companion rulemakings concerning the FMVSS certification requirement. Both Agencies published a separate Notice of Proposed Rulemaking (NPRM) on March 19, 2002. In withdrawing the NPRMs on August 26, 2005, the Agencies concluded that the proposed FMVSS certification label requirement is not necessary to ensure the safe operation of CMVs on the Nation’s highways. Furthermore, because the FMVSSs critical to the operational safety of CMVs are cross-referenced in the FMCSRs under 49 CFR Part 393, FMCSA, in consultation with NHTSA, determined it can most effectively ensure motor carriers’ compliance with the FMVSS through enforcement of the current FMCSRs.

The FMCSA does not believe there are discernible safety benefits associated with an enforcement campaign to remove from service passenger-carrying vehicles that do not display an FMVSS certification label. Neither the presence nor the absence of an FMVSS certification label provides definitive information about the condition of a CMV. The presence of an FMVSS certification label would, at best, indicate that the vehicle manufacturer certified that the vehicle satisfied all applicable FMVSS requirements in effect at the time of manufacture. The certification would not provide any assurance that the safety features and equipment necessary to fulfill the FMVSS requirements, at the time of manufacture, were adequately maintained by the motor carrier(s) that operated the vehicle since it was purchased from the manufacturer. This means FMCSA and its State partners must ultimately rely on a vehicle safety inspection to determine whether the passenger-carrying vehicle has all of the safety features and equipment necessary to comply with the FMVSSs cross-referenced in the FMCSRs applicable to interstate motor carriers.

The absence of a FMVSS label does not, in and of itself, suggest that a vehicle is unsafe. For example, the original vehicle manufacturer may have certified the vehicle, but the label affixed at the time of manufacture may have been damaged or lost since that time. Or, the manufacturer may have been unable to certify the vehicle because the vehicle did not meet every aspect of every applicable FMVSS. The specific area(s) of non-compliance may very well have been inconsequential in the overall scheme of preventing crashes, fatalities and injuries. Nevertheless, any non-compliance, including labeling and marking of certain components or minor deviations in vehicle performance, would preclude the issuance by the manufacturer of an FMVSS certification label.

The FMCSA is not aware of any data to suggest that the absence of an FMVSS certification label is, in and of itself, of such significance that vehicles should be placed out of service. The failure of a vehicle to display an FMVSS certification label is not a basis for placing the vehicle out-of-service under either current FMCSRs or the CVSA North American Standard Out-of-Service Criteria. Designation of an FMVSS violation as an out of service violation would require new rulemaking.

The FMCSA has met with NHTSA, the Office of the Secretary of Transportation, and the U.S. Customs and Border Protection (CBP) to discuss approaches and alternatives to address this recommendation. The Agency supports NHTSA's proposed course of action to address this recommendation through additional training, as stated in its letter to NTSB dated June 28, 2010.

Based on the above, FMCSA requests that NTSB classify the recommendation as "Closed – Acceptable Alternate Response."

H-09-38: Require that federal and state inspectors utilize the database requested in Recommendation H-09-37 during both roadside and compliance review inspections of passenger-carrying commercial motor vehicles to identify and place out of service non-FMVSS-compliant vehicles.

Based on the reasons cited above in recommendation H-09-37, FMCSA requests that NTSB classify this recommendation as "Closed-Acceptable Alternate Response."

H-09-39: Institute a requirement for federal and state enforcement officials to obtain training on a procedure to physically inspect passenger-carrying commercial motor vehicles for an FMVSS compliance label, and work with the Commercial Vehicle Safety Alliance (CVSA) to develop and provide this training.

Based on the responses to H-09-37 and H-09-38, FMCSA does not believe there are discernible safety benefits associated with the Agency developing a training procedure in consultation with CVSA to inspect vehicles for an FMVSS certification label; however, as stated previously, the Agency supports NHTSA's proposed course of action to provide additional training on the FMVSS label to FMCSA and CBP personnel, as stated in its letter to NTSB dated June 28, 2010.

Based on the above, FMCSA recommends that NTSB classify Safety Recommendation H-09-39 as "Closed-Acceptable Alternate Response."

H-09-40: Require that passenger motor carriers certify on their OP 1(P) forms (Application for Motor Passenger Carrier Authority) and initial MCS-150 form (Motor Carrier Identification Report [Application for USDOT Number]) and subsequent required biennial submissions that all vehicles operated, owned, or leased per trip or per term met the FMVSSs in effect at the time of manufacture.

Generally, motor carriers domiciled in the United States and Canada cannot legally obtain non-compliant CMVs. Under the authority of the National Traffic and Motor Vehicle Safety Act of 1966 (Public Law 89-563) (Vehicle Safety Act), NHTSA establishes manufacturing standards – or FMVSSs. 49 CFR Part 567 requires manufacturers or registered importers of motor vehicles built for sale or use in the United States, to affix a label certifying that the motor vehicle meets the applicable FMVSSs in effect on the date of manufacture. Vehicles operated by Canada-domiciled motor carriers meet Canadian Motor Vehicle Safety Standards (CMVSSs), which are consistent with the FMVSSs in all significant respects. Thus, the vehicles that United States- or Canada-domiciled carriers would acquire would have either FMVSS or CMVSS certification labels for their respective countries.

For Mexico- and non-North America-domiciled vehicles, however, there is concern; and Form OP-1(MX), Form OP-2 and Form OP-1(NNA) already include the following vehicle certification statements:

Form OP-1(MX), Application to Register Mexican Carriers for Motor Carrier Authority to Operate Beyond U.S. Municipalities and Commercial Zones on the U.S. - Mexico Border; and

Form OP-2, Application for Mexican Certificate of Registration for Foreign Motor Carriers and Foreign Motor Private Carriers Under 49 U.S.C. 13902:

“The carrier’s vehicles were manufactured or have been retrofitted in compliance with the applicable U.S. DOT Federal Motor Vehicle Safety Standards.”

Form OP-1(NNA), Application for U.S. Department of Transportation (USDOT) Registration by Non-North America-Domiciled Motor Carriers:

“The carrier will ensure, once operations in the United States have begun, that all vehicles it operates in the United States were manufactured or have been retrofitted in compliance with the applicable U.S. DOT Federal Motor Vehicle Safety Standards in effect at the time of manufacture.”

Form OP-1(MX) is used by Mexico-domiciled motor carriers seeking authority to operate within the United States beyond municipalities on the U.S.-Mexico international border and the commercial zones of such municipalities (border commercial zones). Form OP-2, on the other hand, is used by Mexico-domiciled motor carriers registering to operate within the United States exclusively within such border commercial zones. Form OP-1(NNA) is used by non-North America-domiciled for-hire motor carriers of passengers or property or a motor private carrier who wishes to register to transport property or passengers in the United States.

The U.S. - and Canada-domiciled vehicles are already covered by current regulatory requirements, and Mexico-and other non-North America-domiciled vehicles must be certified as meeting the FMVSSs. The addition of certification requirements relating to FMVSS compliance on Form OP-1(P) and the initial Form MCS-150 would therefore yield few additional safety benefits.

Based on the above, the FMCSA recommends that NTSB classify Safety Recommendation H-09-40 as "Closed-Acceptable Alternate Response."

H-09-41: Seek statutory authority to suspend, revoke, or withdraw a motor carrier's operating authority upon discovering the carrier is operating any non-FMVSS-compliant passenger-carrying commercial motor vehicles, a violation of the FMVSS-compliant certification requested in Recommendation H-09-40.

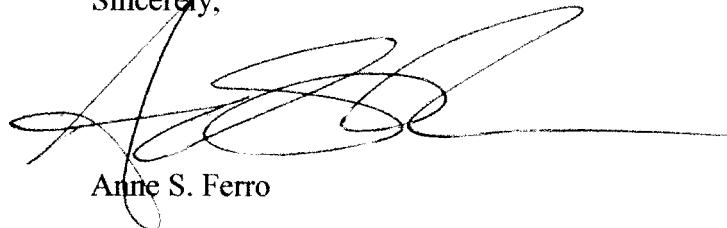
The FMCSA currently has statutory authority to take necessary action against motor carriers operating unsafe vehicles.

As mentioned previously, FMCSA and NHTSA conducted companion rulemakings concerning the FMVSS certification requirement. Both Agencies published NPRMs on March 19, 2002. In withdrawing its NPRM, FMCSA concluded that the proposed FMVSS certification label requirement is not necessary to ensure the safe operation of CMVs on our Nation's highways. Furthermore, since the FMVSSs critical to the operational safety of CMVs are cross-referenced in the FMCSRs, FMCSA, in consultation with NHTSA, determined it can most effectively achieve CMVs' compliance with the FMVSSs through enforcement measures and existing regulations ensuring compliance with the FMCSRs, making additional FMVSS certification-labeling regulation unnecessary. The FMCSA and NHTSA withdrew their proposed rulemakings on August 26, 2005.

Based on the above, in addition to the response provided in H-09-40, the FMCSA believes no additional action is needed, and recommends that NTSB classify Safety Recommendation H-09-41 as "Closed-Acceptable Response."

The FMCSA looks forward to working with NTSB to address the issues identified during this investigation. We share the NTSB's goal of improving motor carrier safety in order to make our roads and highways safer for everyone and believe the actions described above are responsive to the safety recommendations.

Sincerely,

A handwritten signature in black ink, appearing to read "Anne S. Ferro", with a long horizontal line extending to the right.

Anne S. Ferro